

Date of Hearing: April 15, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

AB 44 (Mullin) – As Amended April 8, 2015

SUBJECT: Elections: statewide recounts.

SUMMARY: Creates a new state-funded recount process, as specified. Specifically, **this bill:**

- 1) Permits any voter, within five days after the Secretary of State (SOS) files a statement of the vote, to request a state-funded manual recount of all votes cast for a statewide office or state ballot measure if any of the following occurs:
 - a) The official canvass of returns in a statewide primary election shows that the difference in the number of votes received by the second and third place candidates for a statewide office is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for that office;
 - b) The official canvass of returns in a statewide general election shows that the difference in the number of votes received by the two candidates receiving the greatest number of votes for a statewide office is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for that office; or,
 - c) The official canvass of returns in a statewide election shows that the difference in the number of votes cast for and against a state ballot measure is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast on the measure.
- 2) Prohibits a voter from requesting a state-funded manual recount of all votes cast for the office of Superintendent of Public Instruction if the official canvass of returns in a statewide primary election shows that a candidate received a majority of all votes cast.
- 3) Defines “statewide office,” for the purposes of this bill, to mean the office of Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, SOS, Superintendent of Public Instruction, Treasurer, or Member of the United State Senate.
- 4) Permits any voter, within five days after the SOS files a statement of the vote, to request a state-funded manual recount of all votes cast for the office President of the United States if either of the following occurs:
 - a) The official canvass of returns in a statewide presidential primary election for a political party that received the greatest or second-greatest number of votes in that presidential primary election shows that the difference in the number of votes received by the first and second place candidates for the nomination of that party for the office of President is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for the office of President, or;
 - b) The official canvass of returns in a statewide general election shows that the difference in the number of votes received by the two candidates receiving the greatest number of

votes for the office of President is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for the office of President.

- 5) Prohibits another recount from being conducted if a state-funded recount is conducted pursuant to the provisions of this bill.
- 6) Requires the state to reimburse counties for costs resulting from conducting a manual recount, pursuant to this bill, in an expeditious manner upon the certification of those costs.
- 7) Requires the SOS, upon ordering a recount pursuant to the provisions of this bill, to notify the elections official of each county and direct the county elections official to recount all the votes cast for the office or for and against the state ballot measure.
- 8) Requires a county elections official, while conducting a recount pursuant to the provisions of this bill, to also review ballots rejected in accordance with existing law to ensure that no ballots were improperly discarded during the initial canvass. Requires the process for reviewing rejected ballots to be open to members of the public, including persons associated with a campaign or measure.
- 9) Requires the elections official in each county to complete a state-funded recount as follows:
 - a) In a primary election, by three business days before the ballot-printing deadline for the general election; or,
 - b) In a general election, within 60 days of the voter's request for the recount.
- 10) Permits the SOS to adopt, amend, and repeal rules and regulations necessary for the administration of the provisions of this bill.
- 11) Requires the elections official to store sealed ballots in a manner facilitating the retrieval of any particular ballot in the event of a recount.
- 12) Requires the SOS, no later than January 1, 2018, to adopt regulations establishing uniform guidelines for charges a county elections official may impose when conducting a manual recount.
- 13) Changes the starting day on which a recount may be requested for a recount that is conducted in more than one county from the 29th day after the election to the 30th day after the election.
- 14) Requires a county elections official, if more than one voter requests a recount for the same office, slate of presidential electors, or measure, and at least one request is for a manual recount, to conduct only one manual recount of the ballots subject to recount, the result of which shall be controlling.
- 15) Repeals provisions of law that permitted a voter who files a declaration requesting a recount to select whether the recount is conducted manually, or by means of the voting system used originally, or both and instead requires a voter who files a declaration requesting a recount to only select whether the recount is conducted manually, or by means of the voting system used originally. Permits a county to recount vote by mail (VBM) and provisional ballots in a manner other than that requested by the voter.

