

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 227 Voting Methods and Procedure
SPONSOR(S): Government Operations Subcommittee, Brandes and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 378

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	11 Y, 0 N, As CS	McDonald	Williamson
2) State Affairs Committee			

SUMMARY ANALYSIS

Currently, the Federal Write-In Absentee Ballot (FWAB) serves as a back-up ballot to the state absentee ballot for use by either a member of the uniformed services on active duty or a member of the Merchant Marine, who by reason of such service, is absent from the place of residence where the member is otherwise qualified to vote, whether the absence is stateside or overseas. The FWAB is also permitted to be used by a spouse or dependent of a member who is absent due to the member's absence, and by a United States citizen residing abroad. By federal law, the FWAB is required to be permitted for use and accepted for all primary, special, runoff, and general elections for federal office. Federal law does not require nor prohibit the use of the FWAB in other elections.

The Florida Election Code does not specifically mention the FWAB because this is a federally mandated form to be used by uniformed services members and their spouses and dependents, and U.S. citizens residing abroad. The requirements for voters in these categories are required to be followed by the states.

The bill allows an absent uniformed services voter or an overseas voter to use the FWAB, provided through the Federal Voting Assistance Program, to vote in any federal, state, or local election involving two or more candidates. The bill maintains that the FWAB may only be used by eligible voters as a last resort, that is, when the voter has timely requested but not received an official state absentee ballot. The bill provides specific procedures to duplicate a FWAB when canvassed. Additionally, the bill allows the voter to designate candidate choices by name or political party preference for each office. It requires the Department of State to adopt rules to determine voter intent on a FWAB. The bill requires that all races on each FWAB received by a county supervisor of elections by 7 p.m. on election day be canvassed, unless the voter's official absentee ballot is received by that time. If the official absentee ballot is received, then that ballot is counted instead of the FWAB.

The bill has no fiscal impact.

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Law - *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*¹

UOCAVA, passed in 1986 and subsequently amended in 2004 and 2009², pertains to absentee voting for members of the United States uniformed services and merchant marines who are overseas or absent stateside from their place of residence, their family members who are also absent, and U.S. citizens residing outside the U.S.

UOCAVA mandated the creation of the federal absentee write-in ballot (FWAB) to serve as a backup absentee ballot for UOCAVA voters who make timely application for but do not receive an official absentee ballot. The FWAB can be used only to vote for candidates in all primary, special, runoff, and general elections for federal office.³ The FWAB requires the elector to fill in either the candidate's name or the name of a political party under headings designated for the federal office.

The FWAB contains an extensive affirmation relating to the eligibility of the voter to use the FWAB. By signing the affirmation and voting the FWAB, the voter attests that he or she is a UOCAVA voter, is entitled to vote the FWAB, is eligible to be registered, had previously requested an absentee ballot within the prescribed period and has not yet received that ballot, and is, therefore, eligible to vote the FWAB as a back-up ballot.⁴ If all of the conditions for voting have been met, then the FWAB must be canvassed. However, UOCAVA does permit an elector who has submitted a FWAB and later receives a state's official absentee ballot to submit the official absentee ballot.⁵ An elector who submits a FWAB and later receives and submits an official absentee ballot must make every reasonable effort to inform the appropriate election official that he or she has submitted more than one ballot.⁶

Florida Law

Three types of absentee ballots are available for use by UOCAVA voters: the FWAB, which is neither governed by nor referenced in state law but is governed by Federal law as discussed above; the official Florida absentee ballot;⁷ and the state write-in absentee ballot.⁸ Florida law also provides that for absentee ballots received from UOCAVA voters, there is "a presumption that the envelope was mailed on the date stated on the outside of the return envelope" whether there is no postmark or the postmark date is past the date of the election.⁹

Official Florida Absentee Ballot

UOCAVA voters requesting an official Florida absentee ballot, the most commonly used absentee ballot, can use this ballot to vote in any federal, state, or local primary, special, or general election. This includes all races with more than one candidate, judicial retention elections, and state constitutional amendment or local referendum elections. The ballot is like that used by voters at the polls, containing the names of offices, candidates, and political party identification.

¹ 42 U.S.C. 1973ff et seq.

² In 2009, the Military and Overseas Voter Empowerment Act (MOVE) became Title V, Subtitle H of UOCAVA, 42 U.S.C. 1973ff et seq. Those changes brought about revisions to Florida's election laws that were embodied in CS/CS/HB 131 (2010).

³ 42 U.S.C. 1973ff-2.

⁴ 42 U.S.C. 1973ff-2(c).

⁵ 42 U.S.C. 1973ff-2(d).

