

SENATE BILL NO. 370

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Privileges and Elections

on February 1, 2022)

(Patron Prior to Substitute--Senator Bell)

A BILL to amend and reenact §§ 24.2-669, 24.2-671, and 24.2-679 of the Code of Virginia; to amend the Code of Virginia by adding a section numbered 24.2-671.2; and to repeal § 24.2-671.1 of the Code of Virginia, relating to elections; conduct of election; election results; risk-limiting audits.

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-669, 24.2-671, and 24.2-679 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 24.2-671.2 as follows:

§ 24.2-669. Clerk to keep ballots; inspection; destruction.

The clerk to whom the counted and uncounted ballots are delivered shall, without breaking the seal, deposit them in a secure place in his office, where they shall be kept for the time required by this section. He shall not allow the ballots to be inspected except (i) by an authorized representative of the State Board or by the electoral board at the direction of the State Board to ensure the accuracy of the returns or the purity of the election, (ii) by the officers of election, and then only at the direction of the electoral board in accordance with § 24.2-672 when the provisions of § 24.2-662 have not been followed, (iii) on the order of a court before which there is pending a proceeding for a contest or recount under Chapter 8 (§ 24.2-800 et seq.) of this title or before whom there is then pending a proceeding in which the ballots are necessary for use in evidence, or (iv) for the purpose of conducting ~~an~~ a risk-limiting audit as part of a post election pilot program pursuant to ~~§ 24.2-671.1~~ 24.2-671.2. In the event that ballots are inspected under clause (i), (ii), or (iv) 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 inspection. The representatives and observers lawfully present shall be prohibited from interfering

26 with the officers of election in any way. The State Board or local electoral board shall provide such parties
27 and candidates reasonable advance notice of the inspection.

28 After the counted ballots for a federal election have remained in the clerk's office for two years, if
29 no election contest or other proceeding is pending in which such ballots may be needed as evidence, the
30 clerk shall destroy such ballots. After the counted ballots for any other election have remained in the
31 clerk's office for one year, if no election contest or other proceeding is pending in which such ballots may
32 be needed as evidence, the clerk shall destroy such ballots. After the unused ballots have remained in the
33 clerk's office and the time has expired for initiating a recount, contest, or other proceeding in which such
34 ballots may be needed as evidence and no such contest or proceeding is pending, the clerk may then
35 destroy the unused ballots other than punchcard ballots, which shall be returned to the electoral board.

36 **§ 24.2-671. Electoral board to meet and ascertain results; conclusiveness of results.**

37 Each electoral board shall meet at the clerk's or general registrar's office of the county or city for
38 which they are appointed at or before 5:00 p.m. on the day after any election. The board may adjourn to
39 another room of sufficient size in a public building to ascertain the results, and may adjourn as needed,
40 not to exceed seven calendar days from the date of the election unless an extension has been granted to
41 accommodate a risk-limiting audit conducted pursuant to § 24.2-671.2. Written directions to the location
42 of any room other than the clerk's or general registrar's office where the board will meet shall be posted at
43 the doors of the clerk's and general registrar's offices prior to the beginning of the meeting.

44 The board shall open the returns delivered by the officers.

45 If the electoral board has exercised the option provided by § 24.2-668 for delivery of the election
46 materials to the office of the general registrar on the night of the election, the electoral board shall meet at
47 the office of the general registrar at or before 5:00 p.m. on the day after any election.

48 The board shall ascertain from the returns the total votes in the county or city, or town in a town
49 election, for each candidate and for and against each question and complete the abstract of votes cast at
50 such election, as provided for in § 24.2-675. For any office in which no person was elected by write-in
51 votes, and for which the total number of write-in votes for that office is less than (i) 10 percent of the total
52 number of votes cast for that office and (ii) the total number of votes cast for the candidate receiving the

53 most votes, the electoral board shall ascertain the total votes for each write-in candidate for the office
54 within one week following the election. For offices for which the electoral board issues the certificate of
55 election, the result so ascertained, signed and attested, shall be conclusive and shall not thereafter be
56 subject to challenge except as specifically provided in Chapter 8 (§ 24.2-800 et seq.).

57 Once the result is so ascertained, the secretary of the electoral board shall deliver one copy of each
58 statement of results to the general registrar to be available for inspection when his office is open for
59 business. The secretary shall then return all pollbooks, any printed inspection and return sheets, and one
60 copy of each statement of results to the clerk.

61 Beginning with the general election in November 2007, a report of any changes made by the local
62 electoral board to the unofficial results ascertained by the officers of election or any subsequent change to
63 the official abstract of votes made by the local electoral board shall be forwarded to the State Board of
64 Elections and the explanation of such change shall be posted on the State Board website.

