

TITLE 2. ADMINISTRATION
DIVISION 7: SECRETARY OF STATE

The Secretary of State, under the authority vested in the Secretary by Section 15601 of the Elections Code proposes to adopt regulations in Title 2, Division 7, Chapter 8 of the California Code of Regulations governing the conduct of election recounts.

The Secretary of State proposes the following regulatory action: Adopt Sections 20810, 20811, 20812, 20813, 20814, 20815, 20816, 20817, 20818, 20819, 20820, 20821, 20822, 20823, 20830, 20831, 20832, 20833, 20840, 20841, and 20842, of Chapter 8 of Division 7 of Title 2 of the California Code of Regulations.

AUTHORITY AND REFERENCE

Authority cited: Section 12172.5, Government Code; Sections 10 and 15601, Elections Code.

Reference: Sections 15600 and 15601, Elections Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Elections Code Sections 15600 through 15634 establish the statutory framework for the conduct by a local elections official of a recount of ballots cast in a California ballot measure or public office election.¹ Sections 19200 through 19216 give the Secretary of State exclusive authority to examine voting systems and approve or withhold approval for their use in elections in the state. In Section 15601, the Legislature directed the Secretary of State to adopt regulations to specify the procedures for recounting ballots cast using each voting system approved for use in the state.

After reviewing the voting systems currently approved for use in California elections, the Secretary of State determined that a single set of regulations would be suitable for all approved voting systems. The proposed regulations were drafted for consistency with the Elections Code and with the goal of providing a single, clear and comprehensive set of rules and instructions for recounts. Providing all necessary information in a single

¹ Elections Code Section 320 defines “elections official” as follows:

"Elections official" means any of the following:

(a) A clerk or any person who is charged with the duty of conducting an election.

(b) A county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state.”

“Voting system” is defined by Elections Code Section 362 as “any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both.”

All statutory references are to the Elections Code, unless otherwise indicated. The regulations of the Secretary of State are contained in Sections 19001 through 22610.4 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 7 of the California Code of Regulations, unless otherwise indicated.

location avoids confusion for elections officials, candidates, ballot measure proponents and opponents and voters, who would otherwise need to refer to the Elections Code or other documents.

Proposed regulation 20810 would declare that the purpose of the proposed recount regulations is to establish standards and procedures for conducting voter-requested recounts of votes cast for all elections in the state.

Proposed regulation 20811 would establish definitions for key terms used in the proposed recount regulations.

Proposed regulation 20812 would specify that any voter may request a recount by complying with the requirements of Elections Code Sections 15620, 15621 or 15623; require the elections official to verify that the person making the request is a registered voter; and permit any other voter, during the recount or within 24 hours after completion of the recount, to request the recount of any precincts not recounted under the original request. Regulation 20812 tracks the requirements of sections 15620, 15621 and 15623 of the Elections Code and is included in the proposed regulations to provide a single, clear and comprehensive set of rules and instructions for recounts.

Proposed regulation 20813 would require the elections official to produce relevant material for examination by the recount requestor in response to a written request prior to the completion of recounting; define “relevant material” broadly to include ballot envelopes, electronic records of votes, voting system logs, results of logic and accuracy testing, event logs from polling places, partial and final vote tally results, and video recordings and logs related to election security. Proposed regulation 20813 elaborates upon and makes specific the requirement in section 15630 of the Elections Code that the voter requesting a recount shall, upon request, be permitted to examine as part of the recount “[a]ll ballots, whether voted or not, and any other relevant material” This regulation is necessary because different elections officials have interpreted the term “relevant material” differently. The definition of “relevant material” incorporates the materials held by the Superior Court to fall within the scope of that term as used in Elections Code section 15360 in *COUNTY OF ALAMEDA. et al. v. AMERICANS FOR SAFE ACCESS et al.*, Alameda County Superior Court Case No. RG04-192053, *appeal pending*, Court of Appeal, 1st Civ. No. A121390.

