

2021 Conference Q & A's

VBM (Requests, Mailing Envelopes, VBM count reporting)

- Q: Since SB 90 is effective as of May 6, 2021, how do we address requests from voters for vote-by-mail ballots who have no SSN#, FL DL or FL state ID because they registered to vote years before it was added in statute and on the application form?**
- A:** A voter calling to request a VBM who does not already have a FL DL#, FL ID#, or SSN on record would need to provide their FL DL#, FL ID#, or last four digits of their SSN, whichever a Supervisor of Elections may verify through available sources (by reference to DAVID or by the voter providing a copy of their DL or SS card). Please note that subsection (7) provides exceptions to the rule that a county, municipality, or state agency may not send a VBM ballot to a voter unless the voter has requested a VBM in the manner authorized under 101.62 for “voters having a disability under s. 101.662, for overseas voters under s. 101.697, or for local referenda under ss. 101.6102 and 101.6103.”
- Q. “If a voter has not been issued a FL DL#, FL ID#, or SSN and they are registered to vote pursuant to F.S. 97.053(5)(a)5.b., can we accept a request for a vote-by-mail ballot for this voter? Since they have affirmed that they do not have either and this has been verified by the Division of Elections, how should we proceed with processing a request for a vote-by-mail ballot without the FL DL#, FL ID#, or SSN? It seems this scenario was not contemplated.”**
- A.** Section 101.62(1)(b) provides in pertinent parts that: “If an in-person or a telephonic request [for a VBM] is made, the elector must provide the elector's Florida driver license number, the elector's Florida identification card number, or the last four digits of the elector's social security number, whichever may be verified in the supervisor's records. . .”; and “[a] written request [for a VBM] must be signed by the elector and include the elector's Florida driver license number, the elector's Florida identification card number, or the last four digits of the elector's social security number.”

The new section (7) provides: “Except as expressly authorized for voters having a disability under s. 101.662, for overseas voters under s. 101.697, or for local referenda under ss. 101.6102 and 101.6103, a county, municipality, or state agency may not send a vote-by-mail ballot to a voter unless the voter has requested a vote-by-mail ballot in the manner authorized under this section.”

As such, the statute does not provide a generally applicable mechanism for an individual to request a VBM without providing his or her FL DL#, FL ID card #, or the last four digits of his or her social security number.

Q. Under s. 26 of ch. 2021-11, LOF, which revises section 101.64, Fla. Stat., what needs to change on the vote-by-mail ballot envelope and security envelope that was not required previously?

A. Subsections (b) and (c) of section 101.64(1) are new and provide as follows:

“(b) Each return mailing envelope must bear the absent elector’s name and any encoded mark used by the supervisor’s office.

(c) A mailing envelope or secrecy envelope may not bear any indication of the political affiliation of an absent elector.”

Additionally, if any mailing materials give the elector an option to request a VBM for future elections, the materials would need to be in compliance with section 101.62(1)(b), discussed above, providing in pertinent part that “[a] written request [for a VBM] must be signed by the elector and include the elector's Florida driver license number, the elector's Florida identification card number, or the last four digits of the elector's social security number.”

Q. Currently we indicate on the envelope R1 which means republican precinct 1, or D1 which means democrat precinct 1? We use these indicators to make sure that the correct ballot style is enclosed in the voter’s VBM packet.

In regards to the new requirements [under section 101.64, Fla. Stat.] for information that must be displayed on the outside of a return mailing envelope and prohibits display of an elector’s political affiliation on a ballot envelope – does this mean that we are going to have to change our marking on the envelope to not match the ballot style.

A. Yes. The law does not permit any indication of the political affiliation of the voter on a VBM mailing envelope or secrecy envelope. See 101.64(1)(b) & (c).

Q. New section 102.072, F.S., requires supervisors of elections to report vote-by-mail data on election night.

Do we have to report at 7pm exactly or sometime between 7pm and 8pm and then every hour thereafter while still actively counting?

A. Section 102.072 provides “[b]eginning at 7:00 p.m. election day, the supervisor must, at least once every hour while actively counting, post on his or her website the number of vote-by-mail ballots that have been received and the number of

vote-by-mail ballots that remain uncounted.” We read the provision to require that *the first posting on your website must occur at 7:00 p.m.*, with subsequent updates to occur at least once every hour thereafter while actively counting. Option remains to post more frequent updates, but the statute articulates the minimum frequency.

