

Date of Hearing: May 13, 2020

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 2400 (Quirk) – As Introduced February 18, 2020

**SUBJECT:** Election results: risk-limiting audits.

**SUMMARY:** Extends a risk-limiting audit pilot program that permits an elections official to conduct a risk-limiting audit in place of the 1% manual tally required under existing law, as specified, and eliminates the requirement that counties participating in the pilot program must conduct risk-limiting audits on *all* contests in the county. Specifically, **this bill:**

- 1) Extends, from the March 2020 statewide primary election to the November 2020 statewide general election, the start of an existing risk-limiting audit pilot program. That program permits an elections official to conduct a risk-limiting audit in place of conducting the 1% manual tally of ballots that is otherwise required to occur during the official canvass of the election under existing law.
- 2) Deletes provisions of law that require a county that participates in the pilot program to conduct risk-limiting audits for all contests held in the county, and instead permits a county to conduct a risk-limiting audit on one or more contests fully contained in the county.
- 3) Deletes provisions of law that require a county that participates in the pilot program to conduct partial risk-limiting audits for each cross-jurisdictional contest within its jurisdiction's borders and makes other conforming changes to eliminate the use of partial risk-limiting audits from the scope of the pilot program.
- 4) Clarifies that a participating county may exclude any contest that has been subject to a risk-limiting audit from the 1% manual tally required under current law.
- 5) Extends the sunset date of the pilot program from January 1, 2021 to January 1, 2023.
- 6) Makes other conforming changes.
- 7) Contains an urgency clause, allowing this bill to take effect immediately upon enactment.

**EXISTING LAW:**

- 1) Creates a risk-limiting audit pilot program under which an elections official may conduct a risk-limiting audit in place of the 1% manual tally required under current law during the official canvass of any election, as specified. Provides for the pilot program to commence with the statewide primary election held on March 3, 2020, and to sunset on January 1, 2021.
  - a) Requires participating counties to conduct a risk-limiting audit on each contest fully contained within the county's borders, and partial risk-limiting audits for each cross-jurisdictional contest.
  - b) Requires the Secretary of State (SOS), in consultation with recognized statistical experts, election verification and integrity stakeholders, voting system manufacturers, and local

elections officials, to adopt regulations to implement and administer the risk-limiting audit pilot program, as specified.

- c) Requires an official conducting a risk-limiting audit to include a report on the results of the risk-limiting audit in the certification of the official canvass of the vote.
- 2) Requires an elections official to prepare a certified statement of the results of the election and submit it to the governing body within 30 days of the election.
- 3) Requires an elections official, during the official canvass of every election in which a voting system is used, to conduct a public manual tally of the ballots tabulated by those devices, including vote by mail (VBM) ballots, using either of the following methods:
  - a) A public manual tally of the ballots canvassed in the semifinal official canvass, including VBM ballots but not including provisional ballots, cast in 1% of the precincts chosen at random by the elections official, as specified; or,
  - b) A two-part public manual tally, which includes both of the following:
    - i) A public manual tally of the ballots canvassed in the semifinal official canvass, not including VBM or provisional ballots, cast in 1% of the precincts chosen at random by the elections official, as specified; and,
    - ii) A public manual tally of not less than 1% of the VBM ballots canvassed in the semifinal official canvass, as specified.
- 4) Requires an elections official conducting the election to include a report on the results of the 1% manual tally in the certification of the official canvass of the vote. Requires the report to identify any discrepancies between the machine count and the manual tally and a description of how each of these discrepancies was resolved, as specified.
- 5) Prohibits the SOS from certifying or conditionally approving a voting system that cannot facilitate the conduct of a ballot level comparison risk-limiting audit, as defined. Provides that a voting system that is "noncompliant" is a voting system that cannot facilitate the conduct of a ballot level comparison risk-limiting audit. Authorizes the SOS, until January 1, 2021, to approve a proposed change or modification to a noncompliant voting system even if the voting system will remain noncompliant after the change or modification.

