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SENATE BILL NO. 424

Offered January 11, 2006

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A *BILL to amend and reenact §§ 24.2-611, 24.2-629, and 24.2-802 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 24.2-625.2, 24.2-625.3, and 24.2-671.1, relating to election procedures; pollbooks, voting equipment requirements and audits, and recount procedures.*

 Patron—Devolites Davis

 Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-611, 24.2-629, and 24.2-802 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 24.2-625.2, 24.2-625.3, and 24.2-671.1, as follows:

§ 24.2-611. Form and signing of pollbooks; records of persons voting; electronic pollbooks.

A. The following oath shall be on a form prescribed by the State Board, administered to all officers of election, and kept by the officers of election with the pollbook:

"I do solemnly swear (or affirm) that I will perform the duties for this election according to law and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting this election."

The oath shall be administered to each officer of election by the general registrar, a member of the electoral board, or an officer of election designated by the general registrar and secretary of the electoral board, who shall be so identified on the form. The oath shall be signed by each officer of election and the person administering the oath. The pollbook shall be marked to identify the election for which it is used.

B. The State Board shall provide the pollbook pursuant to subdivision A 7 of § 24.2-404. The pollbook shall (i) provide a space for the officer of election to record the name and consecutive number of the voter at the time he offers to vote and (ii) be retained in accordance with the provisions governing pollbooks in this title. If the pollbook is provided in printed form, the State Board shall provide a numerical check sheet to be used to determine the consecutive number to be recorded with the name of the voter by the officer of election. If the pollbook is provided in electronic form, the consecutive number shall be entered automatically when the officer of election records that the voter has voted. *If the pollbook is provided in electronic form, it shall provide a paper copy record of the names of the voters and their associated identifying information on a contemporaneous and continuous basis as the voters are recorded. The election officers shall verify that the name printed on the paper copy record matches the voter's name on the electronic pollbook.* When the name and number of the last qualified voter have been entered on the pollbook, the officer of election responsible for that pollbook shall sign a statement on the check sheet, or on a separate form if an electronic pollbook is used, certifying the number of qualified registrants who have voted. The State Board shall provide instructions to the local electoral boards, general registrars, and officers of election for the conduct of the election and for procedures for entering a voting record for each voter and recording each voter's name, including voters unable to enter the polling place, and for verifying the accurate entry of the voting record for each registrant on the Virginia Voter Registration System.

C. The State Board shall incorporate safeguards to assure that the records of the election, including the pollbook, voter count sheets, or other alternative records, will provide promptly an accurate and secure record of those who have voted. The State Board may provide for the pollbook to be in a paper format or in an electronic format if funds are appropriated to cover the costs associated with the provision of a pollbook in an electronic format. The State Board shall be authorized to conduct pilot programs in one or more localities, with the consent of the electoral board of the locality, to test the use of an electronic pollbook in one or more precincts, notwithstanding any other provision of law to the contrary.

D. *Within 10 days after the election, the local electoral board shall meet publicly to initiate an audit of at least 5% of the precincts that used electronic pollbooks and shall select the precincts by a drawing or other random method. The local electoral board shall compare the paper record produced by the electronic pollbook in the audited precincts with the information on the electronic pollbook. Audits shall be conducted in public, and candidates and political parties shall be invited to provide observers.*

§ 24.2-625.2. Voting equipment; prohibition on wireless communications.

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59 *No direct recorded electronic voting machine, optical ballot tabulator, or other equipment used to*
60 *enter or count votes shall have any form of wireless or power cable based electronic communication*
61 *capability. Any device that is manufactured with a wireless or power cable based communication*
62 *capability shall have that feature permanently and physically disabled before it may be used in any*
63 *election. It shall not be sufficient to temporarily disable a wireless communication capability by a*
64 *software configuration whether or not a cardkey is used to effect the disabling.*

65 *Wireless communications features include, but are not limited to, radio frequency and infrared ports.*
66 *Permanent physical disabling can be accomplished by cutting the wires that support the feature or by*
67 *removing the hardware circuits or ports. Power cable based communication refers to the capability to*
68 *communicate electronically using power cables as a transmission medium.*

