

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Ethics and Elections

BILL: SB 1160

INTRODUCER: Senator Bradley

SUBJECT: Elections

DATE: March 31, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Ulrich	EE	Pre-meeting
2.			JU	
3.			RC	
4.				

I. Summary:

Senate Bill 1160 addresses several elections issues that include:

- Authorizing the *general* use of touch screen voting systems with a voter-verifiable paper trail for canvass and recount purposes, currently used only for disabled voters;
- Requiring candidates to use a cashier’s check or money order to pay the qualifying fees to run for office;
- Allowing a court to extend poll hours only upon a specific showing or finding of extraordinary circumstances;
- Prohibiting an elected official from being a poll watcher;
- Allowing county Supervisors of Elections to *either* publish sample ballots in newspapers or mail them to registered electors, reversing a duplicative requirement passed in 2013;
- Creating a statutory affidavit “cure” process to remedy and count a vote-by-mail ballot where the signature submitted by the voter doesn’t match the signature on file in the registration book/precinct register (identical to SB 954 [2017] by Sen. Passidomo).

The bill takes effect July 1, 2017.

II. Present Situation:

Touchscreen Voting Systems (*with voter-verifiable paper trail*)

A “voting system” is a method of casting and processing votes that consists of electromechanical components and, in many cases, utilizes marksense ballots.¹ The voting system may also include things like procedures, operating manuals, supplies, printouts, and other software necessary for the system’s operation.

¹ Section 97.021(45), F.S.

To be used in a Florida election, the voting system must be approved by the State Division of Elections. The Division tests the reliability of both the hardware and software components to make sure that they meet the standards set out in law and rule. Florida's certification process is among the most comprehensive in the nation.

Section 101.56062, F.S., enumerates the statutory standards for accessible voting systems, including items like requirements for tactile or audio input devices and font size for the visually impaired. *Only persons with disabilities may vote on one of these accessible voting systems.*²

The disability voting systems generally include a “voter interface device,” which many Floridians may remember being called “touch screens.”³ The difference between the original “touch screen” systems in use in about 15 counties in the mid-2000's and the current crop of certified disability voting systems, such as the ES&S AutoMARK⁴ and VoteExpress,⁵ is that the new systems “mark” a scannable paper ballot — a voter-verifiable paper trail that can be used for recount purposes. These systems prevent an elector from “overvoting” (typically, selecting more than one candidate per race), and warn or prompt the voter if they skip a race (to reduce “undervoting”). There is a summary review screen at the end of the selection process to allow a voter to go back and make or change a selection.⁶ After the ballot is printed, voters are able to review the ballot for accuracy prior to depositing in an optical scanner for counting.

Candidate Qualifying Fees

In 2011, the Legislature modified a long-standing procedure that allowed a partisan candidate to “cure” a bad campaign check submitted at the time of qualifying to cover the fees.⁷ The original provision had given a candidate 48 hours from receiving notice that his or her financial institution had returned the check to sort out the situation, *notwithstanding the end of qualifying*. The 2011 modification required the candidate to correct the situation *no later than* the end of the 4-day (96 hour) qualifying period.

In 2016, the Florida Supreme Court struck down the change and re-wrote section 99.061(7)(a)1., F.S., reinstating the pre-2011 statutory language.

² Section 101.56075 (1),(2), F.S. In some instances, it is possible that only a *single* voter in a polling place will use the disability voting equipment, which can raise concerns with respect to the secrecy of the ballot.

³ In the early-to-mid 2000's, some Florida counties experimented with touch screen voting systems *without a paper trail* for the general voting populace; those systems were ultimately replaced by optical scan voting systems for all but disabled voters, beginning with the 2008 primary election. Ch. 2007-30, § 6, LAWS OF FLA. (codified at § 101.56075, F.S.).

