

The State of Texas




Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
Dial 7-1-1 For Relay Services
(800) 252-VOTE (8683)

John B. Scott
Secretary of State

ELECTION ADVISORY **No. 2022-18**

TO: All Election Officials

FROM: Keith Ingram, Director of Elections 

DATE: April 26, 2022

RE: Additional Ballot by Mail Procedures for May Uniform Election and Primary Runoff Election

This advisory provides answers to some commonly asked questions related to mail ballots for the May uniform election date and the primary runoff election due to the fact that these elections happen in close proximity. **In the situation where the county has contracted with local entities to serve as the local entities' early voting clerk or the county is conducting the constitutional amendment election**, there is a concern that voters will return both ballots in a single carrier envelope. Although we cannot address in this advisory every possible scenario, we will discuss those that appear to be most likely or common.

For scenarios not covered in this advisory please contact our office, as the proper handling of those ballots will need to be decided on a case by case basis. If you have additional questions related to affiliation, please contact the Secretary of State at 1-800-252-VOTE (8683).

All statutory references in this advisory are to the Texas Election Code ("the Code"), unless otherwise indicated.

Scenario 1:

The early voting ballot board ("EVBB") for the May 7, 2022 election is meeting to count ballots. They open a ballot secrecy envelope and there is a primary runoff ballot inside. As the ballot secrecy envelope would have been separated from the carrier envelope, there would be no way to determine which voter's ballot this is.

Procedure for Scenario 1:

This ballot cannot be counted nor retained in a carrier envelope to be forwarded to the EVBB for the runoff primary election. We suggest that the EVBB presiding judge make a notation on the ballot to explain the situation and why the ballot was not counted. The ballot should be stored in

the envelope that contains the other rejected ballots (which will still be in their carrier envelopes). *See* Tex. Elec. Code § 87.043. As there is no way to know which voter submitted this ballot, no notice of rejection can be sent to the voter. There is no authority in the Code to store a voted ballot outside of the jacket or carrier envelope. Additionally, while the EVBB qualified the voter's ballot with respect to the May 7, 2022 election, the EVBB did not qualify the runoff primary ballot. The May 7, 2022 EVBB does not have the authority to qualify a ballot for the runoff primary.

Scenario 2a:

The EVBB for the May 7, 2022 election reviews a carrier envelope (that is marked to show it is a carrier for the May 7, 2022 election) and determines it will accept the ballot. The EVBB proceeds to open the carrier envelope to remove the ballot secrecy envelope, but the ballot is not in a secrecy envelope. The EVBB is able to immediately determine that the ballot inside the carrier is a primary runoff ballot. In this scenario, the ballot is tied to a particular voter as the carrier envelope is still effectively with the ballot.

Procedure for Scenario 2a:

We recommend that the EVBB immediately put the ballot back in the carrier envelope and seal the envelope. The EVBB should deliver the carrier envelope to the early voting clerk, who should then place the carrier envelope in the jacket envelope for that voter for the primary runoff, ready to be forwarded to the EVBB for that election at the appropriate time. We also suggest that the presiding judge of the EVBB write a memo to detail what occurred, what actions were taken, and the date those actions were taken. The presiding judge and at least one other member of the EVBB should sign off on the memo. A copy of the memo should be placed in the voter's May 7, 2022 jacket envelope and a copy provided to the early voting clerk for placement in the voter's primary runoff jacket envelope. When the EVBB for the primary runoff election convenes and sees a carrier envelope for the May 7, 2022 election in the jacket envelope for the primary runoff, the memo will serve to inform that EVBB of what has occurred.

Scenario 2b:

As a corollary to Scenario 2a, as the voter's May 7, 2022 carrier envelope contained the primary runoff ballot, it is possible that the primary runoff carrier contains the May 7, 2022 ballot. Can the early voting clerk take the primary runoff carrier and provide it to the May 7, 2022 EVBB for processing?

Procedure for Scenario 2b:

As we can identify the voter under these scenarios, and hopefully contact the voter, the chain of custody can be well established. Regarding the carrier envelope for the runoff, which presumably contains the May 7, 2022 entity ballot, we suggest that the early voting clerk call the voter (if possible) to see if the voter can confirm that the May 7, 2022 ballot is probably in the runoff carrier envelope. If the voter confirms that he/she believes the ballot in the primary runoff carrier envelope is in fact the May 7, 2022 ballot (or if the early voting clerk is unable to reach voter), the early voting clerk may forward that carrier envelope to the May 7, 2022 EVBB to process as normal, if able to do so in a timely manner.

