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August 4, 2009

County Clerk/Registrar of Voters (CC/ROV) Memorandum #09128

TO: All County Clerks/Registrars of Voters

FROM: Jennie Bretschneider
Assistant Chief Deputy Secretary of State

RE: Proposed Legislation: Post Canvass Audit Bill Language

Attached is the bill proposal to move the Post Election Manual Tally (PEMT) to *after* the canvass period and rename it the "Post Canvass Audit." The bill moves the PEMT to after the certification of election results, but keeps the audit similar in process to the 1% manual tally. Under this bill, elections officials would certify official results, conduct any post canvass audit necessary, and amend the certified statement of results *only if* the post canvass audit escalated to 100% and the winner turned out to be different. The bill makes conforming changes to other statutes, so that candidates and others could still request a recount or file an election contest after the post canvass audit; however, it's likely the post canvass audit would minimize or eliminate most requests for recounts.

Also included in this bill proposal are four separate cost savings measures that would apply to every election (see Cost Savings Amendments #1-4 starting on page 10 of the bill draft). A summary document that briefly describes each cost savings measure has been attached for your review.

The PEMT Revision Working Group worked closely with the Secretary of State's Office over the last few months to develop this proposed bill language. The Secretary intends to introduce this bill in August with the goal of having it in effect for the June 8, 2010, Statewide Primary Election.

We welcome any comments, questions, or concerns you may have on the bill. In addition, as you review the cost savings amendments, please feel free to send any estimates you have on the potential cost savings these measures could generate. Please direct responses to jennie.bretschneider@sos.ca.gov. If you have any questions, please feel free to call me directly at (916) 651-8297. Thank you for your consideration.

Attachments

Post Canvass Audit Bill

Amendment 1

Add Chapter 8 (and renumber Chapters 9, 10, and 11) to Division 15 of the Elections Code commencing with Section 15560 to read:

Chapter 8. Post Canvass Audits

Section 15560. Definitions.

(a) "Official canvass" shall have the meaning set forth in Section 335.5.

(b) "Post Canvass Audit" means a public manual tally of all of the votes cast in a contest in a percentage of precincts, pursuant to the provisions of this chapter.

(c) "Unofficial final results" means the election results upon completion of the official canvass, as defined in Sections 335.5 and 15302(a)-(g), but before reporting final results to the governing board or the Secretary of State, or both, as specified in section 15302(h).

(d) "Vote for One" means an election on a measure or an election for an office in which the voter may select only one candidate.

(e) "Vote for Multiple" means an election for an office in which the voter may select two or more candidates.

(f) "Variance" means any difference between the machine tally and the post canvass audit for a contest, including, but not limited to, differences due to a machine or operational malfunction or due to a ballot that has been marked in a manner that cannot be machine counted.

Section 15561. Post Canvass Audits Required in Contests With Narrow Margins of Victory.

(a) Any post canvass audit required by this chapter shall be based on the official canvass results, except as provided in paragraph (3), of subdivision (a), of this section.

> ***(1) After each election, the elections official shall determine the margin of victory in each contest based upon the official canvass results.***
>
> > ***(A) For Vote for One contests, the "margin of victory" is the difference between the percentage of overall votes cast for the first place candidate or***

position and the percentage of overall votes cast for the second place candidate or position.

(B) For Vote for Multiple contests, the "margin of victory" is the difference between the percentage of overall votes cast for the candidate with the lowest number of votes needed to win a seat and the percentage of overall votes cast for the candidate with the next lowest number of votes. For example, for a contest with three open seats, the margin of victory would be the difference between the percentage of the overall votes cast for the third and fourth place candidates, respectively.

(C) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentage of "yes" votes of overall votes and the percentage of overall votes required for the measure to pass.

(2) For any contest in which the margin of victory, based upon the official canvass results, is less than one half of one percent (0.5%), the elections official shall conduct a post canvass audit, employing the methods set forth in Section 15360 as follows:

(A) For statewide contests, the post canvass audit shall include two percent (2%) of randomly selected precincts in each jurisdiction.

