

Legal Q&A

By Bill Longley, TML Legal Counsel

S.B. 100, passed during the last regular legislative session, implements the federal Military and Overseas Voter Empowerment (MOVE) Act of 2009 in Texas. The MOVE Act adds certain requirements to federal elections related to military and overseas voters. (A detailed summary of the law is available at www.tml.org, by clicking on “Legal,” then “Elections,” and finally “S.B. 100 Information Clearinghouse.”)

Of particular interest to Texas, the MOVE Act requires 45 days between federal elections. It does so to ensure that military and overseas voters will have ample time to return their ballots. S.B. 100 implements that change in Texas by moving the primary runoff date, which is used in even-numbered years, to the fourth Tuesday in May.

That move means that the May uniform election date, which most cities use for their general elections, will fall between the primary and primary runoff dates in even-numbered years. This will cause some local governments, including cities, to modify their election schedule for their general election because they will not be able to secure the required electronic voting systems from their counties for the May uniform election date in even-numbered years. Why? Because state law requires that each polling place used in an election comply with federal laws relating to accessibility for certain individuals. Included in these accessibility laws is a provision implementing the federal Help America Vote Act of 2002 that requires—in all but the tiniest cities—at least one electronic voting system for individuals with disabilities at each polling place.

Cities that currently use the May uniform election date for their general election have multiple options to ensure that they will have machines available. For example: (1) if the county can continue to share, lease, or conduct joint elections on the May uniform election date, no change is required; (2) a city can purchase its own election machines from a private vendor; (3) a city can move its general election to the November uniform election date; or (4) a city can change to two- or four-year terms and unstagger its terms to hold elections on the May uniform election date only in odd-numbered years. Those are the basic options, but there may be other permutations that work for certain cities.

The TML legal department has prepared detailed analyses of S.B. 100, its impact, and options for cities. The most helpful documents are flow charts for home rule and general law cities that detail the options available. All of that information is available at the Web site above. Each city should review the options, decide what works best, and begin consultation with local legal counsel on implementation. The League has received numerous inquiries regarding the bill, and has provided answers to some of the most common below in a question-and-answer format based on topics. Additional questions and answers, and more detailed legal analysis of the most important issues, is available on the Web site.

Q: Does this bill impact the May 2012 election?

A: Yes. The county can refuse to furnish election services to a city for the May 2012 election date.

Q: Can an election be done with paper ballots only?

A: Not for the vast majority of Texas cities. Election Code Section 61.012 requires each polling place used in an election to comply with federal laws relating to accessibility for certain individuals. Included in these accessibility laws is a provision from the federal Help America Vote Act of 2002 that requires at least one electronic voting system for individuals with disabilities at each polling place. *See* 42 U.S.C. § 15481(a)(3).

However, state law limits the applicability of the electronic voting system requirement in certain circumstances. *See* TEX. ELEC. CODE § 61.013. A city located in a county with a population of less than 2,000 is not required to provide accessibility to its voters through the use of an electronic voting system. *Id.* at § 61.013(a)(1). A city located in a county with a population between 2,000 and 5,000 must have at least one electronic voting system operating on Election Day. *Id.* at § 61.013(a)(2). A city located in a county with a population between 5,000 and 10,000 must have at least one electronic voting system on Election Day and during the early voting period. *Id.* at § 61.013(a)(3). Finally, a city located in a county with a population between 10,000 and 20,000 may only provide one electronic voting system on election day and during early voting and a mobile voting station used at least once during early voting and at each early voting polling place, but only if the city first demonstrates to the secretary of state that providing electronic voting systems at every polling place will cause an undue burden on the city. *Id.* at § 61.013(a)(4).

Q: If the county's elections administrator does not have a shortage of machines, does a city still have to change its election dates?

A: No. If the elections administrator or county election clerk has enough machines to conduct the city's elections every May as they've done in the past, and have indicated their ability to continue the practice of providing the machines to the city (preferably in the form of a written contract), the city would not be required to change its election dates in any way.

Q: My county says that it should have no problem with the availability of machines. Is it safe to proceed with this assumption, or should we look into the other options?

A: It is safe to proceed with the county's assurance that it can provide election machines for the city election only if the city can enter into a written agreement with the county detailing the duties of the city and county both with regard to the city's election date.

Q: If the city switches from May of even-numbered years to May of odd-numbered years, will the sitting councilmembers be allowed to hold over the entire year?

A: Yes. Art. XVI, sec. 17, of the Texas Constitution provides the following: "All officers within this State shall continue to perform the duties of their offices until their successors shall be duly

qualified.” There is no provision for how long a councilmember may hold over in office, and the issue has not been addressed by the courts.

Q: May a general law city that currently has two-year staggered terms, and an election every year, continue that same election cycle by moving to November?

A: Yes. Election Code Section 41.0052 clearly authorizes a general law city to adopt an ordinance or resolution to transition from May elections to November elections. Furthermore, the city could continue to have staggered terms of office when using the November date, so long as the county is able to supply the necessary voting services every November.

Q: In a November election, where would city candidates and issues be placed on the ballot? Must they follow national, state, and county candidates and issues?

A: There is no law that requires city candidates and ballot propositions to be placed at the top or bottom of a ballot. The secretary of state’s office has indicated that the county could choose to place non-partisan issues at the top of a November ballot.

Q: Must a home rule city change its election date to November via resolution (that is, not amend its charter)?