- 16) Provides that if an office, slate of presidential electors, or measure are voted on statewide, the results of any recount will be declared null and void if each vote cast statewide for the office, slates, or measure is not recounted.
- 17) Contains a January 1, 2023 sunset date for the state-funded manual recount provisions of this bill.
- 18) Prohibits the SOS from certifying or conditionally approving a voting system that cannot facilitate the conduct of a ballot level comparison risk-limiting audit.
- 19) Makes other technical and corresponding changes.

EXISTING LAW:

- 1) Allows any voter, within five days following the completion of the official canvass and following the completion of any postcanvass risk-limiting audit conducted pursuant to existing law, to request in writing that the elections official responsible for conducting an election commence a recount of the votes cast for candidates for any office or for or against any measure, provided the office or measure is not voted on statewide. Allows a recount for an election that is conducted in more than one county to be conducted in any or all of the affected counties.
- 2) Allows any voter, following the completion of the official canvass and within five days beginning on the 29th day after a statewide election, to file with the SOS a written request for a recount of the votes cast for candidates for any statewide office or for or against any measure voted on statewide. Allows any voter, within five days following the completion of any postcanvass risk-limiting audit conducted pursuant to existing law, to file with the SOS a written request for a recount of the votes cast for candidates for any statewide office or for or against any measure voted on statewide. Requires a request filed to specify in which county or counties the recount is sought and specify on behalf of which candidate, slate of electors, or position on a measure it is filed. Permits a request to specify the order in which the precincts shall be recounted.
- 3) Permits any other voter, at any time during the conduct of a recount and for 24 hours thereafter, to request the recount of any precincts in an election for the same office, slate of presidential electors, or measure not recounted as a result of the original request.
- 4) Requires a voter seeking the recount, before the recount is commenced and at the beginning of each subsequent day, to deposit with the elections official the amount of money required by the elections official to cover the cost of the recount for that day.
- 5) Requires the recount to commence not more than seven days following the receipt by the elections official of the request for the recount and to continue daily, Saturdays, Sundays, and holidays excepted, for not less than six hours each day until completed.
- 6) Provides that if in the election which is to be recounted the votes were recorded by means of a punchcard voting system or by electronic or electromechanical vote tabulating devices, the voter who files the declaration requesting the recount may select whether the recount shall be conducted manually, or by means of the voting system used originally, or both.

- 7) Requires the recount to be conducted publicly.
- 8) Permits all ballots, whether voted or not, and any other relevant material, to be examined as part of any recount if the voter filing the declaration requesting the recount so requests.
- 9) Required the SOS, within the SOS's existing budget, to adopt regulations no later than January 2008, for each voting system approved for use in the state and specify the procedures for recounting ballots, including VBM and provisional ballots, using those voting systems.

FISCAL EFFECT: Unknown. State-mandated local program: contains reimbursement direction.

COMMENTS:

- 1) **Purposed of the Bill:** According to the author:

In the June 2014 primary, former Assembly Speaker John Perez trailed Board of Equalization Member Betty Yee by only 481 votes out of roughly four million. This very narrow margin prompted him to request a recount, which current law permits. When he did so, deep flaws in California's existing recount process were revealed: it allows statewide results to be overturned by a partial recount and it favors candidates who can afford to pay.

Current law allows candidates to specify the counties they want to recount, and if they make up the vote difference in those counties, the entire outcome of the election changes. In response, their opponent can take a turn in selecting counties in an effort to recover the lost votes. This inefficient back and forth could continue until every vote is counted or until a candidate runs out of money. It raises the question of fairness: Should the person with the deepest pockets be able to "out-recount" his opponent?

The obvious answer is "no." In statewide elections, where millions of ballots are cast, the state should be responsible for ensuring the accuracy of the vote, not a candidate or voter. Above all, our system of governance demands that the election process is fair and transparent for all voters and candidates.

AB 44 creates a more equitable elections process by authorizing a state-funded option for recounts, available at or below a threshold of 1,000 votes or 0.015 percent, whichever is smaller. When this option is utilized, the state will fund a full hand recount of all ballots cast, while also re-examining any rejected ballots. When the state-funded threshold is not met, the bill permits candidates to fund their own statewide recounts, reimbursing them if the original results are overturned. Ensuring accurate election outcomes should be a priority for the state, and by creating a state-funded option for very close contests, AB 44 accomplishes this important goal.