We do not recommend that the early voting clerk open the carrier envelope, with or without the voter's permission, to determine whether the carrier actually contains the May 7, 2022 ballot. Only the EVBB should open this carrier envelope, once the EVBB has determined that the carrier envelope was properly processed (signature comparison completed, voter eligibility determined, etc.). We suggest that the early voting clerk write a memo to detail what occurred, what actions were taken, and the date of those actions, and place a copy of the memo in the voter's May 7, 2022 jacket envelope. Another copy should be placed in the voter's primary runoff jacket envelope.

Scenario 3a:

The EVBB for the May 7, 2022 election qualifies the carrier envelope and finds two ballots, each inside a separate ballot secrecy envelope or neither ballot in a ballot secrecy envelope.

Procedure for Scenario 3a:

Under this limited circumstance, the EVBB may open the ballot secrecy envelopes, if used by the voter. (The EVBB has the discretion to open a ballot secrecy envelope in limited circumstances, such as to see if there is a statement of residence included in the secrecy envelope rather than the carrier envelope. It is also not a requirement for a ballot to be in the secrecy envelope.) If one of the ballots is for the May 7, 2022 election and one is for the primary runoff election, the May 7, 2022 ballot may be counted. The primary runoff ballot cannot be counted. There is **no authority** for the EVBB to, for example, copy the carrier envelope for the May 7, 2022 election and place the runoff ballot back in the carrier envelope for forwarding to the primary runoff EVBB (as in Scenario 2b, above).

We suggest that the presiding judge of the EVBB make a notation on the primary runoff ballot to explain the situation and why the ballot was not counted. The primary runoff ballot should be stored in the envelope that contains the rejected ballots (which will still be in their carrier envelopes). *See* Tex. Elec. Code § 87.043. We recommend sending this voter a written notification which explains why the voter's runoff ballot will not be counted, even though this EVBB is not the proper ballot board for the May 24, 2022 primary runoff ballot. The written notification issued by the EVBB for the May 7, 2022 election should also inform the voter that he/she may cast a provisional primary runoff ballot in person if they wish.

As above, we recommend that a memo be written and signed by the EVBB presiding judge to detail the actions taken. A copy of the memo should be placed in the voter's May 7, 2022 jacket envelope and a copy provided to the early voting clerk for placement in the voter's primary runoff jacket envelope.

Scenario 3b:

The EVBB for the May 7, 2022 election qualifies the carrier envelope, but later discovers that the ballot secrecy envelope contains both a May 7, 2022 ballot and a primary runoff ballot.

Procedure for Scenario 3b:

As in Scenario 3a, the May 7, 2022 ballot may be counted, but the May 24, 2022 primary runoff ballot cannot be counted. No notice can be sent to the voter as the identity of the voter cannot be

determined by the time the error (2 ballots in one secrecy envelope) is discovered. Again, we suggest that the presiding judge of the EVBB make a notation on the rejected primary runoff ballot and store it with the rejected May 7, 2022 ballots.

Scenario 4:

The early voting clerk receives two carrier envelopes from a voter. One carrier envelope is for the May 7, 2022 ballot and was properly executed by the voter, which includes the personal identification information required from the voter. The other carrier envelope is for the May 24, 2022 primary runoff and does not include the voter's personal identification information. Can the carrier envelope for the May 7, 2022 election be used by the EVBB for the primary runoff to qualify the voter's primary ballot?

Procedure for Scenario 4:

There is no authority for the signature verification committee ("SVC") for the primary runoff election to copy the carrier envelope from the May 7, 2022 election. Similarly, there is no authority for the EVBB in the primary runoff election to copy the carrier envelope from the May 7, 2022 election and use it to qualify the voter's primary runoff ballot. If the early voting clerk timely receives the defective carrier envelope for the May 24, 2022 primary runoff election, the clerk may use the corrective action process addressed in Section 86.011(d) of the Code to inform the voter of the existing defect(s). The corrective action process under Section 86.011(d) of the Code is addressed in more detail in the following advisories:

- **No. 2022-08** - NEW LAW: Senate Bill 1 – Opportunity to Correct Defects on Application for a Ballot by Mail and Carrier Envelope
- **No. 2022-12** - Additional Procedures Regarding Correction of Defects on Application for Ballot by Mail or Carrier Envelope

Similarly, the SVC/EVBB for the primary runoff election may also use the corrective action process addressed in these advisories to inform the voter of the defective carrier for the primary runoff.

KI:CA:HM