(B) For legislative and Congressional contests, and any contest involving 100 precincts or more, the post canvass audit shall include five percent (5%) of randomly selected precincts in each jurisdiction in which votes were cast in the contest.

(C) For any contest not subject to subparagraphs (A) or (B) of paragraph (2) of subdivision (a) of this section, and involving fewer than 100 precincts, the post canvass audit shall include ten percent (10%) of randomly selected precincts in each jurisdiction in which votes were cast in the contest.

(3) If the unofficial final results indicate a post canvass audit will be required under this chapter, an elections official may choose to begin the post canvass audit during the canvass period based on the unofficial final results, provided the elections official has complied with subparagraphs (A) and (B), of paragraph (4), of subdivision (a), of this section.

(4) If a post canvass audit is required pursuant to this chapter, the elections official shall:

(A) Provide at least a five-day public notice of the time and place of the random selection of the precincts to be manually tallied and of the time and

place of the post canvass audit prior to conducting the selection of precincts and post canvass audit; and

(B) Publish the results to be used for the post canvass audit prior to conducting the selection of precincts and post canvass audit.

(b) The post canvass audit required by this chapter shall apply only to votes cast in the contest or contests with a margin of victory less than one half of one percent (0.5%), not to other contests on the same ballot in which the margin of victory equals or exceeds one half of one percent (0.5%).

(c) The post canvass audit required by this chapter shall not apply to:

(1) political party central committee elections, as provided in Section 7050 et seq.; or

(2) advisory elections, as provided in section 9603.

(d) Tally results for ballots tallied pursuant to Section 15360 may be included as part of the post canvass audit required pursuant to subdivision (a), provided that ballots tallied after election night remain segregated and can be tallied separately.

(e) In any contest in which a two percent (2%), five percent (5%), or ten percent (10%) post canvass audit would otherwise be required pursuant to subdivision (a), an elections official may instead conduct a post canvass audit of a higher percentage of randomly selected precincts. If the post canvass audit does not include one hundred percent (100%) of the precincts involved in the contest, then the elections official must comply with the escalation requirements in Section 15564.

(f) The elections official shall begin the post canvass audit as soon as practicable after the random selection of precincts for the post canvass audit.

(g) The post canvass audit shall be conducted in public view by hand without the use of electronic scanning equipment.

(h) Individuals performing the post canvass audit shall not at any time during the post canvass audit process be informed of the corresponding machine tally results.

(i) A poll worker participating in the post canvass audit shall not be assigned to tally the results from a precinct in which that individual served as a poll worker on Election Day.

(j) The elections official shall take appropriate measures to ensure that voter verifiable paper audit trail records from direct recording electronic (DRE) ballots

that were cancelled before being cast are not inadvertently tallied as valid ballots in the post canvass audit process.

(k) The elections official shall take appropriate measures to ensure that no damaged or defective ballot that has been substituted for by a duplicate copy pursuant to Section 15210 is inadvertently tallied as a valid ballot in the post canvass audit process.

(l) The elections official shall comply with the tally procedures established for conducting manual tallies under Section 15360 when conducting any post-election post canvass auditing required by this chapter, except the requirement in subdivision (e) of Section 15360 to include a report of the results in the certification of the official tally.

(m) The elections official shall establish security procedures for secure interim storage of ballots and to detect unauthorized access to ballots.

Section 15562. Contests Voted Upon in More Than One Jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections officials the jurisdictions in which votes were cast in the contest shall determine whether a post canvass audit is required by Section 15561 by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in Counties A and B is less than one half of one percent (0.5%) within County A but the overall margin of victory in Counties A and B combined is one half of one percent (0.5%) or more, then a post canvass audit is not required by Section 15561 in either county.

(2) If the margin of victory in a contest voted upon in Counties A and B is one half of one percent (0.5%) or more within County A, but the overall margin of victory in Counties A and B combined is less than one half of one percent (0.5%), then County A shall conduct a post canvass audit of randomly selected County A precincts, in which voters cast ballots for that contest, and County B shall conduct a post canvass audit of randomly selected County B precincts in which voters cast ballots for that contest, pursuant to Section 15561.

