

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1265 Preservation of Ballots and Digital Images of Ballots

SPONSOR(S): Geller

TIED BILLS: **IDEN./SIM. BILLS:** SB 1698

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Public Integrity & Elections Committee	16 Y, 1 N	Pardo	Rubottom
2) Infrastructure & Tourism Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Florida law requires a machine recount whenever the margin of victory in an election is one-half of one percent or less. Whenever there is a machine recount, the canvassing board must run all the marksense ballots through the voting system's automatic tabulating equipment. The machine recount results comprise the second set of unofficial results. If the second set of unofficial results (the machine recount) show a margin of victory of one-quarter of one percent or less, a manual recount of the overvotes and undervotes must be conducted.

The bill requires supervisors of elections to preserve all marksense ballot and digital images of the undervotes/overvotes after a manual recount for at least 22 months. In addition, the bill requires the canvassing board to release copies of all digital images of the ballot to all parties involved in the recount.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

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 required, it occurs before the election results are certified.¹ 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.² 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.³

Machine Recounts

If the first set of unofficial results⁴ 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.⁵ During this machine recount process, the tabulators sort out the overvotes⁶ and undervotes⁷ 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.⁸

The machine recount results comprise the second set of unofficial results.⁹

¹ S. 102.141(7), F.S.

² S. 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. S. 102.112(1)-(2), F.S.

³ S. 102.166(5)(b) and (d), F.S.; Rule 1S-2.031, F.A.C. (Recount Procedures).

⁴ 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. S. 102.141(5), F.S.

⁵ S. 102.141(7), F.S. A losing candidate within one-half of one percent or less can waive the automatic recount in writing. *Id.*

⁶ 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.

⁷ 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.

⁸ S. 102.141(7)(a), F.S.

⁹ 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. S. 102.141(7)(c), F.S.

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.¹⁰ The Secretary of State is responsible for ordering a manual recount for federal, state and multicounty races.¹¹ The county canvassing board or local board responsible for certifying the election is responsible for ordering a manual recount for all other races.¹² A manual recount consists of a recount of marksense ballots or of digital images of those ballots by a person.¹³

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.”¹⁴ If a team cannot agree, the ballot is sent to the county canvassing board for a final determination.¹⁵

Retention of records under Florida law

Under Florida law, the retention of election materials is governed by the schedule approved by the Division of Library and Information Services of the Department of State.¹⁶ All ballots, forms, and other election materials must be retained in the custody of the supervisor of elections in accordance with the scheduled approved by Division of Library and Information Services (DLIS).¹⁷ DLIS currently provides that digital images of ballots must be retained for 22 months.¹⁸ Ballots must be retained for 22 months for federal elections.¹⁹ Ballots for state and local elections must be retained until the 1 year anniversary after the certification of the election.²⁰

Federal law require every election officer to retain and preserve all election materials for 22-months.²¹

Effect of Proposed Change

The bill requires the supervisors of elections to preserve all marksense ballot and digital images if any of the overvote and undervote ballots for at least 22 months. The bill only changes the retention of marksense ballots for state elections as those are the only ones not currently required to be retained for 22 months. Any digital images of any ballots is currently required to be retained for 22 months under the Division of Library and Information Services rule.

The bill also requires the canvassing board or the local board responsible for ordering a manual recount to release copies of all digital images of the ballot to all parties of a recount.

B. SECTION DIRECTORY:

Section 1. amends s 102.166, F.S., relating to retention of records after a manual recount.

Section 2. provides an effective date of July 1, 2021.

¹⁰ S. 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.*

¹¹ S. 102.166(1), F.S.

¹² S. 102.166(1), F.S.

¹³ S. 102.166(1), F.S.

¹⁴ S. 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.

¹⁵ S. 102.166(5)(c), F.S.

¹⁶ S. 101.545, F.S.

¹⁷ *Id.*

¹⁸ Florida Department of State Division of Library and Information Services, Election Records Schedule, available at <https://fdoswebumbracoprod.blob.core.windows.net/media/693583/gS03.pdf> (last visited Mar. 19, 2021)

¹⁹ *Id.*

²⁰ *Id.*

²¹ 52 U.S.C. 20701

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The requirements to make digital images of overvoted and undervoted ballots available to parties to a recount may impose some insignificant cost on a supervisor when a manual recount is ordered.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES