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SENATE BILL NO. 190

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Privileges and Elections)

(Patron Prior to Substitute—Senator Miller)

Senate Amendments in [] — February 12, 2016

A *BILL to amend and reenact §§ 24.2-626, 24.2-627, 24.2-639, 24.2-657, 24.2-659, 24.2-801, 24.2-801.1, and 24.2-802 of the Code of Virginia, relating to voting systems; use of direct recording electronic machines.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-626, 24.2-627, 24.2-639, 24.2-657, 24.2-659, 24.2-801, 24.2-801.1, and 24.2-802 of the Code of Virginia are amended and reenacted as follows:

§ 24.2-626. Governing bodies shall acquire electronic voting systems.

A. The governing body of each county and city shall provide for the use of electronic voting or counting machines 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.

Each county and city governing body shall purchase, lease, lease purchase, or otherwise acquire such machines 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.

On and after July 1, 2007, no county or city shall acquire any direct recording electronic machine (DRE) for use in elections in the county or city except as provided herein:

1. DREs acquired prior to July 1, 2007, may be used in elections in the county or city for the remainder of their useful life.

2. Any locality that acquired DREs prior to July 1, 2007, may acquire DREs on a temporary basis to conduct an election when the existing DRE inventory is insufficient to conduct the election because all or part of its inventory is under lock or seal as required by § 24.2-659.

3. Any locality may acquire DREs from another locality within the Commonwealth, from among their existing inventories, for the expressed purpose of providing accessible voting equipment as required by § 24.2-626.1. The local electoral board shall notify the State Board when acquiring any DRE under this provision and shall certify to the State Board that the DRE acquired under this provision is necessary to meet accessible voting requirements.

4. Any locality may modify its existing DREs to comply with federal or state law requirements to provide accessible voting equipment. Any modifications made to existing DREs must be authorized by the State Board of Elections prior to modification.

B. On and after July 1, [2017 2018], no county or city shall use any direct recording electronic machine (DRE) in elections in the county or city.

§ 24.2-627. Electronic voting systems; number required.

A. The governing body of any county or city that adopts for use at elections direct recording electronic machines shall provide for each precinct at least the following number of voting machines:

In each precinct having not more than 750 registered voters, 1;

In each precinct having more than 750 but not more than 1,500 registered voters, 2;

In each precinct having more than 1,500 but not more than 2,250 registered voters, 3;

In each precinct having more than 2,250 but not more than 3,000 registered voters, 4;

In each precinct having more than 3,000 but not more than 3,750 registered voters, 5;

In each precinct having more than 3,750 but not more than 4,500 registered voters, 6;

In each precinct having more than 4,500 but not more than 5,000 registered voters, 7.

B. The governing body of any county or city that adopts for use at elections ballot scanner machines shall provide for each precinct at least one voting booth with a marking device for each 425 registered voters or portion thereof and shall provide for each precinct at least one scanner. However, each precinct having more than 4,000 registered voters shall be provided with not less than two scanners at a presidential election, unless the governing body, in consultation with the general registrar and the electoral board, determines that a second scanner is not necessary at any such precinct on the basis of voter turnout and the average wait time for voters in previous presidential elections.

C. B. The local electoral board of any county or city shall be authorized to conduct any May general election, primary election, or special election held on a date other than a November general election with the number of voting or counting machines systems it determines is appropriate for each precinct, notwithstanding the provisions of subsections subsection A and B.

D. C. For purposes of applying this section, an electoral board may exclude persons voting absentee in its calculations, and if it does so, the electoral board shall send to the Department a statement of the

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number of voting systems to be used in each precinct. If the State Board finds that the number of voting systems is not sufficient, it may direct the local board to use more voting systems.

§ 24.2-639. Duties of officers of election.

The officers of election of each precinct at which voting ~~or counting machines systems~~ are used shall meet at the polling place by 5:15 a.m. on the day of the election and arrange the equipment, furniture, and other materials for the conduct of the election. The officers of election shall verify that all required equipment, ballots, and other materials have been delivered to them for the election. The officers shall post at least two instruction cards for direct recording electronic machines conspicuously within the polling place.

The keys to the equipment and any electronic activation devices that are required for the operation of electronic voting equipment shall be delivered, prior to the opening of the polls, to the officer of election designated by the electoral board in a sealed envelope on which has been written or printed the name of the precinct for which it is intended. The envelope containing the keys and any electronic activation devices shall not be opened until all of the officers of election for the precinct are present at the polling place and have examined the envelope to see that it has not been opened. The equipment shall remain locked against voting until the polls are formally opened and shall not be operated except by voters in voting.

