

**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 Appropriations

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BILL: SB 1312

INTRODUCER: Senators Montford and Gainer

SUBJECT: Voting Systems

DATE: February 26, 2020

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

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Roberts</u>	<u>EE</u>	<b>Favorable</b>
2.	<u>Hackett</u>	<u>McVane</u>	<u>GO</u>	<b>Favorable</b>
3.	<u>Wells</u>	<u>Kynoch</u>	<u>AP</u>	<b>Pre-meeting</b>

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## I. Summary:

SB 1312 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*. 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 has an indeterminate fiscal impact.

The bill takes effect upon becoming a law.

## II. Present Situation:

### Florida’s Voting Systems

Florida’s Electronic Voting Systems Act makes the Department of State responsible for developing and adopting standards for electronic voting and for certifying electronic voting systems for use in the state.<sup>1</sup> A “voting system” is a method of casting and processing votes that consists of electromechanical components and, in most instances, utilizes marksense<sup>2</sup> ballots.<sup>3</sup> The voting system may also include things like procedures, operating manuals, supplies, printouts, and other software necessary for the system’s operation.

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<sup>1</sup> See ss. 101.5601 – 101.5614, F.S.

<sup>2</sup> The term “marksense ballots” is defined to mean “that printed sheet of paper, used in conjunction with an electronic or electromechanical vote tabulation voting system, containing the names of candidates, or a statement of proposed constitutional amendments or other questions or propositions submitted to the electorate at any election, on which sheet of paper an elector casts his or her vote.” Section 97.021(5)(a), F.S.

<sup>3</sup> Section 97.021(45), F.S.

The Division of Elections within the Department of State must approve all voting systems used in Florida elections. Florida's certification process is among the most comprehensive in the nation. The Electronic Voting Systems Act in the Florida Elections Code prescribes the general standards for the approval of voting systems; division rule further details the complex, technical certification requirements.<sup>4</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 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>5</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.

## Machine Recounts

If the *first* set of unofficial results<sup>6</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>7</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.

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<sup>4</sup> Sections 101.5605 and 101.5606, F.S.; *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.); and the 66-page document of the Florida Division of Elections, Bureau of Voting Systems Certification, Florida Voting System Standards, containing technical requirements for certification, available at <http://dos.myflorida.com/media/693718/dsde101.pdf> (last visited February 13, 2020).

<sup>5</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. Chapter 2007-30, s. 32, LAWS OF FLA.).

<sup>6</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 3<sup>rd</sup> 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>7</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.*

### ***Manual Recounts***

If the machine recount results comprising the *second* set of unofficial results<sup>8</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>9</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>10</sup> If a team cannot agree, the ballot is “bumped up” to the canvassing board for a final determination.<sup>11</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>12</sup>

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. With rare exception,<sup>13</sup> county canvassing boards and supervisors of elections have repeatedly risen to the challenge when a state-certified recount has been necessary.<sup>14</sup>

<sup>8</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>9</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>10</sup> Section 102.166(4)(b) and (5)(a), 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>11</sup> Section 102.166(5)(c), F.S.

<sup>12</sup> Section 102.166(5)(b) and (d), F.S.; Rule 1S-2.031, F.A.C. (Recount Procedures).

<sup>13</sup> In the 2018 General Election, Broward, Hillsborough, Miami-Dade, and Palm Beach counties were reported to have missed an interim deadline for submitting *unofficial* results to the state. Frances Robles, New York Times, [Nearly 3,000 Votes Disappeared from Florida’s Recount. That’s Not Supposed to Happen](https://www.nytimes.com/2018/11/16/us/voting-machines-florida.html) (Nov. 16, 2018), available at <https://www.nytimes.com/2018/11/16/us/voting-machines-florida.html> (last visited February 13, 2020). Notwithstanding, all but Palm Beach County, because of its antiquated voting system hardware, were able to certify *final* results to the state in all recount races by the deadline on the 12<sup>th</sup> day following the election.

<sup>14</sup> For more than eight election cycles beginning in 2002, county canvassing boards conducted *recounts in 37 elections* (37 machine; 15 manual) (review of primary, general, and special election results from 2002-2018, excluding the 2018 General Election). *See generally*, Florida Division of Elections, [Election Results Archive](https://results.elections.myflorida.com/) website, available at <https://results.elections.myflorida.com/> (last visited February 13, 2020). Some of these recounts may have involved multiple counties, effectively increasing the total numbers (assuming each county’s recount constitutes a separate event). In the 2018 General Election, canvassing boards and supervisors simultaneously conducted an additional 204 countywide *machine* recounts and 137 countywide *manual* recounts in three separate statewide races (U.S. Senate, Governor, and Commissioner

## 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 one to two percent of precincts in a single race on the ballot.<sup>15</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>16</sup> The tally includes all election day, vote-by-mail, early voting, provisional, and overseas ballot in at least of 20 percent of the precincts chosen at random by the canvassing board.

