

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: CS/SB 964

INTRODUCER: Community Affairs Committee and Senator Baxley

SUBJECT: Voting Systems

DATE: February 6, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Ulrich</u>	<u>EE</u>	<b>Favorable</b>
2.	<u>Cochran</u>	<u>Yeatman</u>	<u>CA</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 964 authorizes the general use of touch screen voting systems with a voter-verifiable paper trail for canvassing and recount purposes, currently available only to disabled voters. The bill also gives county canvassing boards and Supervisors of Elections the *option* to use State-certified, digital-imaging, automated tabulating equipment that is not part of the county's voting system to conduct both machine and manual recounts.

**II. Present Situation:**

**Voting Systems**

A "voting system" is a method of casting and processing votes that consists of electromechanical components and, in many cases, utilizes mark-sense ballots. The voting system may also include things like procedures, operating manuals, supplies, printouts, and other software necessary for the system's operation.<sup>1</sup>

The State Division of Elections approves the voting system used in most Florida 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 rules. Florida's certification process is among the most comprehensive in the nation.

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<sup>1</sup> Section 97.021(45), F.S.

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 an accessible voting system.*<sup>2</sup>

The disability voting systems generally include a “voter interface device,” which many Floridians may remember as “touch screens.”<sup>3</sup> The difference between the original “touch screen” systems in use in about 15 counties in the mid-2000s and the current crop of certified disability voting systems, such as the ES&S AutoMARK<sup>4</sup> and ExpressVote,<sup>5</sup> is that the newer systems “mark” a scannable paper ballot — a voter-verifiable paper trail that can be used for recount purposes.<sup>6</sup> These systems prevent an elector from “overvoting” (selecting more than one candidate per race) and warn or prompt the voter if he or she “undervotes” (completely skips a race). 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.<sup>7</sup> After the ballot is printed, voters are able to review the ballot for accuracy before depositing it in an optical scanner for counting.

## Recounts

The preliminary results of an extremely close election may warrant a statutory *machine* and/or *manual* recount, depending on the margin of victory. The recount occurs *before* the election results are certified. The purpose of the recount is to determine *who won an election*. The State Elections Canvassing Commission, in the case of federal, state, and multicounty races, and the local county canvassing board in most other elections, must certify the results by the 9<sup>th</sup> day after a primary election and the 14<sup>th</sup> day after a general election.<sup>8</sup>

The current recount framework, with only a few minor modifications for peripheral issues, has been in effect since the Legislature enacted the Florida Election Reform Act of 2001 — which completely overhauled the State’s outdated recount process after the 2000 U.S. presidential recount.

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<sup>2</sup> Section 101.56075 (1) and (2), F.S.

<sup>3</sup> In the early-to-mid 2000s, 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 (i.e., blacken-the-oval) 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.).

<sup>4</sup> This system marks the same type of optical scan ballot design familiar to voters, effectively serving as an electronic “pen.” Verified Voting, ES&S AutoMARK Description and Instructional Video, <https://www.verifiedvoting.org/resources/voting-equipment/ess/automark/> (last accessed Feb. 1, 2018)[hereinafter, *AutoMARK Web Page*].

<sup>5</sup> The ExpressVote 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, <https://www.verifiedvoting.org/resources/voting-equipment/ess/expressvote/> (last accessed Feb. 1, 2018)[hereinafter, *ExpressVote Web Page*].

<sup>6</sup> About 2/3rds of Florida’s counties (42/67) currently use either the ES&S AutoMark or Express Vote systems for disabled voters. See Fla. Div. of Elections, *Accessible Voting Equipment by County (updated Jan. 31, 2018)*, available at: <http://www.dos.myflorida.com/media/695364/accessible-voting-systems-in-use-by-county.pdf> (last accessed Feb. 1, 2018).

<sup>7</sup> Voters can return to a contest selection *for any reason*, not just because they left a race blank, or undervoted, and change a selection.

<sup>8</sup> Section 102.111(2), F.S. County canvassing boards must submit final returns to the Department of State for races certified by the Elections Canvassing Commission no later than 5:00 p.m. on the 7<sup>th</sup> day after a primary election and by noon on the 12<sup>th</sup> day after a general election. Section 102.112(1),(2), F.S. (Prior to 2007, the deadline for the county canvassing board to submit general election results was even earlier — 5:00 p.m. on the 11<sup>th</sup> day after the election. Ch. 2007-30, § 32, LAWS OF FLA. (codified at § 102.112(2), F.S.))

### ***Machine Recounts***

If the *first* set of unofficial results<sup>9</sup> indicate that the margin of victory in any race is one-half of one percent or less, each canvassing board must run the marksense ballots through the *voting system's* automatic tabulating equipment for every affected precinct.<sup>10</sup> During this machine recount process, the tabulators sort out the overvotes and undervotes, in case the results are close enough to warrant a manual recount of overvotes and undervotes. Touchscreen ballots for disabled voters are recounted by examining and reconciling discrepancies in the precinct tabulator counters. There are also requirements for canvassing boards to perform L & A (“logic and accuracy”) tests on the tabulation equipment prior to re-tabulation, duplicating damaged ballots, and addressing voting discrepancies.