69 *§ 24.2-625.3. Review of source code for software used in voting equipment.*

70 *No direct recorded electronic voting machine, optical ballot tabulator, or other equipment used to*
71 *enter or count votes shall be certified for use in elections unless the vendor supplies in escrow with the*
72 *State Board the source code for any software used to program the particular equipment for which*
73 *certification is requested. The Board shall appoint technical experts with software engineering and*
74 *computer security credentials and expertise to examine the source code and report to the Board prior to*
75 *certification whether the software is likely to perform correctly and has appropriate security safeguards.*
76 *The Board shall ensure that the technical experts have at least 30 days for the source code review and*
77 *to report their findings. The Board shall make such reports available to the public. The Board shall*
78 *consider the software review reports before certifying all voting systems and shall have the authority to*
79 *deny certification of systems that receive negative reviews. The Board shall also make the source code*
80 *available, if requested by any state political party chairman, for review by a committee of no more than*
81 *three technical experts selected by the political party.*

82 *The Board may require that any technical experts that review vendor source codes agree to refrain*
83 *from making the source code available to third parties, but such agreements shall not prohibit the*
84 *technical experts from making a public report on the engineering quality, accuracy, and security aspects*
85 *of the software reviewed.*

86 *The Board shall use the best technical means possible to ensure that the software provided by a*
87 *vendor is exactly the same as the software that is installed upon the voting equipment being certified.*
88 *Such means may include comparing checksums or digital signatures of the software installed on all*
89 *voting machines with those produced by the binary image of the version of the software that was*
90 *reviewed. Voting systems that were certified prior to the enactment of this requirement must meet the*
91 *review and escrow requirements of this section by June 1, 2007, to retain certification.*

92 *§ 24.2-629. Authorized use of electronic systems and ballots.*

93 *A. Any person, firm, or corporation hereinafter referred to as the "vendor," manufacturing, owning,*
94 *or offering for sale any electronic voting or counting system and ballots designed to be used with such*
95 *equipment may apply to the State Board, in the manner prescribed by the Board, to have examined a*
96 *production model of such equipment and the ballots used with it. The Board may require the vendor to*
97 *pay a reasonable application fee when he files his request for testing or certification of new or upgraded*
98 *voting equipment. Receipts from such fees shall be credited to the Board for reimbursement of testing*
99 *and certification expenses. In addition to any other materials that may be required, a current statement of*
100 *the financial status of the vendor, including any assets and liabilities, shall be filed with the Board; if*
101 *the vendor is not the manufacturer of the equipment for which application is made, such a statement*
102 *shall also be filed for the manufacturer. These statements shall be exempt from the provisions of the*
103 *Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The Board shall also require, at a site of its*
104 *choosing, a demonstration of such system and ballots and may require that a production model of the*
105 *system and a supply of ballots be provided to the Board for testing purposes.*

106 *B. The provisions of this title pertaining to mechanical voting devices and ballots shall be deemed*
107 *applicable to such equipment and ballots provided that (i) the counting equipment used with punchcard*
108 *or mark sense ballots shall not be required to prevent a voter from voting for a greater number of*
109 *candidates than he is lawfully entitled to; (ii) the provisions of this title pertaining to ballot squares shall*
110 *not be applicable to punchcard or mark sense ballots; and (iii) any system approved pursuant to this title*
111 *shall segregate ballots containing write-in votes from all others; and (iv) any direct electronic (DRE)*
112 *voting device shall be equipped to provide a paper copy record of the votes cast on a contemporaneous*
113 *and continuous basis as the votes are cast and accumulated on the device.*

114 *Any direct electronic voting device shall generate a complete paper record showing all votes cast by*
115 *each voter that is visually verifiable by the voter before his vote is cast and he leaves the device. The*
116 *paper record shall be in a format that protects voter privacy and is practical for supporting audits and*
117 *recounts.*

118 *In the case of a discrepancy between the paper and electronic totals, the paper record shall take*
119 *precedence in a recount unless the court finds clear and convincing evidence that there is reason to do*
120 *otherwise.*

Every electronic voting system shall ensure voting in absolute secrecy, and systems requiring the voter to vote a ballot that is inserted in an electronic counting device shall provide for secrecy of the ballot and a method to conceal the voted ballot. Systems requiring the voter to vote a ballot that is inserted in an electronic counting device shall report, if possible, the number of ballots on which a voter voted for a lesser number of candidates for an office than the number he was lawfully entitled to vote and the number of ballots on which a voter voted for a greater number of candidates than the number he was lawfully entitled to vote. Electronic voting devices shall be programmable, if possible, to allow such undervoted and overvoted ballots to be separated when necessary.

B1. The system shall provide the voter with an opportunity to correct any error before a permanent record is preserved.

