

Department of Legislative Services

Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 761

Ways and Means

(Delegate Kaiser)

Education, Health, and Environmental Affairs

Election Law - Postelection Procedures

This bill modifies a threshold relating to when a county, as opposed to a petitioner, must pay for the cost of a recount. The bill also modifies the definitions of “contribution” and “expenditure” under State campaign finance law to include funding associated with contesting an election (a recount or judicial challenge). Under provisions that apply only to publicly financed candidates, the bill establishes provisions governing “contested election committees” (which receive donations and make disbursements relating to a contested election). The bill also requires the State Administrator of Elections to convene a Risk-Limiting Audits Workgroup to draft, by December 17, 2021, (1) a specified plan to conduct a risk-limiting audit after each statewide election and (2) proposed legislation that would enact the plan. **The bill takes effect June 1, 2021.**

Fiscal Summary

State Effect: General fund expenditures increase by at least \$15,000 in FY 2022 only, as discussed below. Revenues are not materially affected.

Local Effect: Local government expenditures may increase, as discussed below. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: None.

Analysis

Bill Summary:

Threshold for County Payment of Recount Costs

The bill changes a threshold defining when a county, and not the candidate, or registered voter (in the case of a ballot question), who petitioned for the recount, must pay the costs of a recount. Under the bill, a county must pay the costs of the recount in that county if the margin of difference in the number of votes received by an apparent winner and the losing candidate with the highest number of votes for an office is 0.25% (replacing 0.1%) or less of the total votes cast for those candidates. In addition, in the case of a ballot question, the county must pay the costs of the recount in that county if the margin of difference between the number of votes cast for and the number cast against the question is 0.25% (replacing 0.1%) or less.

Contributions and Expenditures Associated with Contesting an Election

The bill includes, under State campaign finance law, under the definitions of “contribution” and “expenditure,” respectively, (1) the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to assist in the payment of expenses associated with contesting an election under provisions governing recounts and judicial challenges and (2) a gift, transfer, disbursement, or promise of money or a thing of value by or on behalf of a campaign finance entity to pay expenses associated with contesting an election under provisions governing recounts and judicial challenges. The bill also, correspondingly, repeals a provision that establishes that State campaign finance law provisions relating to limits on contributions and transfers to campaign finance entities do not affect the right of an individual to pay reasonable legal expenses associated with maintaining or contesting the results of an election.

Contested Election Committees for Publicly Financed Candidates

Under provisions that apply only to a person that accepts public campaign financing under the Public Financing Act (PFA) (gubernatorial tickets) or a county public campaign financing system, the bill establishes provisions governing “contested election committees” and prohibits a person from accepting a donation or making a disbursement relating to a contested election unless the person (1) establishes a contested election committee and (2) discloses the donations and disbursements in accordance with provisions (established under the bill) governing the committees.

“Contested election” means an election subject to a recount or a judicial challenge, including an election that may be subject to a recount but for which a recount does not occur because neither candidate files a formal recount petition or initiates a judicial action.

“Contested election committee” means an entity formed for the exclusive purpose of receiving donations and making disbursements relating to a contested election.

The bill establishes various provisions governing contested election committees, including:

- requirements that a statement of organization be filed with the State Board of Elections (SBE), a treasurer of the committee be appointed, a designated bank account be used to receive donations and make disbursements, and detailed and accurate records of donations, disbursements, and outstanding obligations be maintained;
- a prohibition against soliciting or accepting a donation on behalf of a contested election committee in excess of the contribution limits under PFA or the applicable county public campaign financing system;
- a prohibition against a committee accepting a loan other than a loan from (1) a financial institution or other entity in the business of making loans or (2) the personal funds of a candidate or candidate’s spouse if the committee was established to finance a recount of an election in which the candidate was on the ballot;
- a requirement that the treasurer of a committee file specified reports with SBE, electronically, of donations, disbursements, and outstanding obligations of the committee, which SBE must make publicly available on the Internet;
- provisions establishing late filing fees and other sanctions for a failure to file a report, with late filing fees and penalties deposited in the Fair Campaign Financing Fund; and
- requirements that (1) any part of a public contribution made to a committee that is not spent be repaid to the appropriate government entity and (2) a committee, after repaying remaining public contributions and before filing a final report, pay all outstanding obligations and dispose of all its remaining assets by returning the remaining balance in the account of the committee to the donors on a pro rata basis.

