

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 1122

SPONSOR: Committee on Ethics and Elections and Senator Posey

SUBJECT: Election Recounts

DATE: March 28, 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 SB 1122 substantially revises Florida's recount statutes and mechanisms. CS/SB 1122 eliminates the election protest and the statutory limited manual recount (3 precincts; 1% of votes cast), and removes all discretion from local canvassing boards in ordering manual recounts.

Specifically, the bill:

- Requires the same manner of recount to be conducted in the entire geographic jurisdictions of the affected race or ballot question, instead of in select precincts and counties;
- Sets up the following non-discretionary, numeric recount guidelines:
 - An automatic machine recount takes place if the margin of victory in any race or ballot question is one-half of one percent or less (counties using optical scan equipment must physically run the ballots through the counting tabulators instead of adding summaries from counting tabulators);
 - A manual recount of the overvotes and undervotes takes place if the margin of victory in any race or ballot question is one-quarter of one percent or less; and,
 - A manual recount of the overvotes and undervotes takes place where the margin of victory in any race or ballot question is between one-quarter and one-half of one percent, provided:
 - An eligible party makes a written request no later than 5 p.m. on the second day after the election; and,
 - The requesting party posts a bond in an amount prescribed by rule of the Department of State sufficient to cover the costs of the recount, said bond

to be forfeited if the recount is unsuccessful in changing the outcome of the election.

- Provides that a vote will count if there is a “clear indication on the ballot that the voter has made a definite choice.”
- Charges the Department of State to adopt rules for each certified voting system prescribing precisely what constitutes a “clear indication on the ballot that the voter has made a definite choice,” and to adopt rules prescribing uniform recount procedures.

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

II. Present Situation:

Committee Substitute for SB 1122 embodies many of the election recount 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; Voting Systems; and, Deadlines for Certifying Election Returns.

Florida Recounts

There are several different recount provisions in Florida Statutes – automatic recounts, *limited* manual recounts (1% of the votes cast), and *full* manual recounts.

Automatic Recounts

An automatic recount is triggered when the returns for an office indicate that:

- A candidate was defeated or eliminated by one-half of one percent or less of the votes cast for the office;
- A judicial candidate was retained or not retained by one-half of one percent or less of the votes cast on the question of retention; or
- A ballot issue was approved or rejected by one-half of one percent or less of the votes cast on such issue.¹

The canvassing board responsible for certifying the results of the election orders the automatic recount upon a determination that a recount is warranted by the vote.² The canvassing board conducting the recount is required to examine the counters on the machines or the tabulation of the ballots cast in each precinct and determine whether or not the returns correctly reflect the votes cast.

¹ Section 102.141(4), F.S.

² If the candidate or candidates defeated or eliminated by one-half of one percent or less request in writing that a recount not be made, the canvassing board is not required to order the recount.

During the 2000 Presidential election, an automatic recount was ordered based on the vote totals reported election night. County canvassing boards immediately began the automatic recount. Counties conducted their recounts in different manners. Some counties ran their ballots back through the tabulators while other counties instead checked the memory cards on the automatic tabulating equipment for clerical or mathematical errors. Some counties looked at the ballots to determine if votes not counted by the automatic tabulating equipment should be counted as a vote.

Manual Recounts

Any candidate, any political committee supporting or opposing an issue on the ballot, or any political party whose candidates' names appeared on the ballot, may file a written request for a manual recount. The request must contain a statement of the reason the recount is being requested and must be filed prior to the time the canvassing board certifies the results of the election or within 72 hours after the election, whichever occurs later. The county canvassing board has the sole and complete discretion as to whether or not to authorize the manual recount. There are no standards to guide the canvassing board's decision. If the recount is authorized, all candidates in the affected race are notified of the time and place of the recount. The recount is required to include at least 3 precincts³ and at least 1% of the votes cast for such candidate or issue.

If the manual recount indicates an "error in the vote tabulation"⁴ which could affect the outcome of the election, the county canvassing board has the following options:

- Correct the error and recount the remaining precincts with the vote tabulation system;
- Request the Department of State to verify the tabulation software;⁵ or
- Manually recount all of the ballots.

In conducting the manual recount of the ballots, the canvassing board appoints teams of at least two voters with different party affiliations, where possible. The counting team reviews the ballots to see if the voter's intent can be determined. If the counting team is unable to determine a voter's intent, the ballot is presented to the county canvassing board for its determination.⁶

³ The person requesting the recount chooses the precincts to be recounted and if additional precincts are recounted, the county canvassing board chooses the additional precincts. Section 102.166(4)(d), F.S.

