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Senate Bills 1350, 1351, and 1352 (as reported without amendment)  
Sponsor: Senator Alan L. Cropsey  
Committee: Judiciary

Date Completed: 10-3-06

### **RATIONALE**

The Board of State Canvassers is a bipartisan entity mandated by Article II, Section 7 of the State Constitution, which states, "A board of state canvassers of four members shall be established by law...A majority of any board of canvassers shall not be composed of members of the same political party." Although the Constitution does not prescribe responsibilities of the Board, Article II, Section 9, and Article XII, Section 2 require "the state officer authorized by law" or "the person authorized by law" to submit to the voters laws proposed by initiative petition and to perform certain functions concerning the certification of voter-initiated petitions for constitutional amendments. The Michigan Election Law states that these phrases refer to the Board of State Canvassers. Under the Election Law, the Board consists of four members, including two from each major political party, and an action of the Board is effective only if at least one member of each major political party concurs in the action. The Election Law requires the Board to determine whether signatures on nominating petitions are sufficient and to perform other duties, in addition to the responsibilities identified by the Constitution. The Board's role in certifying petitions for the ballot has been the focus of debate and litigation over the years.

In 2002 and 2004, the Michigan Court of Appeals ordered the Board of State Canvassers to certify voter-initiated ballot proposals, after the Board had deadlocked, rejected a petition, or was unable to reach a decision. These cases involved the Board's authority (or lack of authority) to conduct a legal analysis of the constitutional issues or to examine the merits or legality of a

proposal. In keeping with precedent, the Court held that the Board's authority was limited to determining whether the form of a petition complied with the statutory requirements and whether there were sufficient signatures. More recently, the Board was the subject of Court of Appeals orders concerning the Michigan Civil Rights Initiative (MCRI) petition, which proposes to prohibit the State, State universities, and local units of government from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin in public education, employment, and contracting. In October 2005, the Court found that the Board had breached its duty to certify the petition, and ordered the Board to approve it for the November 2006 ballot. After the Board failed to do so, in December 2005, the Court ordered the Secretary of State to place the proposal on the ballot. Subsequently, two members of the Board resigned, after the Court ordered them to show cause why they should not be held in criminal contempt of court for their failure to vote to certify the petition.

In light of these events, some people believe that the Election Law should make the Bureau of Elections responsible for canvassing petitions and require the Elections Director to make a recommendation to the Board as to their sufficiency. Since at least three members must be in agreement for the Board to take action, it has been suggested that the approval (or disapproval) of petitions would be expedited if the Director's recommendation were considered approved unless rejected by a majority of the Board.

## **CONTENT**

### **The bills would amend the Michigan Election Law to do all of the following:**

- Require the Bureau of Elections, on behalf of the Board of State Canvassers, to canvass initiative and referendum petitions and nominating petitions.**
- Require the Director of Elections to make a recommendation to the Board regarding the sufficiency of initiative or referendum petitions and nominating petitions.**
- Specify that the Director's recommendation would be considered approved by the Board unless it were disapproved by a majority vote of the Board.**

The bills are described below.

#### **Senate Bill 1350**

Under Chapter XXII (Initiative and Referendum) of the Election Law, upon receiving notification of the filing of initiative or referendum petitions, the Board of State Canvassers must canvass the petitions to ascertain whether they have been signed by the requisite number of qualified and registered electors. Under the bill, the Bureau of Elections would have to canvass the petitions for that purpose, on behalf of the Board.

Currently, if the Board is unable to verify the genuineness of a petition signature using the digitized signature contained in the qualified voter file (QVF), the Board may cause any doubtful signature to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated, to determine the authenticity of the signature or to verify the registration. Upon request, the clerk of any political subdivision must cooperate fully with the Board in determining the validity of doubtful signatures by rechecking them against registration records in an expeditious and proper manner. Under the bill, the Board *or* the Bureau could cause doubtful signatures to be checked if either were unable to verify the genuineness of signatures, and local clerks would have to cooperate with either the Board or the Bureau.

Under the bill, based on the results of a canvass and the disposition of any challenges filed against an initiative or referendum petition, the Director of Elections would have to make a recommendation to the Board concerning the sufficiency or insufficiency of the petition. The Director's recommendation would have to be considered approved by the Board unless the recommendation were disapproved by a majority vote of the members appointed to and serving on the Board.

#### **Senate Bill 1351**

Under Chapter XXIV (Primary Elections) of the Election Law, when nominating petitions are filed with the Secretary of State, the Secretary of State must notify the Board of State Canvassers within five days after the last day for filing the petitions. Upon receiving candidate nominating petitions, the Board must canvass the petitions to ascertain if they have been signed by the requisite number of qualified and registered electors. Under the bill, the Bureau of Elections would have to canvass the petitions for that purpose, on behalf of the Board.