- 2) **New Recount Process for Statewide Offices:** Existing law permits any registered voter to request a recount within five days following the completion of the official canvass. The voter requesting the recount must specify on behalf of which candidate, slate of electors, or position on a measure it is filed. Additionally, at any time during the conduct of a recount

and for 24 hours thereafter, current law allows any voter other than the original requestor to request a recount of additional precincts. The voter filing the request for the recount is required to deposit, before the recount commences and at the beginning of each day following, sums as required by the elections official to cover the cost of the recount for that day. If upon completion of the recount, the results are reversed, the deposit shall be returned.

This bill creates a new recount method for statewide offices. It sets up a new process for a state-funded manual recount for statewide offices and measures. Specifically, this measure permits any voter, within five days after the SOS files a statement of the vote, to request a state-funded manual recount of all votes cast for a statewide office or state ballot measure in a statewide primary or general election if there is a difference in the number of votes received that is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for that office or measure. For instance, in a general election, if the vote threshold between the two candidates receiving the greatest number of votes for a statewide office is less than or equal to the lesser of one thousand votes or one-and-a-half of one percent of the number of all votes cast for that office, then it would trigger a manual recount that the state would pay for. This bill sets up similar state-funded manual recount triggers for candidates in a statewide presidential primary or general election. This is a groundbreaking new policy for California.

- 3) **Other New Recount Procedures for State-Funded Manual Recounts:** This bill makes a variety of new policy changes to the conduct of a recount that applies to a state-funded manual recount. First, this bill prohibits another recount from being conducted for the same contest if a state-funded manual recount is being conducted pursuant to the provisions of this bill. This means that if a state-funded manual recount is triggered and a voter requests for the recount to occur, this bill would prohibit another voter from requesting a simultaneous recount. This is a departure from current law, which permits another voter, at any time during the conduct of a recount and for 24 hours thereafter, to request a recount of any precincts in an election for the same office, slate of presidential electors, or measure not recounted as a result of the original request.

Second, this bill sets up deadlines for when a state-funded manual recount is required to be finished. For example, in a primary election, this bill requires the recount to be completed by three business days before the ballot-printing deadline. And for a general election, this bill requires the recount to be completed within 60 days of the voter's request for the recount. Currently, there are no hard deadlines in place for when a recount needs to be completed. This has been problematic for past recounts, especially when there is a recount requested for a primary election. If a recount occurring after the primary is not completed in a timely manner, it may make it difficult for county elections officials to comply with the statutory deadlines for the printing and mailing of voter materials for the general election.

Third, current law permits all ballots, whether voted or not, and any other relevant material, to be examined as part of any recount if the voter filing the declaration requesting the recount so requests. This bill, instead, requires a county elections official, while conducting a state-funded manual recount, to also review the ballots rejected in accordance with existing law to ensure that no ballots were improperly discarded during the initial canvass.

- 4) **Changes to the Current Recount Process:** This bill not only creates a state-funded manual recount process it also makes changes to the current recount process. For instance, this bill

repeals provisions of law that permit a voter who files a declaration requesting a recount to select whether the recount is conducted manually, or by the voting system used originally, or both, and instead requires a voter requesting a recount to only select whether the recount is conducted manually, or by the voting system used originally. In other words, this bill requires a recount to be conducted in one manner throughout each jurisdiction, with the exception of VBM and provisional ballots. This bill permits a county, if the county has different processes for VBM or provisional ballots, to allow those ballots to be recounted in a manner other than that requested by the voter. According to the author's office, this change will ensure all ballots are treated the same, while providing flexibility for counties that use different machines or methodologies for counting VBM and provisional ballots.