Before opening the polls, each officer shall examine the equipment and see that no vote has been cast and that the counters register zero. The officers shall conduct their examination in the presence of the following party and candidate representatives: one authorized representative of each political party or independent candidate in a general or special election, or one authorized representative of each candidate in a primary election, if such representatives are available. Each authorized representative shall be a qualified voter of any jurisdiction of the Commonwealth. Each representative, who is not himself a candidate or party chairman, shall present to the officers of election a written statement designating him to be a representative of the party or candidate and signed by the county or city chairman of his political party, the independent candidate, or the primary candidate, as appropriate. If the county or city chairman is unavailable to sign such a written designation, such a designation may be made by the state or district chairman of the political party. However, no written designation made by a state or district chairman shall take precedence over a written designation made by the county or city chairman. Such statement, bearing the chairman's or candidate's original signature, may be photocopied and such photocopy shall be as valid as if the copy had been signed.

If any counter, other than a protective or private counter, on a ballot scanner ~~or direct recording electronic machine~~ is found not to register zero, the officers of election shall immediately notify the electoral board which shall, if possible, substitute a machine in good working order, that has been prepared and tested pursuant to § 24.2-634. No ballot scanner ~~or direct recording electronic machine~~ shall be used if any counter, other than a protective or private counter, is found not to register zero.

§ 24.2-657. Determination of vote on voting systems.

In the presence of all persons who may be present lawfully at the time, giving full view of the voting systems or printed return sheets, the officers of election shall determine and announce the results as shown by the counters or printed return sheets, including the votes recorded for each office on the write-in ballots, and shall also announce the vote on every question. The vote as registered shall be entered on the statement of results. When completed, the statement shall be compared with the number on the counters on the equipment or on the printed return sheets. If, on ~~direct recording electronic machines any ballot scanner~~, the number of persons voting in the election, or the number of votes cast for any office or on any question, totals more than the number of names on the pollbooks of persons voting on the machines, then the figures recorded by the machines shall be accepted as correct. A statement to that effect shall be entered by the officers of election in the space provided on the statement of results.

§ 24.2-659. Locking voting systems after election and delivering keys to clerk; printed returns as evidence.

A. If the voting ~~or counting machine system~~ is secured by the use of equipment keys, after the officers of election lock and seal each machine, the equipment keys shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the election precinct, the number of each machine, the number on the seal, and the number of the protective counter, if one, on the machine. The sealed envelope shall be delivered by one of the officers of the election to the clerk of the circuit court where the election was held. The custodians of the voting equipment shall enclose and seal in an envelope, properly endorsed, all other keys to all voting equipment in their jurisdictions and deliver the envelope to the clerk of the circuit court by noon on the day following the election. If the voting ~~or counting machines systems~~ are secured by the use of equipment keys or electronic activation devices that are not specific to a particular machine, after the officers of election lock and seal each machine, the equipment keys and electronic activation devices shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the

election precinct. The sealed envelope shall be delivered by one of the officers of election to the clerk of the circuit court where the election was held.

If the voting ~~or counting machine system~~ is secured by removal of the data storage device used in that election, the officers shall remove the data storage device and proceed to lock and seal each machine. The data storage device shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the election precinct, the number of each machine, the number on the seal, and the number of the protective counter, if one, on the machine. The sealed envelope shall be delivered by one of the officers of election to the clerk of the circuit court where the election was held. The equipment keys used at the polls shall be sealed in a different envelope and delivered to the clerk who shall release them to the electoral board upon request or at the expiration of the time specified by this section.

If the voting ~~or counting machine system~~ provides for the creation of a separate master electronic back-up on a data storage device that combines the data for all of the voting ~~or counting machines systems~~ in a given precinct, that data storage device shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the name of the precinct. The sealed envelope shall be delivered by one of the officers of election to the clerk of the circuit court where the election was held. The data storage device for the individual machines may remain sealed in its individual machine until the expiration of the time specified by this section. The equipment keys and the electronic activation devices used at the polls shall be sealed together in a separate envelope and delivered to the clerk who shall release them to the electoral board upon request or at the expiration of the time specified by this section.

The voting and counting machines systems shall remain locked and sealed until the deadline to request a recount under Chapter 8 (§ 24.2-800 et seq.) has passed and, if any contest or recount is pending thereafter, until it has been concluded. The machines shall be opened and all data examined only (i) on the order of a court of competent jurisdiction or (ii) on the request of an authorized representative of the State Board or the electoral board at the direction of the State Board in order to ensure the accuracy of the returns. In the event that machines are examined under clause (ii) of this paragraph, each political party and each independent candidate on the ballot, or each primary candidate, shall be entitled to have a representative present during such examination. The representatives and observers lawfully present shall be prohibited from interfering with the officers of election in any way. The State Board or local electoral board shall provide such parties and candidates reasonable advance notice of the examination.

When recounts occur in precincts using direct recording electronic machines with printed return sheets, the printed return sheets delivered to the clerk may be used as the official evidence of the results.

When the required time has expired, the clerk of the circuit court shall return all voting equipment keys to the electoral board.

