

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 Community Affairs

BILL: CS/CS/SB 268

INTRODUCER: Community Affairs Committee; Ethics and Elections Committee; and Senator Baxley

SUBJECT: Voting Methods

DATE: March 7, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Roberts</u>	<u>EE</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 268 mandates that voters with disabilities cast a ballot on a voting system that produces a voter verifiable paper output (“VVPO”) for canvassing and recount purposes. In the 2018 election cycle, voters with disabilities in four counties — Glades, Jefferson, Miami-Dade, and Palm Beach — still cast ballots on older Direct Recording Equipment (“DRE”) touchscreen voting machines that only recorded the votes electronically (no paper).

The bill also authorizes the general use of such VVPO touchscreen systems by all voters, not just those with disabilities. This addresses ongoing concerns of the disability community to be able to cast ballots in the same manner as other voters, and will allow for more cost-effective use of the machines that otherwise would sit idle in many precincts for much of Election Day.

Additionally, the bill revises the definition of the term “voter interface device” (i.e., touchscreen, braille keyboard, sip-and-puff assistive technology) to ensure that such device produces a *scannable* ballot/VVPO (as opposed to something like a “paper under glass” running tally system) that can be run through an automatic tabulator.

Finally, the bill revises requirements for Department of State rules on *manual* recount of hybrid voting system ballots, to mandate the visual counting of **printed text** in lieu of using a device such as a bar code reader to determine voter intent — except where the printed is illegible.

The bill takes effect January 1, 2020.

II. Present Situation:

The Department of State's Division of Elections (Division)¹ provides administrative support to the Secretary of State,² Florida's Chief Election Officer,³ to ensure that Florida has fair and accurate elections.⁴ The Division of Elections consists of three bureaus – the Bureau of Election Records, the Bureau of Voter Registration Services, and the Bureau of Voting Systems Certification. Through these bureaus and the Director's Office,⁵ the Division ensures compliance with the elections laws, provides statewide coordination of election administration and promotes public participation in the electoral process. The Division also assists county Supervisors of Elections in their duties, including providing technical support.

A "voting system" is a method of casting and processing votes that functions wholly or partly by use of electromechanical or electronic apparatus or by use of marksense ballots and includes, but is not limited to, the procedures for casting and processing votes and the programs, operating manuals, supplies, printouts, and other software necessary for the system's operation.⁶ A "voter interface device" is any device that communicates voting instructions and ballot information to a voter and allows the voter to select and vote for candidates and issues.⁷

The Division 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.

The law currently requires all voting by electors *without* disabilities to be done by marksense ballots that can be electronically tabulated.⁸ Since July 1, 2008, however, counties have been allowed to use touchscreen voting equipment for voters *with* disabilities that tabulates votes electronically, without a VVPO; *ONLY* voters with disabilities may cast ballots on these accessible voting systems.⁹ At least one piece of accessible voting equipment must be available at each precinct,¹⁰ which often sits idle much of the day.

Since authorizing this "dual" voting requirement in 2007, the Legislature has three times delayed targeted statutory implementation dates (to 2012,¹¹ 2016,¹² and 2020¹³), to allow election

¹ Section 20.10(2)(a), F.S.

² Section 20.10(1), F.S. The head of the Department of State is the Secretary of State. The Secretary of State is appointed by the Governor, subject to confirmation by the Senate, and serves at the pleasure of the Governor. The Secretary of State performs the functions conferred by the State Constitution upon the custodian of state records.

³ Section 97.012, F.S. *See also* s. 97.035, F.S.

⁴ *See* Department of State, Division of Elections, About Us, available at <https://dos.myflorida.com/elections/about-us/> (last visited on Feb. 14, 2019).

⁵ *Id.* The mission of the Director's Office is to provide statewide coordination and direction for the interpretation and enforcement of election laws and to provide supervision to the Bureaus in the Division.

⁶ Section 97.021(45), F.S.

⁷ Section 97.021(41), F.S.

⁸ Section 101.56075(1), F.S.

⁹ Section 101.56075(2), F.S.

¹⁰ Section 101.56062(2), F.S.

¹¹ Ch. 2007-30, s.6, LAWS OF FLA. (codified at s. 101.56075(3), F.S. [2007]).

¹² Ch. 2010-167, s.5, LAWS OF FLA. (codified at s. 101.56075(3), F.S.[2010]).

¹³ Ch. 2013-57, s.9, LAWS OF FLA. (codified at s. 101.56075(3), F.S. (current)).

technology to catch-up with the ability to allow voters with disabilities to cast an independent ballot that is:

- Recorded on paper, for canvassing and recount purposes; and
- Cast in the same manner as voters without disabilities.

Four Florida counties — Glades, Jefferson, Miami-Dade, and Palm Beach — are still using non-VVPO legacy systems.^{14,15} The remaining 63 counties have purchased touchscreen equipment for voters with disabilities that produces a scannable VVPO, though the printed ballot/ballot card varies in format.¹⁶

There are currently three state-certified systems for voters with disabilities:

- ES&S AutoMARK¹⁷ (22 counties);
- Dominion ImageCast Evolution¹⁸ (16 counties); and
- ES&S ExpressVote¹⁹ (25 counties).

Generally, these systems “mark” a scannable paper ballot — a voter-verifiable paper trail that can be used for canvassing and recount purposes.²⁰ AutoMARK and ImageCast Evolution produce the familiar optical-scan ballot style; ExpressVote produces a ballot card with multiple bar codes at the top corresponding to the voters’ choices. Underneath the bar codes, the card contains the offices or amendments on the ballot, along with the voters’ choices in each contest.

