

Date of Hearing: June 16, 2020

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 860 (Berman) – As Amended June 4, 2020

CONCURRENCE IN SENATE AMENDMENTS

SUBJECT: Elections: vote by mail ballots.

SUMMARY: Requires county elections officials to mail a ballot to every registered active voter for the November 3, 2020 statewide general election.

The Senate amendments delete the Assembly-approved version of the bill, and instead:

- 1) Require county elections officials to mail a ballot to every registered active voter for the November 3, 2020 statewide general election, as specified, and provide that the distribution of vote by mail (VBM) ballots to registered voters does not prevent a voter from voting in person at a polling place, vote center, or other authorized location.
- 2) Require county elections officials to permit any voter to cast a ballot using a certified remote accessible vote by mail (RAVBM) system for the November 3, 2020 statewide general election.
- 3) Require county elections officials to use the VBM ballot tracking system developed by the Secretary of State (SOS), or a system that meets or exceeds the level of service provided by the SOS's system, for the November 3, 2020 statewide general election.
- 4) Extend, for the November 3, 2020 statewide general election, the deadline by which a VBM ballot that is voted on or before election day must be received by the county elections official in order to be counted from the 3rd day after election day to the 17th day after election day. Allow county elections officials, for the November 3, 2020 statewide general election, to consider information from the United States Postal Service (USPS) or bona fide private mail delivery companies other than postmarks—such as Intelligent Mail Barcodes and tracking information—to determine if a ballot was mailed on or before election day.
- 5) Authorize jurisdictions that have the necessary computer capability, for the November 3, 2020 statewide general election, to begin processing VBM ballots on the 29th day before the election.
- 6) Add the following findings and declarations:
 - a) To maintain a healthy democracy in California, it is important to encourage eligible voters to vote and to ensure that residents of the state have the tools needed to participate in every election.
 - b) Vote by mail voting has become the means by which most Californians exercise their right to vote. In the most recent general election, held in November 2018, 65.31 percent of voters used a vote by mail ballot. Just 10 years ago, in the November 2010 statewide general election, only 48.44 percent of voters used a vote by mail ballot.

- c) Preliminary data indicates that for the March 2020 primary election, approximately 78 percent of registered voters received a ballot in the mail.
 - d) Shortly after the March 2020 primary election, the Governor and local governments declared states of emergency and took steps to reduce the spread of COVID-19. One of the early steps taken by the Governor was to order that three pending special elections be conducted as all-mailed ballot elections. This order was issued based on concerns that widespread in-person voting would conflict with public health officials' guidance on COVID-19.
 - e) Since California held its primary election in March 2020, at least 16 states have either postponed their scheduled primary elections, or switched them to vote by mail elections, due to concerns that conducting in-person voting during the spread of COVID-19 would threaten the health and safety of voters, election workers, and the general public.
 - f) In Wisconsin's statewide primary election conducted on April 7, 2020, during which millions of voters had no choice but to vote in person, elections officials were forced to significantly reduce the number of polling locations because of COVID-19. In Milwaukee, the number of polling locations open on election day was reduced by more than 97 percent.
 - g) A statewide general election will be held in California on November 3, 2020, and it is uncertain whether by that date the COVID-19 pandemic will have subsided and what social distancing guidelines will remain in place. Even if the pandemic has subsided by the time of the election, many voters may nonetheless be uncomfortable with in-person voting because of health concerns.
 - h) Broadening the ability of California residents to engage in the democratic process will yield more representative election results and will ensure that the voices of more California residents are heard.
 - i) Mailing every voter a ballot for the November 2020 statewide general election is an important step in promoting resilience in the state's elections and ensuring that every California voter will have the opportunity to fill out their ballot in a safe manner.
 - j) Consistent with paragraph (2) of subdivision (a) of Section 2226 of the Elections Code and with the longstanding interpretation by state and county elections officials of Sections 4000 - 4108 of the Elections Code governing the conduct of all-mailed ballot elections and of Section 3005 governing mailed ballot precincts, nothing in this bill is intended, and shall not be construed, to mean that voters in an inactive voter registration status shall receive vote by mail ballots in connection with the November 3, 2020 statewide general election.
- 7) Add an urgency clause, allowing this bill to take effect immediately upon enactment.

