

RESOLUTION 13-02-2017 (REVISED)

DIGEST

Elections Code: Requirement for Risk Limiting Audits

Adds Elections Code sections 15361 and 15362 to require risk limiting audits for all public elections.

RESOLUTIONS COMMITTEE COMMENT

History:

No similar resolutions found.

Reasons:

This resolution adds Elections Code sections 15361 and 15362 to require risk limiting audits for all public elections.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Elections Code sections 15361 and 15362 to read as follows:

1 § 15361

2 (a) The Legislature finds and declares the following:

3 (1) Transparent, publicly observable auditing of election results is necessary to ensure
4 effective election administration and justifiable public confidence in elections.

5 (2) Risk limiting audits provide efficient and cost-effective scientific quality control for
6 election results.

7 (3) By definition, a risk-limiting audit strictly limits the probability that an incorrect
8 electoral outcome will pass the audit without being corrected.

9 (4) California’s current post-election one percent manual tally law does not meet this
10 standard.

11 (b) Based on the findings and declarations in subdivision (a), it is the intent of the
12 Legislature to enact legislation that would establish an election results audit process to be
13 developed with the assistance of statistical experts, election integrity experts, and election
14 officials, to develop best practices for risk-limiting audits, and to implement risk-limiting audits
15 in California.

16
17 § 15362

18 (a) Commencing with the general election held in the year 2020, and each election
19 thereafter in which a voting system is used, the elections official conducting the election shall
20 conduct a risk-limiting audit with a five percent risk limit (“audit”) of every election contest in
21 accordance with the requirements of this section.

22 (b) The following definitions shall apply to this section:

23 (1) A “risk-limiting audit with a five percent risk limit” means a post-election process
24 that involves hand-to-eye, human inspection of ballots, in such a manner that if a full manual
25 tally of all the ballots cast in the contest would show different winner or winners than the winner
26 or winners reported by the voting system, there is at most a five percent chance that the post-
27 election process will not lead to such a full manual tally. When this post-election process does
28 lead to a full manual tally, the winner or winners according to that full manual tally replace the
29 winner or winners as reported by the voting system, if they differ.

30 (3) A “full manual tally” means a determination of the winner, or winners, of a contest by
31 tallying the votes as determined by a manual, hand-to-eye inspection of all cast ballots on which
32 the contest appears, and without any reliance on the voting system used to produce the results
33 under audit.

34 (4) A “ballot-level comparison audit” means a type of risk-limiting audit that involves
35 both of the following steps:

36 (A) The election official uses an independent system to verify that the cast vote records
37 created by the voting system yield the same election results as reported by the voting system.

38 (B) The elections official compares some or all of those cast vote records to a hand-to-
39 eye, human interpretation of voter intent ascertained from the corresponding ballot marked by
40 the voter or the voter-verified paper record copy, as defined by Section 19271.

41 (1) A “cast vote record” means an auditable document or electronic record that purports
42 to reflect the selection made on a voter’s ballot and lists the contests on the ballot and the voter’s
43 selections for those contests. A cast vote record is not a ballot.

44 (c) Prior to the audit, the elections official shall do all of the following:

45 (1) The elections official shall prepare a written inventory, or manifest.

46 (A) The written inventory, or manifest, shall provide the location of every ballot cast and
47 counted in the election as follows: (i) Voted polling place ballots; (ii) Paper record copies, as
48 defined by Section 19271, if any, of voted polling place ballots; (iii) Voted vote by mail voter
49 ballots; and (iv) Voted provisional voter ballots.

50 (B) The ballot manifest shall, at minimum, contain the following information about
51 ballots cast and counted: (i) the total number of ballots cast and counted in the election
52 (including undervotes, overvotes, and other invalid votes); (ii) the total number of ballots cast in
53 each contest in the election (including undervotes, overvotes, and other invalid votes); and (iii) a
54 precise description of the manner in which the ballots are physically stored, including the total
55 number of physical groups of ballots, the numbering system for each group, a unique label for
56 each group, and the number of ballots in each such group.

57 (C) The ballot manifest shall not be created in reliance on any part of the voting system
58 used to tabulate votes.