Proposed regulation 20814 would authorize the elections official to determine the order in which precincts are to be recounted unless the order is specified in the recount request, and permit the requestor to request in writing a change in the order of precincts, subject to approval by the elections official. Regulation 20814 clarifies and makes specific the authority of the elections official to determine the order in which precincts are to be recounted if no order has been specified by the voter requesting the recount, as permitted by section 15622 of the Elections Code. The Secretary of State also determined that the funds and time expended in a recount could be minimized by allowing the requesting voter to request a change in the order of precincts after the recount had commenced, subject to approval by the elections official.

Proposed regulation 20815 would specify the method by which the elections official estimates, and the requestor deposits in advance, each day's costs to conduct the recount; require provision of deposit receipts; require refund of unexpended deposit amounts to the requestor; and authorize the elections official to terminate the recount for failure to make timely deposits. This portion of Regulation 20815 clarifies and makes specific the requirements in section 15624 of the Elections Code and is included in the proposed regulations to provide a single, clear and comprehensive set of rules and instructions for recounts. Proposed regulation 20815 would clarify the provisions of section 15630 of the Elections Code by specifying that the elections official must estimate, and the requestor must pay in advance, the costs necessary to produce relevant material.

Proposed regulation 20816 would specify requirements for the location chosen by the elections official to conduct the recount, to ensure that representatives of interested parties, bona fide associations of citizens and media organizations may observe the recount. Proposed regulation 20816 would also authorize the elections official to limit to no more than 10 the number of observers representing bona fide associations of citizens and media organizations, selected in a manner to give each entity an equal opportunity to participate. These requirements are necessary to ensure that the elections official conducts the recount in a facility with sufficient space to accommodate all those entitled to observe "any or all phases of the election" under Elections Code section 15004. The part of regulation 20816 authorizing the elections official to limit the number of observers from citizen organizations and media organizations tracks the language of Elections Code section 15004. This part of Regulation 20816 is necessary to ensure that the proposed regulations provide a single, clear and comprehensive set of rules and instructions for recounts.

Proposed regulation 20817 would require each elections official, within six months of the effective date of the proposed regulations, to establish written security measures for recounts, including a requirement for a minimum of two recount board members to perform critical security processes; chain of custody controls; signature verification of electronic voting paper trail records, voted, spoiled and unused ballots and all "relevant material"; serialization of tamper-evident seals applied to voting system components; and permitting, upon request, authorized recount observers to inspect the integrity of externally visible seals used to secure recount materials. Regulation 20817 is necessary to ensure that comprehensive security practices are established that will ensure the integrity of ballots and other election materials during the recount process. The regulation permits each local elections official to develop written security measures tailored to the local jurisdiction's facilities, resources and existing procedures. The regulation covers specific security practices that the Secretary has determined to be necessary for comprehensive security through review of best practices in the field and the results of the Top-To-Bottom Review of voting systems conducted in 2007.

Proposed regulation 20818 would require the local elections official, prior to the recount, to determine the number of recount boards required for timely completion, appoint the

members of each four-person recount board, compile precinct tallies and running tallies, and determine whether additional personnel are required. Regulation 20818 tracks the requirements of section 15625 of the Elections Code and is included in the proposed regulations to provide a single, clear and comprehensive set of rules and instructions for recounts. Proposed regulation 20818 would also require one supervisor for every two recount boards, a staffing level the Secretary of State has determined to be necessary through review of best practices in the field and consultation with local elections officials.

Proposed regulation 20819 would require the elections official to establish and post the daily schedule for the recount, and prohibit a recount board from stopping for a break or lunch while recounting a precinct. Regulation 20819 clarifies and makes specific the requirement in section 15628 of the Elections Code for posting the schedule for the recount. This regulation is necessary to make the posted schedule useful to the interested parties and public by specifying the details, such as hours of operation, lunch and break times, and the specific locations for posting.

