
**SENATE COMMITTEE ON
ELECTIONS AND CONSTITUTIONAL AMENDMENTS**
Senator Steven Glazer, Chair
2023 - 2024 Regular

Bill No: AB 63 **Hearing Date:** 6/20/23
Author: Cervantes
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Urgency: No **Fiscal:** Yes
Consultant: Scott Matsumoto

Subject: Canvass of the vote: reporting results.

DIGEST

This bill requires elections officials to update election results at least two times a week until the results are complete, except as specified. This bill also requires the Secretary of State (SOS) to inform the Legislature if a candidate was elected to the Legislature but was not continuously registered to vote in the district in which the candidate was running between the date that the candidate filed for office and the date on which the SOS notifies the Legislature that the person apparently was elected.

ANALYSIS

Existing law:

- 1) Requires an elections official to mail a ballot to every active registered voter for every election in which the voter is eligible to participate.
- 2) Permits any jurisdiction having the necessary computer capability to start to process vote by mail (VBM) ballots on the 29th day before the election. Provides that processing VBM ballots includes opening ballot return envelopes, removing ballots, duplicating damaged ballots, and preparing the ballots to be machine read or machine reading them, including processing write-in votes so that they can be tallied by the machine. Prohibits a vote count from being accessed or released until 8 p.m. on the day of the election.
- 3) Requires an elections official to conduct a semifinal official canvass of each election by tabulating VBM and precinct ballots and compiling the results. Requires the semifinal official canvass to begin immediately upon the closing of the polls and to continue without adjournment until all precincts are accounted for.
- 4) Requires the elections official to transmit the semifinal official results to the SOS in the manner and according to the schedule prescribed by the SOS prior to each election, for the following:
 - a) All candidates voted for statewide office.
 - b) All candidates voted for the following offices:

- i) State Assembly.
 - ii) State Senate.
 - iii) Member of the United States (US) House of Representatives.
 - iv) Member of the Board of Equalization (BOE).
 - v) Justice of the Court of Appeals.
- c) All persons voted for at the presidential primary or for electors of President and Vice President of the US.
- d) Statewide ballot measures.
- 5) Requires the elections official to transmit the results to the SOS at intervals no greater than two hours following commencement of the semifinal official canvass.
- 6) Requires an official canvass of election results to commence no later than the Thursday following the election. Requires the official canvass to be open to the public and, for state elections, to result in a report of results to the SOS. Requires the official canvass be continued daily (except for Saturdays, Sundays, and holidays) for not less than six hours each day until completed.
- 7) Requires the official canvass of election results to include various tasks, including the following:
- a) Processing and counting any valid VBM and provisional ballots not included in the semifinal official canvass.
 - b) Counting any valid write-in votes.
 - c) Reporting final results to the governing board and the SOS, as required.
- 8) Requires the elections official to prepare a certified statement of the results of an election and submit it to the governing body within 30 days of the election or, in the case of school district, community college district, county board of education, or special district elections conducted on the first Tuesday after the first Monday in November of odd-numbered years, no later than the last Monday before the last Friday of that month.
- 9) Requires an elections official, on the second day after an election, to send to the SOS an initial report containing the estimated number of outstanding unprocessed ballots. Requires the elections official, beginning on the sixth day after the election and on any day that the election official publicly releases updated election results, to send to the SOS a report on the estimated number of outstanding unprocessed ballots. Requires this report to be submitted in the form and manner prescribed by the SOS. Requires the last unprocessed ballot report to be delivered upon the completion of the official canvass. Defines "unprocessed ballot," for these purposes, to mean a voted polling place ballot, voted VBM ballot, voted provisional

ballot, or voted conditional registration ballot that has not yet been counted or processed for counting.

- 10) Provides, unless otherwise specifically provided, that a person is not eligible to be elected to an elective office unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued.
- 11) Provides that a person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the US and a resident of California for three years, immediately preceding the election.
- 12) Provides that each house of the Legislature shall judge the qualifications and elections of its Members.
- 13) Provides that if a person who is chosen as a member of the BOE is not an inhabitant of the district for which the person is chosen, or if a member of the BOE ceases to be an inhabitant of the district for which the person is chosen, a vacancy occurs in the BOE.
- 14) Provides that an office becomes vacant if the officeholder ceases to be an inhabitant of the state before the expiration of the term.