- Q. New section 102.072, F.S., requires supervisors of elections to report vote-by-mail data on election night.**

“What should be included in the number of vote-by-mail ballots received? Everything including ballots that have already been rejected by the Canvassing Board?”

- A. The language of the statute seems to indicate all VBM received, regardless of whether they have been counted or rejected. Of course, you could provide more detail/breakdown if desired to clarify.

Updates to Voter Registration & Verification

- Q. Section 9 of ch. 2021-11, LOF revises section 97.1031, Fla. Stat. which relates to notice of address, name and/or party changes.**

What happens when a person contacts a supervisor by phone or electronic means for an update and the FL DL/ID or last 4 provided in an update cannot be verified pursuant to 97.1031(1)(b)1, F.S.?

- A. Your question references section 97.1031(1)(b)1., which is the provision under which a voter may contact the Supervisor of Elections via *telephone* or *electronic means* to make an address change within the state. This provision requires the elector to provide his or her date of birth and the last four digits of his or her social security number, his or her Florida driver license number, or his or her Florida identification card number, *whichever may be verified in the supervisor’s records*. If the DL/ID/last four cannot be verified, this method of updating (telephone or electronic) is not available. Rather, the voter can submit a signed written notice, or submit the change on a VRA (one of those numbers would likewise need to be provided), in which case the elector may also affirm, however, that he or she has none of the above-referenced personal identification numbers, which nonexistence itself would likewise have to be verified.

- Q. Section 97.1031 (1)(b) as revised by s. 9 of ch. 2021-11, LOF, still reads as follows:**

(b) If the address change is within the state and notice is provided to the supervisor of elections of the county where the elector has moved, the elector may do so by:

1. Contacting the supervisor of elections via telephone or electronic means, in which case the elector must provide his or her date of birth and the last four digits of his or her social security number, his or her Florida driver license number, or his or her Florida identification card number, whichever may be verified in the supervisor's records; or

2. Submitting the change on a voter registration application or other signed written notice

So can we accept "other signed written notice" as long as it includes the DL/ID/last four?"

A. The recent statutory changes do not touch upon an address update submitted on a *signed, written notice* other than a Voter Registration Application. See § 97.1031(1)(b)2., Fla. Stat. In other words, there is no requirement under statute that an address change submitted on a signed, written notice other than a VRA include the FL DL, ID, or last four of the SSN.

Q. The polling location affirmations in §101.045 (2)(a) and (2)(c) do not request the voter to provide driver license number, Florida identification card number or last four digits of social security number as required in 97.053 and 97.1031 for a valid change in name or address. Does a voter making an address or name change at a polling location need to provide this information on an affirmation and have it verified (in office or FVRS) to complete the change?

A. As discussed in response to the prior question, the changes in SB 90 do not touch upon an address update submitted on a *signed, written notice* other than a Voter Registration Application (VRA). See § 97.1031(1)(b)2., Fla. Stat. In other words, there is no requirement under statute that an address change submitted on a signed, written notice other than a VRA include the FL DL, ID, or last four of the SSN. Thus, if the voter at the polling place completes the change of legal residence affirmation described in section 101.045(2)(a), he or she is not required to provide the FL DL, ID, or last four of the SSN. If the voter at the polling place utilizes a VRA to make the residence change, as is an option under section 101.045(2)(d), he or she would need to provide the FL DL, ID, or last four of SSN, or affirm that he or she has none of the personal identifiers. If the FL DL, ID, last four of SSN, or nonexistence of the identifiers has been previously verified, then the change can occur simultaneously. If previous verification of the identification provided has not already occurred, the change may take longer for a manual entry. The voter may wish to consider making the change through OVR,

in which case, verification could occur instantly. Alternatively, as noted above, the signed, written notice other than a VRA remains an option.

Additionally, as to the name change affirmation under section 101.045(2)(c) for a voter at a polling place, this statute is more specific than the general requisite in section 97.1031 that a name change be made on a voter registration application. A general rule of statutory construction is that a statute more specific to a topic generally applies and controls. Here, we would find that to be true and find section 101.045 to be more specific and controlling.

