HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1005 Voting Systems
SPONSOR(S): State Affairs Committee; Byrd and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1312

FINAL HOUSE FLOOR ACTION: 118 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

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SUMMARY ANALYSIS

CS/HB 1005 passed the House on March 9, 2020, and subsequently passed the Senate on March 11, 2020. This bill includes portions of CS/CS/SB 1372.

A "voting system" is a method of casting and processing votes that consists of electromechanical components and, in most instances, utilizes marksense ballots. The Division of Elections within the Department of State (DOS) must approve all voting systems used in Florida elections. The Florida Election Code prescribes the general standards for the approval of voting systems; DOS rules further detail the complex, technical certification requirements.

The preliminary results of a close election may warrant a machine recount and, depending on the margin of victory following the machine recount, may also warrant a manual recount. The recount occurs before the election results are certified. The purpose of the recount is to determine who won an election. If the first set of unofficial results 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 to determine whether the returns correctly reflect the votes cast. If the machine recount results 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.

Voting system audits must be conducted after the final canvassing board certifies the election results. The purpose of the audit is to confirm the accuracy of the voting system tabulation and to identify problems and recommend adjustments for future elections. The county canvassing board has the option to conduct either a manual audit or an automated, independent audit of the voting systems used in randomly selected precincts.

The bill allows county canvassing boards and supervisors of elections to use automated tabulating equipment that is not part of the voting system to conduct both machine and manual recounts. During the machine recount process, the ballots may be run through the automated tabulating equipment instead of the voting system's tabulators that performed the original tally. While the machine recount is underway, overvotes and undervotes may be identified and sorted physically or digitally in preparation of a manual recount should one be warranted. To facilitate faster manual recounts of overvotes and undervotes, the bill specifically allows for the counting of the paper ballots or the digital image of the ballots. The bill specifies that a canvassing board may compare the digital image to the corresponding physical paper ballot. The bill directs DOS to develop procedures relating to the certification and the use of automatic tabulating equipment that is not part of a voting system.

Lastly, the bill corrects a provision of law that results in voting systems being tested for accuracy after the canvassing of vote-by-mail ballots has begun in certain instances. In order to correct this issue, the bill requires testing to occur at least 25 days before the commencement of early voting.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 27, 2020, ch. 2020-109, L.O.F., and will become effective on January 1, 2021, except as otherwise provided.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Voting Systems
A "voting system" is a method of casting and processing votes that consists of electromechanical components and, in most instances, 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.[2]

The Division of Elections (division) within the Department of State (DOS) must approve all voting systems used in Florida elections.[3] The Electronic Voting Systems Act[4] in the Florida Election Code prescribes the general standards for the approval of voting systems; DOS rules further detail the complex, technical certification requirements.[5] The certification process tests the reliability of both the hardware and software components of the voting system to make sure it meets rigorous standards.

Logic and Accuracy Test
All electronic voting systems must be publicly tested to ascertain whether the equipment will correctly count the votes cast.[6] The supervisor of elections (supervisor) must give public notice of the testing at least 48 hours before it begins.[7] Each member of the county canvassing board must convene and certify the results of the test.[8] The date the test must be conducted is tied to the start of early voting; it must be conducted no earlier than 10 days before the early voting period begins.[9] Current law provides a mandatory early voting period, during which a supervisor must offer early voting, and a discretionary early voting period, during which a supervisor may offer early voting. The mandatory period begins on the 10th day before an election and ends on the third day before an election.[10] The discretionary period extends from the 15th day before an election to the 11th day and also includes the second day before an election.[11]

In 2019, the Legislature passed CS/SB 7066,[12] which moved the earliest date a county canvassing board could begin canvassing vote-by-mail ballots from 15 days to 22 days before an election.[13] Because of this change, the testing of a voting system could occur after canvassing of vote-by-mail ballots has begun, depending on when a supervisor begins early voting in his or her county.

Recounts
The preliminary results of a close election may warrant a machine recount and, depending on the margin of victory following the machine recount, may also warrant a manual recount. If a recount is

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[1] Section 97.021(46), F.S.

[2] *Id.*

[3] Sections 101.5605 and 101.5606, F.S.