⁶ *Id.*

⁷ *See* s. 101.62, F.S.

⁸ *See* s. 101.6951, F.S.

⁹ Section 101.6952(2), F.S.

State Write-In Ballot

In response to legal challenges to the validity of overseas military ballots in Florida during the 2000 presidential elections,¹⁰ the Legislature created the state write-in absentee ballot.¹¹

A state write-in ballot is only for use in a general election. In order to receive a state write-in ballot, an overseas voter must state that, due to military or other contingencies that preclude normal mail delivery, the voter cannot vote an absentee ballot during the normal absentee voting period. A request cannot be made earlier than 180 days before a general election and will be made available to the voter between 90 and 180 days before the general election. The write-in ballot contains all federal, state, and local offices for which the voter is entitled to vote, including judicial retention elections. The write-in ballot cannot be used for voting on constitutional amendments or local referendums.

The form of the ballot is prescribed in rule.¹² In completing the ballot, the overseas voter may designate his or her choice by writing in the name of the candidate or the name of the political party, in which case the vote will be counted for the person representing that party. Abbreviation, misspelling, or other minor variation in the form of a candidate's name or of the name of a political party are required to be disregarded when determining the validity of the ballot, provided there is a clear indication on the ballot that a definite choice has been made by the voter.¹³

Receipt of Absentee Ballot Deadlines

In order for an absentee ballot to count, it must be received no later than 7 p.m. on election day.¹⁴ Under specified circumstances, that deadline is extended for overseas voters only. A 10-day extension is given for absentee ballots from overseas voters if the ballots are postmarked or dated by election day. The extension only applies to presidential preference primary elections and general elections, and only votes cast for federal offices are counted. The extension and its application are outcomes of a 1982 consent decree between the United States Department of Justice and Florida to resolve a suit brought against the state which alleged that voters were disenfranchised because supervisors of elections were not provided sufficient time to prepare absentee ballots and mail them in order for ballots to be returned in time to be counted.¹⁵ At that time Florida had two primaries and a general election occurring within nine weeks. Overseas voters had 20 days or less to vote and return ballots.

Florida's election laws have substantially changed since 1982, and issues relating to timeliness and access have been addressed by eliminating the second primary;¹⁶ mandating that UOCAVA voters receive the official absentee ballot 45 days before the primary and general elections; providing e-mail delivery of unvoted ballots;¹⁷ requiring the supervisor of elections to notify the voter of receipt of the ballot request, anticipated time the voter should receive the ballot, and confirmation of receipt of the voted ballot; and providing an online absentee ballot tracking system that can be accessed at the state level or at the local supervisor of elections level.¹⁸

¹⁰ Many of the challenges of the ballot stemmed from ballots lacking a postmark. Florida law required that ballots mailed by absent qualified electors overseas were considered valid only if the ballot were mailed with an APO, FPO, or foreign postmark. *See Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000).

¹¹ Section 48, chapter 2001-40, L.O.F.

¹² *See* Rule 1S-2.028, F.A.C.

¹³ Section 101.6951(2) and (3), F.S.

¹⁴ Section 101.67(2), F.S.

¹⁵ The consent decree requirements are contained in Rule 1S-2.013, F.A.C.

¹⁶ The Legislature suspended the second primary through the 2002 and 2004 general election cycles and eliminated it prior to the 2006 election cycle. *See* chapter 2005-86, L.O.F.

¹⁷ The ballot schedule for mailing of absentee ballots to overseas voters has changed several times. In 2005, the schedule was revised to require supervisors of elections to mail such ballots no later than 35 days before a primary or general election. In 2007, the time was changed to no later than 35 days before a primary election and no later than 45 days before a general election. Finally, in 2010, the time was changed to no later than 45 days before each election. *See* chapters 2005-286, 2007-30, and 2010-167, L.O.F.

¹⁸ In 2010, revisions were made to the Florida Election Code to conform to revisions made by the federal Military and Overseas Voter Empowerment Act (MOVE), Title V, Subtitle H of UOCAVA, 42 U.S.C. 1973ff et seq.

Use of the FWAB in Florida and Other States

The use of the FWAB in Florida has primarily been in Escambia and Okaloosa Counties. In the 2010 general election, Escambia received 34. In the 2008 election, Okaloosa County received 162 and, in the 2010 election, received 101. Sixty-three of the 101 ballots were not counted because the elector's official absentee ballot arrived either after or before the FWAB.¹⁹

Since federal law only requires use of the FWAB in elections for federal office, in order for a FWAB to be used in non-federal elections, a state must specifically authorize it. In those states that have authorized its use, electors use what is called a FWAB "addendum" to identify office and candidate name or party affiliation.