- Q. What is the verification process of a DL/ID # or SS# that is being entered in a voter's active record for the first time? If VR is working on it, what is their timeline? How should SOE's handle this process in the meantime?**
- A. Long term, the verification of an update on a VRA should be similar to an initial application – routing through DHSMV if the information provided by the applicant (or the nonexistence thereof) on the update form has not already been verified. The Division has been working with DHSMV for a proactive verification process for existing FL DL and IDs provided by a voter that have not yet been verified. The Division is also working with VR Systems to systematically provide for both prospective automatic routing of new information provided by the applicant for the first time that needs to be verified, as well as capturing information provided during an update by the voter since passage of the bill that may need to be manually or automatically verified. We say *may* because we understand some Supervisors of Elections to be utilizing DHSMV resources (or a copy of the personal identifying information from the voter) available to them to verify the information provided by the voter and update the record. This is extremely helpful as we all integrate the new requirements into the process. As an additional short-term solution, the Division is working with VR Systems to implement manual or automatic routing of information that will try to mirror as much as possible the verification process that occurs now including verification by BVRS.

Drop Boxes

- Q. Sections 28 and 32 of ch. 2021-11, LOF, revised s. 101.69, Fla. Stat., and s. 104.0616, Fla. Stat., respectively**

Since the law limits a person's lawful possession of ballots to his or her own, those of an immediate family member (which also expanded to include a grandchild), and two others, is the expectation that the person monitoring a VBM drop box question those dropping off ballots to confirm the ballots belong to themselves, an immediate family member, or two others?

Does the person dropping off the ballots have to show some kind of proof? If so, how would the person confirm that it is an immediate family (different addresses, different names, etc.)?

- A. The law does not provide for the employee monitoring a drop box to question the person delivering ballots as to familial relationship, etc., nor to show any kind of proof. As with all elections laws, however, if a Supervisor has reason to believe there has been a violation of law, he or she may wish to consider referring it to law enforcement, the state attorney, etc. For example, if someone arrives with an entire bin of ballots, there is a strong likelihood those are not all ballots of immediate family members and this is something that a Supervisor would want to flag and consider reporting as a possible law violation.

Ballot Harvesting

- Q. What duty does a Supervisor have under s. 104.0616, F.S., to monitor and enforce this section which limits the number of vote-by-mail ballots someone may have in their possession?**

- A. Same response as above.

Polling Place

- Q. Section 29 of ch. 2021-11, LOF revised s. 102.031, Fla. Stat. (relating to order at the polls and no-solicitation zones)**

Does the change to (4)(e) of s. 102.031, F.S., allow for the owner, operator, or lessee of the polling place property to prohibit the solicitation of voters by individuals, groups or organizations not affiliated with a candidate outside of the no-solicitation zone?

- A. Yes. But cautionary note here - subsection (4)(d) remains untouched and provides: "Except as provided in paragraph (a), the supervisor may not designate a no-solicitation zone or otherwise restrict access to any person, political committee, candidate, or other group or organization for the purposes of soliciting voters. This paragraph applies to any public or private property used as a polling place or early voting site." It is difficult to imagine scenarios in which actions of an owner, operator, or lessee of the place would not be attributed to the supervisor maintaining order at the polling place, who cannot take the same actions. We recommend that you be extremely cautious if owners, operators, or

lessees are looking to take such actions, as first amendment and other laws come into play as well.

Public Records & Public Inspection of Ballots

- Q. Section 24 of ch. 2021-11, LOF revised the information to be recorded as it relates to a voter's ballot request and which gets subsumed into the vote-by-mail request files.**

How do we implement and/or protect a voter's designee's Florida driver license number/state ID number or last 4 SSN4? Is it protected under the confidentiality provisions typically associated with FL DL/State ID and SSN4, in s. 97.0585, Fla. Stat.?

- A.** You would want to continue applying section 97.0585(1)(c) which is specific to certain personal identifying information and explicitly provides that the social security number, driver license number, and Florida identification number of a voter registration applicant or voter is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may only be used for voter registration. Section 97.0585(1)(c) is consistent with additional provisions under section 119.071, as well as Federal Law (The Driver's Privacy Protection Act), which provides, at least in relation to motor vehicle records held or distributed by a state motor vehicle agency, that "[i]t shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under ... this title.") See 18 U.S.C. § 2722(a). "Personal information" is defined as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information." *Id.* § 2725(3). "Highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information. *Id.* § 2725(4).

- Q. Section 21 of ch. 2021-11, LOF, revises s. 101.572, relating to public inspection of ballots.**

The new legislation does not specify as in other sections of election law. Naturally, newspaper publication would be acceptable.

"Can publication instead be made on the SOE website and in SOE social media instead of a newspaper of general circulation?"

"Does the notice of access the Supervisor of Elections need to be published in a newspaper of general circulation before they begin comparing signatures on voter's certificates?"

- A. The statute simply says that the Supervisor of Elections must “publish notice.” The Supervisor should ascertain what the best ways of publishing notice to their candidates and political party and committee officials are (website, social media, newspaper, office locations, etc.)