Currently, for the purpose of determining the validity of the signatures, the Board may cause a doubtful signature to be checked against the QVF or the registration records by the clerk of a political subdivision in which the petitions were circulated. The Board must verify the registration or the genuineness of a signature. If the Board is unable to verify the genuineness of a petition signature, the Board must forward the petition to the proper city or township clerk to compare the signatures on the petition with those on the registration record or in some other manner determine whether the petition signatures are valid and genuine. After receiving a request from the Board, the clerk must cooperate fully in determining the validity of doubtful signatures by rechecking them against registration records in an expeditious and proper manner. Under the bill, either the Board or the Bureau would be responsible for these functions.

In addition, the Board may hold a hearing upon a complaint filed or for a purpose considered necessary by the Board, to conduct an investigation of the petitions.

The Board must complete the canvass at least nine weeks before the primary election at which candidates are to be nominated. Before making a final determination, the Board may consider any deficiency found on the face of a petition that does not require verification against data maintained in the QVF or in the voter registration files maintained by a city or township clerk. The bill would allow the Board or the Bureau to consider such a deficiency.

Under the bill, based on the results of a canvass and the disposition of any challenges filed against a petition, the Elections Director would have to make a recommendation to the Board concerning the sufficiency or insufficiency of the nominating petition. The Director's recommendation would have to be considered approved by the Board unless the recommendation were disapproved by a majority vote of the members appointed to and serving on the Board.

### **Senate Bill 1352**

Under Chapter XXIVA (Candidates Without Political Party Affiliation) of the Election Law, the Board of State Canvassers must canvass a qualifying petition filed with the Secretary of State. ("Qualifying petition" means a nominating petition required of and filed by a person to qualify to appear on an election ballot as a candidate for office without political party affiliation.) The bill would require the Bureau of Elections, on behalf of the Board, to canvass a qualifying petition filed with the Secretary of State.

Under the bill, based on the results of a canvass and the disposition of any challenges filed against a petition, the Elections Director would have to make a recommendation to the Board concerning the sufficiency or insufficiency of the qualifying petition. The Director's recommendation would have to be considered approved by the Board unless the recommendation were disapproved by a majority vote of the members appointed to and serving on the Board.

MCL 168.476 (S.B. 1350)  
168.552 (S.B. 1351)  
168.590f (S.B. 1352)

## **BACKGROUND**

### **Board Appointment & Responsibilities**

Under the Michigan Election Law, the members of the Board of State Canvassers are appointed by the Governor with the advice and consent of the Senate. The Board must consist of two members from each major political party, selected by the Governor from a list of three names submitted by each party's State central committee. If a party's State central committee fails to submit names within the time allowed, the Governor must appoint an individual who was formerly elected as a State officer of the party and is presently affiliated with it. A Board member's term of office is four years.

The Board's role in certifying petitions for statewide ballot proposals originates from Article II, Section 9, and Article XII, Section 2 of the State Constitution. Article XII, Section 2 includes the following language:

"Such petitions [proposing amendments to the Constitution] shall be filed with *the person authorized by law* to receive the same...Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. *The person authorized by law* to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official statement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon." (Emphasis added.)

Article XII, Section 2 also requires "the person authorized by law" to prepare "a true and impartial statement of the purpose of the amendment".

Under Article II, Section 9, if a law is proposed by initiative petition, the Legislature must enact or reject it. If the Legislature does not enact the law, "...*the state officer authorized by law* shall submit such proposed law to the people for approval or rejection at the next general election" (emphasis added).

As noted above, the Michigan Election Law states that the terms "the state officer authorized by law" and "the person authorized by law", as used in these

provisions, mean the Board of State Canvassers.

#### MCRI Petition

The MCRI petition was filed with the Secretary of State on January 6, 2005. On April 18, a group known as "By Any Means Necessary" filed a challenge to the petition, based on alleged misrepresentation by the petition circulators. In July, the Chief Deputy Attorney General advised the Board of State Canvassers that it did not have constitutional or statutory authority to consider claims of misrepresentation in determining the validity and sufficiency of petition signatures. The Elections Bureau determined that an estimated 455,373 valid signatures appeared on the petition (while the number required was 317,757), and the Elections Director recommended that the Board certify the petition as sufficient.

When the Board met on July 19, 2005, a motion to certify the petition received two "no" votes, one "yes" vote, and one abstention. The MCRI Committee then appealed to the Michigan Court of Appeals. In its opinion and order of October 31, 2005, the Court found that there was no dispute that the form of the petition was proper or that there were sufficient signatures; concluded that the Board "breached its clear legal duty to certify the petition"; and ordered the Board to approve the petition for placement on the November 2006 ballot (*Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506). The Court also found that the Board did not have the authority to investigate the allegations asserted by the challengers.

