

Date of Hearing: September 14, 2017

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 840 (Quirk) – As Amended September 7, 2017

CONCURRENCE IN SENATE AMENDMENTS

ASSEMBLY: 74-0 (April 20, 2017) SENATE: 40-0 (September 12, 2017)

SUBJECT: Elections: vote by mail and provisional ballots.

SUMMARY: Permits a voter who did not sign his or her vote by mail (VBM) identification envelope to return a completed unsigned ballot statement by email, as specified. Specifically, **this bill:**

- 1) Authorizes a voter who did not sign his or her VBM identification envelope to submit his or her completed unsigned ballot statement to the local elections official by email.
- 2) Requires the unsigned ballot statement to be signed under penalty of perjury and declare the voter is a resident of the precinct in which he or she voted and is the person whose name appears on the VBM ballot envelope.
- 3) Requires the instructions that accompany the unsigned ballot statement to inform a voter that a completed unsigned ballot statement may be submitted by email.
- 4) Requires an elections official to provide the elections official's email address on the Internet Web page containing the unsigned ballot statement and instructions.

The Senate amendments:

- 1) Specify that the one percent manual tally of ballots cast are those canvassed during the semifinal official canvass and do not include provisional ballots.
- 2) Specify that an elections official, when conducting the one percent manual tally, may select additional precincts, which may include VBM and provisional ballots.
- 3) Make a non-substantive technical change to the bill.

EXISTING LAW:

- 1) Requires a county elections official, upon receiving a VBM ballot, to compare the signatures on the identification envelope with either of the following:
 - a) The signature appearing on the voter's affidavit of registration or any previous affidavit of registration of the voter; or,
 - b) The signature appearing on a form issued by an elections official that contains the voter's signature and is part of the voter's registration record.

- 2) Provides that if the ballot is rejected because the signatures do not compare, the envelope shall not be opened and the ballot shall not be counted. Requires the cause of the rejection to be written on the face of the identification envelope.
- 3) Prohibits an elections official from rejecting a VBM ballot on the grounds that the voter failed to sign the ballot identification envelope if the voter does any of the following:
 - a) Signs the identification envelope at the office of the elections official during regular business hours before 5 p.m. on the eighth day after the election;
 - b) Before 5 p.m. on the eighth day after the election, completes and submits an unsigned ballot statement, as specified; or,
 - c) Before the close of the polls on election day, completes an unsigned ballot statement, and submits it to a polling place within the county or a ballot dropoff box.
- 4) Allows a voter to return a completed unsigned ballot statement by mail, have it delivered, submitted by facsimile transmission, or alternatively returned to a polling place within the county or a ballot dropoff box before the polls close on election day.
- 5) Requires an elections official to accept any completed unsigned ballot statement that is timely submitted. Requires the elections official, upon receipt of the unsigned ballot statement, to compare the voter's signature on the statement, as specified.
- 6) Requires an elections official, if he or she determines that the signatures compare, to attach the unsigned ballot statement to the identification envelope and deposit the ballot, still in the identification envelope, in a ballot container in his or her office. Prohibits an identification envelope, if the elections official determines that the signatures do not compare, from being opened or counted.
- 7) Requires an elections official, during the official canvass of every election in which a voting system is used, to conduct a public manual tally of the ballots tabulated by those devices, including VBM ballots, using either of the following methods:
 - a) A public manual tally of the ballots, including VBM ballots, cast in one percent of the precincts chosen at random by the elections official, as specified.
 - b) A two-part tally of the ballots, including a public manual tally of ballots, not including VBM ballots, cast in one percent of the precincts chosen at random by the elections official, as specified, and a public manual tally of not less than one percent of the VBM ballots, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Prior Assembly Consideration of this Bill:** As approved by the Assembly in April, this bill permits a voter who did not sign his or her VBM identification envelope to return a completed unsigned ballot statement by email, as specified. Subsequent to the Assembly's

approval of this bill, it was amended in the Senate to specify that the one percent manual tally of ballots cast are those canvassed during the semifinal official canvass and does not include provisional ballots. Additionally the Senate amendments specify that an elections official, when conducting the one percent manual tally, may select additional precincts, which may include VBM and provisional ballots. As a result, this bill has been re-referred to this committee for further consideration pursuant to Assembly Rule 77.2.

2) **Purpose of the Bill:** According to the author:

The number of Californians who choose to use a vote-by-mail (VBM) ballot continues to rise. In the 2016 General Election, over 57% of California voters received their ballot by mail. In 23 counties, the VBM rate is over 70%. This makes California one of the leading states in VBM balloting. Unfortunately, California is also a leader in the number of ballots that are rejection year after year.

Voters are required to sign the envelope in which they return their [VBM] ballot. In both the 2014 and 2012 November General Election nearly 10,000 voters had their [VBM] ballot rejected because of a missing signature.