⁴ This system marks the same type of optical scan ballot design (i.e., blacken-the-oval design) familiar to voters, effectively serving as an electronic “pen.” Verified Voting, ES&S AutoMARK Description and Instructional Video, available at <https://www.verifiedvoting.org/resources/voting-equipment/ess/automark/> (last accessed Mar. 8, 2017)[hereinafter, *AutoMARK Web Page*].

⁵ The VoteExpress produces a ballot card with multiple bar codes at the top corresponding to the voter's choices. Underneath the bar codes, the card contains the offices or amendments on the ballot, along with the voter's choice in each contest. See Verified Voting, ES&S ExpressVote Description and Instructional Video, available at <https://www.verifiedvoting.org/resources/voting-equipment/ess/expressvote/> (last accessed Mar. 8, 2017)[hereinafter, *ExpressVote Web Page*].

⁶ The voter can return to a contest *for any reason*, not just because they left a race blank (undervoted), and change a selection.

⁷ Chapter 2011-40, § 14, LAWS OF FLA. (codified at § 99.061(7)(a)1., F.S.). The Legislature left the original procedure untouched for *non-partisan* candidates, such as judges and school board members. Section 105.031(5)(a)1., F.S.,

In *Wright v. City of Miami Gardens*,⁸ a candidate for mayor of the City of Miami Gardens was disqualified from the race because the candidate's bank inadvertently erred in not honoring his campaign check, although there were sufficient funds in the campaign account. The bank did not return the check until *two weeks after* the end of the qualifying period; the City didn't notify candidate until four days later — far too late for the candidate to cure under the statute. The Court found that the statutory time frame for curing deficiencies was “essentially impossible” in most circumstances.⁹ Further, the Court held that the:

...[S]tatute at issue here is arbitrary and without a rational basis. [It] effectively forecloses the candidacy of all otherwise qualified candidates who have done all they were required to do but have had their checks returned, not due to insufficient funds or some other matter within their control, but due to sheer bad luck resulting from a bank error totally beyond their control. This bright line, by turning on luck rather than conduct, is irrational and violates Wright's constitutional right to run for public office.¹⁰

Extending Polling Hours

The polls in Florida are open from 7:00 a.m. to 7:00 p.m. on election day, in accordance with the local time zone in the county seat.¹¹ Voters in line at closing time are allowed to cast ballots.

Lawsuits seeking to extend the polling hours on election day due to some problem or perceived irregularity have become an increasingly common tactic nationwide as well as in Florida.¹² For example, in the 2014 Florida gubernatorial race, the Charlie Crist campaign filed an emergency motion to extend the polling hours in Broward County for 2 hours due to what it called “voter confusion and malfunctions.”¹³ Although the motion was denied, judges have been known to grant these type of requests.¹⁴

Poll Watchers

Political parties, candidates, and political committees organized to support or oppose a ballot issue may designate qualified and registered county electors to serve as poll watchers.¹⁵ They are entitled to have one poll watcher in each polling room or early voting site at any given time

⁸ 200 So.3d 765 (Fla. 2016).

⁹ *Id.* at 776-777.

¹⁰ *Id.* at 776.

¹¹ Section 100.011, F.S.

¹² University of Kentucky College of Law, Olivia Snider and Matthew Dearmond, *Closing Time? The Extension of Polling Station Hours* (November 4, 2014), Election Law Society web site, available at

<http://www.uky.edu/electionlaw/analysis/closing-time-extension-polling-station-hours> (last accessed Feb. 24, 2017)

[hereinafter, Snider, *Closing Time?*]

¹³ U.S. News & World Report, *Crist Motion to Keep Polls Open in Broward County Gets Denied* (November 4, 2014), available at <https://www.usnews.com/news/articles/2014/11/04/crist-files-motion-to-keep-polls-open-in-broward-county> (last accessed Feb. 24, 2017)

¹⁴ See e.g., Snider, *Closing Time?* (judges in Georgia and Connecticut extended the hours at several polling places in 2014).

¹⁵ Section 101.131, F.S.

during the election. Candidates, sheriffs, deputy sheriffs, police and other law enforcement officers may NOT be poll watchers.