Finally, under existing provisions that authorize the governing body of a county to establish a system of public campaign financing for elective offices in the executive or legislative branches of county government, the bill:

- allows for such a system to include public financing of a contested election committee; and

- authorizes such a system to allow a publicly financed candidate to transfer any amount of funds from the candidate's campaign finance entity to the candidate's contested election committee.

Risk-Limiting Audits Workgroup

The State Administrator of Elections must convene a Risk-Limiting Audits Workgroup consisting of (1) experts in the theory and practice of risk-limiting audits; (2) at least one representative of the voting system vendor; and (3) local election officials. The State Administrator, or the State Administrator's designee, must serve as the chair of the workgroup. The workgroup's first meeting must be held by June 10, 2021.

“Risk-limiting audit” means a postelection audit procedure that employs statistical methods to ensure a large, predetermined minimum chance of requiring a full manual count of voter-verifiable paper records in an audited contest if a full manual count of the voter-verifiable paper records would find a different outcome than the outcome determined by the electronic count. “Risk limit” means the small, predetermined maximum chance that a risk-limiting audit will not require a full manual count of voter-verifiable paper records in an audited contest if a full manual count of the voter-verifiable paper records would find a different outcome than the outcome determined by the electronic count.

The workgroup must (1) draft a plan to conduct a risk-limiting audit of at least one statewide contest and at least one countywide or other local contest in each county after each statewide election; (2) draft proposed legislation for consideration by the General Assembly during the 2022 regular session that would enact the plan for conducting risk-limiting audits after each statewide election; and (3) meet periodically thereafter to make recommendations to SBE to revise and improve the risk-limiting audit process as appropriate.

The bill establishes specified requirements for the plan, including that it require a risk-limiting audit to be completed before certification of the election results. The plan must include (1) criteria for determining the contests to be audited; (2) the risk limit; and (3) the audit method.

The workgroup must submit its plan and proposed legislation to the Senate Education, Health, and Environmental Affairs Committee and the House Committee on Ways and Means by December 17, 2021.

Current Law:

Election Recounts

A candidate for public or party office who has been defeated based on the certified results of any election conducted under State election law may petition for a recount of the votes cast for the office sought. In addition, a petition for a recount based on the certified results of a question on the ballot in an election may be filed by a registered voter eligible to vote for the question.

The petition must specify that the recount be conducted (1) in all precincts in which the office or question was on the ballot or (2) only in the precincts designated in the petition. A counterpetition may also be filed if the initial petition did not specify all of the precincts in which the office or question was on the ballot and the outcome of the election is changed on completion of the recount.

Each petitioner must pay the cost of a requested recount; however, the petitioner is not liable for the costs of the recount if:

- the outcome of the election is changed;
- the petitioner has gained a number of votes, for the petitioner's candidacy or for or against the question that is the subject of the petition, equal to 2% or more of the total votes cast for the office or on the question, in all precincts being recounted; or
- (1) the margin of difference in the number of votes received by an apparent winner and the losing candidate with the highest number of votes for an office is 0.1% or less of the total votes cast for those candidates or (2) in the case of a question, the margin of difference between the number of votes cast for, and the number against, the question is 0.1% or less.

If the petitioner is not liable for the costs of the recount, a county must pay the costs of the recount in that county.

Judicial Challenges

Title 12, Subtitle 2 of the Election Law Article, authorizes a registered voter, if no other timely and adequate remedy is provided, to seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission (1) is inconsistent with the Election Law Article or other law applicable to the elections process and (2) may change or has changed the outcome of the election.

A registered voter may seek judicial relief in the appropriate circuit court within the earlier of (1) 10 days after the act or omission or the date the act or omission became known to HB 761/ Page 5

the petitioner or (2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

The Maryland Court of Appeals, in *Suessmann v. Lamone*, 383 Md. 697 (2004), has indicated that, in order to meet the requirement under Title 12, Subtitle 2 that an act or omission may change or has changed the outcome of an election, a litigant must prove, by clear and convincing evidence, a substantial probability that the illegal action may change or has changed the outcome of the election. The court indicated that a substantial probability, while less than 100%, is significantly more than “more likely than not.”

