

**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 Budget Committee

BILL: CS/SB 378

INTRODUCER: Rules Subcommittee on Ethics and Elections and Senator Gaetz

SUBJECT: Federal Write-In Absentee Ballot

DATE: April 12, 2011 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Roberts	EE	Fav/CS
2.	Fox	Phelps	RC	Favorable
3.	Martin	Meyer, C.	BC	Pre-meeting
4.				
5.				
6.				

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

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

Committee Substitute for Senate Bill 378 allows absent uniformed services or overseas electors to use the federal write-in absentee ballot (FWAB) in any federal, state, or local election involving two or more candidates. The bill maintains that the FWAB may only be used by eligible electors as a last resort, that is, when the elector has timely requested but has not received an official state absentee ballot. The bill adopts specific procedures to duplicate an FWAB when canvassed, similar to when an absentee ballot is duplicated when received physically damaged. It 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 an FWAB. Finally, 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 an elector’s official absentee ballot is received by that time — in which case the official absentee ballot is counted in lieu of the FWAB.

This bill substantially amends and reenacts ss. 101.5614, 101.6952, 102.166 and 104.18 of the Florida Statutes.

## II. Present Situation:

Currently, there are three different *general* election ballots that an absent uniformed services or overseas Florida voter can use for various federal, state, and local elections: the state write-in ballot, the official absentee ballot, and the federal write-in absentee ballot. The official absentee ballot is the only one that an elector can use to vote in a *primary* election.

### BALLOTS

#### *Official Florida Absentee Ballot*

An absent uniformed services or overseas voter who requests<sup>1</sup> an *official Florida write-in absentee ballot* may vote in any federal, state, or local primary election or general election — including multi-candidate races, judicial retention elections, and state constitutional amendment/local referendum elections. The form of the ballot is the familiar one that voters going to the polls or voting early receive. It contains the name of offices, candidate names, political party abbreviations, and either a bubble or arrow to be filled-in by the voter to designate choices. This is by far the most commonly-used ballot.

#### *Federal Write-In Absentee Ballot (FWAB)*

Federal law provides that an absent uniformed services or overseas voter who timely requests but does not receive an official state absentee ballot may use the *federal write-in absentee ballot (FWAB)* to vote for *candidates* in *federal general* elections only.<sup>2</sup> Absent specific state authorization, the FWAB may not be used in primary contests or for state or local elections. Other southern states, including Arkansas, Mississippi, South Carolina, Tennessee, and neighboring Georgia,<sup>3</sup> have authorized the use of the FWAB in certain state and local elections: Florida has not. While most military and overseas Florida voters utilize the official absentee ballot, eligible electors have used FWABs as a ballot of last resort in recent elections.<sup>4</sup>

In Florida, electors in federal general elections may fill in either the candidate's name or the name of a political party under headings on the FWAB designated as:

- PRESIDENT/VICE PRESIDENT
- U.S. SENATOR
- U.S. REPRESENTATIVE/DELEGATE/RESIDENT COMMISSIONER

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<sup>1</sup> Pursuant to 101.62, F.S.

<sup>2</sup> 42 U.S.C. § 1973ff-2.

<sup>3</sup> O.C.G.A. § 21-2-381.1 (2010).

<sup>4</sup> FWABs have been received in recent elections in military-rich Escambia and Okaloosa Counties. Escambia County received 34 FWABs in the 2010 general election. Okaloosa County received 162 FWABs in 2008 and 101 FWABs in 2010. Regarding the 2010 FWABs received by Okaloosa County, 63 of the 101 were not counted because their official absentee ballot arrived after (or in some cases before) the FWAB was received. E-mail from Nanci Watkins, Executive Assistant to the Florida State Association of Supervisors of Elections to John Seay, Legislative Intern, Rules Subcommittee on Ethics & Elections (Mar. 3, 2011).