**FISCAL EFFECT:** Unknown

**COMMENTS:**

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

Accurate elections are more important now than ever. Over the past two years, we have learned that state elections are frequent targets of international adversaries backed by resources of powerful nations, like Russia. It's certainly possible that homegrown threats could try to disrupt elections as well. All of this comes [at] a time of increased public cynicism of government and politics. Accurate elections

are the bedrock of a free and open democracy. It is crucial that Californians, and indeed all Americans, believe in the power of the vote – the power of their voice.

[AB 2125 (Quirk) of 2018] will allow counties, at their discretion, to use risk-limiting audits (RLAs) to verify the outcomes of their elections. Right now, the only way to verify the results of an election is if one of the candidates petitions for a costly and time-consuming recount. A county that adopts this audit system will be able to verify the reported results of each election on the ballot quickly and accurately.

RLAs use statistics to determine how many ballots need to be counted in order to verify that the outcome is accurate. By looking at the number of votes cast in an election and the totals each candidate or measure earned, a RLA allows a county election official to know how many votes would have to have been miscounted in order for the election results to flip.

AB 2400 will provide technical changes necessary to allow counties to effectively implement RLAs. Without these changes, counties will not be able to utilize this innovative and efficient type of audit.

- 2) **One Percent Manual Tally:** Election officials are required to complete the official canvass no later than 30 days after an election. As part of the official canvass, existing law requires elections officials to conduct a public manual tally of ballots cast in 1% of the precincts chosen at random in order to ensure that vote tabulation equipment is operating correctly before the final official canvass is completed. The Legislature established this process, commonly described as the 1% manual tally, in 1965. In California, in order to overturn official election results, existing law requires a recount of the ballots cast in the contest.
- 3) **What is a Risk-Limiting Audit?** According to risk-limiting audit experts, a risk-limiting audit is a method to ensure that at the end of the canvass, the hardware, software, and procedures used to tally votes found the real winners. Specifically, a risk-limiting audit involves a manual tally of randomly selected ballots that stops as soon as it is implausible that a full recount would alter the result. As long as it is statistically plausible that a full recount would overturn the result, the risk-limiting audit continues to examine more ballots. Risk-limiting audits determine precisely how much hand counting is necessary to confirm election results to a given level of confidence. The closer the contest, the more ballots one must examine to have strong evidence, because fewer errors can change the outcome. The higher the desired confidence, the more ballots one must examine, because higher confidence requires more evidence. Risk-limiting audits, however, do not guarantee that the electoral outcome is right, but they have a large chance of correcting the outcome if it is wrong.

Risk-limiting audits are highly adaptable. Experts state that risk-limiting audits can check simple plurality contests, multi-winner contests, measures requiring a super-majority, among others, and can be conducted for any number of contests in a single election, often using a single sample for greater efficiency. Additionally, risk-limiting audits can begin very soon after the election or later in the process, as long as time remains to correct any incorrect outcomes.

There are several varieties of risk-limiting audits and each has various benefits and

requirements. Methods of conducting a risk-limiting audit include comparison audits (such as a ballot-level audit) and ballot-polling audits. Ballot-polling audits examine randomly selected ballots until the human eye interpretation of the votes on those ballots gives sufficiently high statistical confidence that a full hand count would confirm the machine results. A ballot-polling audit only requires knowing the overall official result. It does not require precinct level results or more detailed results, which comparison audits require.

In contrast, a comparison audit, such as a ballot-level audit, compares a human interpretation of the votes on randomly selected ballots to the voting system's interpretation of the votes on those ballots. A ballot-level comparison audit entails matching a physical ballot with the voting system interpretation of that ballot (typically known as a cast vote record). A comparison audit continues until there is sufficiently high statistical confidence that a full hand count would agree with the machine results, despite any differences between the audit's manual interpretation of the ballots and the voting system's interpretation of those ballots.