EXISTING LAW:

- 1) Provides that a registered voter may vote by mail by requesting a VBM ballot for a specific election or by becoming a permanent VBM voter.
- 2) Requires county elections officials to begin mailing ballots and other required materials to voters no later than 29 days before the day of the election.
- 3) Authorizes any county, pursuant to the California Voter's Choice Act (CVCA), to conduct elections in which every registered voter is mailed a ballot and vote centers and ballot drop-off locations are available prior to and on election day, in lieu of operating polling places for the election, subject to certain conditions.
- 4) Permits an elections official, whenever there are 250 or fewer persons registered to vote in any precinct, to furnish each voter with a VBM ballot along with a statement that there will be no polling place for the election.
- 5) Provides that certain local elections may be conducted as all-mail ballot elections, as specified.
- 6) Defines "remote accessible vote by mail system" as a mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking an electronic VBM ballot for a voter with disabilities or a military or overseas voter who shall print the paper cast vote record to be submitted to the elections official. Prohibits a RAVBM system from being connected to a voting system at any time.
- 7) Requires county elections officials to permit any voter with a disability, and any military or overseas voter, to cast a ballot using a certified RAVBM system, as specified.
- 8) Requires the SOS to establish, by January 1, 2020, a system that a county elections official may use to allow a voter to track the voter's VBM ballot through the mail system and as the ballot is processed by the county elections official.
- 9) Provides that a VBM ballot is timely cast if it is voted on or before election day and, if returned by mail, received by the voter's elections official via the USPS, or a bona fide private mail delivery company, no later than 3 days after election day, as specified.
- 10) Permits any jurisdiction having the necessary computer capability to start processing VBM ballots on the 10th business day before the election. This processing includes opening VBM ballot return envelopes, removing ballots, duplicating any 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, but under no circumstances may a vote count be accessed or released until 8 p.m. on the day of the election.
- 11) Requires an elections official, if specified data from the USPS indicates that a voter has moved and left no forwarding address, or if a voter has moved out of the state, to update the status of the voter's registration to inactive. Requires the elections official to mail a forwardable notice to the address at which a voter is registered when that voter's registration is made inactive. Provides that voters with an inactive voter registration status do not receive

election materials and are not included in calculations to determine the number of signatures required for qualification of candidates and measures, precinct size, or other election administration-related processes.

- 12) Provides, pursuant to Executive Order N-64-20, issued by Governor Newsom on May 8, 2020, that in light of the State of Emergency existing in California as a result of the threat of COVID-19, each county elections officials shall transmit VBM ballots for the November 3, 2020 statewide general election to all voters who are registered to vote in that election. The Executive Order does not limit the extent to which in-person voting opportunities should be available in connection with the election.
- 13) Provides, pursuant to Executive Order N-67-20, issued by Governor Newsom on June 3, 2020, that in light of the State of Emergency existing in California as a result of the threat of COVID-19, that all of the following shall apply to the November 3, 2020 statewide general election:
 - a) Requires all county elections officials to use the SOS's VBM ballot tracking system, as specified, and to use Intelligent Mail Barcodes on all VBM ballot envelopes.
 - b) Provides, in the case of a county that conducts the election pursuant to the CVCA, that the following provisions are applicable for the November 3, 2020 statewide general election:
 - i) The county is not required to have its vote centers open before the third day prior to the election.
 - ii) The county elections official is not required to conduct in-person public meetings or workshops in connection with the preparation of plans for the administration of the election as long as a draft of the plan is posted on the elections official's website, as specified, and the official accepts public comment on the draft plan for at least 10 days.
 - c) Permits a county that does not conduct elections pursuant to the CVCA, and that is unable to comply with the in-person voting requirements in existing law, to comply instead with the following requirements:
 - i) At least one polling place per 10,000 registered voters is made available for voting during the following hours:
 - (1) From Saturday, October 31, 2020, through Monday, November 2, 2020, for at least eight hours (during regular hours convenient for members of the public) each day; and
 - (2) On Tuesday, November 3, 2020, from 7 a.m. until 8 p.m.
 - ii) At least the following number of VBM ballot drop-off locations are made available for ballot drop-off beginning no later than 9 a.m. on Tuesday, October 6, 2020, and continuing during regular business hours each day through the close of voting on