(b) For a legislative, Congressional, or statewide contest, the Secretary of State shall determine whether a post canvass audit is required by Section 15561,based upon the official canvass results and margin of victory for the entire district for a legislative or Congressional contest or the entire state for a state contest.

(c) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall conduct a

separate post canvass audit pursuant to this chapter, except any escalation required by Section 15564, shall be determined based on the overall variance percentage in the contest after completion of the initial audit pursuant to Section 15561 in all jurisdictions.

Section 15563. Determination, Counting and Disclosure of Variances.

(a) An elections official must document and disclose to the public any variances between the machine count and the post canvass audit. Subdivisions (a)(1) through (a)(3) specify how variances should be documented and disclosed.

(1) If the post canvass audit establishes that the machine tally erroneously attributed a vote for Candidate A to Candidate B, two variances result because the vote totals for Candidate A and for Candidate B are each changed by one vote in the post canvass audit.

(2) If the post canvass audit establishes that the machine tally erroneously attributed a vote for Measure A as a vote against Measure A, two variances result because the vote totals for Measure A and against Measure A are each changed by one vote in the post canvass audit.

(3) If the post canvass audit determines that a vote was cast in a contest on a ballot that the machine tally interpreted as an under-vote in the contest, one variance results because the machine tally under-vote becomes a vote for a candidate or a vote for or against a measure in the post canvass audit.

Section 15564. Post Canvass Audit Escalation Requirements for Variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances as follows:

(1) For Vote for One contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances.

(2) For Vote for Multiple contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.

(3) For any contest, variances resulting from ballots cast for unqualified write-in candidates shall not be included in the total number of variances.

(4) After deducting variances pursuant to paragraphs (1) through (3) of this subdivision, the elections official shall divide the remaining number of variances found in the post canvass audit sample for the contest by the total number of votes cast for that contest in the post canvass audit sample.

(b) If the variance percentage represents at least one half (50%) of the margin of victory for that contest based on the official canvass results, or based on the unofficial final results pursuant to subparagraph (C), of paragraph (3), of subdivision (a), of Section 15561, then additional precincts must be manually tallied for that contest as provided in this section.

(c) Additional precincts shall be tallied in randomly selected blocks of five percent (5%) of the precincts in the contest until the variance percentage – re-calculated using the method above – is smaller than one half (50%) of the overall margin of victory in that contest, or until all ballots have been manually tallied, whichever occurs first.

(d) If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, the elections official must preserve the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the Secretary of State in order to allow for an investigation to determine the cause of the problem.

Section 15565. Result of Post Canvass Audit in Affected Precincts.

Upon completion of a post canvass audit showing that a different candidate was nominated or elected, that a different presidential slate of electors received a plurality of the votes, or that a measure was defeated instead of approved or approved instead of defeated, the elections official shall amend the certified statement of results of the election, prepared pursuant to section 15372 by entering the result of the post canvass audit in each precinct affected, which result shall, for all purposes thereafter, be the official returns of those precincts for the office, slates of presidential electors, or measure involved in the post canvass audit. The elections official shall declare null and void the results of any post canvass audit which is not completed by counting the votes in each and every precinct in the jurisdiction within which votes were cast on the candidates for the office, on the slates of electors, or on the measure in question. The elections official shall submit the amended statement of the results of the election to the governing body, or Secretary of State, as is required of the original statement.

Section 15566. Records to be Maintained During and After the Post Canvass Audit Process.

(a) The elections official shall keep a log to record the post canvass audit process, including the results of each round of post canvass auditing for each precinct included in the sample, how variances were reconciled, and details of any actions taken that are contrary to this chapter. The elections official shall make the log available to the public.

(b) The elections official shall compile and submit to the Secretary of State a report summarizing the results of any post canvass audit required by this chapter. The report shall contain, at a minimum, the following information:

(1) For each precinct in the post canvass audit, a comparison of the results tallied by machine and the post canvass audit results, including under-votes and over-votes;

(2) Identification of any variances between the machine count and the post canvass audit; and

(3) A description of how each identified variance was reconciled.

