



**DEBRA BOWEN** | SECRETARY OF STATE  
STATE OF CALIFORNIA | ELECTIONS

1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

January 26, 2011

County Clerk/Registrar of Voters (CC/ROV) Memorandum #11005

TO: All County Clerks/Registrars of Voters

FROM:



Jana M. Lean  
Chief, Elections Division

RE: State Special Elections to Fill Vacancies in Voter-Nominated Offices:  
Implementing the Top Two Candidates Open Primary Act of 2010

The Secretary of State's office has developed the following directives to ensure county elections officials who conduct special elections to fill legislative or congressional vacancies do so in a uniform fashion that complies with the Top Two Candidates Open Primary Act, which took effect January 1, 2011.

**Special Elections to Fill Vacancies in Voter-Nominated  
Offices Under the Top Two Candidates Open Primary Act**

Any special election to fill a legislative or congressional vacancy will be conducted under the new Top Two Candidates Open Primary Act created by the passage of Proposition 14 and Senate Bill 6 (SB 6) (Chapter 1, Statutes of 2009). All of the Elections Code statutes cited within this document took effect January 1, 2011.

**I. Documents from Secretary of State (SOS)**

The Top Two Candidates Open Primary Act required the SOS to change many of the documents candidates must file in order to run for office. In order to facilitate a uniform implementation of special elections using the new open primary format, the SOS office has revised the necessary candidate filing documents. The new aspects of the forms are highlighted below.

Signatures in-lieu – Prior to the Top Two Candidates Open Primary Act, only a voter of the same political party as a candidate could sign the candidate's nomination paper. Additionally, any voter could sign an in-lieu petition, but only the signature of a voter who was of the same political party could be counted toward the number of voters required to sign a nomination paper. Now anyone, regardless of party preference, can sign a nomination paper. As a result, all signatures on an in-lieu

petition can be counted toward the number of voters required to sign a candidate's nomination paper. (Elec. Code §§ 8061, 8068.)

Declaration of Candidacy – A candidate may indicate his or her party preference, or lack of party preference, upon his or her declaration of candidacy. (Elec. Code § 8002.5.) A new section has been added to require candidates to list their 10-year party preference and voter registration history. (Elec. Code §§ 300.5, 8121.)

Nomination Paper – The number of registered voters who must sign the nomination paper remains the same: 40-60 signatures. (Elec. Code § 8062.) However, any qualified registered voter may sign any candidate's nomination paper, regardless of the voter's or the candidate's party preference or lack of party preference. (Elec. Code § 8068.) Counties do not need to verify the political preferences of the voters who have signed nomination papers. (Elec. Code § 8081.)

The forms themselves, along with the qualifications and requirements for running for office and Special Election Calendars, will be forwarded to any counties that are required to hold special legislative or congressional elections in 2011.

## **II. Candidates**

Prior to the Top Two Candidates Open Primary Act, the law allowed for three types of candidates in a special primary election (and in a special general election if a single candidate did not get a majority of the votes): 1) candidates using the party nomination process, 2) candidates using the write-in process, and 3) candidates using the independent nomination process.

If one candidate did not receive a majority of the votes cast in the special primary election, the top vote-getter from each qualified party and any candidates who qualified using the independent nomination process would move on to the special general election.

Now all candidates running in a special primary election must qualify using either the nomination process or the write-in process. There is no longer an independent nomination process for a special primary election. Also, a candidate from a special primary election will only advance to the special general election if he or she is one of the top two vote-getters, unless there is a tie. There is no general election if one candidate receives a majority of the votes in the primary election. (Elec. Code §§ 10705(a), 10705(b), 10706.)

Additionally, the Top Two Candidates Open Primary Act refers to legislative and congressional offices as "voter-nominated offices"; these offices are no longer referred to as partisan offices. (Elec. Code §§ 337, 359.5.)

#### A. Nomination Process

Prior to the Top Two Candidates Open Primary Act, candidates using the independent nomination process could run in both the special primary and special general elections.

Now, in the special primary election, no candidate can run under the independent nomination process. (Elec. Code §§ 359.5, 8002.5.) In the special general election, candidates will only be allowed to run under the independent nomination process if no candidate is nominated for this office at the special primary election. (Elec. Code § 8300.)

#### B. Write-In Candidates

Prior to the Top Two Candidates Open Primary Act, write-in candidates could run in both the special primary and special general elections.

Now, write-in candidates can only run in the special primary election. Only a write-in candidate from the special primary election who is one of the top two vote-getters, is eligible to have his or her name on the ballot in the special general election. (Elec. Code § 8605.) If a person's name is written on a ballot as a write-in candidate in a special general election, the vote cannot be counted. (Elec. Code §§ 8605, 8606.)

### **III. Language and Layout for Sample Ballot Booklet and Ballot**

To facilitate a uniform implementation of special elections using the new open primary format, the SOS office has adopted the following language for county elections officials to use. To assist county elections officials, the SOS office will also provide the multilingual translations of this language.