Tuesday, November 3, 2020:

- (1) At least one VBM ballot drop-off location per 15,000 registered voters; and
- (2) Not less than two VBM ballot drop-off locations regardless of the number of registered voters; and
- iii) At least one VBM ballot drop-off location is required to be fully accessible to the public for at least twelve hours each day (during regular hours convenient for members of the public) between Tuesday, October 6, 2020 and Tuesday, November 3, 2020, inclusive.

FISCAL EFFECT: According to the Senate Appropriations Committee, the SOS indicates that it would cost \$72 million to move the November 2020 General Election to an all-mail event. The state portion of the cost would be \$13 million, for an outreach campaign. Much of these costs would be paid for using federal funds.

COMMENTS:

- 1) **Prior Assembly Consideration of This Bill:** As approved by the Assembly last year, this bill would have clarified that a licensed retailer is not obligated to buy or sell the alcoholic beverage products of a distilled spirits wholesaler when selling marketing data to that wholesaler. Subsequent to the Assembly's approval of this measure, it was amended in the Senate to delete the Assembly-approved provisions of the bill, and to add the current provisions, which were approved by the Senate by a vote of 31-7 on June 11, 2020. 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:

Since California held its statewide primary election on March 3, at least 16 states have either postponed their scheduled primary elections or switched them to vote by mail elections due to concerns that conducting in-person voting during the spread of COVID-19 threatens the health and safety of voters, election workers, and the public generally.

In Wisconsin, which held its statewide primary election as scheduled on April 7, 2020, requests for absentee ballots more than doubled compared to the 2018 general election. Due in part to this large increase, elections officials were unable to send absentee ballots to thousands of voters who had requested them. COVID-19 related concerns forced officials to significantly reduce the number of polling locations available; in Milwaukee, the number of polling locations was reduced by more than 97 percent.

Fortunately, California is better prepared to handle an increase in mail balloting in time for the presidential general election this fall. California voters already choose to vote using mailed ballots in large numbers; in fact, more than 72 percent of voters who participated in California's March primary election cast a vote by mail ballot—the highest percentage ever for a statewide election in California.

While it is uncertain what social distancing guidelines will be in place this November, voters are likely to be less comfortable with in-person voting due to health concerns even if the COVID-19 pandemic has subsided in advance of the November election. Mailing every voter a ballot for the general election is an important step in promoting resilience in the state's elections and ensuring that every California voter will have the opportunity to fill out their ballot in a safe manner.

Californians should not have to risk their health – and possibly their lives – in order to exercise their constitutional right to vote in this November's election. Guaranteeing that every California voter has the opportunity to fill out their ballot in the safety of their own home is essential to ensuring that we can conduct an open, accessible, and safe election this November.

Since the introduction of this bill, Governor Newsom has issued two executive orders that require each county's elections official to send VBM ballots to all registered voters for the November 3, 2020 statewide general election. Two federal lawsuits have been filed challenging the validity of taking such an action through an executive order. In light of those lawsuits, it remains essential to enact AB 860, and ensure that there is no confusion that all California voters will receive a ballot in the mail this fall.

- 3) **Secretary of State Working Group:** The Secretary of State's office established a working group to discuss the conduct of elections during the COVID-19 pandemic, and to develop recommendations for how to conduct the November election in light of the challenges posed by COVID-19. The working group included SOS, legislative and gubernatorial staff, local elections officials, and representatives from numerous good government and voting rights groups, among others. According to the author, the provisions of this bill were informed by those discussions.
- 4) **Governor's Executive Orders:** On May 8, 2020, Governor Newsom issued Executive Order N-64-20, which requires each county's elections official to send VBM ballots for the November 3, 2020 general election to all registered voters. The Executive Order noted that "it is unknown to what degree COVID-19 will pose a threat to public health in November, and California and its counties must begin taking action now—to procure supplies, secure polling places, enlist volunteers, and draw up plans, among other steps—to ensure that the November 3, 2020 General Election is held in a manner that is accessible, secure, and safe."

