

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1116

SPONSOR: Committee on Ethics and Elections and Senator Posey

SUBJECT: Election Certification Deadlines

DATE: March 23, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable/CS
2.	_____	_____	AGG	_____
3.	_____	_____	AP	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for Senate Bill 1116 creates the following deadlines for the certification of election returns:

- First Primary – 7 days after the election (maintains current law)
- Second Primary – 7 days after the election (currently 3 days)
- General Election – 11 days after the election (currently 7 days)

CS/SB 1116 removes the Secretary of State’s discretion with regard to late-filed election returns. The Department of State is prohibited from accepting late-filed election returns in primary contests and in the U.S. Presidential election race. Conversely, the Department must accept late-filed general election returns through late-filing deadlines that vary depending on the office or ballot measure at issue.

The bill also establishes a *firm* 3-day deadline for eligible candidates and others to request a manual recount, instead of allowing a request to be made up until the time the canvassing board certifies the results of an office being protested.

Finally, the bill increases from \$200/day to \$500/day the penalty for canvassing board members who fail to meet certification deadlines, and extends by 3 days (following the second primary) the time allotted for a gubernatorial candidate to designate and qualify a running mate.

CS/SB 1116 substantially amends sections 99.063, 102.111, 102.112, and 102.166 of the Florida Statutes.

II. Present Situation:

CS/SB 1116 embodies the certification deadline recommendations contained in the committee staff interim project report on the 2000 election. Florida Senate, *Review of Voting Irregularities of the 2000 Presidential Election* p. 46-47 (March 2001) (Report Number 2001-201). The report recommends specific changes in three other broad electoral areas: Confirmation of a Person's Eligibility to Vote at the Polls; Recount Standards and Procedures; and, Voting Systems. The certification deadline recommendations in this bill are intended to work in concert with the recount recommendations, which advise manually counting only the overvotes and undervotes.

Certification of Voting Results

Florida law requires that each county canvassing board certify the results of all elections for a federal or state officer no later than 7 days after the first primary and the general election.¹ Returns for the second primary are due 3 days after the election.² These deadlines are problematic because, in many cases, manual recounts cannot be completed prior to the deadline. In addition, in *federal* general elections, *overseas absentee ballots* must be counted up to 10 days after the election.

Manual Recounts

As a practical matter, it is virtually impossible for larger counties to meet the certification deadlines if circumstances warrant a manual recount of *all* ballots. Florida law allows a losing candidate whose name appeared on the ballot, or the candidate's political party, to ask the county canvassing board for a manual recount.³ This request may be made up until 3 days after the election (or by the time the canvassing board certifies the result, whichever occurs later⁴). In the *first primary* and *general election*, this 3-day manual recount request period potentially limits the county canvassing board to 4 days to complete a manual recount of hundreds of thousands of ballots.

In the case of the *second primary*, the certification deadline and time for requesting a manual recount are identical --- 3 days. The certification deadline is so close to election day because the second primary scenario in certain years contains a built-in delay in determining which candidates' names will appear on the general election ballot. The State Constitution provides that a gubernatorial candidate may run without a lieutenant governor running mate until *after* the second primary.⁵ Following certification of the second primary, the gubernatorial candidate has 3 more days under Florida law to designate a running mate, and for that designee to file the necessary qualification papers with the Department of State.⁶ Thus, the name of the lieutenant

¹ Sections 102.111(1), 102.112(1), F.S.

² Section 102.112(1), F.S.

³ Section 102.166(4), F.S.

⁴ The conditionality allowing a party to request a manual recount *any time* prior to the canvassing board certifying the results was enacted in 1999 as part of an overhaul of the protest and contest provisions of the Election Code. Ch. 99-339, Section 1, p. 3545, Laws of Fla.

⁵ Art. IV, Section 5, Fla. Const. The Constitutional amendment was adopted in 1998. It was intended to allow the Governor to select a running mate who ran for another office but was defeated prior to the general election.

⁶ Section 99.063, F.S.

governor candidate may not be known until almost a week after the date of the second primary, delaying the printing of general election ballots.

It is important for county canvassing boards to meet all certification deadlines. It is absolutely essential that they do so in the primaries, since ballots for subsequent elections must be printed almost immediately following the certification. The names of the candidates appearing on subsequent ballots are dependent on the certification.

The 2000 Presidential election demonstrated that the sheer volume of ballots to be counted during a recount in Florida's larger counties makes the current 7-day certification deadline unrealistic. While Miami-Dade, Broward, and Palm Beach received special scrutiny during the most recent election, the difficulties experienced in these counties would undoubtedly have been encountered by many other counties had recounts been required there.