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of Agriculture), one Florida Senate race (District 18), and two Florida House races (District 26 and District 89). *See generally*, Florida Division of Elections, [Election Results Archive](https://results.elections.myflorida.com/) website, available at <https://results.elections.myflorida.com/> (last visited February 13, 2020).

<sup>15</sup> Section 101.591(2)(a), F.S.

<sup>16</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. Chapter 2013-57, s. 10, LAWS OF FLA; Hillary Lincoln, Marketing and Communications Manager, Clear Ballot, [Clear Ballot’s Audit of Florida’s Presidential Election Results a Success](http://www.prnewswire.com/news-releases/clear-ballots-audit-of-floridas-presidential-election-results-a-success-300378422.html) (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 visited February 13, 2020) [hereinafter, Clear Ballot, [2016 Press Release](https://dos.myflorida.com/media/699784/clearaudit-144-approval-7272018.pdf)]. The Florida 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 February 13, 2020); Maria Matthews, Director, Florida Division of Elections, [ClearAudit 1.4.4. Approval Letter](https://dos.myflorida.com/media/699784/clearaudit-144-approval-7272018.pdf) (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 the 2018 election cycle) (last visited February 13, 2020); Maria Matthews, Director, Florida Division of Elections, [Clear Ballot Group’s ClearAudit 1.0.6 Interim Approval Extension Letter](http://dos.myflorida.com/media/695954/clearaudit-106-interim-approval-extension-1252016.pdf) (Jan. 25, 2016) (approving *ClearAudit* as alternative to manual audit process provided in s. 101.591, F.S., for the 2016 election cycle), available at <http://dos.myflorida.com/media/695954/clearaudit-106-interim-approval-extension-1252016.pdf> (last visited February 13, 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. Clear Ballot, [2016 Press Release](https://dos.myflorida.com/media/699784/clearaudit-144-approval-7272018.pdf). Since that time, it is the understanding of the Senate Ethics and Elections Committee staff that Hillsborough and Indian River counties have also purchased the equipment and plan to use it to conduct the legally required, post-election-certification audits in the 2020 election cycle; and that Palm Beach may be piloting the technology. *See* E-mail from Ronald Labasky, Executive Director, Florida Supervisors of Elections, to Senate Ethics and Elections Committee staff (Feb. 13, 2020) (On file with the Senate Appropriations Committee).

The division “approves” the independent audit equipment pursuant to both statutory and administrative rule standards. The automated audit equipment must be:<sup>17</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.

Administrative 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>18</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>19</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>20</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 the audit.<sup>21</sup>

### III. Effect of Proposed Changes:

The bill grants 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 *pre-certification* machine *and* manual recounts.

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 Florida Division of Elections 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.

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

<sup>18</sup> Rule 1S-5.026, F.A.C. (Post-Election Certification Voting System Audit).

<sup>19</sup> Section 101.591(4), F.S.

<sup>20</sup> Section 101.591(5), F.S.

<sup>21</sup> Section 101.591(6), F.S.

The bill takes effect upon becoming a law.

**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:

To the extent a county chooses to purchase digital imaging, automated tabulating equipment for recounts, private sector companies that manufacture, sell, or lease such systems may benefit.

C. Government Sector Impact:

The bill makes the use of digital imaging systems for recounts permissive. To the extent a county elects to use such equipment that is not part of the voting system, that county may incur additional costs to purchase the equipment. However, to the extent a county uses such equipment to conduct automated audits, those counties may realize cost savings in the event of a recount.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

To allow the Department of State sufficient time to formally adopt new rules for certifying the digital imaging equipment for recount purposes, modifying recount rules/procedures as necessary, and certifying the systems (should the new rules provide additional requirements beyond the current “approval” process governing the use of the equipment for post-certification audits) may warrant consideration of changing the bill’s effective date to January 1, 2021 (i.e., after the 2020 election cycle). Florida’s recent electoral history and experience suggest that it may be advisable to make election administration system changes in a *non-presidential* election cycle.

Section 4 of the bill amends s. 106.166, F.S., to require the Florida Division of Elections 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.”

**VIII. Statutes Affected:**

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

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.