Comparison audits require detailed information from the voting system. They require the voting system to report how it interpreted each physical ballot, in a way that allows the interpretation of any particular ballot to be checked. In other words, it offers a way to trace a cast vote record back to the corresponding ballot. Some voting systems however, can only report tallies for large groups of ballots, such as precincts, and are unable to record cast vote records. When a comparison audit is feasible, a comparison audit generally requires examining fewer ballots than a ballot-polling audit. Both ballot-polling and comparison audits require a ballot manifest that says how many ballots there are in all and how they are stored, i.e., that lists identifiable groups of ballots and says how many there are in each group.

- 4) **Risk-Limiting Audit Pilot Program and Previous Legislation:** Last session, the Legislature approved and Governor Brown signed AB 2125 (Quirk), Chapter 913, Statutes of 2018, which created a risk-limiting audit pilot program and permitted an elections official to conduct risk-limiting audits in lieu of conducting a 1% manual tally beginning with the statewide primary elections held on March 3, 2020. Specifically, AB 2125 requires a participating county to conduct a risk-limiting audit on each contest fully contained within the county's borders, and partial risk-limiting audits for each cross-jurisdictional contest, as specified. Additionally, AB 2125 required the SOS, in consultation with recognized statistical experts, election verification and integrity stakeholders, voting system manufacturers, and local elections officials, to adopt regulations to implement and administer the risk-limiting audit pilot program, as specified.

In January 2019, the SOS began the process of developing risk-limiting audit regulations, as required by AB 2125. Those regulations were adopted and in place by January of this year. As required by AB 2125, the regulations state that an elections official who elects to conduct a risk-limiting audit in accordance with current law is required to do so on each contest fully contained within its jurisdiction's borders, and a partial risk-limiting audit on each cross-jurisdictional contest partially contained within its jurisdiction's borders.

As mentioned above, risk-limiting audits are audits that can require a full manual recount in certain close elections. During the development of the regulations by the SOS's working group, it was determined that if a jurisdiction is required to audit *all* contests during an election cycle, the chances that one of the election contests might be close is statistically

high, increasing the chances that a jurisdiction participating in the pilot program would have to conduct a full manual recount for *all* races in the county. Consequently, the working group determined it would likely not be feasible for a county to participate in the risk-limiting pilot program, because conducting a full manual tally of an entire election would be too costly and burdensome to complete within the canvass period and under existing resources.

Additionally, the working group determined that a partial risk-limiting audit would offer weaker confirmation of the election results than a standard risk-limiting audit, and thus would not be useful in determining whether an election outcome is accurate.

To address these issues, this bill requires a pilot program participating county to conduct a risk-limiting audit on one or more contests fully contained within the county's borders, instead of conducting a risk-limiting audit on each contest fully contained within the county's border and a partial risk-limiting audit for each cross-jurisdictional contest.

- 5) **Stakeholder Letter:** Last December, toward the end of the public comment period for the risk-limiting audit regulation process, a letter was submitted from a coalition of stakeholders that participated in the SOS's working group to develop the regulations. The letter included various recommendations regarding the risk-limiting audit regulations. The letter also recommended that the Legislature pass emergency legislation that postpones the implementation of AB 2125 (Quirk) until the November 2020 general election, and permits counties, as part of the pilot program, to conduct a minimum of three risk-limiting audits of contests wholly contained within the county, with a 1% manual tally being performed for the remaining contests. In addition, the letter recommended that the SOS clarify how a partial risk-limiting audit would work. Specifically, the letter stated that while AB 2125 (Quirk) defines a partial risk-limiting audit, it does not fully describe the process by which a county should conduct a partial risk-limiting audit and that a partial risk-limiting audit conducted in only some of the counties involved in a cross-jurisdictional race is not equivalent to a full risk-limiting audit. The stakeholder letter also suggested that the regulations require the SOS to disclose the source code of the risk-limiting audit software tool and urged the SOS to ensure that cast vote records are made publicly available online sufficient to allow the public to verify that the risk-limiting audit is being conducted appropriately.
- 6) **Governor's Budget and New Voting Machines:** The Governor's 2018-2019 budget appropriated \$134 million in one-time General Fund spending to purchase new equipment for county voting systems. This equipment includes hardware, software, and initial licensing to replace existing systems and technology. Additionally, the Governor's 2019-2020 fiscal year budget included another \$87.3 million to help fund the replacement of county voting systems.
- 7) **Federal Election Security Funding:** On March 23, 2018, President Trump signed the Consolidated Appropriations Act of 2018 (Act)—the omnibus spending bill for the federal fiscal year ending on September 30, 2018. Among other provisions, the Act provided \$380 million in funding to the federal Election Assistance Commission (EAC) to make payments to states for activities to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements. States that receive federal funds are required to provide a match of five percent of the funds received within two years of receiving the federal funds.