59 (2) The elections official shall secure the ballots cast and counted, as defined in (c)(1)(A)
60 of this section, from loss, theft, alteration, augmentation, substitution, damage, or destruction, by
61 maintaining an accurate, written chain of custody record. The chain of custody record shall be
62 posted and maintained on the elections official’s Internet Web site. The chain of custody record
63 shall be retained along with other ballot materials as required in Section 17300 et seq.

64 (d) Audits performed under this section shall determine voter intent directly from
65 original, voter-verifiable ballots and paper record copies, as defined by Cal. Elec. Code § 19271,
66 cast and counted in the contest. In particular, the audits shall not determine voter intent from
67 ballot images, reproductions, re-made ballots, or by relying upon electronic or digital
68 representations of ballots.

69 (e) An elections official shall be deemed in compliance with this section if the elections
70 official conducts a ballot-level comparison audit with five percent risk limit, or a risk-limiting
71 audit with five percent risk limit using other methods for conducting risk-limiting audits as may
72 be approved by the Secretary of State.

73 (f) An elections official conducting a ballot-level comparison audit shall comply with the
74 following requirements:

75 (1) Prior to the selection of the sample for a ballot level comparison audit, a cast vote
76 record for every ballot cast in the contest shall be exported from the voting system and sent to the
77 Secretary of State. The elections official must be able to identify the cast vote record that
78 corresponds to any particular cast ballot on which the contest appears.

79 (2) The ballot manifest prepared under subsection (c)(1) must allow for each cast vote
80 record to be matched to its corresponding unique physical ballot, or paper record as defined in
81 Cal. Elec. Code § 19721, in a way that makes it possible to retrieve that ballot, or paper record.

82 (3) The elections official shall retain physical or electronic proof that the cast vote
83 records relied upon in the audit are those used to tally the election results that were reported to
84 the Secretary of State and the public.

85 (g) Except upon a finding of exigent circumstances as determined by the Secretary of
86 State, the audits shall be completed by the end of the statutory canvass period as specified in the
87 Elections Code.

88 (h) The public shall have the right to observe the audit process described in this section.
89 Three days prior to the occurrence of each of the following, the elections official shall provide
90 public notice of the audit and shall include in the notice information about the public's right to
91 observe the audit, including observation of the following elements of the audit:

92 (1) The process for selecting the ballots to be inspected manually;

93 (2) Evidence that the ballots retrieved and inspected by the auditors were those selected
94 by the process referenced in (1), above;

95 (3) For each ballot selected for manual inspection, the voter's mark(s) on the ballot for
96 the contests under audit;

97 (4) For ballot-level comparison audits, a true and correct human-readable rendering of the
98 cast vote record corresponding to each ballot selected for audit;

99 (5) The calculations and other information used to determine whether and when the audit
100 of each contest is complete.

101 The public right to observe, under this subsection, does not include the right to interfere
102 with the conduct of the audit.

103 (i) Upon completing the auditing mandated under this section, each county's election
104 official shall report to the Secretary of State all information pertinent to the audits conducted in
105 that county, including any and all information the Secretary of State deems necessary to verify
106 that the audits were conducted properly. When the Secretary of State publishes the Statement of
107 Vote for an election, the Secretary of State shall also publish these reports, together with any
108 other documents that confirm the audits were conducted according to the provisions of this
109 section.

110 (j) An elector may, upon a good-faith belief that an elections official did not properly
111 conduct a risk limiting audit, submit a timely, written statement of these concerns to the
112 Secretary of State. This written statement shall articulate specific facts that detail any relevant
113 information, such as (1) the inability of the public to observe the audit adequately; (2) violations
114 of law; or (3) failure to comply with audit procedures. Upon receipt of a publicly filed written

115 statement as described in this subsection the Secretary of State shall publish the statement on the
116 Secretary of State’s Internet Web site and shall respond in a timely manner.

