

MODIFY ELECTION CERTIFICATION PROCESS

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Senate Bill 529 as enrolled
Sponsor: Sen. Jeremy Moss
House Committee: Elections
Senate Committee: Elections and Ethics
Complete to 11-30-23

Analysis available at
<http://www.legislature.mi.gov>

(Enacted as Public Act 269 of 2023)

SUMMARY:

Senate Bill 529 would amend the Michigan Election Law to align several of the act's provisions with the federal Electoral Count Reform and Presidential Transition Improvement Act of 2022. Among other things, the federal law clarified the process for certifying each state's slate of presidential electors and required a certificate of ascertainment of the electors to be issued by each state's executive at least six days before the Electoral College meets (see **Background**, below). Senate Bill 529 would amend the state's election law to reflect these changes and to make other modifications to the responsibilities of the governor, Board of State Canvassers (BSC), and boards of county canvassers during the canvass and certification process.

Certificate of ascertainment

The Michigan Election Law currently requires the governor to certify the names and addresses of Michigan's Electoral College electors to the United States Secretary of State as soon as is practicable once the BSC has made its official determination of the results of a presidential election. The governor must also transmit three copies of the certification to each elector.

Instead, Senate Bill 529 would specify that the governor must issue a certificate of ascertainment of appointment of electors ("certificate") and immediately transmit it to the Archivist of the United States by the most expeditious method available. The certificate would have to be issued after the BSC has finished its determination and at least six days before the electors convene (as described below). It would have to include the names of the appointed electors and the votes cast for each presidential and vice-presidential candidate, bear the state seal, and contain at least one security feature chosen by the governor to verify its authenticity.¹ The governor would have to transmit six duplicates of the certificate to each appointed elector on or before the date that the electors convene.

Recount petitions

If a candidate for office files a recount petition with the Bureau of Elections, the SOS must notify each opposing candidate of the petition within 48 hours. Opposing candidates can currently file objections to the petition with the BSC until 4 p.m. on the seventh day after the petition has been filed, and the BSC must then hold a hearing on the objections. The BSC must make a determination within five business days of the hearing and cannot begin a recount, if applicable, until two business days have passed since the determination. Under the bill, an opposing candidate would have 48 hours to file objections to a recount petition, and the BSC

¹ Secure components of any security feature would be confidential and not subject to disclosure under the Freedom of Information Act (FOIA).

would have to rule on the objections within four calendar days of the 48-hour deadline. Additionally, the two-day delay to begin a recount would no longer apply.

Candidates also currently have until 4 p.m. on the seventh day after a recount petition has been filed to file a counter petition, which Senate Bill 529 would decrease to 48 hours after the petition has been filed.

Recounts

Senate Bill 529 would provide that the governor has the responsibility and authority to issue a certificate of ascertainment of electors regardless of whether a recount petition has been filed or whether a recount is pending. However, if a statewide recount is required,² the governor could not issue the certificate until the recount is certified. If a recount is certified before 3:00 p.m. on the sixth day before the electors convene, the certificate would have to reflect the results of the recount. If the recount is *not* certified by that time, the governor would have to issue a certificate that reflects the original certification of the results.

If a recount that alters the winner of the presidential election is completed by 11:59 p.m. on the second day before the date that the electors convene, the affected presidential or vice-presidential candidate could have the certification reviewed by the state supreme court or could seek other judicial relief, such as an order directing the governor to issue a superseding certificate that reflects the updated and certified results of the election. Such an action would have to be filed within 24 hours after the recount is certified, and the plaintiff would have to request an expedited hearing and for an order granting relief to be issued by 4:00 p.m. on the day before the electors convene.

If the supreme court issues an order by this deadline that requires the governor to issue a superseding certificate, the governor would have to do so before the date that the electors convene. If the court does not issue an order by 4:00 pm on the day before the date that the electors convene, the governor would be required to issue a superseding certificate based on the BSC's certified recount results by 11:59 p.m. on the day before the date that the electors convene.

A superseding certificate of ascertainment issued by the governor after a recount would replace any prior certificate and would have to be transmitted consistent with the requirements described above. Superseding certificates would be conclusive with respect to the determination of Michigan's appointed slate of electors for president and vice president.

Meeting of presidential electors

Senate Bill 529 would require the state's appointed presidential electors to convene in the Senate chamber at 2:00 p.m. on the first Tuesday after the second Wednesday in December to perform their duties. (The Michigan Election Law currently requires the electors to meet on the first *Monday* after the second Wednesday in December.)

Board of State Canvassers duties and authority

Currently under the Michigan Election Law, the BSC must meet at the Michigan Secretary of State (SOS) office on or before the twentieth day after an election to canvass the returns of the

² A statewide recount is required when a primary or general election is determined by a vote differential of 2,000 or less.

election, and the SOS is responsible for determining the day of the meeting and notifying the BSC members. The board can adjourn when necessary, such as to await the receipt or correction of returns, but is required to complete the canvass and announce the results by the fortieth day after the election.

Under Senate Bill 529, the BSC would have to meet as soon as practicable after receiving returns from the county canvass boards and would have to announce its determination by the twentieth day after an election. The board would no longer be required to meet at the SOS office, and the secretary of the BSC would be responsible for calling the meeting and notifying other board members. (The secretary of the BSC, rather than the SOS, would also be responsible for calling a BSC meeting within 20 days of a primary election to certify the results.) The bill would also remove provisions allowing the BSC to adjourn its meeting before completing its canvass.