Poll watchers are there to observe the conduct of elections and elections officials. They cannot come any closer to an official's table or a voting booth than is reasonably necessary to do their job. They are not allowed to obstruct the orderly conduct of the election. Poll watchers can only pose questions regarding polling procedures directly to the clerk in charge of the precinct or polling place, and are prohibited from interacting with voters.

Sample Ballot Publication

Prior to the passage of the 2013 Paper Reduction Act,¹⁶ county Supervisors of Elections had the option to either publish a sample ballot in a newspaper of general circulation in the county or mailing one to registered voters. The Act authorized sending sample ballots by e-mail, but also set-up the *double requirement* of publishing *and* sending a sample ballot.

Canvassing of Vote-by-Mail Ballots

In 2013, at the urging of the state supervisors of elections, the Legislature changed the law to allow a voter who returned a vote-by-mail ballot *without a signature* on the Voter's Certificate (on the back of the mailing envelope) to correct or "cure" the defect by submitting a sworn affidavit along with corroborating identification.¹⁷

For the 2014 election cycle, county canvassing boards cured *missing* vote-by-mail ballot signatures by confirming the validity of the voter identification submitted and comparing the voter's signature on the cure affidavit with the registration signature on file in the registration books or precinct register. If the voter ID was valid and the signatures matched, the canvassing board counted the ballot; otherwise, the board rejected the ballot and notified the voter of the reason, *post-election*.¹⁸ The notification included a card for the voter to update his or her signature for the next election. It is important to note that a matching voter signature was an essential component of the cure process for determining the validity of the ballot.¹⁹

In 2016, shortly before the general election, U.S. District Judge Mark Walker ruled that the state's failure to provide a process for curing vote-by-mail ballots with *mismatched* signatures was unconstitutional in light of the State's statutory procedure for correcting *missing* signatures.²⁰ The federal court issued a temporary injunction directing the state to offer the same

¹⁶ 2013-192, LAWS OF FLA.

¹⁷ Ch. 2013-57, § 15, Laws of Fla. (codified at § 101.68, F.S.) Previously, the practice had been that a ballot was deemed "cast" when a voter took the final step that enabled the ballot to be counted.

¹⁸ There was and is no statutory requirement that the supervisors notify voters who submit missing ballot signatures. The idea was that third parties (political parties and other groups) who follow vote-by-mail ballot returns on a daily basis would handle that responsibility.

¹⁹ "The canvassing board shall, if the supervisor has not already done so, compare the signature of the elector on the voter's certificate **or on the absentee ballot affidavit as provided in subsection (4)** [the cure affidavit] with the signature of the elector in the registration books or the precinct register to see that the elector is duly registered in the county and to determine the legality of that absentee ballot." (emphasis added) Section 101.68(1)(c)1., F.S. (2014).

²⁰ *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620, Case No. 4:16cv607-MW/CAS (N.D. Fla., Oct. 16, 2016). The court opined, "It is illogical, irrational, and patently bizarre for the State of Florida to withhold the opportunity to

process for curing both types of signature deficiencies, notwithstanding that Florida law *requires a matching signature on the cure affidavit* in order for a ballot to count.²¹

As a result, the only mismatched-signature ballots that canvassing boards should have remedied under the judge's order were those where the voter returned an affidavit with a *matching* signature, perhaps because the voter:

- Hurriedly wrote his or her signature on the original Voter's Certificate or signed on an uneven surface, but was more precise in signing the cure affidavit; or
- Recalled using a different signature in the past, and signed the cure affidavit with that prior signature.²²

The judge's order did not provide relief to voters who submitted the *same* mismatched signature on both the Voter's Certificate *and* cure affidavit, perhaps resulting from:

- The voter forgetting that he or she had registered using a different signature; or
- The voter's signature deteriorating or changing *over time* as the result of the natural aging process or a specific health-related event (i.e., stroke, blindness, paralysis, and dementia).