Section 15567. Public Right to Observe.

(a) The elections official shall make the official canvass precinct tally results, or unofficial final precinct tally results pursuant to subparagraph (C), of paragraph (3), of subdivision (a), of Section 15561, available to the public before any post canvass audit of the results from those precincts begins.

(b) The post canvass audit shall be a public process and shall begin no later than 5 days after the elections official prepares a certified statement of the results of the election, pursuant to section 15372. The official conducting the election shall provide a 5-day public notice of the time and place of the post canvass audit and of the time and place of the selection of the precincts to be tallied prior to conducting the selection and tally. If a contest voted upon in more than one jurisdiction is subject to a post canvass audit pursuant to this chapter, the elections officials from each jurisdiction shall begin the post canvass audit no later than 5 days after the certified statement of results of the election has been completed in all of the jurisdictions involved in the contest.

(c) The elections official shall permit the public to observe the post canvass audit process, including the random selection of precincts. The elections official shall not permit members of the public to touch ballots, voter verifiable paper audit trail records or other official materials used in the post canvass audit process or to interfere in any way with the post canvass audit process.

(e) This chapter does not permit the examination of ballots and other materials as permitted in a recount, pursuant to section 15630.

Section 15568. Limitations of Chapter.

This chapter does not:

(a) Authorize the opening or auditing of ballots for any precinct except for the purposes specified in this chapter.

(b) Limit other provisions of law regarding an election recount or contest.

Section 15569. Secretary of State May Adopt Post Canvass Audit Model.
The Secretary of State may adopt in regulation a statistical auditing model to replace the post canvass audit required by this chapter, provided that the model achieves the same or higher level of statistical confidence in the audited election results.

Amendment 2

Amend Section 15620 to read:

15620. Following completion of the official canvass, ***and any post canvass audit conducted pursuant to Sections 15560 to 15568***, any voter may, within five days thereafter, file with the elections official responsible for conducting an election in the county wherein the recount is sought a written request for a recount of the votes cast for candidates for any office, for slates of presidential electors, or for or against any measure, provided the office, slate, or measure is not voted on statewide. The request shall specify on behalf of which candidate, slate of electors, or position on a measure (affirmative or negative) it is filed.

If an election is conducted in more than one county, the request for the recount may be filed with the elections official of, and the recount conducted within, any or all of the affected counties.

For the purposes of this section "completion of the canvass" shall be presumed to be that time when the elections official signs the certified statement of the results of the election except that, in the case of a city election, if a city council canvasses the returns itself and does not order the elections official to conduct the canvass as permitted by Section 10263, "completion of the canvass" shall be presumed to be that time when the governing body declares the persons elected or the measures approved or defeated.

Amendment 3

Amend Section 15621 to read:

15621. Following completion of the official canvass, ***and any post canvass audit conducted pursuant to Sections 15560 to 15566,*** any voter may, within five days beginning on the 29th day after a statewide election, file with the Secretary of State a written request for a recount of the votes cast for candidates for any statewide office or

for or against any measure voted on statewide. The request shall specify in which county or counties the recount is sought and shall specify on behalf of which candidate, slate of electors, or position on a measure (affirmative or negative) it is filed.

The Secretary of State shall forthwith send by registered mail one copy of the request to the elections official of each county in which a recount of the votes is sought.

All the other provisions of this article shall apply to recounts conducted under this section.

Amendment 4

Amend Section 16401 to read:

16401. The contestant shall verify the statement of contest, as provided by Section 446 of the Code of Civil Procedure, and shall file it within the following times after the declaration of the result of the election, ***and after declaration of the results of any post canvass audit conducted pursuant to Sections 15560 to 15568,*** by the body canvassing the returns thereof:

(a) In cases other than cases of a tie, where the contest is brought on any of the grounds mentioned in subdivision (c) of Section 16100, six months.

(b) In all cases of tie, 20 days.

