

Comments of Michael Fletcher on SB0313, Election Law - Risk Limiting Audits

Favorable with amendments

While the introduction of Risk Limiting Audits, (RLAs) in MD elections is an admirable goal, SB0313, in its present form, is a flawed vehicle for this purpose. SB0313 requires the SBE and LBEs to implement and conduct RLAs with insufficient guidance to assure high-quality RLAs are implemented in Maryland.

The main problem with SB0313 is that it provides too much latitude to the State Board of Elections (SBE) to define the parameters for the new RLAs. The bill should better define the requirements that the new RLAs should meet. As written, SB0313 fails to define important requirements that characterize a quality RLA. For example, the report, *Principles and Best Practices for Post-Election Tabulation Audits* was published in 2018. This report was endorsed by the American Statistical Association, Brennan Center for Justice, Common Cause, Public Citizen and several election integrity groups. The report lists nine principles that a sound RLA should meet. The first five of these are:

1. **EXAMINATION OF VOTER-VERIFIABLE PAPER BALLOTS:** Audits require human examination of voter-marked paper ballots – the ground truth of the election. Voter-marked paper ballots may be marked by hand or by ballot marking device. Audits cannot rely on scanned images or machine interpretations of the ballots to accurately reflect voter intent.
2. **TRANSPARENCY:** Elections belong to the public. The public must be able to observe the audit and verify that it has been conducted correctly, without interfering with the process.
3. **SEPARATION OF RESPONSIBILITIES:** Neither the policy and regulation setting for the audit, nor the authority to judge whether an audit has satisfied those regulations, shall be solely in the hands of any entity directly involved with the tabulation of the ballots or the examination of ballots during the audit.
4. **BALLOT PROTECTION:** All the ballots being tabulated and audited must be verifiably protected from loss, substitution, alteration or addition.
5. **COMPREHENSIVENESS:** All jurisdictions and all validly cast ballots, including absentee, mail-in and accepted provisional ballots, must be taken into account. No contest should be excluded a priori from auditing, although some contests may be prioritized.

While SB0313 addresses principles 1 and 2, it fails to define the limitations for principles 3 through 5.

Regarding Principle 3, Separation of Responsibilities, the bill should require that certain aspects of the RLA be defined by an entity independent of the SBE. These aspects are

selection of races, risk limits, and type of RLA to be implemented. Possible independent parties could be the Office of Legislative Audits or an outside organization familiar with statistical analysis and auditing. This independent party would select races, set risk limits, and oversee the conduct of the RLA by the SBE and local boards. Public trust in the results of the audit would be enhanced if the RLA were not conducted by the same entity, i.e., the SBE, that conducts the election. A further benefit of this would be to avoid the tendency observed in other states where RLAs are employed to select races that have large margins so that fewer ballots need to be reviewed to meet the risk limits thus reducing the effort of the election staff.

The Fiscal and Policy Note for SB0313 states that there are two types of RLAs. The bill should prescribe the type to be used in Maryland.

Regarding Principle 4, Ballot Protection, the bill should specify ballot protection measures to be used to ensure the ballots chosen for the audit are protected from loss or alteration. Auditors must have timely access to Cast Vote Records to assure that the votes cast agree with the eligible ballots received.

Regarding Principle 5, Comprehensiveness, the bill also should require all types of ballots to be audited including provisional, web, and UOCAVA ballots.

To minimize the chances of fraud, SB0313 should specify that the races to be audited remain undisclosed until after the initial results of the election have been made public.

In addition, the provision in SB0313 that allows the outcome of an election to be changed based on the outcome of the RLA should be removed or revised. The outcome of a statistically based audit should not be able to overturn an election. This could disenfranchise voters. In accordance with RLA methodology, adverse audit results should require an audit of more ballots up to and including all ballots in a race as necessary. So rather than allowing the RLA to overturn a race, the bill should allow the RLA process to proceed to its ultimate conclusion. Only the voter verified paper records should be able to determine the outcome of an election.