The federal court stayed the case with a permanent injunction until Friday, May 5, 2017, the last day of the regular session and scheduled a status conference for the week of May 15, 2017.²³

III. Effect of Proposed Changes:

SB 1160 makes a number of substantive changes to the Florida Election Code.

Touchscreen Voting Systems (*with voter-verifiable paper trail*)

SB 1160 modifies a few voting system terms and provisions in the election code to authorize the use of an electronic "voter interface device" to mark paper ballots for optical scanning. The bill further provides that the ballot layout need only apply to the voter interface device and not to the printed ballot. These changes will effectively allow *any* elector to use the touchscreen voting equipment with a scannable paper trail that is currently authorized solely for disabled voters, such as the ES&S AutoMARK and ExpressVote systems.

Candidate Qualifying Fees

SB 1160 requires most partisan and non-partisan candidates²⁴ to pay for qualifying fees to run for office with a cashier's check or money order, removing the need for any cure procedure for

cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time." *Id.* at 22.

²¹ The State chose not to defend the statute on substantive grounds, leaving the judge only the one-sided Petitioner's brief/argument and Florida statutory law as sources of information from which to construct the opinion.

²² A person may use different signatures at various stages of life, especially at a younger age when the person is seeking to establish his or her own identity.

²³ *Fla. Dem. Party, et al. v. Detzner*, No. 4:16cv607-MW/CAS (N.D. Fla, Dec. 12, 2016) (order staying case).

²⁴ Excluding special district candidates.

personal campaign checks returned for insufficient funds.²⁵ This will provide absolute certainty as to who is running at the close of the qualifying period, and allow Supervisors of Elections in most cases to immediately begin preparing and distributing vote-by-mail ballots.

Extending Polling Hours

The bill allows a court to extend polling hours beyond 7:00 p.m. *only* upon a specific showing or finding of fact that extraordinary circumstances justify the extension. The degree to which a court would consider itself constitutionally bound or practically limited by this requirement is unclear.

Poll Watchers

The bill prohibits an *elected official* from being designated as a poll watcher, joining the ranks of candidates, sheriffs, deputy sheriffs, police, and other law enforcement officers.

Sample Ballot Publication

The bill allows a county Supervisors of Elections to *either* publish a sample ballot in a local newspaper or mail them to registered voters; the Supervisors of Elections had this option prior to 2013.

Canvassing of Vote-by-Mail Ballots

SB 1160 creates a process for a voter to cure a vote-by-mail ballot with a *non-matching* signature. The voter must submit a signed “cure” affidavit along with a copy of a valid picture ID. This is similar to the process the Legislature authorized in 2013 for fixing vote-by-mail ballots that contained *no signature*, a process which is maintained and expanded upon in the current bill.

The cure process for both types of defective ballots begins when a Supervisor of Elections receives a vote-by-mail ballot that contains *no signature* or that contains a signature that *does not match* the voter’s signature in the registration book or precinct register. The supervisor must immediately notify the voter²⁶ and provide an opportunity to cure the defect by submission of a signed cure affidavit and a copy of a proper ID no later than 5:00 p.m. on the day before the election — the current deadline for correcting a ballot with no signature.²⁷

²⁵ Cashier’s checks and money orders are effectively *purchased* with funds drawn from the campaign account. As such, the cashier’s check or money order operate like a cash substitute, though there is a paper trail for campaign finance reporting purposes.

²⁶ Current law does not specifically task the supervisor with this responsibility, as the 2013 authorizing legislation envisioned notification by campaigns, parties, and interested third-party groups that track vote-by-mail ballots on a daily basis. This position is no longer viable given the judge’s temporary injunction in *Fla. Dem. Party* case directing the supervisors to provide such notice, notwithstanding that the directive may have sprung from a misunderstanding of current Florida law. See *Fla. Dem. Party v. Detzner*, No. 4:16cv607-MW/CAS at p. 28-29 (N.D. Fla., Oct. 16, 2016) (citing a notice provision historically applied only *post-election*).

