

CALIFORNIA CODE OF REGULATIONS

TITLE 2. DIVISION 7. CHAPTER 8.

SECRETARY OF STATE

NOTICE IS HEREBY GIVEN that the Secretary of State intends to adopt the regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

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. The Secretary of State drafted a single set of proposed regulations applicable to all approved voting systems.

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.

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.

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 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.

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. Proposed regulation 20815 would also require the elections official to estimate, and the requestor to 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.

Proposed regulation 20817 would require each elections official, within 6 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.

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. Proposed regulation 20818 would also require one supervisor for every two recount boards.

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.

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.

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.

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.

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.

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.

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.

Proposed regulation 20832 would establish procedures for manual recounts by the recount boards 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.

Proposed regulation 20833 would establish procedures for manual recounts in “Vote for Multiple” contests, similar to those in proposed regulation 20832.

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.

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. The proposed regulation would require a pre-count public logic and accuracy test of each direct recording electronic voting system used in a recount employing this method.

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.

PUBLIC HEARING

The Secretary of State will consider the proposed regulations at a public hearing on March 4, 2009, at the offices of the Secretary of State, 1500 11th Street, Sacramento, California, commencing at 10:00 a.m.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Secretary of State’s office. Written comments

concerning the proposed rulemaking must be received by 5:00 p.m. on March 13, 2009. The Secretary of State's office will consider only comments received by that time. Submit written comments to the contact indicated below.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Secretary of State's office must determine that no reasonable alternative has been identified that would be more effective in carrying out the purposes for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Secretary of State invites persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Secretary of State's office will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at the address indicated below. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed regulations and the initial statement of reasons. The initial statement of reasons includes the express terms of the proposed action and the information upon which the proposed action is based. Copies are posted on the Secretary of State's web site at <http://www.sos.ca.gov/business/business.htm> and may also be obtained from the contact indicated below.

AVAILABILITY OF THE TEXT IN PLAIN ENGLISH

The text of the proposed regulations is available in plain English from the contact person indicated below.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, the Secretary of State's office may adopt the proposed regulations substantially as described in this notice. If the Secretary of State's office makes modifications that are sufficiently related to the originally-proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Secretary of State's office adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the contact indicated below. The Secretary of State's office will accept written comments on the modified regulations for 15 days after the date on which they are made available generally.

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

Any inquiries should be made to Lowell Finley, Office of the Secretary of State, 1500 11th Street, 6th Floor, Sacramento, CA 95814; telephone (916) 653-7244; e-mail lfinley@sos.ca.gov. Back-up contact: Pam Giarrizzo, Office of the Secretary of State, 1500 11th Street, 6th Floor, Sacramento, CA 95814; telephone (916) 653-7244; e-mail pgiarrizzo@sos.ca.gov.