This bill:

- 1) Requires an elections official, beginning no later than the Thursday following an election, and until publication of a certified statement of results, as specified, to post updated information regarding the election on their internet website at least two times per week. Requires the update to include at least the following information:
 - a) Updated results for any candidate or measure appearing on the ballot.
 - b) The number of ballots processed and an estimated number of outstanding ballots remaining unprocessed for each of the following categories: ballots voted at a polling place, VBM ballots received on or before Election Day, VBM ballots received after Election Day, provisional ballots, and conditional registration ballots.
 - c) The date and time when it is expected that the next results will be posted.
- 2) Permits the elections official to stop posting the results in 1) if either of the following occurs:
 - a) The certified statement of results is published pursuant to existing law.
 - b) The only ballots left to count are VBM ballots for which a voter has the opportunity either to verify their signature or to provide their signature pursuant to existing law. Provides that if the elections official stops posting results for this reason, they shall post a notice stating this reason on their internet website.

- 3) Provides that the reporting requirements pursuant to this bill are in addition to any other duty to report or publish information required of the elections official, as specified.
- 4) Requires the SOS, whenever the SOS transmits a certificate of election or any other information to the State Senate or State Assembly regarding a person who appears to have received the plurality of votes in an election for State Senator or State Assemblymember, to include a notation in that information, if applicable, that the person was not continuously registered to vote in the district in which the person appears to have received a plurality of votes from the date the candidate filed their declaration of candidacy to the date, inclusive, on which the SOS transmits the certificate of election or other information.

BACKGROUND

Processing Ballots and Reporting of Election Results. Under existing law, when a voter casts a VBM ballot, that voter generally must return the completed VBM ballot in a ballot identification envelope that contains information about the voter to whom the ballot was issued. Among other purposes, the identification envelope serves as a way to verify the identity of the voter who cast the ballot. Accordingly, before a VBM ballot identification envelope can be opened and the ballot counted, the elections official must first verify information on the envelope, including comparing the voter's signature on the identification envelope to the signature(s) in the voter's registration record. That verification process means that tabulating VBM ballots generally is more time and labor intensive than tabulating ballots that are cast at in-person voting locations. Non-provisional ballots, (i.e. "live," "regular," or "polling place" ballots) that are cast at in-person voting locations generally are placed into a ballot box without first being put into an identification envelope, and can be counted by the elections official without needing to undergo further verification.

Existing law allows elections officials to begin processing VBM ballots before Election Day, and allows verified VBM ballots to be run through ballot tabulators before Election Day, provided that the elections official does not access or release election results before 8 p.m. on the day of the election. By Election Day, county elections officials generally have processed a substantial majority of VBM ballots that were received by the weekend before the election, and have run those ballots through ballot tabulators.

Once the polls close on Election Day, elections officials begin the semifinal official canvass, which includes tabulating VBM and precinct ballots and compiling the results. The first batch of results that elections officials release shortly after the polls close on Election Day primarily are VBM ballots that were received and processed by the elections official before Election Day. Subsequent updates to election results released on Election Night and into the next morning primarily are ballots that were cast at in-person voting locations on Election Day. Ballots cast at in-person voting locations generally are included in the election results that are released as part of the semifinal official canvass, with some exceptions. It should also be noted that while the description above provides a general overview of the semifinal official canvass, the exact types of ballots tabulated as part of that process varies from county-to-county.

However, many other ballots are tabulated as part of the official canvass that must begin no later than the Thursday after Election Day. In particular, VBM ballots that are returned on or very shortly before Election Day and that cannot be verified before Election Day will be verified and tabulated in the days and weeks after Election Day as part of the official canvass. Provisional ballots and other ballots that require additional verification or processing also generally are tabulated during the official canvass.

In recent elections, California voters have increasingly used VBM ballots to vote in elections, particularly since state law was amended to require elections officials to mail a ballot to all active registered voters starting with the 2020 statewide general election. At every statewide election held since California began mailing a ballot to every active registered voter, more than 86% of Californians who voted did so using a VBM ballot.