65 Each political party and each independent candidate on the ballot, or each primary candidate, shall
66 be entitled to have representatives present when the local electoral board meets to ascertain the results of
67 the election. Each such party and candidate shall be entitled to have at least as many representatives present
68 as there are teams of officials working to ascertain the results, and the room in which the local electoral
69 board meets shall be of sufficient size and configuration to allow the representatives reasonable access
70 and proximity to view the ballots as the teams of officials work to ascertain the results. The representatives
71 and observers lawfully present shall be prohibited from interfering with the officials in any way. It is
72 unlawful for any person to knowingly possess any firearm as defined in § 18.2-308.2:2 within 40 feet of
73 any building, or part thereof, used as a meeting place for the local electoral board while the electoral board
74 meets to ascertain the results of an election, unless such person is (a) any law-enforcement officer or any
75 retired law-enforcement officer qualified pursuant to subsection C of § 18.2-308.016; (b) occupying his
76 own private property that falls within 40 feet of a polling place; or (c) an armed security officer, licensed
77 pursuant to Article 4 (§ 9.1-138 et seq.) of Chapter 1 of Title 9.1, whose employment or performance of
78 his duties occurs within 40 feet of any building, or part thereof, used as a meeting place for the local
79 electoral board while the electoral board meets to ascertain the results of an election.

80 § 24.2-671.2. Risk-limiting audits.

81 A. For the purposes of this section:

82 "Contested race" means an election for an office where more names appear on the ballot than there
83 are vacancies to be filled or a statewide referendum or proposed constitutional amendment.

84 "Risk limit" means the largest probability that the risk-limiting audit will fail to correct an election
85 outcome that differs from the outcome that would be found by a full manual tabulation of the votes on all
86 ballots cast in the contested race.

87 "Risk-limiting audit" means an audit protocol conducted after an election and prior to the
88 certification of the election results with a pre-specified minimum probability of requiring a full hand count
89 of votes cast if the outcome reported by the voting system differs from the outcome that would be found
90 by a full hand count of the votes in a contested race. A "risk-limiting audit" requires a hand count of
91 randomly sampled printed ballots that continues until there is either strong statistical evidence that the
92 reported outcome is correct or, in the absence of such evidence, a full hand count of all ballots cast in the
93 contested race that determines the outcome.

94 B. Risk-limiting audits conducted pursuant to this section shall be performed by the local electoral
95 boards and general registrars under the supervision of the Department and in accordance with the
96 procedures prescribed by the State Board, including:

97 1. Processes for randomly selecting contested races and determining the risk limit.

98 2. Procedures for preparing for a risk-limiting audit, including guidelines for organizing ballots,
99 selecting venues, and securing appropriate materials by local electoral boards and general registrars.

100 3. Procedures for ballot custody, accounting, security, and written record retention that ensure that
101 the collection of cast ballots from which samples are drawn is complete and accurate throughout the audit.

102 4. Procedures for hand counting of the audited ballots.

103 5. Processes and methods for conducting the risk-limiting audit.

104 6. Procedures for ensuring transparency and understanding of the process by participants and the
105 public, including guidelines for direct observation by members of the public, representatives of the
106 candidates involved in the risk-limiting audit, and representatives of the political parties.

- 107 C. The Department shall provide that the following risk-limiting audits be conducted:
- 108 1. In the year of a general election for members of the United States House of Representatives, a
- 109 risk-limiting audit of at least one randomly selected contested race for such office;
- 110 2. In the year of a general election for members of the General Assembly, a risk-limiting audit of
- 111 at least one randomly selected contested race for such office;
- 112 3. In any year in which there is not a general election for a statewide office, a risk-limiting audit
- 113 of at least one randomly selected contested race for a local office, including constitutional offices, for
- 114 which certification by the State Board is required under § 24.2-680; and
- 115 4. In any year, any other risk-limiting audit of a contested race that is necessary to ensure that each
- 116 locality participates in a risk-limiting audit of an office within its jurisdiction at least once every five years
- 117 or that the State Board finds appropriate. Such audits must be approved by at least a two-thirds majority
- 118 vote of all members of the Board.
- 119 D. A local electoral board may request that the State Board approve the conduct of a risk-limiting
- 120 audit for a contested race within the local electoral board's jurisdiction. The state board shall promulgate
- 121 regulations for submitting such requests. The State Board shall grant an extension of the local electoral
- 122 board's certification deadline under § 24.2-671 as necessary to accommodate the conduct of a risk-limiting
- 123 audit conducted pursuant to this subsection. The Department may count a risk-limiting audit conducted
- 124 pursuant to this subsection toward the requirement in subdivision C 4.
- 125 E. Notwithstanding the provisions of subsections C and D, no contested race shall be selected to
- 126 receive a risk-limiting audit if the tabulation of the unofficial result for the contested race shows a
- 127 difference of not more than one percent of the total vote cast for the top two candidates.
- 128 F. Upon the tabulation of the unofficial results of an election, the State Board shall determine, in
- 129 accordance with subsection C, all the contested races for that election that will receive a risk-limiting audit
- 130 and shall set the risk limit to be applied in such audits. As soon as practicable after selection of the contests
- 131 to be audited, the Department shall publish a notice of the contested races in accordance with the
- 132 requirements for public meetings in § 2.2-3707. The Department shall provide support to local electoral
- 133 boards and general registrars in preparing to hold the risk-limiting audits.

