

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1005 Voting Systems

**SPONSOR(S):** Byrd and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee	13 Y, 0 N	Toliver	Smith
2) Public Integrity & Ethics Committee	15 Y, 0 N	Poreda	Rubottom
3) State Affairs Committee			

### SUMMARY ANALYSIS

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 (division) must approve all voting systems used in Florida elections. The Florida Election Code prescribes the general standards for the approval of voting systems; division rule further details 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 digital imaging, automated tabulating equipment that is not part of the voting system, equipment currently used for conducting independent audits, 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 actual paper ballots or the digital image of the ballots. Lastly, the bill directs the Department of State to develop procedures relating to the certification and the use of automatic tabulating equipment that is not part of a voting system.

Currently, only nine counties —Bay, Broward, Columbia, Hillsborough, Indian River, Leon, Nassau, Putnam, and St. Lucie — are expected to use such equipment to conduct post-certification, automated audits for the 2020 election cycle.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED 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.<sup>1</sup> The voting system may also include things like procedures, operating manuals, supplies, printouts, and other software necessary for the system’s operation.<sup>2</sup>

The Division of Elections (division) must approve all voting systems used in Florida elections.<sup>3</sup> The Electronic Voting Systems Act<sup>4</sup> in the Florida Election Code prescribes the general standards for the approval of voting systems; division rule further details the complex, technical certification requirements.<sup>5</sup> The certification process tests the reliability of both the hardware and software components of the voting system to make sure that they meet rigorous standards.

##### 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. The recount occurs before the election results are certified.<sup>6</sup> 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>7</sup> 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.<sup>8</sup>

##### *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 to determine whether the returns correctly reflect the votes cast.<sup>10</sup>

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<sup>1</sup> Section 97.021(46), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Sections 101.5605 and 101.5606, F.S.

<sup>4</sup> Sections 101.5601 – 101.5614, F.S., are cited as the Electronic Voting Systems Act. Section 101.5601, F.S.

<sup>5</sup> *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).

<sup>6</sup> Section 102.141(7), F.S.

<sup>7</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.

<sup>8</sup> Section 102.166(5)(b),(d), F.S.; Rule 1S-2.031 (Recount Procedures).

<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.*

During this machine recount process, the tabulators sort out the overvotes<sup>11</sup> and undervotes,<sup>12</sup> 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.<sup>13</sup>

### *Manual Recounts*

If the machine recount results comprising the second set of unofficial results<sup>14</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>15</sup>

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.”<sup>16</sup> If a team cannot agree, the ballot is sent to the county canvassing board for a final determination.<sup>17</sup>

### 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.<sup>18</sup> The county canvassing board may conduct a manual audit or an automated, independent audit of the voting systems used in randomly selected precincts.<sup>19</sup>

Manual random audits consist of a public, hand tally of at least one percent of precincts but not more than two percent of precincts in a single race on the ballot.<sup>20</sup> The audit includes a tally of Election Day, vote-by-mail, early voting, provisional, and overseas ballots.<sup>21</sup> Automated, independent audits are much more extensive, tallying votes cast across every race that appears on the ballot.<sup>22</sup> The tally includes all

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<sup>11</sup> The term “overvote” means that the elector marks or designates more names than there are person 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.

<sup>12</sup> 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.

<sup>13</sup> Section 102.141(7)(a), F.S.

<sup>14</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>15</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>16</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.

<sup>17</sup> Section 102.166(5)(c), F.S.

<sup>18</sup> Section 101.591, F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 101.591(2)(a), F.S.

<sup>21</sup> Section 101.591(2)(b), F.S.

<sup>22</sup> Section 101.591(2)(b), F.S. 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 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* — use the Clear Ballot product to audit nearly 14% 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.pnnewswire.com/news-releases/clear-ballots->

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.<sup>23</sup>

The division approves the independent audit equipment pursuant to both statutory and rule standards.<sup>24</sup> 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.<sup>25</sup>

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>26</sup> The canvassing board must complete the audit no later than midnight of the seventh day after it certifies the election results.<sup>27</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:

- 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.<sup>28</sup>

If a manual recount takes place, the affected canvassing board is not required to conduct an audit.<sup>29</sup>

### **Effect of the Bill**

The bill allows county canvassing boards and supervisors of elections the option to use digital imaging, automated tabulating equipment that is not part of the voting system, equipment currently used for conducting independent audits, 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.

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

The Bill would take effect on July 1, 2020.

### **B. SECTION DIRECTORY:**

Section 1 amends s. 97.3021, F.S., relating to definitions applicable to the Florida Election Code.

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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).

<sup>23</sup> Section 101.591(2)(b), F.S.

<sup>24</sup> Section 101.591(2)(c), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Rule 1S-5.026, F.A.C. (Post-Election Certification Voting System Audit).

<sup>27</sup> Section 101.591(4), F.S.

<sup>28</sup> Section 101.591(5), F.S.

<sup>29</sup> Section 101.591(6), F.S.

Section 2 amends s. 101.5614, F.S., relating to the canvass of election returns.

Section 3 amends s. 102.141, F.S., relating the county canvassing boards.

Section 4 amends s. 102.166, F.S., relating to manual recounts.

Section 5 provides an effective date of July 1, 2020.

## 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:

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.<sup>30</sup>

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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<sup>30</sup> 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 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).

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill does not confer rulemaking authority but does require the Department of State to adopt detailed rules prescribing additional procedures relating to the certification and the use of automatic tabulating equipment that is not part of a voting system for recounts. The Department of State has sufficient rulemaking authority in s. 97.012(1), F.S., to adopt the rules required by the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.