[4] Sections 101.5601 – 101.5614, F.S., are cited as the Electronic Voting Systems Act. Section 101.5601, F.S.

[5] *Id.*; *see* Florida Division of Elections, Bureau of Voting Systems Certification, Form DS-DE 101 (eff. Jan. 12, 2005) (incorporated by reference, Rule 1S-5.001, F.A.C.) (66-page *Florida Voting System Standards* document containing technical requirements for certification), available at http://dos.myflorida.com/media/693718/dsde101.pdf, (last visited Jan. 23, 2020).

[6] Section 101.5612, F.S. This type of testing is often referred to as logic and accuracy testing.

[7] Section 101.5612(2), F.S.

[8] *Id.*

[9] Early voting is the casting of a ballot prior to election day at an early voting site designated by the supervisor and depositing the voted ballot in the tabulation system. Section 97.021(9), F.S. Early voting must begin on the 10th day before an election and end on the third day before the election. Section 101.657(1)(d), F.S. Additionally, a supervisor may choose to have early voting on the 15th, 14th, 13th, 12th, 11th, and second day before an election. *Id.*

[10] Section 101.657(1)(d), F.S.

[11] *Id.*

[12] Chapter 2019-162, L.O.F.

[13] Section 101.68(2)(a), F.S.

required, it occurs before the election results are certified.[14] 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 ninth day after a primary election and the 14th day after a general election.[15] All 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.[16]

Machine Recounts
If the first set of unofficial results[17] indicate 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 to determine whether the returns correctly reflect the votes cast.[18] During this machine recount process, the tabulators sort out the overvotes[19] and undervotes[20] in case the results are close enough to warrant a manual recount of overvotes and undervotes. There are also requirements for canvassing boards to perform logic and accuracy tests on the tabulation equipment prior to re-tabulation.[21]

The machine recount results comprise the second set of unofficial results.[22]

Manual Recounts
If the second set of unofficial results indicate a margin of victory of one-quarter of one percent or less, a manual recount of the overvotes and undervotes must be conducted.[23]

The majority of the manual recount process involves teams of two electors reviewing marksense paper ballots to determine whether there is a "clear indication on the ballot that the voter has made a definite choice."[24] If a team cannot agree, the ballot is sent to the county canvassing board for a final determination.[25]

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[14] Section 102.141(7), F.S.
[15] Section 102.111(2), F.S. County canvassing boards must submit final returns to DOS for races certified by the Elections Canvassing Commission no later than 5:00 p.m. on the seventh day after a primary election and by noon on the 12th day after a general election. Section 102.112(1)-(2), F.S.
[16] Section 102.166(5)(b) and (d), F.S.; Rule 1S-2.031 (Recount Procedures).
[17] County canvassing boards must report the first set of unofficial results in federal, statewide, state, or multicounty office or ballot measure to DOS by noon of the third day after a primary election and noon of the fourth day after a general election. Section 102.141(5), F.S.
[18] 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.*
[19] The term "overvote" means that the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question. Section 97.021(25), F.S.
[20] The term "undervote" means that the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question. Section 97.021(40), F.S.
[21] Section 102.141(7)(a), F.S.
[22] County canvassing boards must report the second set of unofficial results in federal, statewide, state, or multicounty office or ballot measure to DOS by 3:00 p.m. of the fifth day after a primary election and 3:00 p.m. of the ninth day after a general election. Section 102.141(7)(c), F.S.
[23] 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.*
[24] 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.
[25] Section 102.166(5)(c), F.S.

Voting System Audits

Voting system audits must be 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 adjustments for future elections.[26] The county canvassing board may conduct a manual audit or an automated, independent audit of the voting systems used in randomly selected precincts.[27]

Manual random audits consist of a public, hand tally of at least 1 percent of precincts but not more than 2 percent of precincts in a single race on the ballot.[28] The audit includes a tally of Election Day, vote-by-mail, early voting, provisional, and overseas ballots.[29] Automated, independent audits are much more extensive, tallying votes cast across every race that appears on the ballot.[30] The tally includes all election day, vote-by-mail, early voting, provisional, and overseas ballot in at least 20 percent of the precincts chosen at random by the canvassing board.[31]

The division approves the independent audit equipment pursuant to both statutory and rule standards.[32] The automated audit equipment must be:

