

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: May 5, 2021
To: Veterans and Legal Affairs Committee
From: Janet Stocco, Legislative Analyst
LD 1496 **An Act To Establish the Board of Canvassers for Certifying Election Results**
(Rep. Kinney)

SUMMARY

Board established. This bill establishes the Board of Canvassers, which consists of 4 members appointed by the Governor. Two members must be appointed, per party, from lists of individuals nominated by the two political parties holding the largest number of seats in the Legislature. The board must canvass the election returns for general and special elections for the offices of: (1) U.S. President, (2) U.S. Senator, (3) Representative to Congress, (4) Governor, (5) State Senator, and (6) State Representative.

Process for canvassing election returns under current law (*all citations are to Title 21-A*):

- The warden of each precinct lists the number of votes cast for each candidate or question on the ballot on an election return “as soon as the results of the election have been declared.” §711.
- The municipal clerk prepares the municipal election return—by comparing the warden’s return to the tally sheets or tapes and, if necessary, totaling the results from different precincts—and submits an attested copy of the return to the Secretary of within 2 business day after the election. §711(3). The Secretary of State may send a courier to obtain an election return not submitted within this time.
- The Secretary of State tabulates the election returns—including by conducting a ranked-choice voting tabulation, if applicable—for each candidate or question on the ballot. The Secretary must submit a certified copy of the tabulation to the Governor within 20 days of the election. §722. To the extent possible, the Secretary of State’s staff also conducts requested recounts within this time.
 - *By statute:* “Within a reasonable time after an election, the Secretary of State shall prepare and the Governor shall sign an election certificate . . . for each person elected to office.” If the election was the subject of a recount for which a further appeal is pending, the certificate must be “issued to the apparent winner of the election based on the final recount tabulation.” §724.
 - *Under the Maine Constitution:* The Governor must examine the voting lists and summon the candidates elected to the State Legislature 7 days before the first Wednesday of December; Me. Const. art. IV, pt. 1, §5; Me. Const. art. IV, pt. 2, §4. The Secretary of State must send the lists of votes for the office of Governor to the Legislature on the first Wednesday after the first Tuesday of January. Me. Const. art. V, pt. 1, §3.

Changes to the canvassing process proposed by the bill.

- The bill amends §722 to require the Secretary of State to tabulate election returns within 10 days after a general or special election for an office subject to oversight by the Board of Canvassers.
- The Secretary submits the returns to the Board of Canvassers, which “shall meet on or before the 10th day after an election” and may meet “as often as necessary up to the 20th day after an election.”

- The Board must “canvass” the election—*i.e.*, examine and count the returns of votes cast submitted by municipalities to the Secretary of State—and prepare a statement, approved by at least 3 members of the board, certifying: (a) the total number of votes cast for each covered office and (b) the number of votes cast for each candidate for each covered office in each municipality.
- In addition, the board may, by a vote of at least 3 members, order recount of all the ballots cast, or of all the ballots cast in specific municipalities, for a particular office. The recount must adhere to the requirements of §737-A(3) to (10).

ISSUES RAISED AT PUBLIC HEARING

Secretary of State concerns. The Secretary of State raised several issues about the bill at the public hearing, including the following logistical concerns regarding the canvassing process it creates:

- Under current staffing levels, the Secretary of State believes it “would be impossible” to reduce from 20 days to 10 days the time for the Secretary of State’s office to tabulate election results received from each municipality for the affected offices.
- Because §711(3) requires municipal clerks to submit attested election returns to the Secretary of State—but not a copy of the underlying tally sheets or tally tapes—it is not clear to the Secretary how the Board of Canvassers will be able to “determine that the returns submitted by municipal election officials are not accurate” as contemplated in the bill on page 2, lines 37-38.
- Depending on the number of recounts ordered by the Board of Canvassers, it may be difficult to complete the required recounts for legislative races within the time required by the state constitution.
- Because members of the board are appointed by the Governor in February of odd-numbered years, well before they engage in their canvassing duties for the general election in November of an even-numbered year, it may be difficult to establish a quorum for canvassing.

TECHNICAL AND DRAFTING ISSUES

1. Submission of certificate to the Governor:

- It may make sense to change the headnote of §722 in section 3 of the bill to “Certification of results to the Governor.”
- What is the deadline, if any, for the Board to certify the results of the covered elections to the Governor under section 3 of the bill? Given that section 4 of the bill authorizes the board “to meet as often as necessary up to the 20th day after the election,” is the intent to impose a deadline of 20 days after the election, mirroring the deadline for the Secretary of State to certify the results of other elections?
- If the board orders a recount, does it wait to submit a certification to the Governor? Or, does the board submit a certificate reflecting the Secretary of State’s original tabulation of election results? *Compare* §737-A(8) (a recount may provide a result “different from the results show on the tabulation submitted to the Governor pursuant to section 722...”).

2. **Initial member terms.** Under the bill, the Governor appoints board members to 4-year terms in odd-numbered years. When the board is first established, the terms of 2 board members are 5 years

in duration, however. These members' terms will thus expire in February of an even-numbered year. Should the initial terms for those board members be 6 years in duration?

3. **Member qualifications.** Is the intent to prohibit any individual who has *ever* been elected to a state or municipal "governing body" from serving on the board, or is the intent instead to prohibit only individuals who are *currently* serving on a state or municipal governing body? (See p.1, lines 31-33.)
4. **Recount requirements.** The bill directs that a recount ordered by the board "must be conducted in the same manner as provided by section 737-A, subsections 3 to 10" and "the applicable rules adopted pursuant to section 737-A, subsection 12." This provision raises two questions:

- Should the first and second unnumbered paragraphs at the beginning of [§737-A](#) (quoted below), with relate to transportation of the ballots to be recounted, also apply to these recounts?

Once a recount is requested for an election for the office of State Senator or State Representative or for a county office that does not encompass more than one county, the Secretary of State shall notify the contracted courier service, which shall take physical control of all ballots and related materials involved in the recount as soon as possible and deliver them to the recount facility. When a recount is requested for a statewide office, congressional office or statewide referendum or for a county office that encompasses more than one county, the Secretary of State may direct the courier to retrieve ballots from certain voting jurisdictions and deliver them to the recount facility so that the recount may be conducted in stages until the requesting candidate or the lead applicant for a referendum recount concedes or until all the ballots are recounted. If a qualified courier service is not available to provide these services, the State Police shall collect and deliver the ballots as described in this section at the request of the Secretary of State.

The Secretary of State shall store and maintain exclusive control over the ballots and other materials pending and during the recount and until the courier, or the State Police if requested, retrieves the materials for return to the municipalities.

- Who are the "designated recount candidates" whose votes should be tallied in the recount under §737-A(4) (quoted below)? Is the intent that all candidates' votes be counted anew?

4. Time of recount and designated recount candidates. The recount must be held as soon as reasonably possible at a time and place that affords the designated recount candidates a reasonable opportunity to be present. For purposes of this section, "the designated recount candidates" means the leading candidate and each candidate who has requested a recount and paid the applicable fee in accordance with this section. ***The recount involves a new count of the results for the designated recount candidates only.***

... Candidates for that elective office other than the designated recount candidates may be present to observe the recount but are not included in the recount, and their vote totals remain as indicated in the official results reported by the municipalities.

FISCAL IMPACT

Not yet determined.