The FWAB “ADDENDUM” allows voters to designate choices in state and local candidate races. The elector must write-in the name of each office for which he or she wishes to vote, along with the corresponding candidate’s name or political party preference for the office. The form of the addendum is essentially as follows:

<b>ADDENDUM</b>	
Some states allow the Federal Write-In Absentee Ballot to be used by military and overseas civilian voters in elections other than general elections or for offices other than Federal offices. Consult your state section in the <i>Voting Assistance Guide</i> to determine your state’s policy. <i>If you are eligible to use this ballot to vote for offices/candidates other than those listed above</i> , please indicate in the spaces provided below, the office for which you wish to vote (for example: Governor, Attorney General, Mayor, State Senator, etc.) and the name and/or party affiliation of the candidate for whom you wish to vote.	
OFFICE	CANDIDATE’S NAME or PARTY AFFILIATION
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

***State Write-In Absentee Ballot***

An overseas voter who states that, due to military or other contingencies that preclude normal mail delivery, he or she cannot vote an absentee ballot during the normal absentee voting period may request a “***state write-in absentee ballot***” not earlier than 180 days before a general election.<sup>5</sup> The state write-in absentee ballot *may not* be used in a primary election. The state write-in ballot contains all *offices* --- federal, state, and local --- for which the elector would otherwise be entitled to vote, including judicial retention elections; the elector, however, *cannot* use the ballot to vote in state constitutional amendment or local referendum elections.

The form of the state write-in absentee ballot includes the printed name of the office to be voted, along with a corresponding line for the elector to designate a candidate’s name or political party preference for that office.<sup>6</sup> The judicial retention questions are also printed on the form, including the names of the appellate justices or judges scheduled to be on the ballot for retention.

<sup>5</sup> Section 101.6952(1), F.S.

<sup>6</sup> See Rule 1S-2.028, FLA. ADMIN. CODE (detailing the form of the state write-in absentee ballot).

## BACKGROUND

### *Military/Overseas Voting in Florida Elections*

Florida has had a somewhat troubled past with respect to accommodating military and overseas voters, due primarily to the existence of the historical second primary election — which hindered the timely delivery of absentee ballots to overseas voters. The existence of the second primary meant that Florida had to conduct three elections in a 9-week period, with the first primary being held nine weeks prior to the general election and the second primary (or “runoff”) held five weeks prior to the general election.<sup>7</sup> Many of these problems, however, have been overcome by: eliminating the second primary;<sup>8</sup> mandating that official absentee ballots be provided to uniformed services and overseas voters at least 45 days before each primary and general election where requests have been received; and, providing for the electronic (e-mail) delivery of unvoted ballots, as mandated by the federal Military and Overseas Voter Empowerment (MOVE) Act.

The former election schedule prompted the federal government to sue the State of Florida in the early 1980's. The suit alleged that Florida's system of conducting three elections in nine weeks disenfranchised military and overseas voters by not providing sufficient time for supervisors of elections to prepare absentee ballots, mail them to overseas voters, and have the voters return them by election day. To resolve the suit, Florida entered into a consent decree with the federal government, which ultimately required the State to count votes from such electors in the presidential preference primary and federal general election contests that are received up to 10 days after the date of the election.<sup>9</sup> Florida is still bound by the terms of this consent decree, having never sought relief from the courts.

In 1989, the Legislature attempted to further accommodate absentee voting by military and overseas electors by adopting an advance ballot system.<sup>10</sup> Under the advance ballot system, supervisors of elections mailed first primary absentee ballots to qualified overseas electors no later than 35 days before the primary.<sup>11</sup> Subsequently, the supervisors would mail *advance* ballots for the second primary and general election if the regular absentee ballots for the second primary and general election were not available 45 days before the respective elections.<sup>12</sup> Advance ballots for the second primary and general election could necessarily contain candidates who may have been eliminated in the prior election. In 2005, the Legislature permanently ended the second primary system but did not change the number of days in advance to send absentee ballots.<sup>13</sup> Beginning in 2010, supervisors of elections were required to mail absentee ballots to

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<sup>7</sup> Section 100.091, F.S. (2000).