C. After its examination of the equipment, ballots, and other materials submitted by the vendors, the Board shall prepare and file in its office a report of its finding as to (i) the apparent capability of such equipment to accurately count, register, and report votes; (ii) whether the system can be conveniently used without undue confusion to the voter; (iii) its accessibility to voters with disabilities; (iv) whether the system can be safely used without undue potential for fraud; (v) the ease of its operation and transportation by voting equipment custodians and officers of election; (vi) the financial stability of the vendor and manufacturer; (vii) whether the system meets the requirements of this title; (viii) whether the system meets federal requirements; and (ix) whether, in the opinion of the Board, the potential for approval of such system is such as to justify further examination and testing.

D. If the Board determines that there is such potential and prior to its final determination as to approval or disapproval of such system, the Board shall obtain a report by an independent electronics or engineering consultant as to (i) whether the system accurately counts, registers, and reports votes; (ii) whether it is capable of storing and retaining existing votes in a permanent memory in the event of power failure during and after the election; (iii) the number of separate memory capabilities for the storage of recorded votes; (iv) its mechanical and electronic perfections and imperfections; (v) the audit trail provided by the system; (vi) the anticipated frequency of repair; (vii) the ease of repair; (viii) the anticipated life of the equipment; (ix) its potential for fraudulent use; (x) its accessibility to voters with disabilities; (xi) the ease of its programming, transportation, and operation by voting equipment custodians and officers of election; and (xii) any other matters deemed necessary by the Board. Failure by an applicant to cooperate with the consultant by furnishing information and production equipment and ballots requested shall be deemed a withdrawal of the application, but nothing in this section shall require the disclosure of trade secrets by the applicant. If such trade secrets are essential to the proper analysis of the system and are provided for that reason, the consultant shall subscribe to an oath subject to the penalty for perjury that he will neither disclose nor make use of such information except as necessary for the system analysis. The report of the consultant shall be filed in the office of the Board.

E. If the Board determines that there is potential for approval of the system and prior to its final determination, the Board shall also require that the system be tested in an actual election in one or more counties or cities. Its use at such election shall be as valid for all purposes as if it had been legally approved by the Board and adopted by the counties or cities.

F. If, following testing, the Board approves any electronic system and its ballots for use, the Board shall so notify the electoral boards of each county and city. Systems so approved may be adopted for use at elections as herein provided. No form of electronic system and ballots not so approved shall be adopted by any county or city. Any electronic system and ballots approved for use by the Board shall be deemed to meet the requirements of this title and any applicable federal laws, and their use in any election shall be valid.

§ 24.2-671.1. Random audits of voter-verified paper records.

Each electoral board shall publicly conduct a random drawing to select at least five percent of the precincts for a postelection manual audit of the voter-verified paper records. The audit shall be performed using the same procedures established by the Board for conducting hand counts of voter-verified paper records during recounts. The audited precincts shall include all years and models of the election devices producing voter-verified paper records, including, but not limited to, DREs and optical scan tabulators. The drawing shall not occur until such time as all initial vote counts have been completed and announced publicly, but shall be completed with 48 hours of that time. Any candidate, qualified voter, or political party may petition the electoral board to include additional precincts in the audit. Immediately following the random drawing, the local Board shall publicly announce the time and location of the audits. Candidates and political parties may have representatives observe the audits.

No election results shall be certified until all audits have been completed.

If the local board finds that any of the hand counts conducted under this section show a discrepancy between the hand count and the initial device tally that totals more than 0.1% of the vote in the audited precincts, the local board shall conduct audits at such additional precincts as it considers appropriate to ensure the accuracy of the results.

182 *With respect to votes cast other than at the precinct on the date of the election or votes cast by*
183 *provisional ballot on the date of the election that are certified and counted by the electoral board on or*
184 *after the date of the election, including votes cast by absent uniformed services voters and overseas*
185 *voters under the Uniformed and Overseas Citizens Absentee Voting Act, the electoral board shall count*
186 *by hand the applicable voter-verified paper records and compare its count with the machine tally of*
187 *those votes.*

188 *If an error is detected with a voting device during the course of an audit, the results obtained from*
189 *hand counting the voter-verified paper records shall form the official election results.*

190 *At the conclusion of each audit, the local board shall announce and publish the results of the audit,*
191 *and shall include in the announcement a comparison of the results of the election in the precinct as*
192 *determined by the local board under the audit and the initial tally in the precinct as previously*
193 *announced by the local board.*

194 § 24.2-802. Procedure for recount.