B. The local electoral board may direct that the officers of election and custodians, in lieu of conveying the sealed equipment keys to the clerk of the circuit court as provided in subsection A, shall convey them to the principal office of the general registrar on the night of the election. The general registrar shall secure and retain the sealed equipment keys and any other electronic locking or activation devices in his office and shall convey them to the clerk of the court by noon of the day following the ascertainment of the results of the election by the electoral board.

§ 24.2-801. Petition for recount; recount court.

The petition for a recount of an election, other than an election for presidential electors, shall be filed within 10 days from the day the State Board or the electoral board certifies the result of the election under § 24.2-679 or § 24.2-671, but not thereafter. The petition shall be filed in the Circuit Court of the City of Richmond in the case of any statewide office and in the circuit court of the county or city in which the candidate being challenged resides in the case of any other office. The petition shall be filed in the Circuit Court of the City of Richmond in the case of any statewide referendum and in the circuit court of any county or city comprising a part of the election district in the case of any other referendum.

The petition shall set forth the results certified by the Board or electoral board and shall request the court to have the ballots in the election recounted ~~or, in the case of direct recording electronic machines, the vote redetermined.~~

In an election for office, a copy of the petition shall be served on the candidate apparently nominated or elected as provided under § 8.01-296 and within 10 days after the Board or electoral board has certified the results of such election. In a referendum, a copy of the petition shall be so served on the governing body or chief executive officer of the jurisdiction in which the election was held.

The chief judge of the circuit court in which a petition is filed shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under §§ 24.2-805

183 and 24.2-806.

184 **§ 24.2-801.1. Petition for recount of election for presidential electors; recount court.**

185 The petition for a recount of an election for presidential electors shall be filed no later than 5:00
186 p.m. on the second calendar day after the day the State Board certifies the result of the election under
187 § 24.2-679, but not thereafter. Presidential candidates who anticipate the possibility of asking for a
188 recount are encouraged to so notify the State Board by letter as soon as possible after election day. The
189 petition shall be filed in the Circuit Court of the City of Richmond. If any presidential candidate is
190 eligible to seek a recount of the results of the election for presidential electors under § 24.2-800 the
191 State Board shall, within 24 hours of the certification of the results, notify the Circuit Court of the City
192 of Richmond and the Supreme Court of Virginia (i) that a recount is possible, (ii) which presidential
193 candidate is eligible to seek a recount, and (iii) of the date the results were certified. The Circuit Court
194 of the City of Richmond shall make arrangements to receive any such filing if the office would
195 normally be closed the entire day, or prior to 5:00 p.m., on the second calendar day after the day the
196 State Board certified the result of the election.

197 The petition shall set forth the results certified by the Board and shall request the court to have the
198 ballots in the election recounted ~~or, in the case of direct recording electronic machines, the vote~~
199 ~~redetermined.~~

200 A copy of the petition shall be served on the presidential candidate whose electors were apparently
201 elected as provided under § 8.01-296 and within five calendar days after the Board has certified the
202 results of such election.

203 As soon as a petition is filed, the chief judge of the Circuit Court shall promptly notify the Chief
204 Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief
205 judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under
206 § 24.2-805.

207 Any recount of an election for presidential electors shall be held promptly and completed, in
208 accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of
209 the electors.

210 **§ 24.2-802. Procedure for recount.**

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

219 The recount procedures to be followed throughout the election district shall be as uniform as
220 practicable, taking into account the types of ballots and voting ~~and counting machines systems~~ in use in
221 the election district.

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

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

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

244 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 Department, the State Board, or any local electoral board, as appropriate, and such boards or agency 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 printed ballots; ~~or in the case of direct recording electronic machines, 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 printed ballots and to redetermine the vote cast on direct recording electronic machines 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 using ballot scanner machines to insert the ballots into one or more scanners. The ballot scanner machines 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 paper ballots using the standards promulgated by the State Board pursuant to subsection A.

2. ~~For direct recording electronic machines (DREs), 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.~~

3. For ballot scanner machines, the recount officials shall rerun all the machine-readable ballots through a scanner 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 scanner, and any ballots for which a scanner 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. If the total number of machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards promulgated by the State Board pursuant to subsection A. Prior to running the machine-readable ballots through the ballot scanner machine, the recount officials shall ensure that logic and accuracy tests have been successfully performed on each scanner after the scanner has been programmed. The result calculated for ballots accepted by the ballot scanner machine during the recount shall be considered the correct determination for those machine-readable ballots unless the court finds sufficient cause to rule otherwise.

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

306 validity of which questions exist, to the court. The written statement of any one recount official
307 challenging a ballot shall be sufficient to require its submission to the court. If, on all ~~direct recording~~
308 ~~electronic machines~~ *ballot scanners*, the number of persons voting in the election, or the number of
309 votes cast for the office or on the question, totals more than the number of names on the pollbooks of
310 persons voting on the voting machines, the figures recorded by the machines shall be accepted as
311 correct.

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

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

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

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

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

340 I. For the purposes of this section:

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

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

346 **2. That the provisions of this act shall become effective on July 1, [2017 2018] .**