(c) In cases involving presidential electors, 10 days.

(d) In all other cases, 30 days.

Amendment 5

Amend Section 16421 to read:

16421. The affidavit shall be filed in the office of the clerk of the superior court having jurisdiction, within five days after ***either*** the completion of the official canvass, ***or the completion of any post canvass audit conducted pursuant to Sections 15560 to 15568,*** by the ~~board of supervisors of the~~ county last making the declaration. In the case of an office for which candidates are certified for the ballot by the Secretary of State, or a measure which is voted on throughout the state, the superior court having jurisdiction shall be Sacramento County.

Cost Savings Amendments

Amendment 1

Add Section 8029 to the Elections Code to read:

8029. In any county in which no one or only one candidate has filed nomination papers for a county office, his or her name shall not appear on the ballot unless there is filed with the elections official, within 10 days after the final date for filing nomination papers for the office, a petition indicating that a write-in campaign will be conducted for the office and signed by 100 registered voters qualified to vote with respect to the office.

If a petition indicating that a write-in campaign will be conducted for the office at the general election, signed by 100 registered voters qualified to vote with respect to the office, is filed with the elections official not less than 83 days before the general election, the name of the candidate shall be placed on the general election ballot if it has not appeared on the direct primary election ballot.

If, in conformity with this section, the name of the candidate does not appear either on the primary ballot or general election ballot, the elections official, on the day of the general election, shall declare the candidate elected. Certificates of election specified in Section 15401 or 15504 shall not be issued to a person elected pursuant to this section before the day of the general election.

Amendment 2

Amend Section 10229 of the Elections Code to read:

10229. (a) If, by 5 p.m. on the 88th day prior to the day fixed for a regularly scheduled municipal election or the 83rd day if an incumbent fails to file pursuant to Section 10225, (i) no one or only one person has been nominated for any office which is elected on a citywide basis, or (ii) no one or only one person is nominated to be elected from or by a legislative district, or (iii) in the case of any office or offices to be elected at large, the number of persons who have been nominated for those offices does not exceed the number to be filled at that election; or, if, by the 88th day, during normal business hours, as posted, before a municipal election to fill any vacancy in office, no one, or only one person has been nominated for any elective office to be filled at that election, and the election is subject to Section 36512 of the Government Code, the city elections official shall submit a certificate of these facts to the governing body of the city and inform the governing body of the city

that it may, at a regular or special meeting held before the municipal election, adopt one of the following courses of action:

(1) Appoint to the office the person who has been nominated.

(2) Appoint to the office any eligible elector if no one has been nominated.

(3) Hold the election, if no one, or only one person has been nominated. The city elections official shall publish a notice of the facts described in this section and the courses of action available under this subdivision. Publication shall be made pursuant to Section 6061 of the Government Code in any newspaper of general circulation as designated by the city elections official.

After the fifth day following the date of posting or publication, the governing body of the city may make the appointment or direct an election to be held in the affected territory. The person appointed, if any, shall qualify and take office and serve exactly as if elected at a municipal election for the office.

Notwithstanding Section 10403, if, by the 75th day before the municipal election, no person has been appointed to office pursuant to paragraph (1) or (2), the election shall be held.

~~**(b) Subdivision (a) shall not apply if, at the regularly scheduled municipal election, more than one person has been nominated to another city office to be elected on a citywide basis or, a city measure has qualified and is to be submitted to the voters at that municipal election.**~~

~~(c)~~ *(b)* Notwithstanding Chapter 1 (commencing with Section 8600) of Part 3 of Division 8, or any other provision of the law to the contrary, if the governing body of a city makes an appointment pursuant to subdivision (a), the elections official shall not accept for filing any statement of write-in candidacy that is submitted after the appointment is made.

~~(d)~~ *(c)* Nothing in this section shall be construed to prevent a city from enacting an ordinance pursuant to Section 36512 of the Government Code, requiring that a special election be held, or from enacting an ordinance pursuant to Section 36512 of the Government Code, providing that a person appointed to fill a vacancy on the city council shall hold office only until the date of the special election, or both. Any ordinance or ordinances may allow for appointment consistent with subdivision (a) without requiring or providing for a special election.