Following a series of motions filed by all of the parties, the Court of Appeals, on December 7, 2005, again directed the Board to approve and certify the petitions. The Board met on December 14, 2005. As widely reported in the news media, the meeting was subject to considerable disruption by opponents of the petition. A motion to approve the petition received two "yes" votes, one "no" vote, and one abstention. Although there was some dispute about the intention of the members who failed to vote "yes", the petition had not been certified when the meeting adjourned.

The matter returned to the Court of Appeals, which issued an order on December 20,

2005. The order stated, "Notwithstanding this Court's December 7, 2005 clear and unconditional directive, certain members of the Board of State Canvassers failed to comply with our Court's Order and thus, once again, the Board of State Canvassers failed to discharge its legal obligation under our State Constitution, statutes, and Court Orders to certify the petitions". The Court therefore ordered the Secretary of State "...forthwith to take all necessary steps and measures, consistent with State election laws, to place the initiative on the November 2006 ballot".

On April 3, 2006, the Court ordered two Board members either to show cause why they should not be held in criminal contempt for violating the Court's order to certify the petition, or to pay a \$250 fine, which would be deemed an admission of contempt. In May, one of the Board members paid the fine and was found to have admitted contempt. In June, the other Board member entered into a settlement with the Court, agreeing to resign from the Board, submit a statement of conciliation, and make a \$250 charitable contribution.

#### Previous Legislation

Enrolled Senate Bills 973 through 976 proposed to amend the Michigan Election Law to transfer from the Board of State Canvassers to the State Elections Director responsibilities for canvassing petitions to determine the validity and sufficiency of signatures; performing other constitutional duties concerning ballot petitions; and holding hearings on complaints or to investigate signatures. The bills also proposed to delete requirements for the Board to approve ballot statements prepared by the Elections Director.

Governor Granholm vetoed the bills, stating, "The legislation would transfer decisions relating to ballot proposals and petition signatures from a bi-partisan board of election officials that acts at public meetings to an individual state bureaucrat who reports to a partisan secretary of state and acts behind closed doors... Reducing public scrutiny and accountability in this way would undermine public confidence in the election process...".

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Given the history of litigation over the role of the Board of State Canvassers in certifying ballot petitions, and the recent orders of the Michigan Court of Appeals, it is clear that the Board is dysfunctional. Instead of promoting the integrity of the elections process in Michigan, the Board is impeding the people's right to vote. Although the Michigan Supreme Court and the Court of Appeals have said numerous times that the Board has no authority to consider the merits of a proposal, the Board has continued to refuse to certify petitions that are in the proper form and have sufficient signatures. As the Court of Appeals stated on December 20, 2005, "...this failure by the Board of State Canvassers wrongfully thwarts and interferes with the clear constitutional mandate that the citizens of this State have the right to amend or not amend their Constitution by a vote of the people."

The Elections Bureau, which is headed by the Director of Elections, already does the actual work of canvassing petitions and makes a recommendation to the Board. In this respect, the bills simply would codify what is current practice. The Board would retain the ultimate authority to accept or reject the Election Director's recommendation as to the sufficiency of petitions, but a majority vote would be required to disapprove the recommendation. Since the Board cannot take action unless at least three members are in agreement, it too frequently has been deadlocked or failed to approve a petition. As a result, one party or another has had to seek a court order requiring the Board to do its job, or preventing the Board from attempting to exercise authority that it does not have. By requiring a majority vote of the Board to *reject* the Director's recommendation, the bill would allow ballot proposals to be placed before the voters without the need for litigation.

### **Opposing Argument**

The constitutional and statutory provisions governing the Board ensure a system of checks and balances, which involves the

Governor, both major political parties, and, at times, the judiciary. The Board is bipartisan both in the way it is constructed and in the way it functions. Since the Board cannot act without the agreement of three members, at least one from each major political party must concur. The Constitutional Convention delegates were well aware of what they were doing by not providing for a partisan advantage. The bill would undermine this design by requiring the decision of one bureaucrat to stand unless it was rejected by a majority of the Board.

Although the current Elections Bureau and its director may do an excellent job and perform without any appearance of bias, there is no guarantee that future staff will do the same. The Elections Director, after all, is appointed by the Secretary of State, who is a partisan elected official. It is not inconceivable that the decisions of Elections Bureau personnel could be influenced by the person to whom they answer.

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

The bills would have a minimal fiscal impact on State government. Currently, members of the Board of State Canvassers are entitled to a per diem of \$75. To the extent that the number of Board meetings decreased as a result of the proposed legislation, per diem expenses could be reduced and result in minimal savings to the State.

The bills would have no fiscal impact on local government.

Fiscal Analyst: Joe Carrasco

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.