²⁷ The affidavit and instructions are available on the Division of Elections and all supervisors’ websites, along with all relevant contact information and mailing addresses. Section 101.68(4)(e), F.S. (re-designated as subparagraph (d) in the bill).

The decision tree in **Section VII, Related Issues** graphically details the process for canvassing vote-by-mail ballots with missing or mismatched signatures. Key points from the diagram are discussed below.

Mismatched-Signature Ballots

A voter may cure a mismatched signature on a vote-by-mail ballot by submitting:

- A *signed affidavit* attesting to his or her eligibility to vote and attesting to the fact that he or she requested and returned a vote-by-mail ballot; and
- The same type of current and valid picture identification required at the polls, which is now categorized as Tier 1 identification, such as a Florida driver's license or passport,²⁸ if the signature on the cure affidavit does not match the voter's signature on file; or
- Either Tier 1 identification, such as picture identification that is accepted at the polls or one of the lesser forms of identification currently authorized in law for curing *missing* signatures with the voter's name and current residence address, which is —categorized in the bill as Tier 2²⁹ identification, such as a current utility bill, if the signature on the cure affidavit does not match the voter's signature on file.

Missing-Signature Ballots³⁰

A voter may cure a missing signature on a vote-by-mail ballot by submitting:

- A *signed affidavit* attesting to his or her eligibility to vote and attesting to the fact that he or she requested and returned a vote-by-mail ballot; and
- The same type of current and valid picture identification required at the polls, now categorized as Tier 1 identification,³¹ if the signature on the cure affidavit does not match the voter's signature on file; or
- Either Tier 1 identification, like a photo identification acceptable at the polls, or one of the lesser forms of identification currently authorized in law with the voter's name and current residence address, which is categorized in the bill as Tier 2,³² such as a current utility bill, if the signature on the cure affidavit does match the voter's signature on file.

Additional minor changes made by the bill include:

²⁸ Tier 1 identification includes the following current and valid photo IDs: Florida driver license; Florida identification card issued by the Department of Highway Safety and Motor Vehicles; United States passport; debit or credit card; military identification; student identification; retirement center identification; neighborhood association identification; public assistance identification; veteran health identification card issued by the United States Department of Veterans Affairs; a Florida license to carry a concealed weapon or firearm; or, an employee identification card issued by any branch, department, agency, or entity of the Federal Government, the state, a county, or a municipality. The bill also *specifically* designates a Florida driver's license and state-issued ID as permissible forms of photo identification, a clarification of the original 2013 legislation that incorporates the current practice and informal legal interpretation.

²⁹ Tier 2 identification includes a current utility bill, bank statement, government check, paycheck, or government document, but excluding a voter identification card.

³⁰ With the exception of providing an *additional* opportunity for a voter to cure a defective ballot upon submission of a cure affidavit with a *mismatched* voter signature, which would not count under current law, the process for cure remains the same.

³¹ See *supra* note 28.

³² See *supra* note 29.

- Modifying the cure affidavit instructions to request a preference for Tier 1 identification, if available. (If the signature on the cure affidavit does not match the signature on file, the voter must have submitted a current and valid Tier 1 photo ID for the ballot to count.)
- Amending the *post-election* notification process to require that a supervisor of elections send a voter registration card to any voter whose ballot *counted* notwithstanding a non-matching signature — for purposes of updating the signature for the next election.
- Making technical, conforming, and structural changes to the statute.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Sample Ballot Publication

Revenue; recurring

Local newspapers may lose revenue in the form of publication fees for sample ballots, as Supervisors of Elections are increasingly preferring to mail sample ballots to voters' residences. The overall amount of revenue lost is inestimable as it will depend on how many Supervisors of Elections choose to mail sample ballots *in lieu of* publication.