In the event that an appointment to office is made in a particular legislative district pursuant to subdivision (a), that appointment shall not affect the conduct of the municipal election in other legislative districts of the city.

Amendment 3

Add Section 13318 to the Elections Code to read:

Section 13318. (a) Notwithstanding any other provision of law, whenever a city or county elections is required to send to each voter the sample ballot or any other official voter information required to appear in the voter information pamphlet, the elections official may permit each voter to choose not to receive by postal mail a copy of the sample ballot and the voter information pamphlet. The voter must opt out in writing by sending the elections official a form or letter that includes the voter's name, residence address, date of birth, and signature along with a statement indicating the voter's desire to opt out of receiving the sample ballot voter information pamphlet by postal mail. At any time, the voter may request in writing to return to receiving the sample ballot and the voter information pamphlet by postal mail.

(b) The opt out provision in subdivision (a) shall only be made available if the city or county elections official provides the sample ballot and other official voter information included in the voter information pamphlet on its official website no later than on the first day that paper copies of the sample ballot and voter information pamphlet are made available to the public.

(c) The city or county elections official must continue to provide all voters who are not permanent vote by mail voters an application for a vote by mail ballot and notice of polling place. The notice of polling place shall include information on where the voter may obtain a paper copy of the sample ballot and voter information pamphlet.

Amendment 4

Amend Section 13300 of the Elections Code to read:

13300. (a) By at least 29 days before the primary, each county elections official shall prepare separate sample ballots for each political party and a separate sample nonpartisan ballot, placing thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names of all candidates for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ballot shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) One sample ballot of the party to which the voter belongs, as evidenced by his or her registration, shall be mailed to each voter

entitled to vote at the primary who registered at least 29 days prior to the election not more than 40 nor less than 10 days before the election. A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election, provided that on election day any person may, upon request, vote the ballot of a political party if authorized by the party's rules, duly noticed to the Secretary of State.

(d) An elections official may elect not to send a sample ballot to voters who are registered to vote as a permanent vote-by-mail voters pursuant to Elections Code 3200 and who receive both a ballot, pursuant to Elections Code sections 3005 or 3010, and the voter information pamphlet.
(e) An elections official may elect not to send a sample ballot to each voter in a mail ballot election conducted pursuant to Elections Code section 4100 et seq., provided each voter in the precinct receives both a ballot, pursuant to Elections Code sections 3005 or 3010, and a voter information pamphlet.
(f) An elections official may elect not to send a sample ballot to each voter in an mailed ballot precinct established pursuant to Elections Code section 3005, provided each voter in the precinct receives both a ballot, pursuant to Elections Code sections 3005 or 3010, and a voter information pamphlet.

Post Canvass Audit Bill
Cost Savings Amendments – Summary

Amendment 1

Current law (EC 8203) states counties do not have to place uncontested judicial nominees on the ballot.

This amendment allows counties not to place uncontested nonpartisan, county-level races on the ballot as long as there is also no write in candidate.

Amendment 2

Current law (EC 8203) states counties do not have to place uncontested judicial nominees on the ballot.

Current law (EC 10229) requires any uncontested city race to be listed on the ballot if there's another measure already going on the ballot.

This amendment permits counties not to place uncontested nonpartisan, city-level races on the ballot as long as there is also no write in candidate.

Amendment 3

Current law (EC 13300) requires counties to mail a sample ballot to each registered voter in advance of each election.

This amendment permits counties to allow voters to opt out of receiving the sample ballot. Any county that exercises this option would be required to post the sample ballot on the county's official website (which most, if not all, counties already do).

Amendment 4

Current law (EC 13300) requires counties to mail a sample ballot to each registered voter in advance of each election.

This amendment allows counties not to send a sample ballot to permanent vote by mail voters, because those voters already receive the *actual* ballot, which contains the same information about measures and candidates, when they receive their vote-by-mail ballot.