- Q. Section 21 of ch. 2021-11, LOF, revises s. 101.572, relating to public inspection of ballots.**

Suppose a requesting entity does not make a timely request before canvassing or tabulation begins. Does this mean that the entity has missed its opportunity to review or inspect as provided in the new subsection (2)?

- A. Subsection (2) explicitly provides for specific access to specific materials for statutory individuals at the *pre canvassing* stage. However, section 101.572(1) remains and provides for public inspection of a number of materials. Public records laws remain as well. As such, for many of these items, inspection may not have been missed for all time; however, special access prior to signature comparison would not necessarily be afforded.

- Q. Does the notice of access under the new subsection (2) relate only to the items brought to canvassing and before those items are canvassed and tabulated or all?**

- If yes, could the supervisor grant access on the day of each CB meeting, before the CB meeting commences, or grant access on a different day before a CB meeting? In this scenario, the SOE would include this on the canvassing board meeting schedule that will be published before signature comparison begins on VBM voter's certificates and define, on the published notice, when access will be available and how to request access. For example, each meeting could consider potential requests for access to inspect and review before the items presented at that particular meeting are canvassed and tabulated.
- If no, would access mean to all items brought before canvassing board before canvassing or tabulation begins, including but not limited to reviewing and inspecting for example, 100,000 voter certificates, 1,500 cure affidavits, and 3,000 duplicates and their originals?
- Obviously, this would be problematic because we could not begin canvassing or tabulation until all requesting entities have had an opportunity to review or inspect the items for which they have submitted a request. A reasonable effort to accommodate such requests before canvassing or tabulation begins would seriously impede the SOE's ability to carry out its election duties.

- A. There are going to be a variety of scenarios that could play out depending on how a Supervisors' office structures the access, timing of canvassing, etc. The key takeaway is that those designated in statute are to be given the opportunity to view voting materials before they are canvassed. Whether this is on a rolling basis, etc., will depend on formulation of plan – although it would appear likely that canvassing will not be all at once so access may not be either. Suggestion would be to formulate an access plan first, as well as your own suggested resolution to the above questions within that plan framework. We're happy to help talk through more specific plans with you once you have formulated them. This is a great area for consultation with colleagues as well, especially those of similar sized counties, as they may have excellent ideas on how to structure this from a practical perspective within the confines of the law.

Q. Section 20 of ch. 2021-11, LOF, revises s. 101.5614, Fla.Stat., relating to canvass of returns.

Based on the language in the statute, is there a difference in whether canvassing board review is required for duplication of a ballot containing an overvote versus an undervote?

- A. The duplication of ballots that have one or more overvotes or one or more undervotes must occur in the presence of at least one canvassing board member. It is only if there is an objection to the duplication by an observer (whether a duplication of an over or under vote) that the ballot and duplicate goes to the canvassing board for a determination.

For example, as described by a helpful county attorney, a county may have a canvassing board member present on days when duplications are happening and observers present as well. The duplicates/originals would be put out the following morning as part of the daily public inspection and, if there were objections during the duplication day or as part of the following public inspection, those duplicates/originals would be set aside and brought to a full canvassing board meeting for determination.

Q. Section 20 of ch. 2021-11, LOF, revises s. 101.5614, Fla.Stat., relating to canvass of returns.

If an observer on behalf of a party official, political committee official, or authorized designee objects to the duplication of a ballot, must the observer be present when the ballot is duplicated?

The observer entities designated in Section 101.5614 are the same entities designated in Section 101.572 (Public Inspection of Ballots). Would they likewise have missed their window to object to duplication if they did not request access?

A. It seems that being present for duplication as allowed under section 101.5614 would be the natural and most likely sequence and opportunity for objection. However, provision for the public inspection of ballots and materials (including duplicate ballots, implying that duplication has already occurred) under 101.572(2) may provide additional opportunities to view materials prior to canvassing or tabulation and does not explicitly require that such access be during duplication, although it certainly could be, depending upon how the Supervisor chooses to accommodate such requests. 101.572(1) is also not limited to those entities designated in 101.572(2). Thus, it could be that nobody objected to duplication during its occurrence, however, prior to canvassing/tabulation and during a time of access to view ballots and materials, an objection comes about that may potentially be raised with the canvassing board. Additionally, canvassing board meetings are open to the public and presumably, depending on the sequence of events in a meeting, members of the public may object to certain decisions as well for further consideration by the board, or at least voice their objections to various decisions on the record. In sum, we could foresee other potential times when someone could object to a duplication prior to tabulation other than during the act of duplication itself.