Proposed regulation 20820 would authorize the elections official to require interested parties, such as the requestor, candidates for the office or proponents or opponents of a ballot measure subject to recount, to appoint a representative as a spokesperson through whom questions are channeled, and require observers to log in and wear identification badges. Proposed regulation 20820 would also prohibit requestors, interested parties, representatives and observers from interfering with the recount, assisting in recount procedures, touching voting system components or ballots and other recount materials, or talking to recount workers while they are conducting recount activities. The regulation would authorize the elections official to deny entry to any person who fails to comply with these requirements. Regulation 20820 is necessary to clarify and make specific the requirement in Elections Code section 15625 that a recount shall be conducted under the supervision of the elections official. The regulation specifies that the elections official may maintain effective control over the proceedings by limiting the number of persons permitted to speak on behalf of interested parties and by requiring an attendance log and identifying badges and by excluding those who do not comply. Regulation also clarifies and makes specific the prohibition in Elections Code section on touching or handling of recount materials by unauthorized persons.

Proposed regulation 20821 would require the elections official, within six months of the effective date of the recount regulations, to develop a written policy providing reasonable media access to the recount location, including use of cameras or audio or video recording devices in a manner that will not interfere with the recount. This regulation clarifies and makes specific the requirement in section 15629 of the Elections Code that recounts be conducted in public. The regulation permits each local elections official to develop written media access rules tailored to the local jurisdiction's facilities, resources and procedures. Regulation 15629 is necessary to make it possible for the general public to obtain independent information about the recount and is based on best practices of elections officials in California as well as in states such as Minnesota that encourage highly transparent and well-publicized recount proceedings.

Proposed regulation 20822 would require the elections official to announce publicly at the end of each day the results of the tally of precincts tallied that day and the cumulative recount tally. Proposed regulation 20822 would also require the elections official, in elections in which the results of the completed recount change the outcome of an election, to post the recount results publicly and refund all monies deposited for the recount by any requestor in whose favor the recount changed the outcome of the election. In local contests, the proposed regulation would require the elections official to recertify the results of the recounted contest and send a copy of the recertification to the public official or governing body that declares the results of the election subject to recount. In a contest for statewide office, Assembly, State Senate, Presidential convention delegate or elector, Congress, State Board of Equalization, Supreme Court or Court of Appeal, the proposed regulation would require the elections official to transmit one copy of the recount results to the Secretary of State. Regulation 20822 tracks the requirements of sections 15624 and 15632 of the Elections Code and is included in the proposed regulations to provide a single, clear and comprehensive set of rules and instructions for recounts. Regulation 20822 also clarifies and makes specific the requirement to post recount results by requiring daily announcement of single-day and cumulative results. This requirement is necessary to facilitate meaningful observation pursuant to regulation 20816 and meaningful media coverage pursuant to regulation 20821.

Proposed regulation 20823 would provide the procedure by which a challenged ballot is handled, and a final determination made and recorded by the elections official as to whether the challenged ballot will or will not be added to the count, and would require the elections official to make that determination on the same day the ballot was challenged. Regulation 20823 clarifies and makes specific the requirements of section 15631 of the Elections Code, permitting ballots to be challenged during a recount. It requires resolution of challenged ballots at the end of each day in an area separate from where the recount is being conducted. These requirements are necessary to avoid confusion and mixing of ballots.

Proposed regulation 20830 would establish the procedures for recounts conducted using the same type of vote tabulating device used in the election, conducted as nearly as possible using the same methods used to tabulate ballots originally, and would require the elections official to report separately the results of the recount for each precinct subject to recount, including the number of ballots undervoted and overvoted. At the conclusion of the tabulation, the regulation would require a public logic and accuracy test of each tabulation device used in the recount, with the results of the test and the test deck used in the test available for inspection on request by the requestor, spokespersons and observers. Regulation 20830 clarifies and makes specific how a recount conducted by means of the voting system used originally must be conducted if the requestor selects that method, as permitted by section 15627 of the Elections Code. The requirement to report results by precinct, including undervotes and undervotes, ensures that the results of the recount are presented in a form useful to the interested parties. To increase confidence in recount

results, regulation 20830 also requires post-recount testing of the tabulation devices used to confirm their accuracy.