In addition, this bill makes changes to how recount costs are calculated. While the SOS has adopted regulations that specify procedures for recounting ballots, including VBM and provisional ballots, current regulations do not provide detailed guidance for the charges a county elections official may impose when conducting a recount. The regulations require an elections official to estimate the costs necessary to produce relevant material and require the requestor to pay an advance deposit of the estimated amount at least one day prior to the materials being produced. Regulations define "relevant materials" to include, but not be limited to, unvoted ballots, VBM and provisional ballot envelopes, voting system redundant vote data, ballot definition files, language translation files and the central database or other electronic repository of results for the election in which the contest subject to recount occurred, election data media devices, audit logs, system logs, pre-and post-election logic and accuracy testing plans and results, polling place event logs, precinct tally results, central count tally results and consolidated results in a structured non-proprietary format, surveillance video recordings and chain of custody logs, including logs of security seals and access to election-related storage areas. In addition to the relevant materials produced, actual recount costs may also include additional supervision hours, security guard hours, the elections official's staff hours, space rental, transportation of ballots, and materials and administrative costs.

While there is no standardized pricing for a recount, not all recounts are the same. As mentioned above the requestor has the ability to request a recount to be conducted manually, by the voting system used, or both. In addition, a recount may or may not include the examination of all ballots, including those ballots that were rejected. All of these variables and others also contribute to the cost of a recount. A quick search done by committee staff found that in Los Angeles County the cost of one recount board is \$5,054.71 per day, in Orange County the fee for a four-member counting board is \$600.00 per day, and in Santa Cruz County the cost for one recount board and supervisor pay is \$1,008 per day.

While many factors contribute to the cost of a recount, the significant cost variations may warrant more review and detailed guidance. In an effort to address this issue, this bill requires the SOS, not later than January 1, 2018, to adopt regulations establishing uniform guidelines for charges a county elections official may impose when conducting a manual recount.

Furthermore, as mentioned above in the author's statement, existing law does not require all of the ballots cast in the entire state to be recounted in order to change the result in a statewide contest. Current law only requires that all the ballots in each county included in a recount request be recounted in order to change the result. This means that if the ballots

recounted in the counties listed in the voter's request make up the vote difference in those counties, then the entire outcome of the election contest may change. In addition, current law permits any other voter to request a recount as long as he or she selects different counties that were not originally included in the previous request. This back and forth could continue until every vote is counted or until a candidate runs out of money. In an effort to try to address this issue, this bill requires a recount for a statewide office or measure to be null and void unless each vote cast for the statewide office or measure is recounted.

Finally, current law permits any other voter to request a recount of any precincts in an election for the same office, slate of presidential electors, or measure that were not included in the original recount request. According to county elections officials, current law does not clarify what would happen should another voter request the same precincts as the original recount request, but request for that recount to be conducted in a different manner. This bill will address this situation and make certain that should multiple requests be made to recount the same precincts, but differ in method, that the request for the precincts to be manually recounted will prevail. Specifically, this bill requires a county elections official, if more than one voter requests a recount for the same office, slate of presidential electors, or measure, and at least one request is for a manual recount, to conduct only one manual recount of the ballots subject to the recount, the result of which shall be controlling.

- 5) **Fairvote Report:** A 2011 survey and analysis conducted by FairVote, a national non-partisan organization that works to promote fair, functional and representative democracy for voters, examined statewide election recount outcomes and practices in the United States, using data from elections taking place in the years 2000 to 2009. The report quantified various aspects of statewide recounts in the United States in elections from 2000-2009, including how often they occur, how often they change outcomes, how much vote totals change and how these figures vary with the size of the electorate. The report's major findings include: 1) statewide recounts are rare; 2) outcome reversals are even rarer; 3) margin shifts in recounts are small; 4) margin shifts are smaller and recounts rarer in larger electorates; and 5) most states should revise their laws governing statewide recounts.

According to the report, states with automatic recount provisions for state and federal elections are based on a specified threshold. Some states automatically conduct a recount within a margin of 0.5 percent between the top two candidates, other states automatically hold a recount if the margin is one percent or less, some do so at margins of 0.1 percent up to 0.25 percent, and some conduct automatic recounts for margins equal to or below 2,000 votes. Finally, some states do not have automatic recounts although allow recounts in the case of an exact tie.