Q. The new language provides in that "the observer must be allowed to observe the duplication of ballots in such a way that the observer can see the markings on each ballot and the duplication taking place."

How much latitude does the supervisor of elections have in the public observation process of duplicated ballots? Understanding that this is a procedural issue, does the SOE have the latitude to allow the observer to view the markings on the duplicate during the QC (quality control) phase (post-duplication during a comparison by QC staff) instead of viewing markings on a duplicate as the duplication occurs?

- **For example, for an SOE that utilizes document cameras with a visual display, duplication teams could duplicate as usual without a visual display. The visual display would occur at the quality control end, where QC staff would compare the original to the duplicate visual display. An observer would be able to see the markings and the comparison taking place - at this point, they have already seen the duplication taking place. At the QC time, an observer could make a reasonable objection. Due to the cost of document cameras and the set-up required to enable the visual display, comparison of the original and duplicate markings at the QC end would decrease the number of document cameras and visual display units needed to facilitate the observation requirement in statute."**

A. 101.5614(4)(a) provides in pertinent parts that duplication of ballots shall be made in an open and accessible room, in the presence of witnesses. At least one

canvassing board member shall be present. Statutorily designated witnesses must be allowed to observe the duplication in such a way that the observer is able to see the markings on each ballot and the duplication taking place. Observers must be able to lodge objections for further consideration by the canvassing board. How a Supervisor of Elections goes about meeting those legal requirements, through the use of visual equipment and other technology, etc. is up to them. This may be a good area to consult with colleagues on best and most efficient practices.

Q. Section 20 of ch. 2021-11, LOF, revises s. 101.5614, Fla.Stat., relating to canvass of returns.

“(4)(a) . . . If any observer makes a reasonable objection to a duplicate of a ballot. . . What constitutes a reasonable objection?”

A. Section 101.5614(4)(a) provides in pertinent part: “[i]f any observer makes a reasonable objection to a duplicate of a ballot, the ballot must be presented to the canvassing board for a determination of the validity of the duplicate.” What constitutes a reasonable objection will be a fact specific determination. Dictionary definitions of “reasonable” are “agreeable to reason or sound judgment; logical” and “not exceeding the limit prescribed by reason; not excessive.” Perhaps another way to think of it is an objection that is not frivolous.

Voting Systems Audit Report

Q. Section 22 of ch. 2021-11, LOF, revises §101.591 Fla. Stat., relating to voting Systems audit.

While the new law still requires post-election voting system audits to be conducted for all elections (except in cases of a manual recount having been done), the only report that would have to be filed with the state would be the one for the general election, correct?

The revision provides that the post-election manual audit report is due to the DOS by December 15 of each general election year. Before, the audit report was due within 15 days after completion of the post-election manual audit. The post-election manual audit report must be combined with the overvote and undervote report filed with the DOS. The new language now states that a post-election manual audit report must be filed with the Department by December 15 of each general election year instead of 15 days after every audit. For other types of elections that may not occur in a general election year as defined in Section 97.021 FS, for example, odd-numbered year special district referendum or municipal elections, etc.

- A. Correct. An audit would still occur after each election as required by § 101.591, Fla. Stat. (unless a manual recount has occurred). However, the only time a Supervisor would have to submit the audit report to the Department of State is after a general election. The new deadline is December 15th following the general election.

Miscellaneous

Prohibition on Use of Private Funds

- Q. Section 2 of ch. 2021-11, LOF, creates section 97.0291, Fla.Stat., relating to prohibition on use of private funds for election-related expenses.**

“Does this mean that we can no longer use free space at farmers markets or no cost space at ticketed events for voter outreach, etc.?”

- A. You would have to analyze the origin/ownership of the space and arrangement. Section 97.0291 provides in pertinent parts, “No...supervisor of elections . . . may solicit, accept, use, or dispose of any donation in the form of money, grants, property, or personal services from an individual or a nongovernmental entity for the purpose of funding election-related expenses or voter education, voter outreach, or registration programs.” If there is a farmer’s market on city or county property, or let’s say a completely unrelated community event, and you are merely one of many community organizations setting up shop at a port authority, it may be that there is not a nongovernmental entity donating anything to you. If there is an event, however, for which organizations normally would pay to have a presence and you are being offered the space for free, that would likely be a donation of space for voter outreach subject to the prohibition. You would want to analyze the arrangement on a fact specific basis.