On June 3, 2020, Governor Newsom issued Executive Order N-67-20, which established minimum levels of in-person voting opportunities that must be available in counties that are unable to comply with the in-person voting requirements in existing law, among other provisions. Executive Order N-67-20 also specified that consistent with specified provisions of existing law, Executive Order N-64-20 is not intended and shall not be construed to mean that voters in an inactive voter registration status shall receive VBM ballots in connection with the November 3, 2020 statewide general election.

- 5) **Current Vote by Mail Ballot Use in California:** In 2001, the Legislature approved and Governor Davis signed AB 1520 (Shelley), Chapter 922, Statutes of 2001, which, among

other provisions, authorized any voter to become a permanent VBM voter. As a result, California voters have increasingly used VBM ballots to vote in elections. Since 2012, a majority of ballots cast in all California statewide elections were VBM ballots.

Nearly 60 percent of all California voters are now permanent VBM voters. In three counties (Alpine, Plumas, and Sierra), 100 percent of their precincts are small enough that they are deemed all-mail ballot precincts. Fifteen counties conduct elections pursuant to the CVCA (Amador, Butte, Calaveras, El Dorado, Fresno, Los Angeles, Madera, Mariposa, Napa, Nevada, Orange, Sacramento, San Mateo, Santa Clara, and Tuolumne) wherein every registered voter receives a ballot in the mail. The net result is that for the November 3, 2020 statewide general election, more than 87 percent of California's registered voters will already be receiving a ballot in the mail even without this bill or the Governor's recent executive orders.

- 6) **Pending Lawsuits Challenging Executive Order N-64-20:** Two separate lawsuits were recently filed in the United States (US) District Court, Eastern District of California challenging the validity of Executive Order N-64-20. The first suit, *Darrell Issa et al. v. Gavin Newsom et al.* (Case No. 2:20-CV-01044-MCE-CKD), contends, among other things, that the Executive Order conflicts with various sections of the US Constitution which provide that the times, places and manner of holding elections for members of Congress and presidential electors shall be prescribed by state legislatures. The suit also contends that the Governor exceeded his authority under the Government Code to issue the Executive Order.

The second suit, *Republican National Committee et al. v. Gavin Newsom et al.* (Case No. 2:20-CV-01055-MCE-CKD), also contends, among other things, that the Executive Order similarly conflicts with the US Constitution.

- 7) **Pending Lawsuit Challenging Executive Order N-67-20:** On June 12, 2020, Sutter County Superior Court Judge Perry Parker issued an order in the case of *James Gallagher et al. v. Gavin Newsom* (Case No. CVCS20-0000912) granting interim declaratory relief and a temporary restraining order suspending Executive Order N-67-20 "as an impermissible use of legislative powers in violation of the California Constitution and the laws of the State of California." The next hearing in that case is scheduled for June 26, 2020.
- 8) **Other States:** According to the National Conference of State Legislatures, five states currently conduct all elections in which ballots are mailed to all registered voters: Colorado, Hawaii, Oregon, Washington, and Utah. At least 21 other states have laws that allow certain smaller elections, such as school board contests, to be conducted by mail.

Numerous other states have enacted or are in the process of considering action to mitigate the effects of the COVID-19 pandemic on the conduct of elections including, but not limited to, delaying the dates of primary and local elections, conducting elections by mail, expanding the criteria under which voters may request a VBM ballot, and expanding early voting opportunities.

- 9) **Deadline for Receipt of Vote by Mail Ballots:** As detailed above, existing law permits VBM ballots that are cast by election day to be counted as long as they are received by the elections official by mail no later than three days after the election. That policy was enacted through the passage of SB 29 (Correa), Chapter 618, Statutes of 2014. Prior to the enactment

of SB 29, VBM ballots in California could be counted only if the elections official received them by election day.