134 G. The local electoral board and general registrar shall conduct a risk-limiting audit within their
135 jurisdiction at the date, time, and location noticed by the Department. At least one member of the local
136 electoral board representing each party shall participate in the risk-limiting audit and be present for the
137 duration of the risk-limiting audit when ballots are being selected and counted and calculations are being
138 made. All risk-limiting audits shall be conducted in a place and manner that is open to the public. At the
139 conclusion of a risk-limiting audit, all audit materials, including ballots and any records generated during
140 the course of the audit, shall be delivered to the clerk of the circuit court and retained as election materials
141 pursuant to § 24.2-668.

142 H. The local electoral board in coordination with the general registrar shall promptly report the
143 results of a risk-limiting audit of any contested races subject to § 24.2-680 in their jurisdiction to the
144 Department. The results of any risk-limiting audit for a local contested race shall also be retained by the
145 local electoral board. At the conclusion of each risk-limiting audit requiring certification by the State
146 Board, the Department shall submit to the State Board a report, which shall include all data generated by
147 the risk-limiting audit and all information required to confirm that the risk-limiting audit was conducted
148 in accordance with the procedures adopted by the State Board. The Department shall publish the results
149 of all risk-limiting audits pursuant to this section on the Department's website.

150 I. If a risk-limiting audit of a contested race escalates to a full hand count, the results of the hand
151 count shall be used to certify the election in lieu of the tabulation of the unofficial results obtained prior
152 to the conduct of the risk-limiting audit. A full hand count conducted pursuant to this section shall not be
153 construed as a recount under Chapter 8 (§ 24.2-800 et seq.). Nothing in this section shall be construed to
154 limit the rights of a candidate under Chapter 8.

155 **§ 24.2-679. State Board to meet and make statement as to number of votes.**

156 A. The State Board shall meet ~~on~~ by the ~~third~~ first Monday in ~~November~~ December to ascertain
157 the results of the November election. If a majority of the Board is not present or if, for any other reason,
158 the Board is unable to ascertain the results on that day, the meeting shall stand adjourned from day to day
159 for not more than three days until a quorum is present and the Board has ascertained the results as provided
160 in this section.

161 The Board shall examine the certified abstracts on file in its office and make statements of the
162 whole number of votes given at any such election for members of the General Assembly, Governor,
163 Lieutenant Governor and Attorney General, members of the United States Congress and electors of
164 President and Vice President of the United States, and any officer shared by more than one county or city,
165 or any combination thereof, or for so many of such officers as have been voted for at the election.

166 The statement shall show, for each office and each county, city, and election district, the whole
167 number of votes given to each candidate and to any other person elected to office. The Board members
168 shall certify the statements to be correct and sign the statements. The Board shall then determine those
169 persons who received the greatest number of votes and have been duly elected to each office. The Board
170 members shall endorse and subscribe on such statements a certificate of their determination. The Board
171 shall record each certified statement and determination in a suitable book to be kept by it in its office.

172 B. The State Board shall meet as soon as possible after it receives the returns for any special
173 election held at a time other than the November general election to ascertain the results of the special
174 election in the manner prescribed in subsection A. If the returns have not been received within seven days
175 of the election, the Board shall meet and adjourn from day to day until it receives the returns, ascertains
176 the results, and makes its determination.

177 **2. That the provisions of subdivisions C 2 and 4 of § 24.2-671.2 of the Code of Virginia, as created**
178 **by this act, shall become effective on July 1, 2023.**

179 **3. That the provisions of subdivision C 3 of § 24.2-671.2 of the Code of Virginia, as created by this**
180 **act, shall become effective on July 1, 2024.**

181 **4. That, notwithstanding the provisions of subsection F of § 24.2-671.2 of the Code of Virginia, as**
182 **created by this act, the risk limit for all risk-limiting audits conducted pursuant to that subsection**
183 **shall be at least 10 percent.**

184 **5. That the Department of Elections shall convene a work group to consider and propose a process**
185 **and timeline for implementing risk-limiting audits of statewide contests. The work group shall**
186 **include such persons determined by the Department of Elections as necessary or appropriate. The**
187 **work group shall organize no later than July 31, 2022, and shall complete its work no later than**

188 **October 31, 2022. If recommending any specific policies or legislative proposals, the work group,**
189 **through the Commissioner of Elections, shall communicate such recommendations to the Chairmen**
190 **of the House and Senate Committees on Privileges and Elections by November 15, 2022.**

191 **6. That § 24.2-671.1 of the Code of Virginia is repealed.**

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