As the percentage of Californians who vote using a VBM ballot has increased, the number of ballots that are unable to be included in the semifinal official canvass (i.e. the “Election Night results”) has similarly increased. For the November 2022 statewide general election, nearly half of all ballots cast were not included in the semifinal official canvass, but instead were tabulated in the days and weeks after Election Day as part of the official canvass of the election.

For elections for state and federal office and statewide ballot measures, existing law requires elections officials to provide regular updates to the results during the semifinal official canvass. Specifically, subdivision (b) of section 15151 of the Elections Code requires the elections official to transmit updated results to the SOS during the semifinal official canvass at intervals of no greater than two hours. By contrast, state law does not expressly require election results to be updated on any particular schedule during the official canvass. While many counties provide updated election results multiple times a week during the official canvass, other counties have chosen not to provide any updated election results until they have completed the official canvass. In those counties, election results may not be updated for four weeks—or longer—between Election Night and the certification of the election.

As fewer ballots are included in the “Election Night results” and more ballots are tabulated in the days and weeks after the election, there is a stronger public interest in requiring regular updates to election results during the official canvass. Such regular updates can help provide greater certainty in a timely manner about the likely outcome of most elections, even if the exact final vote tallies are not known until the election is certified approximately a month after the election.

Residency and Candidate Eligibility Requirements. In addition to the provisions of this bill that require elections officials to update election results at least two times a week, this bill also requires elections officials to identify situations where a candidate for the Legislature is registered to vote in a district other than the one in which the candidate is running. In background materials provided to the committee, the author explains that this provision of the bill is meant to address a recent instance in which a candidate for the Legislature changed residence to a location outside of the district in which the candidate was running in the period between the person’s certification as a candidate and the certification of the results of the election.

As detailed above, Section 201 of the Elections Code generally provides that a person is not eligible to be elected to an elective office unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued. In accordance with that law, county elections officials generally will not issue nomination papers to a person to become a candidate for a legislative district unless the person is registered to vote in that district. Once a candidate has been issued nomination papers, however, the Elections Code does not expressly address a situation where a candidate for the Legislature moves out of the district in which they are running.

More detailed residency requirements for members of the state Legislature are found in the California Constitution. Specifically, Article IV, Section 2 provides that “[a] person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year...and a resident of California for 3 years, immediately preceding the election” among other provisions.

The residency requirements found in Article IV, Section 2, however, generally are not enforced as part of the candidate filing process or through any steps taken involving the conduct of the election. Rather, Article IV, Section 5 of the California Constitution provides that each house of the Legislature shall judge the qualifications and elections of its Members. In light of that provision, California courts have found that the authority to enforce the durational residency requirements found in Article IV, Section 2 of the California Constitution rests exclusively with the respective houses of the Legislature.

More than 110 years ago, in *Allen v. Lelande* (1912) 164 Cal.56, the California Supreme Court refused to issue a writ of mandate compelling a county clerk to strike the name of a candidate for the Assembly on the grounds that the candidate was not a resident of the district. In refusing to issue the writ, the *Allen* court cited the provision of the California Constitution that was the predecessor to Article IV, Section 5, and explained that “By that article the assembly is made the exclusive judge of the qualifications of its members. The law providing for an official ballot cannot be held to have changed the intent of the people in adopting that constitutional provision that the assembly should be the sole and exclusive judge of the eligibility of those whose election is properly certified. For this court to undertake to try the question of eligibility and to deprive the candidate of any chance to be elected, would simply be to usurp the jurisdiction of the assembly.”

Nearly 40 years later, the California Supreme Court reached a similar conclusion in *In re McGee* (1951) 36 Cal.2d 592. In that case, a losing candidate in a primary election for an Assembly seat filed an election contest alleging that the winning candidate failed to meet the durational residency requirements found in the Constitution for members of the Legislature. On appeal, the Supreme Court found that it had no jurisdiction over the election contest, concluding that the Constitution “confers exclusive jurisdiction on the Legislature to judge the qualifications and elections of its members.” The court rejected an argument that the power of the Assembly to judge the elections and qualifications of its members did not extend to primary elections, writing “the jurisdiction to judge qualifications and elections of assemblymen lies exclusively with the Assembly and it cannot delegate that duty and it cannot achieve that result indirectly by authorizing the courts to decide contests after primary elections.”

More recently, in *Fuller v. Bowen* (2012) 203 Cal.App.4th 1476, the Third District Court of Appeal, relying on *Allen* and *McGee*, ruled that California courts lacked the jurisdiction to determine whether a candidate for state Senate met the durational residency requirements in the Constitution, concluding that “the California Constitution vests in the Senate the sole authority to judge [the candidate’s] qualifications to serve as a senator.”

In light of the Legislature’s authority to judge the elections and qualifications of its members, a house of the Legislature theoretically could refuse to seat a member who did not meet the qualifications found in Article IV, Section 2. In the case of a candidate who met the requirements of Elections Code Section 201 by being registered to vote in a legislative district at the time that candidate was issued nomination papers, but who moved out of that district and re-registered in a different legislative district after filing for office but before the election at which the person was elected, a question could be raised about whether that person meets the requirement found in Article IV, Section 2 of the Constitution that the person must have been a “resident of the legislative district for one year...immediately preceding the election.”

The extent to which the durational residency requirements in Article IV, Section 2 would apply following redistricting is unclear. In *Legislature v. Reinecke* (1973) 10 Cal.3d 396, the California Supreme Court adopted redistricting plans when the Legislature and the Governor were unable to do so. In adopting plans at the end of November 1973 that would be in effect for a primary election held in June 1974, the court recognized that the durational residency requirements could create problems given that the district lines “did not exist in time for [candidates] to select a residence so as to become a resident of a district for a year preceding the election.” The court went on to say that “[i]n the exercise of our equitable powers to fashion remedial techniques in this area of law, we hold that a person is eligible to be a member of the Legislature if he becomes a resident of the district involved by January 28, 1974, the first day for filing the declaration of intention to become a candidate...and otherwise complies with election law requirements.” However, the court’s decision in *Reinecke* did not discuss the rulings in *Allen* and *McGee*, so it is unclear whether the court would have considered that holding to be binding on a house of the Legislature in judging the qualifications and elections of its Members.

COMMENTS

According to the author: AB 63 will help improve transparency in California elections on two fronts. First, it will improve voters’ confidence in California’s elections by requiring county registrars to post more frequent election result updates during the official canvass of the vote. The bill would require county registrars to, at least two times a week, provide on their websites updated election results as well as the number of ballots and types of ballots remaining to be counted.

Second, AB 63 will impose a new notification requirement on the SOS upon certification of final election results for statewide general elections and special elections. The SOS would be required to notify the relevant house of the Legislature if any legislative candidate who won their race changed their voter registration to be outside of the district they ran to represent in the period between certification as a candidate for office and certification of the results of the official canvass. This will provide both houses of

the Legislature with an opportunity to act in accordance with their constitutional duties to judge the qualifications of the members of their house, if necessary.

RELATED/PRIOR LEGISLATION

SB 518 (Wilk) of 2023 requires an elections official to submit the certified statement of the results for an election to the governing body on the 30th calendar day following the election, except as specified, thereby prohibiting the elections official from submitting the results before the 30th calendar day following the election, which is permitted under existing law. SB 518 is pending consideration in the Assembly Committee on Elections.

SB 718 (Wilk) requires unprocessed ballot reports that are prepared by county elections officials to include the number of VBM ballots that have not been processed because the ballot identification envelope is missing the voter's signature and the number of VBM ballots that have not been processed because the ballot identification envelope has a signature that did not compare to a signature that is part of the voter's registration record, and that therefore must be verified before the ballot is counted. SB 718 is pending consideration in the Assembly Committee on Elections.

PRIOR ACTION

Assembly Floor:	75 - 0
Assembly Appropriations Committee:	11 - 0
Assembly Elections Committee:	8 - 0

POSITIONS

Sponsor: Author

Support: None received

Oppose: None received

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