A: S.B. 100 authorizes a home rule city to change its election date by resolution, and—according to the bill’s language—the resolution would supersede any conflicting language in the city charter. *See* TEX. ELEC. CODE § 41.0052(c). However, because the state constitution provides that a city charter may not be amended except by a vote of the people, a home rule city that changes its election date by resolution only (i.e., without a charter amendment election) risks an election contest or other challenge brought against the city. *See* TEX. CONST. art. XI, § 5. For more on this issue, please see http://www.tml.org/legal_pdf/SB100_qa.pdf.

Q: In a home rule city, a charter amendment election is recommended to reinforce the resolution to unstagger the city’s terms. What if the proposition fails?

A: The possibility exists that a charter election to unstagger terms, or a charter election to change the election date, will not be approved by the voters. That would leave a city in the same position as it started. Under S.B. 100, a home rule city may adopt a resolution to change the election date or unstagger terms, and must do so by December 31, 2012. TEX. ELEC. CODE § 41.0052(c). Any resolution adopted by a home rule city should contain some contingency language providing for the holdover of councilmembers should the charter proposition fail.

Q: Our county has suggested that cities adopt a hybrid schedule with May elections in odd-numbered years and November elections in even-numbered years. Is there a mechanism to do this?

A: Probably not. Following the passage of S.B. 100, a city is now required to conduct its election on *one* of the following dates: (1) the second Saturday in May of an odd-numbered year; (2) the second Saturday in May of an even-numbered year (with the caveat that a county

elections administrator does not have to furnish election services to the city); or (3) the first Tuesday following the first Monday in November. TEX. ELEC. CODE § 41.001. Further, Election Code Section 41.0052(a) authorizes a city that holds its officer elections on a date other than the November date to change the date on which officers are elected to the November election date. This section implies that a city must choose one of the May dates to elect its officers, or choose the November date to elect its officers. It doesn't expressly authorize a city to choose both. Reading Election Code Sections 41.001 and 41.0052 together, a city is probably not authorized to conduct its staggered city council and mayoral elections in both May of odd-numbered years and November of even-numbered years.

Q: If a city unstaggeres its terms, all members would be elected at the same time. What happens if a councilmember runs for mayor (or vice versa)?

A: State law prohibits a candidate from filing applications for a place on the ballot for two or more offices that are not permitted to be held by the same person and are to be voted upon on the same day. TEX. ELEC. CODE § 141.033. Consequently, a councilmember who wants to run for mayor in a city with unstaggered terms of office could only apply for that position. In other words, he or she couldn't apply for both.

Q: If we choose to adopt a resolution to go to unstaggered terms in odd-numbered years, do we need to submit the resolution to obtain preclearance?

A: Yes. The U.S. Department of Justice (DOJ) regulations provide that any voting practice or procedure change that affects voting "even though it appears to be minor and indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General" must be precleared. 28 C.F.R. § 51.12. Because a shift from staggered to unstaggered terms, and a decision to only conduct elections in May of odd-numbered years, alters voting procedures in the city limits, the city will need to preclear any such changes with the DOJ.

Q: Can you confirm that moving the city council election date from May to November does not prevent a special election required by petition, such as recall, local option, charter amendment, and so on, to be held in May in even-numbered years?

A: S.B. 100 does not eliminate the May uniform date in even-numbered years. Thus, a city can still conduct any election on that date. Of course, the issue of machine availability would still be present.

Q: If a city has moved its elections from May to November, but gets a petition for an election to be held on the next available uniform election date (and that date is the May date), what can it do?

A: If a city receives a petition for a special election when the next available uniform election date is in May of an even-numbered year, the city's first action should be to contact the county to inquire into the availability of electronic voting machines. If the county is unable to provide its machines, and assuming that election vendors are unable to provide the machines to service the

special election, the city would arguably need to wait until November to conduct the election as the next feasible uniform election date in which the city could comply with Election Code Section 61.012, which requires cities to have an electronic voting system in place at each polling place for individuals with disabilities.

Q: What about the requirement for school districts to have joint elections with cities? Will schools also have to make these same election date choices?

A: Yes, to some extent. An election for the trustees of an independent school district must be held as a joint election on the same date as the election for the members of the governing body of a city located in the school district, the general election for state and county officers (November of even-numbered years), or the election for the members of the governing body of a hospital district in certain independent school districts. TEX. EDUC. CODE § 11.0581(a). If the school district wishes to conduct a joint election with the city, it will need to work with the city as the city contemplates its options following the passage of S.B. 100.

Q: If the city has a three-year term of office, can the school and junior college also adopt a three-year term of office?

A: School districts can adopt three- or four-year terms of office for their trustees. TEX. EDUC. CODE § 11.059. The trustees of a junior college district that does not operate under the school board each serve a six-year term of office. TEX. EDUC. CODE § 130.082(e).

Q: Can a county refuse to conduct city or school district elections in November?

A: A county with an elections administrator must enter into a contract to furnish election services to a city for the November election if requested by the city in accordance with a cost schedule agreed upon by the contracting parties. TEX. ELEC. CODE § 31.093. A county that does not have an elections administrator is not required to conduct a city's election in November, as was the case prior to the enactment of S.B. 100. However, a county is required to lease equipment owned by the county to a city under terms agreed to by both parties, except the duty to lease the equipment is subject to reasonable restrictions and conditions imposed by the commissioner's court to both ensure the availability of the equipment for other elections and to protect the equipment from misuse or damage. TEX. ELEC. CODE §123.032(c).