<sup>8</sup> The year 2000 was the last time Florida conducted a second primary. The second primary was suspended for the 2002 and 2004 election cycles, and permanently eliminated prior to the 2006 cycle.

<sup>9</sup> Rule 1S-2.013, FLA. ADMIN. CODE.

<sup>10</sup> Section 28, ch. 89-338, LAWS OF FLA.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> In 2005, the ballot schedule was revised to require supervisors of elections to mail absentee ballots to overseas voters no later than 35 days before the primary or general election. Section 16, ch. 2005-286, LAWS OF FLA. In 2007, the Legislature again revised the ballot schedule to require absentee ballots to overseas voters to be mailed no later than 35 days prior to a primary election and no later than 45 days prior to a general election. Section 30, ch. 2007-30, LAWS OF FLA.

absent uniformed services and overseas electors no later than 45 days before each election.<sup>14</sup> The 45-day period currently required under Florida law is in compliance with the federal Military and Overseas Voter Empowerment (MOVE) Act.<sup>15</sup>

On a related note, there were numerous legal challenges to the validity of overseas military ballots in Florida during the 2000 presidential election.<sup>16</sup> In response, the 2001 Legislature created the state write-in absentee ballot system. Overseas voters who anticipate that they will not be able to vote an absentee ballot during the regular absentee ballot voting period may request a state write-in absentee ballot. A date line was also added to the absentee ballot return envelope, and a presumption was created in law that absentee ballots received from overseas electors were mailed on the date stated on the envelope — regardless of the absence of a postmark or a postmark which is dated later than the date of election.<sup>17</sup>

### *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*

In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>18</sup> The Act created an emergency back-up ballot, the Federal Write-In Absentee Ballot (FWAB), which can be cast by voters who make timely application for but do not receive an official absentee ballot.<sup>19</sup> The Act covers citizens who are members of the Armed Forces and Merchant Marine, and their spouses and dependents, and citizens residing outside of the United States. Members of the Armed Forces and Merchant Marine and their spouses and dependents are allowed to vote absentee while away from their place of voting residence, wherever stationed, either within or outside the United States. Other U.S. citizens residing outside of the United States and its territories may vote in the state where they last resided prior to leaving the United States.

In addition, UOCAVA requires states to accept and canvass an FWAB from an absent military or overseas voter provided:

- The voter is absent from his or her voter residence (overseas voters must submit their ballots from outside the U.S.);
- The voter applied for an official state absentee ballot early enough so the request is received by the appropriate local election official not later than the state deadline<sup>20</sup> or 30 days before an election, whichever is later; and,
- The state has not received the requested official state absentee ballot from the voter by the requisite deadline under State law.<sup>21</sup>

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<sup>14</sup> Section 101.62(4)(a), F.S. *See also* Section 7, ch. 2010-167, LAWS OF FLA.

<sup>15</sup> The MOVE Act requires ballots for uniformed services and overseas citizen voters be sent at least 45 days prior to a general election for federal office. Pub. L. 111-84; 42 U.S.C. § 1971.

<sup>16</sup> *See e.g., Congress Muzzling the Military*, FLORIDA TIMES-UNION, Dec. 13, 2000, at B6. Many of the challenges of the ballot validity stemmed from the fact that many ballots lacked 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 also Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000).

<sup>17</sup> Section 101.6952(2), F.S.

<sup>18</sup> Pub. L. 99-410.

<sup>19</sup> 42 U.S.C. § 1973ff-2.

<sup>20</sup> Florida law requires supervisors to send absentee ballots to UOCAVA voters from whom they have received a request at least 45 days before the election. Section 101.62(4)(a), F.S.

UOCAVA also allows overseas electors who have submitted an FWAB and later receive an official absentee ballot to submit the official absentee ballot.<sup>22</sup> The FWAB is also required to clearly state that an overseas elector who submits an FWAB and later receives and submits an absentee ballot must make every reasonable effort to inform the appropriate election official that the elector has submitted more than one ballot.<sup>23</sup>

### III. Effect of Proposed Changes:

The CS expands use of the FWAB by absent uniformed services and overseas voters to state and local elections involving two or more candidates.

