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SENATE BILL NO. 840

Offered January 10, 2007

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A BILL to amend and reenact §§ 24.2-626 and 24.2-802 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 24.2-625.2 and 24.2-671.1, relating to voting equipment and the required use of optical scan tabulators; a ban on wireless communications on voting equipment; postelection equipment audits; and recount procedures.

Patrons—Devolites Davis and Deeds

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-626 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 and 24.2-671.1 as follows:

§ 24.2-625.2. Prohibition of wireless communications on voting equipment.

No optical ballot tabulator or other equipment used to enter or count votes shall have any form of wireless electronic communication capability. Any device that is manufactured with a wireless communication capability shall have that feature permanently and physically disabled before it may be used in any election. It shall not be sufficient to temporarily disable a wireless communication capability by a software configuration whether or not a cardkey is used to effect the disabling.

Wireless communications features include but are not limited to radio frequency and infrared ports. Permanent physical disabling shall be accomplished by cutting wires that support the feature or removing hardware circuits or ports.

§ 24.2-626. Governing bodies shall acquire optical scan tabulator voting or counting systems.

A. The governing body of each county having an optional form of government and of each city shall provide for the use of ~~mechanical or electronic~~ optical scan tabulator voting or counting systems, of a kind approved by the State Board, at every precinct and for all elections held in the county, the city, or any part of the county or city. The governing body of every other county shall provide for the use of such systems at every precinct having 750 or more registered voters. No county shall divide or create precincts so that resulting precincts will contain fewer than 750 registered voters, in order to avoid the requirements of this section.

Each county and city governing body shall also provide a paper ballot marking device, of a kind approved by the State Board, to assist disabled voters in producing an optical scan paper ballot at every precinct and for all elections held in the county, city, or any part of the county or city.

No county or city governing body may use direct recording electronic (DRE) voting machines in an election other than as a means to mark a paper ballot for use with an optical scan tabulator.

Each county and city governing body shall purchase, lease, lease purchase, or otherwise acquire such systems and may provide for the payment therefor in the manner it deems proper. Systems of different kinds may be adopted for use and be used in different precincts of the same county or city, or within a precinct or precincts in a county or city, subject to the approval of the State Board.

Any county may acquire such systems for precincts containing fewer than 750 registered voters.

The governing body of a town may provide for the use of paper ballots, in lieu of such systems, in elections for town offices and in town referendum elections if every town precinct contains 500 or fewer registered voters.

B. Notwithstanding the provisions of subsection A of this section, the governing body of any county may elect to use paper ballots throughout the county so long as the county meets the following criteria: (i) the population of the county is less than 7,000 according to the ~~1990~~ most recent United States Census; (ii) the county is divided into six precincts; and (iii) no precinct contains 1,000 or more registered voters; and ~~(iv) the county has not provided for the use of mechanical or electronic voting or counting systems in any precinct prior to July 1, 1996.~~

§ 24.2-671.1. Random audits of optical scan tabulators.

A. Each local electoral board shall publicly conduct a random drawing to select a sample set of optical scan tabulators for a postelection manual audit to test the accuracy of the machines. The audit shall be performed by local electoral boards using procedures established by the State Board of Elections for conducting hand counts of ballots. 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. Immediately following the random drawing, the local electoral board shall publicly announce the time and location of the audit. Candidates and political parties may have representatives observe the

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59 audits.

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

61 *C. Any candidate, qualified voter, or political party may petition a local electoral board to include*
62 *additional specific machines or precincts in the audit by showing cause to question the tally of those*
63 *specific machines or precincts.*

64 *D. Each local electoral board must audit at least two percent of the machines in jurisdictions with*
65 *50,000 or more registered voters and at least five percent of the machines in jurisdictions with fewer*
66 *than 50,000 registered voters. The machines selected for the audit shall include at least one machine*
67 *from each model, make, and year of the optical scan tabulators, whether used at a precinct on election*
68 *day or for any form of absentee ballot counting.*

69 *E. If the audit discloses a significant discrepancy between any of the hand counts and the initial*
70 *device tally for the audited machines, the local electoral board shall, in consultation with the State*
71 *Board of Elections, conduct audits of such additional machines as it considers appropriate to ensure the*
72 *accuracy of the results. A significant discrepancy is any discrepancy greater than one-tenth of one*
73 *percent of the hand counted total for that machine. The State Board of Elections, at the request of a*
74 *local electoral board, may decrease this threshold as it considers appropriate to ensure the accuracy of*
75 *the results.*

76 *F. If a significant discrepancy is detected with a voting device during the course of an audit, the*
77 *results obtained from hand counting the ballots shall be the official election results. If no significant*
78 *discrepancy is detected during an audit, the results produced by the vote counting machine shall be the*
79 *official election results.*

80 *G. At the conclusion of each audit, the local electoral board shall announce publicly the results of*
81 *the audit of the machines in its jurisdiction. The announcement shall include a comparison of the*
82 *audited election results and the initial tally for each machine audited.*

83 § 24.2-802. Procedure for recount.

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

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

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

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

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

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

119 *The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the*
120 *filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be*

used pursuant to § 24.2-803 in contesting the results of an election.

C. The court shall permit each candidate, or petitioner and governing body or chief executive officer, to select an equal number of the officers of election to be recount officials and to count ballots, or in the case of mechanical or direct electronic voting devices to redetermine the vote. The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may permit each party to the recount to submit a list of alternate officials in the number the court directs. There shall be at least one team of recount officials to recount paper ballots and to redetermine the vote east on mechanical or direct electronic devices of the type that prints returns for the election district at large in which the recount is being held. There shall be at least one team from each locality in the election district to redetermine the vote on other types of mechanical voting devices. There shall be at least one team from each locality using electronic counting devices to insert the ballots into one or more 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 the request of any party to the recount, the court shall allow that party to appoint one representative observer for each team of recount officials. The representative observers shall have an unobstructed view of the work of the 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 machines (DREs) *not equipped 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, the recount officials shall first examine the printout to redetermine the vote randomly select at least three percent of the tabulators, beyond any tabulators audited during the normal certification process, for a manual audit to determine the accuracy of the equipment. Any candidate, qualified voter, or political party may petition an electoral board to include additional specific tabulators in the audit by showing cause to question that tabulator's tally.

a. For the audited tabulators, 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.

b. If the totals found in the hand recount show any significant discrepancy compared with the totals reported by the audited tabulators, then (i) the recount officials shall count the votes by hand in the remaining precincts using the same State Board standards and (ii) the State Board shall investigate the discrepancies and prepare a report for the public. Any discrepancy greater than one-tenth of one percent of the hand counted total for the tabulator shall be considered significant. The State Board of Elections, upon request of a local electoral board or upon petition of a candidate, qualified voter, or political party, may lower this threshold.

c. If the totals found in the hand recount of the audited tabulators match the totals reported by the tabulators within the threshold provided in subdivision b, then the recount officials shall rely upon the tabulator results for the remaining tabulators. In these precincts relying upon the tabulator results, ~~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, any ballots not accepted by the tabulator, and any ballots for which a tabulator could not be programmed to meet the programming requirements of this subdivision, 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.

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

At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and votes. After determining all matters pertaining to the recount and redetermination of the vote as raised by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for each party to the recount and declare the person who received the higher number of votes to be nominated or elected, as appropriate, or (b) the votes for and against the question and declare the outcome of the referendum. The State Board shall post on the Internet any and all changes made during the recount to the results as previously certified by it pursuant to § 24.2-679.

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

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

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

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

I. For the purposes of this section:

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

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

2. That the provisions of this act shall become effective on January 1, 2009.