117 (k) The Secretary of State may promulgate rules as may be necessary to implement and
118 administer the requirements of all parts of this section, including but not limited to establishing
119 procedures for:

120 (1) ensuring security of ballots and documenting that those procedures were followed;

121 (2) ensuring the accuracy of ballot manifests produced by counties;

122 (3) establishing rules governing the format of ballot manifests, cast vote records, and
123 other data involved in risk limiting audits;

124 (4) establishing methods to ensure that any cast vote records used in a risk-limiting audit
125 are those used by the voting system to tally the election results sent to the Secretary of State and
126 made public;

127 (5) establishing procedures for the random selection of ballots to be inspected manually
128 during each audit;

129 (6) establishing the calculations and other methods to be used in the audit and to
130 determine whether and when the audit of each contest is complete;

131 (7) establishing procedures and requirements for testing any software used to conduct
132 risk-limiting audits under this section.

133 In connection with the promulgation of the rules, the Secretary of State shall consult
134 recognized statistical experts, equipment vendors, and elections officials, and shall consider
135 publishing best practice guidelines for conducting risk-limiting audits.

136 (l) The Secretary of State may coordinate risk-limiting audits of contests that involve
137 more than one county, including but not limited to selecting the ballots to be inspected manually,
138 determining when the audit can stop, and determining whether a complete manual tally is
139 required in order to meet the risk limit specified in this section.

140 (m) If an elections official fails to comply with this section, the Secretary of State may
141 order a partial or full recount, or may call for a new election, as appropriate.

142 (n) An elections official may choose to comply with this section prior to the general
143 election held in the year 2020. Compliance with this section for a given election shall be deemed
144 to be compliance with Cal. Elec. Code § 15360 for that election.

145 (o) In the event that a risk limiting audit leads to a full manual tally of a contest, the
146 results of the full manual tally shall become the official results for that contest.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Public elections are the foundational process by which we establish and maintain our republic. But as of late, public elections have been described as rigged, hacked, undercounted, overcounted, or simply untrustworthy. Either these allegations are true or they are false. If true, we need a reliable process by which to audit and catch irregularities. If false, we need a scientifically verifiable way to report back to the electorate how we know—up to a 95% confidence—that the beacon of modern democracy does not, in fact, run rigged or otherwise faulty elections.

The Solution: Currently, California’s audit procedure for testing the reliability of its elections is fairly weak. *See* Cal. Elec. Code § 15360. Experts in the field, such as Philip Stark at Berkeley and Ronald Rivest at MIT argue for more robust procedure, called risk-limiting audits. Risk-limiting audits address limitations and vulnerabilities of voting process and voting technology, including the accuracy of algorithms used to infer voter intent, configuration and programming errors, and malicious subversion. *See* Jennie Bretschneider et al., *Risk-Limiting Post-Election Audits*, Oct. 2012, *available at*, <https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf>. Risk-limiting audits have been endorsed by the bi-partisan Presidential Commission on Election Administration, the League of Women Voters, the American Statistical Association, Common Cause, and Verified Voting (co-sponsor of this resolution).

Risk-limiting audits have three key benefits. First, they detect outcome-changing irregularities with a high degree of accuracy—at least 95% accuracy under the language of the proposed resolution. Second, risk-limiting audits designed by expert statisticians are proven to be scientifically sound. Finally, as compared against full recounts, risk-limiting audits are generally far less expensive, except when the contest outcome is incorrect.

Currently, only Colorado mandates a form of risk-limiting audits. *See Voting Systems Team Report To The Pilot Election Review Committee Mock Risk-Limiting Audits In Select UVS Pilot Counties*, Dec. 2015, *available at*, <http://www.sos.state.co.us/pubs/elections/VotingSystems/files/2015/20151217MockRLA-Report.pdf> (last visited Feb. 26, 2017). But its statute is dangerously vague, inviting mischief if an anti-democratic Secretary of State were to decline to draft sensible regulations or simply refuse to order a recount upon finding irregularities. *See* Colo. Rev. Stat. § 1-7-515. The language of the proposed resolution, by contrast, sets out the basic framework for mandating risk-limiting audits, describes the key elements of these audits, provides for public transparency and commentary, and mandates the Secretary of State to enact a remedy when irregularities are found in the audit.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

SIMILAR LAWS: Cal. Elec. Code § 15560 provided for a five-county, voluntary, post-canvass risk limiting audit pilot program that ran in 2011.

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