Overseas Absentee Ballots

In *general* elections for *federal* office, the State of Florida is required⁷ to count all ballots received from overseas voters which are postmarked or signed and dated by the date of the election, provided they are received no later than *10 days after the election*. Thus, Florida's one-week general election certification deadline *precedes* the date on which all valid ballots must be received.

The certification deadline for the 2000 Presidential general election was November 14, 2000, seven days after the election. On November 15, 2000, the results forwarded by the county canvassing boards to the Department of State indicated that the Bush/Cheney ticket was ahead of the Gore/Lieberman ticket by a mere *300 votes* (Bush/Cheney: 2,910,492; Gore/Lieberman: 2,910,192). At that time, as it turns out, there were 2,490 valid absentee ballots from overseas voters on their way to the county supervisors of elections but yet to be received and counted. Since the number of outstanding overseas ballots was greater than the Bush/Cheney margin of victory, any certification and declaration of a winner by the State Elections Canvassing Commission on November 15 would have essentially been a meaningless ministerial exercise.

Effect of Late-Filed Returns

In addition to these timing problems, there is a patent conflict in Florida law concerning the *effect* of a county missing the certification deadline. Section 102.111, Florida Statutes, mandates that late-filed returns "shall" not be included in the official results. Section 102.112, Florida Statutes, states that such late-filed returns "may be ignored," arguably vesting the Secretary of State with the discretionary authority to accept or reject late-filed returns. This ambiguity led to a

⁷ In the early 1980's, the United States Government sued the State of Florida claiming that the State's system of holding three elections in nine weeks failed to provide eligible overseas voters sufficient time to receive and vote the ballot. Florida Senate, Committee on Executive Business, Ethics and Elections, *Increasing Participation by Florida's Overseas Voters*, p. 1-2 (September 1997) (Report No. 97-P-33). As a result, the State entered into a Consent Order and court-approved Plan of Compliance with the U.S. Department of Justice, requiring Florida to modify the timing of its overseas ballot mailings in federal elections and mandating that such ballots be counted if postmarked or signed and dated by election day, *provided* they are received no later than 10 days following the election. *Id.*

tremendous amount of confusion, uncertainty, and litigation during the 2000 Presidential election.

Through 1988, section 102.111, Florida Statutes, on its face, *required* the Secretary to reject late-filed returns. In *State of Florida on the relation of Bill Chappell v. Martinez*,⁸ the Florida Supreme Court was faced with the question of whether to disregard 11,000 votes from Flagler County in a U.S. congressional general election because the returns were phoned in to the Department of State instead of “on file” by the certification deadline. The Court held that the Flagler votes had to be counted since the statute was “substantially complied” with. The Court’s rationale was that the purpose of an election is to effectuate the will of the voter, and hypertechnical compliance with statutes should not defeat that purpose.

In 1989, the Florida Legislature, as part of a major election reform package, enacted Section 102.112, Florida Statutes. The new statute maintained the one-week certification deadline but provided that returns not timely filed “may be ignored.”⁹ The statute also directed that civil fines of \$200 per day be assessed against the personal funds of each county canvassing board member for late-filed returns. The Legislature, however, did not repeal the provision in Section 102.111, Florida Statutes, providing that late-filed returns “shall be ignored,” thereby creating, on its face, a patent statutory conflict.¹⁰

III. Effect of Proposed Changes:

Certification Deadlines

CS/SB 1116 establishes certification deadlines as follows:

- First Primary – 7 days after the election (maintains current law)
- Second Primary – 7 days after the election (currently 3 days)
- General Election – 11 days after the election (currently 7 days)

The bill maintains the certification deadline for the *first primary* at one week. There are only 21 days between this certification time and the second primary, and it is important that second primary ballots be printed quickly and distributed to domestic and overseas absentee voters. Reducing the scope of manual recounts to overvotes and undervotes combined with the fact that historically there are fewer ballots cast in a first primary contest than a general election will enable county canvassing boards to meet the certification deadline.

The bill extends the 3-day certification deadline for the *second primary* to 7 days, and allows eligible gubernatorial candidates until 9 days after the second primary to designate a running mate. There is simply no way to conduct a manual recount in 3 days when you allow that much time to request a manual recount. While this change delays printing of the general election

⁸ 536 So.2d 1007 (1988).

⁹ Ch. 89-338, Section 30, at 2162, Laws of Fla.