⁴ On November 13, 2000, the Division of Elections issued three opinions interpreting the term "error in the vote tabulation." The Division opined that "an 'error in the vote tabulation' means a counting error in which the vote tabulation system fails to count properly marked optical scan or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Voter error is not an 'error in the vote tabulation.'"

DE 00-12 (November 13, 2000). The following day, the Attorney General issued AGO 2000-65 in which he disagreed with the Division's opinion and instead indicated his opinion that "the term 'error in voter [sic] tabulation' encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), F.S."

⁵ Within 24 hours after any logic and accuracy test, the supervisor of elections is required to send a copy of the tabulation program to the Department of State. Section 101.5607, Florida Statutes.

⁶ Section 102.166(7), F.S.

The 2000 Presidential election highlighted a number of problems with the current recount provisions. These problems included:

- Even though the election was a statewide election, manual recounts were only requested in a few selected counties.
- Large counties conducting manual recounts were not able to meet the certification deadline prescribed by statute.⁷

The United States Supreme Court in *Bush v. Gore* held that other problems with the Florida recount scheme violated equal protection and fundamental fairness:

- While the standard of effectuating the “intent of the voter” was an adequate starting point, there were inadequate substandards in effect prior to the recount as to what constituted a vote. The absence of substandards resulted in the use of varying standards both county-to-county and within the same county, where the same voting system was used.
- Some counties certified partial recounts while full recounts were certified in others.
- The Florida Supreme Court ordered all counties to count undervotes, but not overvotes.
- The county canvassing boards had to pull together “ad hoc” counting teams with no prior experience or training in interpreting/handling ballots.
- Observers were prohibited from objecting during the recount.⁸

III. Effect of Proposed Changes:

The propriety and scope of recounts were two of the most hotly contested and litigated issues in the 2000 Presidential election.

Where to Recount

Committee Substitute for SB 1122 provides for the same manner of recount in all affected jurisdictions. For national and statewide elections, recounts will be conducted in every county in Florida to insure fair and equal treatment of all Florida voters. For multicounty races, all counties comprising the district of the candidacy or ballot measure at issue will be required to recount.

When and What to Recount

The bill eliminates the election protest and the statutory limited manual recount (1% of votes cast), and also removes all discretion from local canvassing boards in ordering manual recounts. Specifically, CS/SB 1122 requires:

- An automatic machine recount, if the margin or victory in any race or ballot question is one-half of one percent or less;

⁷ Section 102.111, F.S., requires returns to be submitted by the county canvassing boards by 5 p.m. on the 7th day following the general election.

⁸ *Bush v. Gore*, 121 S.Ct. 525, 530-32.

- A manual recount of the overvotes and undervotes, if the margin of victory in any race or ballot question is one-quarter of one percent or less; and,
- A manual recount of the overvotes and undervotes where the margin of victory in any race or ballot question is between one-quarter and one-half of one percent, provided:
 - An eligible party makes a written request no later than 5 p.m. on the second day after the election; and,
 - The requesting party posts a bond in an amount prescribed by rule of the Department of State sufficient to cover the costs of the recount, said bond to be forfeited if the recount is unsuccessful in changing the outcome of the election.

With regard to the automatic machine recount, the bill provides that counties using optical scan technology run the ballots through the tabulators a second time instead of just adding up summary totals from the tabulators.

How to Recount (Recount Standards and Procedures)

Committee Substitute for SB 1122 clarifies the current statutory “voter intent” standard in a number of provisions of Florida’s election code. Under the bill, a vote for a candidate or ballot question will count if there is a “clear indication on the ballot that the voter has made a definite choice.” The Department of State is charged with adopting rules for each certified voting system prescribing precisely what constitutes a “clear indication on the ballot that the voter has made a definite choice.” In addition to developing these administrative substandards, the bill also charges the Department to adopt rules prescribing uniform *recount procedures*.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Candidates and political committees supporting or opposing ballot questions may incur additional expenses in posting bonds to cover some manual recounts. The amounts are indeterminable.

C. Government Sector Impact:

Florida counties may receive revenue from forfeited bonds posted for manual recounts, whereas under current law counties are required to pay for a manual recount. The amounts are indeterminable.

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.