If an expedited canvass is necessary to determine the results of a presidential election,³ the BSC would be responsible for completing the canvass and would have to announce its determination on or before the twentieth day after the election.

If there is a tie between two or more individuals for the winner of any office as canvassed by the BSC, Senate Bill 529 would require the BSC to determine the winner by lot. (Currently, the BSC certifies the result of the election for that office to the legislature as a tie, and the legislature chooses one of the candidates to fill the office. State law also allows the legislature to decide which person is elected when a determination of the BSC is contested.)

BSC appointment

Individuals are currently appointed to the BSC to serve a four-year term from a list of three nominees submitted to the governor by the state central committee of each major political party. Nominations for open seats must be made by January 10 in each odd-numbered year, and the governor must appoint one individual from each party by the following January 20. If a vacancy occurs before a term expires, the appropriate political party must submit another list of three individuals, and the governor must appoint one within ten days of the vacancy. If the state committee fails to nominate those individuals, the governor must appoint an individual who was formerly elected as a state officer of the appropriate party and is currently affiliated with that party.⁴

Senate Bill 529 would retain these provisions but would additionally allow the Senate majority leader, the Senate minority leader, the speaker of the House, and the House minority leader to each nominate one individual for each position on the BSC that their respective political party is entitled to. These individuals would also each nominate an individual within ten days of a vacancy. Effectively, each political party would nominate five individuals—three from the state party and two from the legislature.

³ The Michigan Election Law requires an expedited canvass when the unofficial returns of a presidential election show a vote differential between the top two candidates of less than 25,000.

⁴ If this person declines to serve on the BSC, the governor must appoint another nominee from the party list or appoint another individual that meets these criteria.

Additional provisions

Currently under the Michigan Election Law, if a county canvass board does not certify the results of an election within 14 days, the BSC must meet immediately to determine the outcome of the election and is required to certify the results within ten days of receiving records from the county board. Under Senate Bill 529, the BSC would instead be required to certify the results on or before the twentieth day after the election. The county canvassers and all other county staff necessary to complete the canvass would have to be present at all times while the BSC makes its determination.

A ballot cast by an eligible elector could not be rejected or otherwise not counted in a canvass, recount, or court order altering the certification of a canvass board on the grounds that an election official did not comply with a directive set forth under the Michigan Election Law unless the ballot is otherwise ineligible to be counted.

The bill would provide that it is the ministerial, clerical, and nondiscretionary duty of a board of county canvassers and of each member of that board to certify election results based solely on statements of returns from that county's precincts, early voting sites, and absent voter counting boards and on any corrected returns. The bill also would provide that it is the ministerial, clerical, and nondiscretionary duty of the BSC and each member of the BSC to certify election results based solely on the certified statements of votes from counties.⁵

Finally, for partisan elections, ballots would have to include an option for straight-ticket voting.

MCL168.46 et seq.

BACKGROUND:

The federal Electoral Count Reform and Presidential Transition Improvement Act of 2022 requires the executive of each state (generally speaking, each governor) to issue a certificate of ascertainment of the state's appointed slate of presidential electors. Certificates must be issued at least six days before the electors meet, and each certificate must list the names of the appointed electors and the certified number of votes cast for each slate, bear the state seal, and contain at least one security feature to verify its authenticity. Governors must then immediately transmit their certificate to the Archivist of the United States and must provide six copies of the certificate to each of their state's Electoral College electors on or before the first Tuesday after the second Wednesday in December, which is the day the electors are required to meet.

The law contains additional provisions relating to the authority and responsibilities of Congress, the Vice President, and federal courts during the presidential election certification process.

BRIEF DISCUSSION:

According to committee testimony, the aftermath of the 2020 election revealed areas in which state law could be strengthened to ensure that the winner of the presidential election in Michigan receives the state's Electoral College votes and that only one slate of electors is

⁵ Proposal 2 of 2022 amended the state constitution to provide that it is the duty of a board of canvassers and its members to certify election results based solely on the certified statements of votes.

submitted. The Electoral Count Reform and Presidential Transition Improvement Act provided some federal reforms, but state-level legislation is necessary to bring Michigan into compliance with that law and to further clarify the presidential election certification process. Senate Bill 529 would address these needs by specifying that the governor is responsible for certifying the state's presidential electors through a certificate of ascertainment and by providing a clear process for issuing the certificate, even if a recount is taking place.

FISCAL IMPACT:

The bill could result in marginal costs to the Department of State's Bureau of Elections and to county clerk offices. There could be additional compensation costs if the Board of State Canvassers is required to hold an additional meeting they would not have otherwise scheduled. Board of State Canvassers members are entitled to compensation for expenses incurred in the performance of their duties, such as travel expenses, and \$75 for each day's attendance at a meeting. Any potential costs would be supported by existing appropriations to the Bureau of Elections.

County clerks could incur marginal costs related to compensating county staff for their time being present at all times during the completion of a canvass by the Board of State Canvassers.

The bill may increase costs to the governor by an indeterminate amount related to the administrative responsibilities for the new certificate of ascertainment of appointment of electors. Any increase in costs to the Office of the Governor is not expected to be significant and would be supported by existing appropriations.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.