SB 29 was introduced in response to the fact that an increasing number of VBM ballots that were returned to elections officials were arriving too late to be counted. Furthermore, given USPS facility closures and changes to USPS service standards, there was a fear that the number of ballots arriving too late to be counted would continue to rise.

For the purposes of SB 29, a ballot was deemed to have been cast by election day as long as it was postmarked by election day. However, in response to information provided by the California Association of Clerks and Election Officials that a significant portion of ballots that are received by mail do not have a legible postmark (especially for ballots received from military and overseas voters), SB 29 also allowed a VBM ballot to be counted if the return envelope had no postmark, a postmark with no date, or an illegible postmark, if the ballot was (1) received by the elections official no later than three days after the election, (2) received from the USPS or a bona fide private mail delivery company, (3) date stamped by the elections official upon receipt from the USPS or bona fide private mail delivery company, and (4) the VBM ballot envelope was signed and dated by the voter on or before election day.

Since the Legislature enacted SB 29, additional tools have become more widely available that allow a person to determine when an envelope was mailed. In particular, Intelligent Mail Barcodes and processing marks that are printed on items that are mailed through the USPS can be used to determine when an envelope was mailed. This bill allows the use of this processing data to determine whether a ballot was mailed by election day.

Additionally, due to concerns that COVID-19 and financial challenges facing the USPS may result in additional mail delays this fall, this bill allows a ballot that is cast by election day to be counted if it is received by the elections official from the USPS or a bona fide private mail delivery company by the 17th day after the election.

10) **Ballot Tracking:** Last session, the Legislature approved and Governor Brown signed AB 2218 (Berman), Chapter 432, Statutes of 2018, which required the SOS to establish a system that a county elections official may use to allow a VBM voter to track and receive information about the voter's VBM ballot as it moves through the mail system and as the VBM ballot is processed by the county elections official. The SOS officially launched that system in February of this year. Twenty-five counties (Amador, El Dorado, Fresno, Glenn, Kern, Los Angeles, Marin, Mariposa, Merced, Monterey, Orange, Placer, Riverside, Sacramento, San Benito, San Joaquin, San Luis Obispo, Santa Clara, Shasta, Sutter, Tehama, Tuolumne, Ventura, Yolo, and Yuba) made that tool available to their voters for the March 3, 2020 statewide primary election. Since that time, according to information from the SOS, four additional counties (Kings, San Mateo, Santa Cruz, and Sonoma) have adopted the SOS's ballot tracking system. This bill requires all California counties to use that system for the purposes of the November 2020 statewide general election. Any county that has its own ballot tracking system would be able to use that system instead as long as it meets or exceeds the level of service provided by the system developed by the SOS.

11) **Vote by Mail Ballot Processing:** Elections Code section 15101 permits elections officials to begin processing VBM ballot return envelopes 29 days before the election, and authorizes

any jurisdiction having the necessary computer capability to start processing VBM ballots 10 business days before the election.

This bill allows an elections official to begin processing VBM ballots 29 days before the election, instead of 10 business days before the election for the November 2020 statewide general election only. With the expected increase in VBM balloting, elections officials believe that allowing them to begin processing VBM ballots earlier will help minimize overtime that otherwise would be needed for staff to process VBM ballots, and will allow them to process a larger number of VBM ballots before election day, thereby reducing the number of VBM ballots that need to be processed after the election.

- 12) **Remote Accessible Vote by Mail Voting:** In 2018, the Legislature approved and Governor Brown signed AB 1013 (Low), Chapter 906, Statutes of 2018, which requires a county elections official to permit a voter with a disability, or a military or overseas voter, to cast their ballot using a certified RAVBM system. While AB 1013 did not apply to counties conducting elections pursuant to the CVCA, the CVCA separately requires counties to have a process to send or deliver a VBM ballot that voters with disabilities can read and mark privately and independently—a requirement that counties generally have met through the use of RAVBM systems.

Generally, RAVBM systems that are approved for use in California use electronic delivery to provide a voter with a ballot that the voter can mark using their own computer, including any assistive device that the voter uses with that computer. After marking the ballot, the voter must print and return the ballot by mail (existing law also permits military and overseas voters to return their ballot by facsimile transmission under certain circumstances); RAVBM systems that are approved for use in California are *not* permitted to transmit completed ballots electronically to the elections official.