- Completely independent of the voting system;
- Fast enough to produce audit results no later than midnight of the seventh day following election certification; and
- Capable of demonstrating that the audit system has accurately tallied the ballots.[33]

DOS rules contain additional approval requirements and procedures for independent audit equipment and voting system audits.[34] The canvassing board must complete the audit no later than midnight of the seventh day after it certifies the election results.[35] The canvassing board must provide a report to DOS by the 15th day after completing the audit that addresses:

- The overall accuracy of the audit;
- A description of any problems or discrepancies encountered;
- The likely cause of such problems or discrepancies; and

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[26] Section 101.591, F.S.

[27] *Id.*

[28] Section 101.591(2)(a), F.S.

[29] Section 101.591(2)(b), F.S.

[30] Section 101.591(2)(b), F.S. The division 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 and 2018 general election cycles. *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"), available at http://dos.myflorida.com/elections/voting-systems/approvals-and-technical-advisories/ (last visited Jan. 24, 2020); Maria Matthews, Director, Florida Division of Elections, *ClearAudit* 1.4.4. Approval Letter (July 27, 2018, available at https://dos.myflorida.com/media/699784/clearaudit-144-approval-7272018.pdf (approving *ClearAudit* as alternative to manual audit process provided in s. 101.591, F.S. for 2018 election cycle) (last accessed Jan. 24, 2020); 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. for 2016 election cycle), available at http://dos.myflorida.com/media/695954/clearaudit-106-interim-approval-extension-1252016.pdf (last visited Jan. 24, 2020). Seven of Florida's 67 counties — *Bay, Broward, Columbia,, Leon, Nassau, Putnam, and St. Lucie* — used the Clear Ballot product to audit nearly 14 percent of the ballots cast in the Florida 2016 general election. 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 https://www.prnewswire.com/news-releases/clear-ballots-audit-of-floridas-presidential-election-results-a-success-300378422.html (last visited Jan. 24, 2020); Since the 2018 election cycle, Hillsborough and Indian River Counties have joined the list of counties using the Clear Ballot product, bringing the total to nine counties. Mitch Perry, *Hillsborough County Adds Accountability Measure for Elections*, available at https://www.baynews9.com/fl/tampa/news/2019/11/25/hillsborough-county-adds-accountability-measures-for-elections (last visited Jan. 24, 2019).

[31] Section 101.591(2)(b), F.S.

[32] Section 101.591(2)(c), F.S.

[33] *Id.*

[34] Rule 1S-5.026, F.A.C. (Post-Election Certification Voting System Audit).

[35] Section 101.591(4), F.S.

- Recommended corrective action with respect to avoiding or mitigating such circumstances in future elections.[36]

If a manual recount takes place, the affected canvassing board is not required to conduct an audit.[37]

Effect of the Bill

The bill allows county canvassing boards and supervisors of elections to use automated tabulating equipment that is not part of the voting system to conduct both machine and manual recounts.

During the machine recount process, the ballots may be run through the automatic tabulating equipment instead of the voting system's tabulators that performed the original tally. While the machine recount is underway, overvotes and undervotes may be identified and sorted physically or digitally in preparation of a manual recount, should one be warranted.

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. In addition, a county canvassing board or local board involved in the recount may compare a digital image of a ballot to its corresponding physical paper ballot during a manual recount.

The bill directs DOS to adopt by rule "procedures relating to the certification and the use of automatic tabulating equipment that is not part of a voting system."

Finally, the bill corrects a provision of law that results in voting systems being tested for accuracy after the canvassing of vote-by-mail ballots has begun in certain instances. In order to correct this issue, the bill requires testing to occur at least 25 days before the commencement of early voting.

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:

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[36] Section 101.591(5), F.S.
[37] Section 101.591(6), F.S.

The bill may result in a positive fiscal impact to private sector companies that manufacture or sell automatic tabulating machines. As these machines become available for use as recount machines, counties would likely be incentivized to procure the machines to expedite the recount process. Currently, only one machine has been authorized to conduct independent automated audits in the state;[38] however, under the bill, the machine would need to be certified as a recount machine by DOS before being used for that purpose.

D. FISCAL COMMENTS:

None.

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[38] *Supra* note 22.