### ***Manual Recounts***

If the machine recount results comprising the *second* set of unofficial results<sup>11</sup> indicate a margin of victory of one-quarter of one percent or less, the county canvassing board generally must conduct a manual recount of the *overvotes* and *undervotes*.<sup>12</sup>

The majority of the manual recount process involves teams of two electors (preferably from opposing parties) reviewing marksense paper ballots to determine whether there is a “clear indication on the ballot that the voter has made a definite choice” — a very detailed process in the case of some markings.<sup>13</sup> If a team cannot agree, the ballot is “bumped up” to the canvassing board for a final determination.<sup>14</sup>

Recounts are governed by complex procedures and requirements designed to protect the integrity of the process, involving:

- Duplication of ballots;
- Security of ballots during the recount;
- Time and location of the recount;
- Opportunity for public observance;
- Objections to ballot determinations;
- Recordation of recount proceedings; and,
- Processes relating to affected candidates.<sup>15</sup>

<sup>9</sup> County canvassing boards must report the first set of unofficial results in federal, statewide, state or multicounty office or ballot measure to the Department of State by noon of the third day after a primary election and noon of the 4<sup>th</sup> day after a general election. Section 102.141(5), F.S.

<sup>10</sup> Section 102.141(7), F.S. A losing candidate within one-half of one percent or less can waive the automatic recount in writing. *Id.*

<sup>11</sup> County canvassing boards must report the second set of unofficial results in federal, statewide, state or multicounty office or ballot measure to the Department of State by 3:00 p.m. of the 5<sup>th</sup> day after a primary election and 3:00 p.m. of the 9<sup>th</sup> day after a general election. Section 102.141(7)(c), F.S.

<sup>12</sup> Section 102.166(1), F.S. A manual recount is not required if the losing candidate waives the recount or if the number of overvotes and undervotes to be recounted is fewer than the number of votes needed to change the election outcome. *Id.*

<sup>13</sup> Section 102.166(4)(b), F.S. The division has a 14-page rule detailing which ballot markings constitute a valid vote in the context of how a voter filled out a particular ballot. Rule 1S-2.027, F.A.C. There are also some relatively straightforward rules for counting touchscreen ballots cast on disability voting equipment. *Id.*

<sup>14</sup> Section 102.166(5)(c), F.S.

<sup>15</sup> Section 102.166(5)(b),(d), F.S.; Rule 1S-2.031 (Recount Procedures).

The recount process — both machine and manual — creates numerous logistical and organizational challenges for county Supervisors of Elections; depending on the race and the number of ballots involved, it can be a very time-consuming and labor-intensive process. Fortunately, Supervisors of Elections have repeatedly risen to the challenge on those rare occasions when a State-certified recount has been necessary.<sup>16</sup>

### Voting System Audits

Voting system audits, as distinct from recounts, are conducted *after* the final canvassing board certifies the election results for the purposes of *confirming* the accuracy of the *voting system tabulation* and *identifying problems and recommending cures for future elections*.

Section 101.591(1), F.S., provides:

*Immediately following the certification of each election, the county canvassing board... shall conduct a manual audit or an automated, independent audit of the voting systems used in randomly selected precincts (emphasis added).*

Manual random audits consist of a public, hand tally of a 1%-2% of precincts in a single race on the ballot.<sup>17</sup> The audit includes a tally of Election Day, vote-by-mail, early voting, provisional, and overseas ballots.

Automated audits are much more extensive, tallying votes cast across every race that appears on the ballot.<sup>18</sup> The tally includes all election day, vote-by-mail, early voting, provisional, and overseas ballot in at least of 20% of the precincts chosen at random by the canvassing board.

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<sup>16</sup> Supervisors of Elections have conducted 37 recounts (22 machine; 15 manual) in the past 8 general election cycles, most recently in a 2016 Florida House District 118 race where former U.S. congressman David Rivera lost by a mere 53 votes (out of 62,771 cast). See, Florida Division of Elections Election Results Archive, available at <http://dos.myflorida.com/elections/data-statistics/elections-data/election-results-archive/> (last accessed Feb. 6, 2018)(review of primary and general election results from 2002-2016).

<sup>17</sup> Section 101.591(2)(a), F.S.