According to the report, recounts uphold the value of every vote when an outcome is in doubt and for that reason the report makes certain recommendations to states. First, the report recommends that states without provisions for automatic recounts should establish them. In addition, the report recommends that states with provisions for automatic recounts in elections won initially by 0.5 percent or more should reduce those triggers to reflect current realities of what is a realistic change in a recount when there is no evidence of systematic fraud or error. While a recount trigger of 0.5 percent can make sense for local and state legislative races with small electorates, the trigger for automatic recounts funded by taxpayers in statewide races should be smaller. Furthermore, given the data on margin shifts in statewide recounts with modern voting machines, the report recommends 0.1 percent as an

automatic trigger for most states, perhaps rising to 0.2 percent for the smallest population states. Finally, the report recommends that recount laws should go hand-in-hand with rigorous post-election audit procedures designed to identify outcomes that may be questionable due to fraud or error no matter what the initial margin.

6) **Arguments in Support:** In support of this bill, FairVote, writes,

FairVote supports the provisions of AB 44 that modernize California's recount law. According to FairVote's research of all statewide recounts occurring since 2000, full statewide recounts are rarely necessary, as the average change in victory margin is less than 0.03%, with that number generally becoming smaller as a state's electorate becomes bigger. Automatic triggers for recounts in most states are unnecessarily high; a better approach would be a system of risk-limiting audits to be ready to establish confidence in outcomes no matter what the original margin...

We would support improving the bill with a provision to allow candidates, parties, or individual taxpayers in statewide races to pay for an accelerated initial count. This provision is particularly critical in presidential races because, under its current schedule, California simply could not resolve a close statewide contest for allocating its electoral votes in a timely way. We propose that each county be required to show how it could accelerate its count and what doing so would cost, with any costs for an accelerated count being paid for by the entity requesting it.

7) **Arguments in Opposition:** The Peace and Freedom Party of California, who is opposed unless amended, writes:

The point of holding an automatic recount is that when results are so close that it is uncertain based on the initial count which candidate(s) would be nominated or elected, or whether or not a ballot measure would be approved, the ballots should be recounted. However, the language for presidential primary elections doesn't serve this purpose...[There] are at least four specific problems:

- (1) Recounts are only triggered by close races in the two largest parties' presidential primaries.
- (2) Presidential primaries nominate neither the leading nor the leading two candidates.
- (3) It is unclear whether automatic recounts would be of all parties' presidential primaries or only of the party's which triggered the recount.
- (4) Many candidates whose names appear on California presidential primary ballots are no longer running by the time recounts would happen.

8) **Suggested Amendments:** There are a few amendments the committee may wish to consider. The first is an author's amendment concerning the threshold in this bill. This bill currently requires the threshold that triggers a state-funded manual recount of all votes cast for a statewide office or state ballot measure to be the difference in the number of votes received that is less than or equal to the lesser of 1000 votes or one-and-a-half of one percent of the

number of all votes cast for that office or measure. According to the author, there is an error in the threshold and the threshold currently in the bill is much too high. Consequently, the author requests amending the bill to delete all references to "one-and-a-half of one percent" and instead insert "0.015 percent."

Second, this bill prohibits the SOS from certifying or conditionally approving a voting system that cannot facilitate the conduct of a ballot level comparison risk-limiting audit. According to the author's office, the purpose of these provisions is to begin setting the foundation for future voting systems that will have the ability to conduct of risk-limiting audits. It is unclear, however, whether these provisions will impact existing voting systems and possible upgrades to those systems. As a result, the committee may wish to amend the bill to add clarifying language to ensure voting systems that are currently in use or counties that are in the process of making upgrades to those systems are not required to abide by this new standard.

Finally, as mentioned above, the Peace and Freedom Party of California are opposed unless amended, stating in their letter that the provisions of this bill pertaining to the presidential primary election do not take into account the different parties' differing delegate selection rules, as specified. In order to remedy this, the author requests that the committee amend the bill to delete provisions of the bill that permit a state-funded manual recount to occur in a statewide presidential primary election, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

FairVote
VerifiedVoting.org
Voting Rights Task Force
Wellstone Democratic Renewal Club
One Individual

Opposition

Peace and Freedom Party of California (unless amended)

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