Campaign Finance Entities and Reporting

Unless otherwise expressly authorized by law, all campaign finance activity for an election under the Election Law Article of the Annotated Code must be conducted through a campaign finance entity (defined as a political committee established under Title 13 of the Election Law Article). An individual may not file a certificate of candidacy or a declaration of intent until the individual establishes, or causes to be established, an authorized candidate campaign committee (a campaign finance entity authorized by the candidate to promote the candidate’s candidacy). Campaign finance entities are also formed to promote the success or defeat of ballot questions or prospective ballot questions (referred to as “ballot issue committees”). For each election in which a campaign finance entity participates, it generally must file campaign finance reports at various times prior to and after the primary and general elections, as well as an annual report. The reports must contain information required by SBE with respect to all contributions received and all expenditures made by or on behalf of the campaign finance entity during a reporting period.

“Contribution” and “Expenditure” under State Campaign Finance Law

Under State campaign finance law, “contribution” means the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, question, or prospective question. “Expenditure” means a gift, transfer, disbursement, or promise of money or a thing of value by or on behalf of a campaign finance entity to (1) promote or assist in the promotion of the success or defeat of a candidate, political party, question, or prospective question at an election or (2) pay for the publication expense of a legislative newsletter.

Legal Expenses Associated with a Contested Election

Under State campaign finance law, provisions relating to limits on contributions and transfers to campaign finance entities do not affect the right of an individual to pay

reasonable legal expenses associated with maintaining or contesting the results of an election.

Post-election Audit Requirements

Pursuant to Chapter 523 of 2018, SBE is required to conduct an audit of the accuracy of the voting system's tabulation of votes, following each statewide general election, by completing (1) an automated software audit of the electronic images of all ballots cast in the election and (2) a specified manual audit of voter-verifiable paper records. Following each statewide primary election, SBE (1) must complete an automated software audit of the electronic images of all ballots cast in the election and (2) may complete a manual audit of voter-verifiable paper records in a manner prescribed by SBE.

Manual Audit (Post-general Election) and Reporting

The manual audit of voter-verifiable paper records required to be conducted following each statewide general election must be of (1) at least 2% of precincts statewide, including at least one randomly chosen precinct in each county and additional precincts selected by SBE and (2) a number of votes equal to at least 1% of the statewide total in the previous comparable general election of early votes, of absentee votes, and of provisional votes, including at least a minimum number of early votes, absentee votes, and provisional votes in each county, as prescribed by SBE. "Previous comparable general election" is defined as (1) in a presidential election year, the presidential election held four years earlier and (2) in a gubernatorial election year, the gubernatorial election held four years earlier.

The manual audit must be completed within 120 days after the general election. If the manual audit shows a discrepancy, SBE is authorized to expand the manual audit and take any other actions it considers necessary to resolve the discrepancy.

Within 14 days after the conclusion of the audit, SBE must post a report on its website that describes (1) the precincts and number of votes selected for the manual audit in each county and the manner in which the precincts and votes were selected; (2) the results of the manual audit; and (3) any discrepancy shown by the manual audit and how the discrepancy was resolved. SBE must allow for public observation of each part of the manual audit process to the extent practicable.

SBE Regulations and the Effect of the Audits

An audit pursuant to the provisions established under Chapter 523 may not have any effect on the certified election results and must be used to improve the voting system and voting process for future elections.

SBE is required to adopt regulations to implement the provisions established under Chapter 523.

State Fiscal Effect: General fund expenditures increase by \$15,000 in fiscal 2022 only, to make changes to SBE's campaign finance reporting system to incorporate contested election committee reporting.

General fund expenditures may also increase, in fiscal 2022, by approximately \$12,500 for each expert in the theory and practice of risk-limiting audits that SBE may need to compensate for their participation in the workgroup. This estimate is based on a past SBE cost for an expert, in the development of an audit process.

Local Fiscal Effect: Local government expenditures increase to the extent counties are responsible for the cost of any additional recounts under the bill as a result of the increase in the margin of difference threshold (0.25% instead of 0.1%) defining when a county, and not a petitioner, must pay the costs of a recount. For illustrative purposes, Montgomery County indicates that it incurred costs of \$737 per precinct and just over \$38,000 total (consisting largely of personnel costs) for a 2018 recount in a district consisting of 52 precincts.

Local government expenditures also increase to the extent counties with public campaign financing systems provide public funds to any contested election committees of publicly financed candidates, as authorized by the bill.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 632 (Senator Kagan) - Education, Health, and Environmental Affairs.

Information Source(s): State Board of Elections; Office of the State Prosecutor; Judiciary (Administrative Office of the Courts); Carroll, Harford, Montgomery, and St. Mary's counties; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2021
rh/lb Third Reader - April 12, 2021
Revised - Amendment(s) - April 12, 2021
Revised - Updated Information - April 12, 2021

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