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.²¹ After the ballot is printed on an AutoMARK or ExpressVote system, voters are able to review the ballot for accuracy before depositing it themselves in an optical

¹⁴ See Department of State, Division of Elections, *2019 Voting Systems* (Feb. 4, 2019 update), available at <https://dos.myflorida.com/media/695246/voting-systems-in-use-by-county.pdf> (last visited on Feb. 14, 2019).

¹⁵ Palm Beach is in the process of replacing its outdated machinery with a new countywide system. Jeff Ostrowski, Palm Beach Post, *After Election Debacle, Palm Beach County to Spend \$16M on Voting Machines for 2020* (Feb. 5, 2019), available at <https://www.palmbeachpost.com/news/20190205/after-election-debacle-palm-beach-county-to-spend-16m-on-voting-machines-for-2020> (last visited on Feb. 6, 2019).

¹⁶ DOS, *2019 Voting Systems*.

¹⁷ This system marks the same type of optical scan ballot design familiar to voters, effectively serving as an electronic “pen.” See Verified Voting, ES&S AutoMARK Description and Instructional Video, available at <https://www.verifiedvoting.org/resources/voting-equipment/ess/automark/> (last visited on Feb. 18, 2019).

¹⁸ ImageCast Evolution is a second-generation system similar to AutoMARK in that it marks a typical optical scan ballot using the voter’s electronic selections. Evolution goes a step further, however, by *automatically* forwarding the marked ballot into the tabulator — especially helpful for voters with certain physical limitations. See Dominion Voting, ImageCast Evolution, available at <https://www.dominionvoting.com/products> (last visited on Feb. 18, 2019).

¹⁹ 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, available at <https://www.verifiedvoting.org/resources/voting-equipment/ess/expressvote/> (last visited on Feb. 18, 2019).

²⁰ About two-thirds of Florida’s counties (47/67) currently use either the ES&S AutoMark or ExpressVote systems for disabled voters. See *supra* note 12.

²¹ Voters can return to a contest selection *for any reason*, not just because they left a race blank, or undervoted, and change a selection.

scanner; the ImageCast Evolution system automatically deposits the optical-scan ballot into the ballot box for the voter.

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 9th day after a primary election and the 14th day after a general election.²²

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.

Machine Recounts

If the *first* set of unofficial results²³ 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.²⁴ 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 results²⁵ 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*.²⁶ Section 102.166(4)(b), F.S., requires the Department of State’s Division of Elections to adopt rules for the federal write-in absentee ballot and for each certified voting system prescribing what constitutes a “clear

²² 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 7th day after a primary election and by noon on the 12th day after a general election. Section 102.112(1),(2), F.S.

²³ 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 4th day after a general election. Section 102.141(5), F.S.

²⁴ 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.*

²⁵ 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 5th day after a primary election and 3:00 p.m. of the 9th day after a general election. Section 102.141(7)(c), F.S.

²⁶ 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.*

indication on the ballot that the voter has made a definite choice.” The Division of Elections promulgated Rule 1S-2.207, F.A.C., entitled Standards for Determining Voter’s Choice on Ballot.

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.²⁷ If a team cannot agree, the ballot is “bumped up” to the canvassing board for a final determination.²⁸

III. Effect of Proposed Changes:

Section 1 amends s. 97.021(41), F.S., to revise the definition of “voter interface device” to stipulate that a voter interface device may not be used to tabulate votes, and any vote tabulation must be based upon a subsequent scan of the marked marksense ballot or the voter-verifiable paper output after the voter interface device process has been completed.

Section 2 amends s. 101.56075, F.S., and provides that, for the purpose of designating ballot selections, all voting must be done by marksense ballot using a marking device (i.e., ink pen) or voter interface device (i.e., touchscreen) that produces a voter verified paper output. *All* voters, those with disabilities and those without, will be able to cast *paper ballots* on the *same* certified voting equipment — thereby fulfilling a promise that the Legislature made to the disability community back in 2007.

The bill effectively puts the ExpressVote ballot card on a par with the more familiar optical scan ballot for purposes of canvassing and recounts. This will save millions of dollars in equipment upgrades in the 25 counties currently using ExpressVote for voters with disabilities. In order to meet the 2020 disability implementation deadline, however, the four Florida counties still recording votes on legacy direct recording electronic (DRE), non-VVPO touchscreen systems— Glades, Jefferson, Miami-Dade, and Palm Beach — will have to purchase at least one new piece of disability voting equipment per polling place.

Also, allowing *any* elector, not just voters with disabilities, to use touchscreen VVPO systems will mean fewer idle machines at the polls and possibly shorter lines at certain polling places.

Section 3 amends s. 102.166(4)(b), F.S., to revise requirements for Department of State rules concerning manual recounts of overvotes and undervotes. The Department of State’s rules may not authorize the use of an electronic or electromechanical reading device to review a hybrid voting system ballot that is produced using a voter interface device and contains both machine-readable fields and machine-printed text of the contest titles and voter selections, unless the printed text is illegible.

Section 4 provides that the bill takes effect January 1, 2020.

²⁷ Section 102.166(4)(b), F.S. *Also, see* Rule 1S-2.027, F.A.C.

²⁸ Section 102.166(5)(c), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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 is no anticipated impact on state revenues or expenditures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 97.021, 101.56075, and 102.166 of the Florida Statutes.

IX. Additional Information:

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

CS/CS by Community Affairs on March 5, 2019:

The committee substitute:

- Revises the definition of the term “voter interface device.”
- Revises requirements for Department of State rules regarding manual recount of certain ballots.

CS by Ethics and Elections on February 5, 2019:

Technical and structural amendment moving the 2020 effective date out of the substantive statutes (s. 101.56075, F.S.), and making conforming changes.

- B. **Amendments:**

None.