C. Government Sector Impact:

Sample Ballot Publication

Expenditures; recurring

County Supervisors of Elections will save an indeterminate amount of money each election cycle, by either foregoing newspaper publication *or* the mailing of sample ballots to voters. The bulk of the savings will be realized by the county Supervisors of Elections who pay for the elections, except for *special election* savings which will be realized by the State (who must reimburse the counties to run these elections).

Canvassing of Vote-by-Mail Ballots

Supervisors of Elections may incur some additional costs to notify voters who submit vote-by-mail ballots with missing or mismatched signatures and do not have an e-mail address on file. Such costs are expected to be minimal.

VI. Technical Deficiencies:

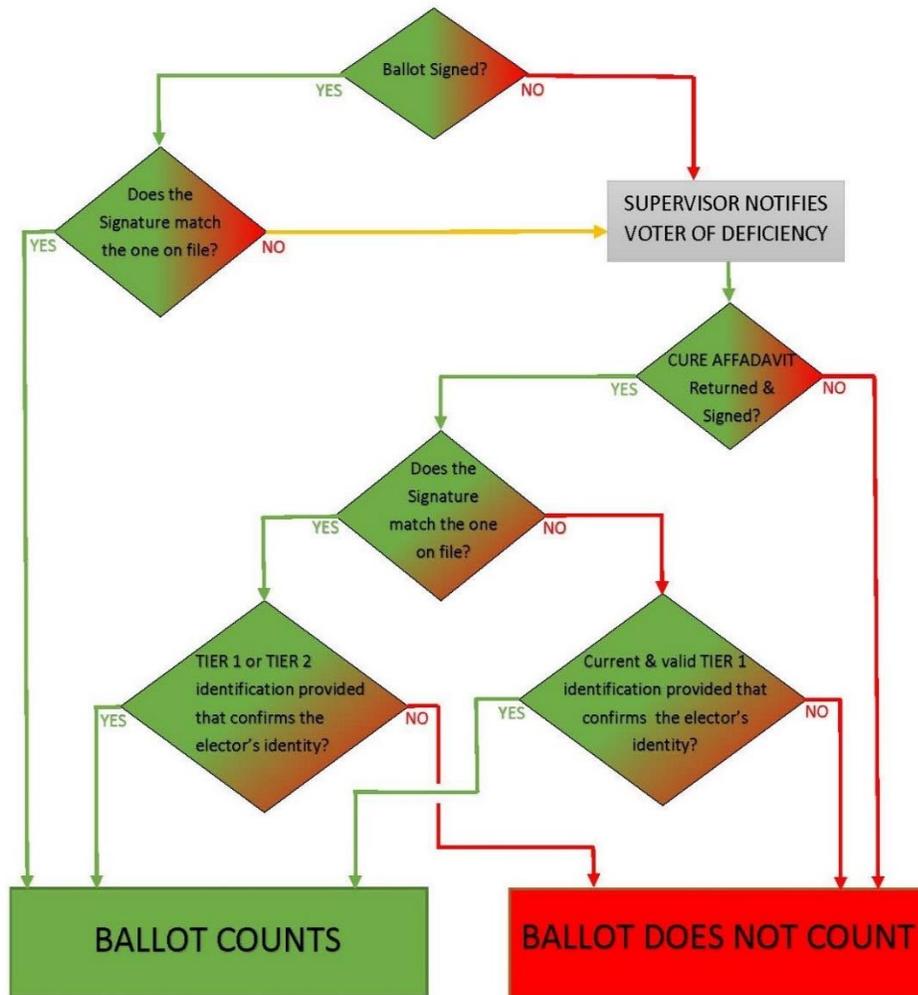
None.

VII. Related Issues:

Canvassing of Vote-by-Mail Ballots

The following decision tree outlines the canvassing board process for determining the validity of vote-by-mail ballots with missing and/or mismatched signatures:

CANVASSING VOTE-BY-MAIL BALLOTS



VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 97.021, 99.061, 100.011, 101.131, 101.151, 101.20, 101.5603, 101.56075, 101.68, 105.031.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