¹⁰ It is unclear why the Legislature chose not to repeal the conflicting language in Section 102.111, F.S. In fact, Senate staff recommended repealing the conflicting language in conjunction with creating Section 102.112, F.S. Florida Senate, Committee on Ethics and Elections Staff, *Report on Late Filing of County Election Returns* (January 6, 1989).

ballots by 3 days compared to the current statutory scheme, it still allows 26 days to print and distribute absentee ballots domestically and overseas in years in which gubernatorial candidates are on the ballot. This exceeds the current time frame for printing and distributing second primary absentee ballots, which, because of the timing of certifications and election dates, is necessarily limited to 21 days.¹¹

CS/SB 1116 moves the certification deadline for the *general election* from 7 to 11 days after the election. This change will allow adequate time for the receipt and counting of all valid overseas ballots. It will also allow sufficient time to complete the limited manual recounts of overvotes and undervotes.

Given these changes, local county canvassing boards should have little or no reason to file late returns. To further encourage timely filing, existing penalties for county canvassing boards filing late returns should be increased from \$200 to \$500 per day.

The bill also eliminates a conditionality in Florida law allowing a candidate or other eligible party to request a manual recount in an election protest scenario up to 3 days after the election *or until the canvassing board certifies the results of the election, whichever occurs later*. CS/SB 1116 provides that a request for a manual recount may be made up until 3 days after midnight of the date of the election, thereby allowing canvassing boards to meet certification deadlines.

Effect of Late-Filed Returns/Late-Filing Deadlines

The bill prohibits the Department of State from accepting late-filed election returns in *primary* contests and in the *U.S. Presidential election* race. Conversely, the Department is required to accept late-filed *general* election returns through the following dates:

- For U.S. Senate and U.S. House races, until 5 p.m. on January 2 of the year following the election.
- For statewide races, until 5 p.m. on first Monday in January following the election.
- For state legislative races, until 5 p.m. on the day before the State Legislature convenes for organizational session.¹²
- For multi-county races, until 5 p.m. on the day before the successful candidate is to take office.
- For ballot issues, until 5 p.m. on the day prior to the measure taking effect or until the certification deadline, whichever occur later.

The legal reasoning underlying this approach is detailed in Part IV.D. “Other Constitutional Issues.”

¹¹ Additionally, overseas voters receive an *advance ballot* for the general election which is counted if the regular ballot is not returned. Section 101.62(4), F.S. In general elections involving *federal candidates*, ballots do not need to be received by the supervisor of elections until 10 days after election day.

¹² Although state legislators are elected as of the date of the election, they do not take the oath of office until the Legislature convenes in organizational session 14 days after the election. Art. III, Sections 3(a), 15(d), Fla. Const.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida courts have held that the fundamental purpose of the election laws is to “facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right.”¹³ Therefore, insofar as the certification deadline constitutes a “technical requirement,” it cannot defeat the will of the voter and late returns must be counted.

In a primary election contest, the certification deadline is a substantive, not a technical, requirement. The effective administration of subsequent elections turns on the timeliness of the certification and the determination of which candidates’ names will appear on subsequent ballots. Ballots for subsequent elections are designed, printed, *and distributed* almost immediately following the certification. The Secretary should have no discretion to accept late-filed results as they would interfere with the State’s compelling interest and duty to administer elections, potentially disenfranchising thousands or millions of Floridians in subsequent elections.

Similarly, because of federal Constitutional considerations, the certification deadline in the U.S. Presidential election must be viewed as a substantive, not a technical, requirement. For U.S. Presidential races, the certification deadline must be mandatory and the Secretary should not have discretion to include late-filed returns in the official results. As a practical matter, the certification process cannot drag on in the U.S. Presidential race, since such delay further shortens an already truncated contest period. Federal law requires all contests and controversies to be resolved by early December or Congress is not obligated to count the votes of Florida’s Presidential electors, potentially disenfranchising the entire State.¹⁴

In the case of other general election contests and ballot questions, however, the certification deadline is *initially* a technical requirement. It becomes a substantive requirement only when the

¹³ *Palm Beach Co. Canvassing Bd., et al. v. Harris*, Nos. SC 00-2346, SC00-2348, SC00-2349, at p.32 (November 21, 2000) *vacated on other grounds, Bush v. Palm Beach Co. Canvassing Bd., et al.*, No. 00-836 (December 4, 2000); see also *Boardman v. Esteve*, 323 So.2d 259, 269 (Fla. 1975) (“... the primary consideration in an election contest is whether the will of the people has been effected.”)

¹⁴ 3 U.S.C. Section 5.

current officeholder's term expires and the successor is due to be sworn into office, or when a ballot question is to take effect.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