Under current law, a voter has until 5 pm on the eighth day after the election to submit a hard copy of their signature (fax, mail, or in person). To decrease the amount of rejected ballots, AB 840 modernizes the process by allowing a voter who did not sign his or her VBM envelope to electronically submit a signature through email.

Preserving and protecting voter integrity is one of the most important jobs held by the Secretary of State and County Election Officials. A recent decision in San Diego's lower court jeopardizes that. AB 840 also clarifies existing law regarding the purpose of the 1% Manual Tally, which is to ensure the automated tabulation system is counting ballots accurately during the semifinal official canvass. While this has been the accepted interpretation of the law by many election officials, without additional clarification, we put our County Registrars in danger of being unable to certify election results on schedule.

3) **Vote by Mail Ballot Rejection:** The California Civic Engagement Project, housed at the University of California at Davis, conducted a statewide survey of California's 58 county election offices to gain a better understanding of California's use of VBM ballots, including return methods. According to their September 2014 brief, entitled "California's Uncounted VBM Ballots: Identifying Variation in County Processing," in 2012, for the first time in a statewide general election, over 50 percent of California's voters chose to cast their ballot using a VBM ballot. This totaled 6.6 million ballots. However, approximately one percent of those VBM ballots received by the elections official were rejected during ballot processing. That amounts to approximately 69,000 ballots. According to the survey, late receipt was the most common reason why a VBM ballot was uncounted. Signature issues, such as a missing signature or a mismatching signature, were the other top two reasons for VBM ballot rejection.

- 4) **Previous Legislation:** In an effort to remedy the significant VBM ballot rejection rate, in 2014 the Legislature approved and Governor Brown signed SB 29 (Correa), Chapter 618, Statutes of 2014, which allowed VBM ballots to be counted if they are cast by election day and received by the elections official by mail no later than three days after the election, as specified. The signing and implementation of SB 29 (Correa) represented the first time that California state law explicitly allowed any ballot which was received after election day to be counted.

Additionally, in 2015, the Legislature passed and the Governor signed AB 477 (Mullin), Chapter 726, Statutes of 2015, which allows a voter who failed to sign his or her VBM identification envelope to complete and sign an unsigned ballot statement up to eight days after the election, as specified, in order to have his or her ballot counted. AB 477 allows an unsigned ballot statement to be submitted to a polling place within the county or a ballot drop-off box. Alternately, a voter may return an unsigned ballot statement by mail, have it delivered, or submit it by facsimile. This bill further authorizes a voter to return a completed unsigned ballot statement via email, and requires the unsigned ballot statement instructions to include the election official's email address.

- 5) **Colorado Law:** AB 477 (Mullin), Chapter 726, Statutes of 2015, which set up the unsigned ballot statement process, was inspired by a Colorado election law pertaining to unsigned mail or provisional ballots. Colorado requires an elections official, if a mail or provisional ballot return envelope lacks a signature, to contact the voter in writing no later than two calendar days after election day. The elections official is required to send a letter informing the voter that he or she must sign and return a Signature Affidavit Form in person or by mail, facsimile, or email no later than eight days after the election. This bill similarly would allow unsigned ballot statements to be returned by email.
- 6) **Current Manual Tally Practice:** After an election, election officials are required to complete the official canvass and certify election results to the Secretary of State's office no later than 30 days after an election. As part of the official canvass, existing law requires elections officials to conduct a public manual tally of ballots cast in one percent of the precincts chosen at random in order to ensure that vote tabulation equipment is operating correctly before the final official canvass is completed. Current law provides two alternative methods to conduct the manual tally. The first method permits a county elections official to conduct a public manual tally of the ballots, including VBM ballots, cast in one percent of precincts chosen at random, as specified. The second method permits an elections official to conduct a two-part public manual tally, which includes a public manual tally of the ballots, not including VBM ballots, cast in one percent of the precincts chosen at random and conduct a public manual tally of not less than one percent of the VBM ballots cast in the election chosen at random, as specified. Under both methods, current law permits an elections official to select additional precincts to be added to the one percent manual tally. However, in both practices, current law does not require provisional ballots to be included.

According to a September 15, 2016 memorandum from the SOS to county elections officials, "the one percent manual tally requirement set forth in Elections Code section 15360 does not require provisional ballots or all vote-by-mail ballots to be included in the tally. Such a requirement would be inconsistent with the stated purpose of the one percent manual tally, which is to tabulate ballots in which voting system devices are used '[d]uring the official canvass.'" Additionally, the memorandum states that "Sections 15360(a)(1)(B)(ii) and

(a)(2)(B)(iii)(I) specifically provide elections officials with the discretion to include additional precincts and batches of vote-by-mail ballots." Furthermore, the memorandum contends that the legislative history of Elections Code Section 15360 confirms that the interpretation of Section 15360 does not require the inclusion of provisional ballots or the inclusion of all VBM ballots.

This bill codifies the SOS's interpretation, as detailed above, of the requirement for elections officials to conduct the one percent manual tally. That interpretation is consistent with the manner in which the one percent manual tally has been conducted by many county elections officials. In other words, this bill would not require any county to change their current practice for conducting the one percent manual tally.

- 7) **San Diego County Lawsuit:** On June 16, 2016, a lawsuit was filed in the San Diego Superior Court challenging the methodology used by the San Diego Registrar of Voters (ROV) in conducting the one percent manual tally during the canvass of elections. In the court filing, petitioners contended that all VBM and provisional ballots must be included when conducting the manual tally in selected precincts. (*Citizens Oversight, Inc. v. Vu*, San Diego County Superior Court case number 37-2016-00020273-CLMC-CTL)

Per court documents, the San Diego ROV used the election night results for determining the ballots that were included in the manual tally. The election night results included all ballots cast at the polls on election day and all VBM ballots received and processed by the San Diego ROV prior to election night. The San Diego ROV did not include VBM or provisional ballots processed after election night in the manual tally.

Initially, petitioners requested a preliminary injunction to prevent the San Diego ROV from certifying the election results without first complying with the manual tally requirements as interpreted by petitioners. After an expedited briefing schedule, the court heard oral arguments on petitioners' request on July 6, 2016, one day before the San Diego ROV had to certify the election results. The court delayed action on this request until after the election had been certified, which made the request moot.

On December 19, 2016, after the November general election, the court issued a Statement of Decision wherein the court ruled that provisional ballots do not need to be included in the one percent manual tally but that all VBM ballots need to be included for precincts selected in the random draw for the one percent manual tally. Judgment was entered on January 10, 2017, and the County of San Diego and petitioner have both moved to appeal.

- 8) **Related Legislation:** AB 1154 (Nazarian), Chapter 88, Statutes of 2017, prohibits elections officials from randomly choosing the initial precincts or selecting an additional precinct for the one-percent manual tally, which is required by existing law, until after the close of the polls on election day.
- 9) **Arguments in Support:** The sponsor of this bill, Secretary of State Alex Padilla, writes:

AB 840 also includes clarifying language to ensure county elections officials may continue to conduct the 1% manual tally as they historically have after every election. A recent court ruling suggested that counties may have to conduct the

tally in a manner that would be near impossible for many to complete.

The tally uses ballots that were tabulated on Election Night to determine whether the machine tabulators are accurate. Ballots tabulated after Election Night may be included at the discretion of the elections officials. The tally takes several weeks for many counties.

A few counties are capable of processing and tabulating every ballot before beginning the tally. However, many counties do not complete ballot tabulation until just before the 30 day deadline to certify the election results. This is one reason why counties often conduct the tally while simultaneously completing ballot tabulation - to get both done on time. Another reason for conducting the tally and tabulation simultaneously is that elections officials are able to quickly identify and troubleshoot possible issues should they arise.

A different interpretation suggests that all counties may have to finish tabulating all ballots before beginning the tally. While this is possible for some counties, many others would not be able to complete the tally and tabulation before the certification deadline. Additionally, there are benefits to the integrity of the election to conduct them at the same time.

AB 840 simply clarifies that counties are allowed to continue completing the 1% manual tally and ballot tabulation on time while protecting the integrity of our elections, and makes it more convenient for voters to provide their missing signature by allowing them to use email.

10) Arguments in Opposition: In opposition, Kammi Foote, the Inyo County Clerk/Recorder writes:

The amendments added to AB 840 substantially change [Elections Code Section] 15360 (a)(1)(A). There are several California counties that do not interpret the provisions of [Elections Code Section] 15360 et. Seq. to only require the semiofficial vote totals to be subject to the audit, including Inyo, San Francisco, Santa Clara, Orange and Alameda. This is not an exhaustive list but is meant to illustrate that these proposed amendments are not merely codifying current practice, but changing current practice for many areas of California.

County Registrars have other checks and balances in place to ensure accurate vote total, but these rely entirely on trust in their employee and/or election volunteers. As one of the 58 Registrars that are charged with overseeing the vote tabulation process, I would like to ensure that there are codified procedures in place that do not rely simply on trust. The public deserves a process that provides them with full faith that every vote is counted as cast, and the 1% public manual tally is an important part of ensuring that the vote count is accurate. This can only be accomplished by ensuring that all ballots cast in the election will have possible inclusion in the manual count (i.e. early voting, absentee and provisional ballot).

REGISTERED SUPPORT / OPPOSITION:

Support

Secretary of State Alex Padilla (sponsor)
American Civil Liberties Union of California (prior version)
California Association of Clerks and Election Officials
California State Association of Counties
County of Santa Cruz (prior version)
County of San Diego
County of Sonoma
Disability Rights California (prior version)
Urban Counties of California

Opposition

California Voter Foundation
Citizens' Oversight Projects
Kammi Foote, Inyo County Clerk/Recorder
Los Angeles County Democratic Party
Sonoma County Democratic Party
Verified Voting
Approximately 6 dozen individuals

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