The states of Arkansas, Georgia, Mississippi, South Carolina, and Tennessee have authorized the use of the FWAB in certain state and local elections.²⁰

According to a PEW Center on the States survey of state election officials, 28 states accept the FWAB for all state and local elections, including those not occurring during a federal election. Thirty-three states accept the FWAB for all state and local elections occurring during a federal election.²¹

Effect of Proposed Changes

The bill allows an absent uniformed services voter or an overseas voter to use the FWAB, provided through the Federal Voting Assistance Program, to vote in any federal, state, or local election involving two or more candidates. The bill maintains that the FWAB may only be used by eligible voters as a last resort, that is, when the voter has timely requested but not received an official state absentee ballot. The bill provides specific procedures to duplicate a FWAB when canvassed. The procedures for duplication are similar to those used when a physically damaged absentee ballot is received. Additionally, the bill allows the voter to designate candidate choices by name or political party preference for each office. It requires the Department of State to adopt rules to determine voter intent on a FWAB. The bill requires that all races on each FWAB received by a county supervisor of elections by 7 p.m. on election day be canvassed, unless the voter's official absentee ballot is received by that time. If the official absentee ballot is received, then that ballot is counted instead of the FWAB. Finally, the bill provides that a person voting an absentee ballot and a FWAB is not criminally liable for casting more than one ballot under circumstances outlined in the bill.

B. SECTION DIRECTORY:

Section 1. Amends s. 101.6952, F.S., permitting an absent uniformed services voter or an overseas voter to use the FWAB, provided through the Federal Voting Assistance Program, to vote in any federal, state, or local election involving two or more candidates; providing that the FWAB can only be used by eligible voters if they have requested and not received an official state absentee ballot; providing instructions on using the FWAB; permitting a voter to submit the official state absentee ballot after having voted a FWAB under certain circumstances; directing the voter to notify the supervisor of elections; providing deadlines for determining which absentee ballot will be canvassed.

Section 2. Amends s. 101.5614, F.S., providing procedures for canvassing of FWABs received by the supervisors of elections.

Section 3. Amends s. 102.166, F.S., requiring the adoption of rules for counting the FWAB and determining sufficiency of designations in decisions relating to voting choices.

Section 4. Amends s. 104.18, F.S., conforming provisions to changes made by the act.

Section 5. Provides an effective date of July 1, 2011.

¹⁹ Information received from Ron Labasky, Executive Director, Florida State Association of Supervisors of Elections (March 7, 2010).

²⁰ Analysis of Senate Bill 378, Senate Ethics and Elections Subcommittee, March 3, 2011, at 2.

²¹ *Making the Election System Work for Military and Overseas Voters*, Issue Brief (July 2009), the PEW Center on the States, at 2.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill is exempt from the mandate requirements because it is amending the elections laws.

2. Other:

Under section 5 of the Federal Voting Rights Act, new legislation that implements a voting change including, but not limited to, a change in the manner of voting, change in candidacy requirements and qualifications, change in the composition of the electorate that may vote for a candidate, or change affecting the creation or abolition of an elective office, is subject to preclearance by the U.S. Department of Justice. The preclearance review is to determine if the change has a discriminatory purpose or effect that denies or abridges the right to vote on account of race, color, or membership in a language minority group in a covered jurisdiction. Florida has five covered jurisdictions subject to preclearance: Collier, Hardee, Hendry, Hillsborough, and Monroe. If the Attorney General objects to the voting change, the legislation is unenforceable.

B. RULE-MAKING AUTHORITY:

The Department of State is required to adopt a specific rule for the FWAB to assist in determining the clear choice of the voter. The rule must address, at a minimum, directions and criteria for determining voter intent.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2011, the Government Operations Subcommittee adopted a strike-all amendment to HB 127 and passed the bill as a committee substitute. The committee substitute differs from the original bill in the following ways:

- Authorizes using the FWAB in state and local candidate races involving two or more candidates (no issue or retention elections);
- Limits FWAB use as a ballot of last resort, as under federal law;
- Requires supervisors of elections to canvass all FWABs in their possession by 7 p.m. on election day, unless a voter's official absentee ballot has been received by that time;
- Adopts specific procedures to duplicate a FWAB when it is canvassed;
- Requires the Department of State to adopt rules to determine voter intent on a FWAB;
- Encourages voters who have submitted a FWAB and later receive and submit an official absentee ballot to make every reasonable effort to inform the appropriate supervisor of elections that they have submitted more than one ballot; and,
- Removes criminal penalties for casting more than one ballot under such circumstances, to conform.