195 A. The State Board of Elections shall promulgate standards for (i) the proper handling and security
196 of voting and counting devices, ballots, and other materials required for a recount, (ii) accurate
197 determination of votes based upon objective evidence and taking into account the counting device and
198 form of ballots approved for use in the Commonwealth, and (iii) any other matters that will promote a
199 timely and accurate resolution of the recount. The chief judge of the circuit court or the full recount
200 court may, consistent with State Board of Elections standards, resolve disputes over the application of
201 the standards and direct all other appropriate measures to ensure the proper conduct of the recount.

202 The recount procedures to be followed throughout the election district shall be as uniform as
203 practicable, taking into account the types of ballots and voting devices in use in the election district.

204 B. Within seven calendar days of the filing of the petition for a recount of any election other than an
205 election for presidential electors, or within five calendar days of the filing of a petition for a recount of
206 an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing
207 at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to
208 review by the full court. As part of the preliminary hearing, the chief judge may permit the petitioner
209 and his counsel, together with each other party and his counsel and at least two members of the
210 electoral board and the custodians, to examine any mechanical or direct electronic voting device of the
211 type that prints returns when the print-out sheets are not clearly legible. The petitioner and his counsel
212 and each other party and their counsel under supervision of the electoral board and its agents shall also
213 have access to pollbooks and other materials used in the election for examination purposes, provided
214 that individual ballots cast in the election shall not be examined at the preliminary hearing. The chief
215 judge during the preliminary hearing shall review all security measures taken for all ballots and voting
216 devices and direct, as he deems necessary, all appropriate measures to ensure proper security to conduct
217 the recount.

218 The chief judge, subject to review by the full court, may set the place or places for the recount and
219 may order the delivery of election materials to a central location and the transportation of voting devices
220 to a central location in each county or city under appropriate safeguards.

221 After the full court is appointed under § 24.2-801 or § 24.2-801.1, it shall call a hearing at which all
222 motions shall be disposed of and the rules of procedure shall be fixed finally. The court shall call for
223 the advice and cooperation of the State Board or any local electoral board, as appropriate, and such
224 boards shall have the duty and authority to assist the court. The court shall fix procedures that shall
225 provide for the accurate determination of votes in the election.

226 The determination of the votes in a recount shall be based on votes cast in the election and shall not
227 take into account (i) any absentee ballots or provisional ballots sought to be cast but ruled invalid and
228 not cast in the election, (ii) ballots cast only for administrative or test purposes and voided by the
229 officers of election, or (iii) ballots spoiled by a voter and replaced with a new ballot.

230 The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the
231 filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be
232 used pursuant to § 24.2-803 in contesting the results of an election.

233 C. The court shall permit each candidate, or petitioner and governing body or chief executive officer,
234 to select an equal number of the officers of election to be recount officials and to count ballots, or in
235 the case of mechanical or direct electronic voting devices to redetermine the vote. The number shall be
236 fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may
237 permit each party to the recount to submit a list of alternate officials in the number the court directs.
238 There shall be at least one team of recount officials to recount paper ballots and to redetermine the vote
239 cast on mechanical or direct electronic devices of the type that prints returns for the election district at
240 large in which the recount is being held. There shall be at least one team from each locality in the
241 election district to redetermine the vote on other types of mechanical voting devices. There shall be at
242 least one team from each locality using electronic counting devices to insert the ballots into one or more
243 counting devices. The counting devices shall be programmed to count only votes cast for parties to the

recount or for or against the question in a referendum recount. Each team shall be composed of one representative of each party.

The court may provide that if, at the time of the recount, any recount official fails to appear, the remaining recount officials present shall appoint substitute recount officials who shall possess the same qualifications as the recount officials for whom they substitute. The court may select pairs of recount coordinators to serve for each county or city in the election district who shall be members of the county or city electoral board and represent different political parties. The court shall have authority to summon such officials and coordinators. On request of a party to the recount, the court shall allow each party to appoint one representative observer for each team of recount officials. The expenses of its representatives shall be borne by each party.

D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used and any or all ballots cast at the election, or may assume supervision thereof through the recount coordinators and officials.

The redetermination of the vote in a recount shall be conducted as follows:

1. For paper ballots, the recount officials shall hand count the ballots using the standards promulgated by the State Board pursuant to subsection A.

2. For mechanical lever machines without printouts, the recount officials shall open the machines and read the counters.

3. For mechanical lever machines with printouts and direct recording electronic (DRE) voting machines ~~(DREs) not designed to produce a voter-verified paper record~~, the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.