#### A. Sample Ballot Booklet

The Top Two Candidates Open Primary Act requires certain information to be provided to voters in the Secretary of State's Official Voter Information Guide (VIG). (Elec. Code § 9083.5(b)) Since there is no VIG for special elections to fill vacancies, county elections officials should provide the following language (taken from Elections Code section 9083.5), on the sample ballot in order to educate voters about the changes in the law:

#### **"VOTER-NOMINATED OFFICES**

Under the California Constitution, political parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election, and a candidate nominated for a voter-nominated office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a voter-nominated office may,

however, designate his or her party preference, or lack of party preference, and have that designation reflected on the primary and general election ballot, but the party designation so indicated is selected solely by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party designated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party. The parties may have a list of candidates for voter-nominated offices, who have received the official endorsement of the party, printed in the sample ballot.

All voters, regardless of the party for which they have expressed a preference upon registering, or of their refusal to disclose a party preference, may vote for any candidate for a voter-nominated office, provided they meet the other qualifications required to vote for that office. The top two vote-getters at the primary election advance to the general election for the voter-nominated office, and both candidates may have specified the same party preference designation. No party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two highest vote-getters at the primary election."

#### B. Primary Ballot

The Top Two Candidates Open Primary Act requires certain information be provided to voters on the ballot. (Elec. Code § 13206.) Although Elections Code section 13206 seems to contemplate a ballot with partisan, voter-nominated, and nonpartisan offices, the special election ballots will only contain a voter-nominated office. Therefore, to eliminate the potential for confusion, the SOS office is providing the ballot language below for county elections officials to use. It is based on the language of Section 13206(b), but removes the references to "nonpartisan offices" to eliminate the potential for voter confusion since a nonpartisan office will not be on the ballot.

In furtherance of Elections Code section 13206(a), on the ballot, immediately below the instructions to voters, there should be a box not less than one-half inch high enclosed by heavy-ruled line the same as the borderline. The box should be as long as there are columns for the partisan ballot and should be set directly above these columns.

Within the box shall be printed in 24-point boldface gothic capital type the words "Voter-Nominated Offices." Immediately below that phrase within the same box shall be printed, in 8-point boldface gothic type, the following:

"All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated office.

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party."

C. Sample Ballot Booklet and All Ballots

a. Pursuant to Elections Code sections 8002.5 and 13105(a), the language following the candidates' names should be as follows:

i. If a candidate has a political party preference and would like it disclosed: "My party preference is the   [insert party]   Party."

ii. If a candidate has not disclosed a political party preference: "No Party Preference."

iii. If a candidate has a political party preference but does not want it listed on the ballot: "My party preference is the        Party."

b. With respect to the ballot layout, there is potentially conflicting language in the Elections Code. The potential for the conflicting language existed prior to the enactment of the Top Two Candidates Open Primary Act and was retained by the Act. If there is not sufficient space next to the candidate's name, Elections Code section 13105 states that the political party identification should be placed "immediately below the name" of the candidate. However, Elections Code section 13107 states that the ballot designation shall be placed "immediately under the name" of the candidate. The potential for conflict will be more likely to occur now, given the new political party identification sentences required by the Top Two Candidates Open Primary Act.

In order to facilitate a uniform implementation of how candidates appear on the ballot, county elections officials should follow a three-line format for all candidates in any special election for legislative or congressional office:

Name of Candidate

Political Party Identification Sentence (e.g., "My party preference is the        Party.")

Ballot Designation

#### **IV. Other Duties**

There are a number of other duties that the Top Two Candidates Open Primary Act requires county elections officials to adhere to when conducting a special primary or special general election. Two of the items the Secretary of State's office has identified are:

- A. County elections officials, when posting or distributing a list of the names of precinct board members, must indicate the precinct board members' party preferences or lack of party preferences. (Elec. Code § 12108.)
- B. Any qualified political party may submit to the county elections official a list of all candidates for voter-nominated office who will appear on any ballot in the county in question, and who have been endorsed by the party. The county elections official shall print any such list that is timely received in the sample ballot. (Elec. Code § 13302(b).)

Although this section does not specifically address special elections, given the language of the statute ("In connection with any election at which a candidate for a voter-nominated office will appear on the ballot") and the spirit of the Top Two Candidates Open Primary Act, the SOS office has determined that this subdivision does apply to special elections, despite the shortened time frame.

For purposes of special primary elections, the SOS office has determined that E-43 is the last day for a qualified political party to provide county offices with a list of endorsed candidates. A deadline of E-43 coincides with the close of the nomination period and the last day for candidates to purchase space for candidate statements in the county sample ballot booklets.

With respect to special general elections, given that the timeframes are even more condensed, the SOS office asks that counties work with any interested qualified political parties who wish to submit lists, just as counties work with candidates who wish to purchase space for candidate statements, in determining a last day to submit the lists.

The political parties are not required to pay for the space to print the list.

If you have any questions, please feel free to contact our office at (916) 657-2166.