Because RAVBM systems involve the electronic delivery of a blank VBM ballot from the elections official to the voter, these systems can significantly cut down on the time needed to get a ballot to a voter after that voter requests such a ballot.

- 13) **Inactive Voters:** California law provides a procedure under which a registration may become “inactive.” When a county elections official receives specified information from the USPS that indicates that a voter has moved and left no forwarding address, or if a voter has moved out of the state, an elections official is required to mail a forwardable notice to that voter and update the voter’s registration to inactive. (Existing California law does *not* permit a voter’s registration to be made inactive simply because the voter has not voted for a period of time—the only information that can trigger a registration being made inactive is specified information from the USPS.) The “inactive” voter registration status is a safeguard designed to protect voters from being disenfranchised inadvertently if elections officials receive inaccurate information about the residence address of a voter.

As detailed above, the Elections Code specifically provides that voters whose registrations are inactive do not receive election materials that otherwise are sent to registered voters and are not included in voter registration numbers for the purposes of certain election administration related processes. Consistent with those provisions, when a county conducts an election pursuant to the CVCA, conducts an election as a mailed-ballot election, or designates a precinct as a mailed-ballot precinct, the county does not mail ballots to inactive

voters. Consistent with that longstanding practice, this bill provides that it shall not be construed to mean that voters in an inactive voter registration status shall receive VBM ballots in connection with the November 3, 2020 statewide general election.

- 14) **Arguments in Support:** In support of this bill, American Civil Liberties Union of California writes:

The COVID-19 pandemic poses unique challenges to administering the November 2020 election. California must act proactively to ensure the November 2020 election is safe, secure, and accessible for all voters. The first and most commonsense step is to send all registered California voters a [VBM] ballot. A majority of Californians already securely use VBM, and no one should have to choose between their health and their right to vote. AB 860 will help provide more uniform access to VBM across the state and, hopefully, will be accompanied by additional funding to counties to help them expand the distribution and processing of VBM ballots this November.

- 15) **Arguments in Opposition:** In opposition to this bill, Election Integrity Project, California writes:

Election Integrity Project California...joins with Governor Newsom and the spirit of AB 860 to ensure that all eligible voters can cast a ballot in a safe and secure environment of their own choosing in November, 2020. No one should be faced with the choice between their health and their franchise. California's current laws already thoroughly and completely accomplish that goal.

Approximately 75% of the state's voters are already slated to receive a [VBM] ballot...automatically for every election. Any other voter who deems it a personal risk to vote in person for this election need only make a phone call any time between now and 7 days prior to Election Day to receive a VBM. There is no need for this law; it is governmental over-reach and it increases the potential for election corruption and ballot fraud.

- 16) **Related Legislation:** SB 423 (Umberg and Berman), which is pending in this committee, authorizes changes to in-person voting requirements for the November 3, 2020 statewide general election, and requires the state and counties to conduct voter education and outreach campaigns to notify voters about voting in that election.

REGISTERED SUPPORT / OPPOSITION:

Support

350 Silicon Valley
American Civil Liberties Union of California
Asian Americans Advancing Justice - California
Black Women for Wellness
California Calls
California Common Cause
California Donor Table
California Environmental Justice Alliance
California Federation of Teachers
California Labor Federation
California League of Conservation Voters
California School Employees Association
California Teachers Association
Center for Community Action and Environmental Justice
Coalition for Humane Immigrant Rights (CHIRLA)
Congregations Organized for Prophetic Engagement (COPE)
Courage California
Disability Rights California
Inland Empire United
League of Women Voters of California
Mi Familia Vota
Million Voters Project
NARAL Pro-Choice California
National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund
NextGen California
Power California
Secretary of State Alex Padilla
SEIU California
UDW/AFSCME Local 3930
Union of Concerned Scientists
Approximately 4,500 individuals indicating support via various petitions and letters

Opposition

Election Integrity Project California
Inyo County Registrar of Voters (unless amended)
1 individual

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