Proposed regulation 20831 would establish procedures for manual recounts generally and require that vote by mail and early-voted ballots be recounted separately from ballots cast in a polling place on Election Day. Regulation 20831 clarifies and makes specific how a manual recount must be conducted if the requestor selects that method, as permitted by section 15627 of the Elections Code. It requires the elections official to instruct and provide documentation to the recount boards on how to interpret and count votes consistently. This requirement is necessary to ensure the application of unbiased, uniform standards for what constitutes a vote, in compliance with state and federal law. Regulation 20831 also tracks the requirement of section 15625 of the Elections Code that each recount board have four-members and is included in the proposed regulations to provide a single, clear and comprehensive set of rules and instructions for recounts.

Proposed regulation 20832 would establish procedures for manual recounts by the recount boards specifically in “Vote for One” contests, including pre-count sorting into ballots that were not voted for the contest (under-voted), ballots that were over-voted for the contest, and ballots that were voted for the contest, sorted by candidate or position. Regulation 20832 clarifies and makes specific the requirement of section 15625 of the Elections Code, by specifying the roles and responsibilities of each of the four members of a recount board. These requirements are necessary to ensure uniformity in procedures used by all county elections officials, a matter of particular importance in recounts of contests voted upon in more than one county. The Secretary of State determined that these procedures were necessary through review of best practices in the field and consultation with local elections officials.

Proposed regulation 20833 would establish an iterative procedure for manual recounts in “Vote for Multiple” contests, and is otherwise similar to proposed regulation 20832. The iterative procedures are necessary to ensure accuracy and avoid double counting or failure to count any of the votes cast on the ballot. Proposed regulation 20833. The Secretary of State determined that these procedures were necessary through review of best practices in the field and consultation with local elections officials.

Proposed regulation 20840 would establish requirements and procedures for recounts on direct recording electronic voting systems using electronic vote results, including a requirement for a pre-count public logic and accuracy test of each direct recording electronic voting system used in the recount. The pre-recount test is necessary to ensure that the equipment used in the recount meets the same logic and accuracy requirements as the equipment used originally and that there has been no degradation of accuracy during the election and canvass periods.

Proposed regulation 20841 would establish requirements and procedures for recounts of votes cast on a direct recording electronic voting system based on an automated scan and tabulation of the voted ballots directly from the voter verified paper audit trail record, a method that could be employed only if the Secretary of State has tested and approved the

automated scan method as part of the approval of the voting system. No automated scan system has been presented for approval. The proposed regulation would also require a pre-count public logic and accuracy test of each direct recording electronic voting system used in a recount employing this method. The pre-recount test is necessary to ensure that the equipment used in the recount meets the same logic and accuracy requirements as the equipment used originally and that there has been no degradation of accuracy during the election and canvass periods.

Proposed regulation 20842 would establish requirements and procedures for recounts of votes cast on a direct recording electronic voting system by manually counting the voter verified paper audit trail records. The requirements and procedures are similar to those in proposed regulation 20832 for manual recounting of votes cast on paper. Also included are special requirements and procedures uniquely applicable to voter verified paper audit trails: verifying the zero-results tapes printed before opening the polls, and noting but not counting paper audit trail records for ballots that were cancelled or cancelled and revoked. The Secretary of State determined that these procedures were necessary through review of best practices in the field and consultation with local elections officials.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Secretary of State has made the following initial determinations:

1. **Mandate on local agencies and school districts:** None.
2. **Cost or savings to any state agency:** None.
3. **Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630:** None.
4. **Other nondiscretionary cost or savings imposed on local agencies:** None.
5. **Cost or savings in federal funding to the state:** None.
6. **Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states:** None. This proposed regulation merely proposes to implement, interpret or make specific existing requirements and procedures for election recounts as set forth in the Elections Code. The proposed regulation, therefore, has no impact directly affecting business.
7. **Cost impacts on a representative private person or businesses:** None. The Secretary of State's office is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

8. Adoption of these regulations will not:

- (A) create or eliminate jobs within California;
- (B) create new businesses or eliminate existing businesses within California;
- or
- (C) affect the expansion of businesses currently doing business within California.

9. Significant effect on housing costs: None.

10. Effect on small business: None. This proposed regulation merely proposes to implement, interpret or make specific existing requirements and procedures for election recounts as set forth in the Elections Code. The proposed regulation, therefore, has no impact directly affecting small business.

CONTACT

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