Specifically, the CS:

- Authorizes an eligible elector to use the FWAB to cast a vote in any federal election and any state or local election involving two or more candidates.<sup>24</sup>
- Authorizes an eligible elector to use the FWAB *only* as a ballot of last resort under the same limitations as apply in federal races; an elector must have made timely application for an official state absentee ballot<sup>25</sup> and not received it.
- Allows the elector to designate a candidate choice by writing the candidate's name or, in many elections,<sup>26</sup> the name of a political party.
- Clarifies that, in many cases, a candidate designation of "Independent" shall be ascribed to the candidate in the race who has registered to run with no party affiliation (NPA), provided there is only one such candidate.
- Requires supervisors to canvass all races on each FWAB received by 7:00 p.m. on election day, unless the supervisor has also received an official absentee ballot from an elector to substitute for the FWAB by that time — in which case the FWAB shall be invalid and the official absentee ballot is canvassed.
- Establishes specific procedures for duplicating an FWAB to be canvassed, mirroring the current procedures for duplicating a ripped, torn, or otherwise damaged official absentee ballot that cannot be processed by the voting equipment.
- Requires the Department of State to adopt specific rules to prescribe what constitutes a "clear indication on the ballot that the voter has made a definite choice" on the FWAB, such that local canvassing boards will use the same rules for duplicating ballots at the front-end of the canvassing process as will be used later in the case of a manual recount. The rules must be consistent with other ballots for certified voting systems, to the extent practicable. The rules must include, but are not limited to, addressing the following

<sup>21</sup> 42 U.S.C. § 1973ff-2(b).

<sup>22</sup> 42 U.S.C. § 1973ff-2(d).

<sup>23</sup> *Id.*

<sup>24</sup> The FWAB is not designed to accommodate choices in issue elections such as constitutional amendments and referendums or judicial retention elections, both of which are foreign to the federal electoral system.

<sup>25</sup> Application must have been made such that it would have been received by a supervisor of elections at least 30 days before the election. 42 U.S.C. § 1973ff-2(b); *see also*, VOTER'S DECLARATION/AFFIRMATION - FEDERAL WRITE-IN ABSENTEE BALLOT (FWAB) (Affirmation #5), at <http://www.fvap.gov/resources/media/fwab.pdf>.

<sup>26</sup> Excludes primary, special primary, and nonpartisan elections.

issues: opposing candidates who have the same or similar names; the use of marks, symbols, or language to indicate that the same political party designation applies to all listed offices; designating a qualified candidate for the wrong office; and, the appropriate lines or spaces for designating a candidate choice.

- Mirrors UOCAVA's provision allowing an elector who submits an FWAB and later receives an official absentee ballot to also submit the official absentee ballot, and encourages the elector to make every reasonable effort to inform the appropriate supervisor of elections that they have submitted more than one ballot.
- Removes criminal penalties for electors who have cast more than one ballot in an election in the limited circumstance of an elector who has submitted an FWAB and later received and submitted an official absentee ballot, to conform.
- Provides an effective date of July 1, 2011.

#### **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:

None.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

None.

**VIII. Additional Information:**

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

**CS by Rules Subcommittee on Ethics and Elections on March 7, 2011:**

The CS fleshes out and incorporates into Florida’s electoral voting scheme the concept found in the original bill — expanding the use of the Federal Write-In Absentee Ballot to state and local races. Specifically, the CS differs from the original bill in that it: authorizes using FWABs for state and local candidate races (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 an elector’s official absentee ballot has been received by that time; adopts specific procedures to duplicate an FWAB when canvassed; requires the Department of State to adopt rules to determine voter intent on an FWAB; encourages electors who have submitted an 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.

- B. **Amendments:**

None