<sup>18</sup> Section 101.591(2)(b), F.S. In 2013, Florida became the first state to give counties the option of conducting post-certification audits either manually or through an automated, independent method. Ch. 2013-57, § 10, LAWS OF FLA. (codified at § 101.591, F.S.); Hillary Lincoln, Marketing and Communications Manager, Clear Ballot, Clear Ballot's Audit of Florida's Presidential Election Results a Success (Dec. 14, 2016) (press release), available at <http://www.prnewswire.com/news-releases/clear-ballots-audit-of-floridas-presidential-election-results-a-success-300378422.html> (last accessed Feb. 6, 2018) [hereinafter, Clear Ballot, 2016 Press Release]. Division of Elections indicates that the *ClearAudit* digital imaging system from Clear Ballot Group of Boston, MA, was the only system approved to conduct automated audits for the 2016 general election. See, Florida Division of Elections, Approvals and Technical Advisories (identifying Democracy Live, Inc.'s, *LiveBallot* electronic ballot delivery/duplication [non-audit] system as the only other system that the division "approved" for the 2016 election cycle), available at <http://dos.myflorida.com/elections/voting-systems/approvals-and-technical-advisories/> (last accessed Feb. 6, 2018); Maria Matthews, Director, Florida Division of Elections, *ClearAudit* Interim Approval Extension Letter (Jan. 25, 2016) (approving *ClearAudit* as alternative to manual audit process provided in s. 101.591, F.S.), available at <http://dos.myflorida.com/media/695954/clearaudit-106-interim-approval-extension-1252016.pdf> (last accessed Feb. 6, 2018). Seven of Florida's 67 counties — Bay, Broward, Columbia, Leon, Nassau, Putnam, and St. Lucie — used the Clear Ballot product to audit nearly 14% of the ballots cast in the Florida 2016 general election. Clear Ballot, 2016 Press Release. For more information on *ClearAudit*, see Clear Ballot, The ClearVote Solution, available at <http://www.clearballot.com/explore> (last visited Feb. 6, 2018).

The division “approves” the independent audit equipment pursuant to both statutory and rule standards. The automated audit equipment must be:<sup>19</sup>

- Completely independent of the primary voting system;
- Fast enough to produce audit results no later than midnight of the 7<sup>th</sup> day following election certification; and,
- Capable of demonstrating that the audit system has accurately tallied the ballots.

Division Rule 1S-5.026, F.A.C., contains additional “approval” requirements and procedures, which are not as comprehensive as the requirements for certifying full voting systems.<sup>20</sup>

The canvassing board must complete the audit no later than midnight of the 7<sup>th</sup> day after it certifies the election results.<sup>21</sup> The canvassing board must provide a report to the Department of State by the 15<sup>th</sup> day after completing the audit that addresses:<sup>22</sup>

- The overall accuracy of the audit;
- A description of any problems or discrepancies encountered;
- The likely cause of such problems or discrepancies; and,
- Recommended corrective action with respect to avoiding or mitigating such circumstances in future elections.

If a manual recount takes place, the affected canvassing board is not required to conduct an audit.<sup>23</sup>

### III. Effect of Proposed Changes:

CS/SB 964 modifies a few voting system terms and provisions in the Florida Election Code to authorize the use of an electronic “voter interface device” for marking 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. The bill also adds a definition for “automatic tabulating equipment,” which is an apparatus that automatically examines, counts, and records votes.

These changes will effectively allow *any* elector, not just disabled voters, to use the touch screen voting equipment with a scannable paper trail like the ES&S AutoMARK or ExpressVote systems. Supervisors who have already purchased this type of equipment will benefit by increased use of the machines and possible shorter lines at certain polling places, something that is particularly important *this* election cycle with the potentially longer ballot that includes Constitution Revision Commission proposals.

The bill gives county canvassing boards and Supervisors of Elections the *option* to use digital imaging, automated tabulating equipment that is not part of the voting system to conduct both machine and manual recounts.

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<sup>19</sup> Section 101.591(2)(c), F.S.

<sup>20</sup> Rule 1S-5.026 (Post-Election Certification Voting System Audit); *see also*, *infra* note 2 and accompanying text (discussing voting system certification requirements).

<sup>21</sup> Section 101.591(4), F.S.

<sup>22</sup> Section 101.591(5), F.S.

<sup>23</sup> Section 101.591(6), F.S.

In the machine recount process, the ballots are run through the digital imaging tabulators and not the voting system's tabulators that performed the original tally. Overvotes and undervotes may be sorted physically or digitally, in case the results are close enough to require a manual recount.

To facilitate faster manual recounts of overvotes and undervotes, the bill specifically allows for the counting of the actual paper ballots *or* the digital image of the ballots.

Further, the bill directs the division to adopt by rule "procedures relating to the certification, and the use thereof, of automatic tabulating equipment that is not part of a voting system." Use of the word "certification" suggests a higher threshold for authorization than the current "approval" process for automated *audit* systems, something more akin to the *voting systems* certification standards.

The bill takes effect January 1, 2019.

#### **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:

None.

C. Government Sector Impact:

Local Supervisors of Elections typically purchase voting equipment using county funds or, occasionally, federal grant money. There should be no direct impact on state revenues or expenditures.

The bill makes the use of digital imaging systems for recounts permissive, and as there is no way to predict which county may be impacted by a recount, any government sector impact would be purely speculative. Supervisors of Elections currently using digital-imaging, automated tabulating equipment to conduct automated audits may realize cost

savings in the event of a recount. As counties generally fund elections at the local level, Supervisors of Elections wishing to purchase new or additional digital-imaging equipment would not necessitate an expenditure from the State's General Revenue fund.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 97.021, 101.151, 101.5603, 101.56075, 101.5614, 102.141, and 102.166.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Community Affairs on February 6, 2018:**

Gives county canvassing boards and Supervisors of Elections the *option* to use State-certified, digital-imaging, automated tabulating equipment that is not part of the county's voting system to conduct both machine and manual recounts.

- B. **Amendments:**

None.