According to information from the EAC, California's share of the federal funding is

\$34,558,876, and the state's required five percent match totals \$1,727,944. The EAC notes that a joint explanatory statement prepared by Congress to indicate congressional intent on how the funds may be spent specifies that states may use the funds to replace electronic voting equipment that does not have a paper trail; to implement a post-election audit system; to upgrade election-related computer systems to address cyber vulnerabilities; to facilitate cybersecurity training for state and local election officials; to implement established cybersecurity best practices; and to fund other activities that will improve the security of elections for federal office.

8) **Arguments in Support:** In support, the California Association of Clerks and Election Officials write:

During the regulation process several items were discovered that needed to [be] addressed, such as the number of items to be included in the [risk-limiting audit (RLA)], how to handle contests that cross jurisdictions, and whether or not a county can do both an RLA and the 1% manual tally.

Building from the lessons learned during the regulation process, [AB 2400] would clarify that an RLA may be conducted in addition to the 1% manual tally, that contests that cross jurisdictions are not part of the process, that county elections officials may conduct an RLA on any contest of its choosing that resides wholly within its borders and that that contest can be excluded from the 1% manual tally. With these changes the pilot program becomes more workable for counties and makes joining the pilot program more attractive.

9) **Amendments Sought:** The Citizens' Oversight Projects organization, which has an "oppose, unless amended" position on this bill, sent a letter containing various comments for consideration and suggested recommendations regarding risk-limiting audits. In summary, Citizens' Oversight Projects requests the following points of consideration: 1) require any risk-limiting audit to include nearly all ballots; 2) require the 1% manual tally to also incorporate nearly all ballots; 3) allow a county to include cross-jurisdictional contests in the risk-limiting audit; 4) allow a county to conduct a batch comparison audit; 5) use hand-marked uniform tally sheets to provide more transparency; 6) create a uniform audit report; and, 7) make clarifications to ballot manifest requirements. Additionally, Citizens' Oversight Projects recommends the following: 1) a comprehensive independent automated "ballot image audit" that will consider all contests down to the single ballot, combined with 2) a limited risk-limiting audit that will focus on the most consequential contests using a weighed selection process.

10) **Previous Legislation:** AB 840 (Quirk), Chapter 820, Statutes of 2017, specified that the 1% manual tally of ballots cast are those canvassed during the semifinal official canvass and does not include provisional ballots. Additionally, AB 840 permitted an elections official, when conducting the 1% manual tally, to select additional precincts, which may include VBM and provisional ballots.

AB 1154 (Nazarian), Chapter 88, Statutes of 2017, prohibits elections officials from randomly choosing the initial precincts or selecting an additional precinct for the one percent manual tally until after the close of the polls on election day.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Secretary of State Alex Padilla (sponsor)  
California Association of Clerks and Election Officials  
California Voter Foundation  
Verified Voting  
One Individual

**Opposition**

Citizens' Oversight Projects (unless amended)

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