4. For optical scan tabulators *and DREs designed to produce a voter-verified paper record*, the recount officials shall ~~first examine the printout to redetermine the vote. Only randomly select at least five percent of the precincts, beyond any precincts audited during the normal certification process, for a manual audit to determine the accuracy of the voting equipment.~~ (i) *For the audited precincts, the recount officials shall count the votes for the office or issue in question in the recount by hand using the standards promulgated by the State Board pursuant to subsection A.* (ii) *If the totals found in the hand recount do not match the totals reported by the tabulators or DREs in the audited precincts within the more stringent tolerance of either 0.1 % of the totals reported in the hand recount or the margin of victory in the audited precincts reported prior to the recount, then the recount officials shall count the votes by hand in the remaining precincts using the same standards promulgated by the State Board. In that case, the State Board shall also conduct an investigation into the reasons for the discrepancies and prepare a report for the public.* (iii) *If the totals found in the hand recount of the audited precincts match the totals reported by the tabulators or DREs within the tolerances specified in clause (ii), then the recount officials shall rely upon the tabulator or DRE results for the remaining precincts. In those precincts only if the printout is not clear, or on the request of the court, the recount officials shall rerun all the ballots through a tabulator programmed to count only the votes for the office or issue in question in the recount and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set aside and any ballots not accepted by the tabulator shall be hand counted using the standards promulgated by the State Board pursuant to subsection A.*

5. For punchcard tabulators, the recount officials shall first examine the printout to redetermine the vote. Only if the printout is not clear, or on the request of the court, the recount officials shall rerun all the ballots through a tabulator programmed to count only the votes for the office or issue in question in the recount and to set aside all ballots containing write-in votes and, if possible, overvotes and undervotes. The ballots that are set aside and any ballots not accepted by the tabulator shall be hand counted using the standards promulgated by the State Board pursuant to subsection A and the standards set forth in this subdivision. The following standards shall apply in determining whether a ballot has been properly voted and should be counted. A chad is the small piece of a punch card ballot that, when removed by the voter in the voting process, leaves a hole that is recognizable by a ballot tabulator. A ballot on which the chad indicating the selection of a candidate or position on an issue is broken or separated from the card at two or more corners shall be deemed a vote and counted; a chad on which only one corner is broken or separated from the card shall not be considered a vote. No other depression, dimple, or other mark on the ballot shall be counted as a vote. On any ballot on which two or more corners of the chad indicating the selection of a candidate or position have been broken or separated from the card and the voter has also cast a vote for another candidate for the same office or position on the same issue, the partially punched chad also shall be deemed a vote and, if the voter has cast more votes than the number for which he was lawfully entitled to vote, the ballot shall be deemed an overvote and shall not be counted with respect to that office or issue.

There shall be only one redetermination of the vote in each precinct.

305 At the conclusion of the recount of each precinct, the recount officials shall write down the number
306 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots
307 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates
308 or for and against the question. They shall submit the ballots or the statement of results used, as to the
309 validity of which questions exist, to the court. The written statement of any one recount official
310 challenging a ballot shall be sufficient to require its submission to the court. If, on all mechanical or
311 direct electronic voting devices, the number of persons voting in the election, or the number of votes
312 cast for the office or on the question, totals more than the number of names on the pollbooks of persons
313 voting on the devices, the figures recorded by the devices shall be accepted as correct.

314 At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
315 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
316 votes. After determining all matters pertaining to the recount and redetermination of the vote as raised
317 by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for
318 each party to the recount and declare the person who received the higher number of votes to be
319 nominated or elected, as appropriate, or (b) the votes for and against the question and declare the
320 outcome of the referendum.

321 E. Costs of the recount shall be assessed against the counties and cities comprising the election
322 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
323 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
324 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
325 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
326 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
327 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
328 petitions for a recount, the court may assess costs in an equitable manner between the counties and
329 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date
330 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

331 F. The court shall determine the costs of the recount subject to the following limitations: (i) no per
332 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of
333 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the
334 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed
335 only if they serve.

336 G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety
337 with the court in the amount of \$10 per precinct in the area subject to recount. If the petitioner wins the
338 recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to
339 the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.

340 H. The recount proceeding shall be final and not subject to appeal.

341 I. For the purposes of this section:

342 "Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or
343 positions than the number for which he was lawfully entitled to vote and no vote shall be counted with
344 respect to that office or issue.

345 "Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or
346 positions than the number for which he was lawfully entitled to vote.