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SENATE BILL NO. 1076

Offered January 12, 2011

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A BILL to amend and reenact § 24.2-802 of the Code of Virginia, relating to elections; recount procedures.

Patron—Barker

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That § 24.2-802 of the Code of Virginia is amended and reenacted as follows:

§ 24.2-802. Procedure for recount.

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

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

In preparation for the recount, the clerks of the circuit courts shall (a) secure all paper ballots and other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely locked except when access is necessary for the clerk and his staff; and (d) certify that these security measures have been taken in whatever form is deemed appropriate by the chief judge.

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

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

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

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

The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the 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 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

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SB1076

59 party to the recount to submit a list of alternate officials in the number the court directs. There shall be
60 at least one team of recount officials to recount paper ballots and to redetermine the vote cast on direct
61 electronic devices of the type that prints returns for the election district at large in which the recount is
62 being held. There shall be at least one team from each locality using electronic counting devices to
63 insert the ballots into one or more counting devices. The counting devices shall be programmed to count
64 only votes cast for parties to the recount or for or against the question in a referendum recount. Each
65 team shall be composed of one representative of each party.

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

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

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

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

81 2. For direct recording electronic machines (DREs), the recount officials shall open the envelopes
82 with the printouts and read the results from the printouts. If the printout is not clear, or on the request
83 of the court, the recount officials shall rerun the printout from the machine or examine the counters as
84 appropriate.

85 3. For optical scan tabulators, the recount officials shall rerun all the ballots through a tabulator
86 programmed to count only the votes for the office or issue in question in the recount and to set aside all
87 ballots containing write-in votes, overvotes, and undervotes. The ballots that are set aside, any ballots
88 not accepted by the tabulator, and any ballots for which a tabulator could not be programmed to meet
89 the programming requirements of this subdivision, shall be hand counted using the standards
90 promulgated by the State Board pursuant to subsection A. *If the total number of paper ballots reported*
91 *as counted by the tabulator plus the total number of ballots set aside by the tabulator do not equal the*
92 *total number of ballots rerun through the tabulator, then all ballots cast on optical scan equipment for*
93 *that precinct shall be set aside to be counted by hand using the standards promulgated by the State*
94 *Board pursuant to subsection A. Prior to running the ballots through the tabulator, the recount officials*
95 *shall ensure that logic and accuracy tests have been successfully performed on each tabulator after the*
96 *tabulator has been programmed. The result calculated for ballots accepted by the tabulator during the*
97 *recount shall be considered the correct determination for those ballots unless the court finds sufficient*
98 *cause to rule otherwise.*

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

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

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

117 E. Costs of the recount shall be assessed against the counties and cities comprising the election
118 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
119 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
120 or elected and the candidate petitioning for the recount a difference of not more than one-half of one

121 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
122 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
123 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
124 petitions for a recount, the court may assess costs in an equitable manner between the counties and
125 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date
126 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

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

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

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

137 I. For the purposes of this section:

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

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