

BRENNAN
CENTER
FOR JUSTICE

ISSUE BRIEF:
ELECTION 2012 RECOUNTS

by Lawrence Norden

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S DEMOCRACY PROGRAM

The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

ACKNOWLEDGEMENTS

This issue brief was written with the able assistance of four students in the Brennan Center Public Policy Advocacy Clinic: Randall V. Johnston (class of 2013), William J. Ehrenreich (class of 2014), Tristan Freeman (class of 2013), and Alex Halpern Levy (class of 2014). Thanks to members of the Democracy program, who assisted on various aspects of the report. Our attorneys Jonathan Brater, Diana Kasdan, Lee Rowland, Ian Vandewalker, and Alicia Bannon all provided legal research and expertise at every stage. Our communications department, including Jafreen Uddin, Kimberly Lubrano, and Jeanine Plant Chirlin provided thorough review and edits. Last but not least, the authors especially thank Research Associate Amanda Melillo for her exceptional diligence in putting together this report and moving it through to publication. An additional resource on recounts in all 50 states can be found here: <http://www.ceimn.org/ceimn-state-recount-laws-searchable-database>.

The Brennan Center gratefully acknowledges the Democracy Alliance Partners, Educational Foundation of America, The Ralph and Fanny Ellison Charitable Trust, Ford Foundation, Anne Gumowitz, Irving Harris Foundation, The Joyce Foundation, The JPB Foundation, Mitchell Kapor Foundation, John D. and Catherine T. MacArthur Foundation, Mertz Gilmore Foundation, Open Society Foundations, Rockefeller Family Fund, the State Infrastructure Fund, the Lawson Valentine Foundation, the William B. Wiener Jr. Foundation, and Nancy Meyer and Marc Weiss for their generous support of our voting work.

ABOUT THE AUTHORS

Lawrence Norden is Deputy Director of the Brennan Center's Democracy Program. He has authored several nationally recognized reports and articles related to voting rights and voting technology, including *Better Design, Better Elections* (July 2012) and *Voting Law Changes in 2012* (October 2011). His work has been featured in media outlets across the country, including *The New York Times*, *The Wall Street Journal*, Fox News, CNN, MSNBC, and National Public Radio. He has testified before Congress and several state legislatures on numerous occasions.

In April 2009, Mr. Norden completed his duties as Chair of the Ohio Secretary of State's bipartisan Election Summit and Conference, authoring a report to the State of Ohio for the purpose of improving that state's election administration practices and laws. The report was endorsed by many of the State's leading election experts, as well as the Ohio Association of Election Officials, the bipartisan organization representing Ohio's 88 county boards of election. *The Columbus Dispatch* called Mr. Norden "a respected authority on voting law," and praised him for "following an independent path" in developing the report and recommendations.

Mr. Norden was the Keynote Speaker at the Sixth Annual Votobit International Conference on Electronic Voting (Buenos Aires, 2008), and the 2009 Electronic Voting Technology Workshop/Workshop on Trustworthy Elections (Montreal, 2009). In June 2009, he received the Usability Professional Association's Usability In Civic Life Award for his "pioneering work to improve elections." Mr. Norden is the lead author of the book *The Machinery of Democracy: Protecting Elections in an Electronic World* (Academy Chicago Press) and a contributor to the *Encyclopedia of American Civil Liberties* (Routledge 2007).

In addition to his voting work, Mr. Norden has authored numerous articles and reports detailing the need to reform New York State's legislative process. He manages and writes for the Brennan Center's blog on New York State, ReformNY. Mr. Norden is an Adjunct Professor at the NYU School of Law, where he teaches the Brennan Center Public Policy Advocacy Clinic.

GLOSSARY OF TERMS

Accessible Voting Machine: The federal Help America Vote Act (“HAVA”) established standards for polling places to accommodate voters with disabilities, requiring that voting systems, “be accessible for individuals with disabilities, including non-visual accessibility for the blind and visually-impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”

Direct Recording Electronic (DRE): A DRE machine directly records the voter’s selections in each contest, using a ballot that appears on a display screen. Typical DRE machines have flat panel display screens with touch-screen input, although other display technologies have been used. The defining characteristic of these machines is that votes are captured and stored electronically.

Voter-Verified Paper Audit Trail (VVPAT): A VVPAT captures a voter’s choice on paper when that person votes by machine. It allows the voter to confirm the accuracy of the paper record.

UOCAVA ballots: Ballots cast by voters covered under the Uniformed and Overseas Citizens Absentee Voting Act. This allows uniformed service members in the military and United States citizens living outside of the U.S. to vote absentee.

INTRODUCTION

With the polls deadlocked just a few days before Election Day, state recount laws once again take on national significance. It is no exaggeration to say that these laws could determine who is elected president in 2012.

This issue brief takes a look at some of the most critical provisions of the recount laws in the ten states identified by Nate Silver of the New York Times on October 26, 2012 as most likely to be “tipping point” states that could provide the decisive electoral vote in a close presidential contest (Colorado, Florida, Iowa, New Hampshire, Nevada, North Carolina, Pennsylvania, Ohio, Virginia, and Wisconsin). We also look at factors related to each state that could increase the likelihood of bitter recount contests.

Some key findings from the analysis of these recount laws:

- In four states — Colorado, Florida, Ohio and Pennsylvania — automatic recounts are triggered when the margin of victory is less than a specified percentage of the total vote. An automatic recount is triggered when the margin of victory is 0.25% of the vote total in Ohio and 0.5% of the vote total in Florida and Pennsylvania. In Colorado, an automatic recount is triggered if the margin is less than or equal to 0.5% of the apparent winner’s vote total. Most of the remaining states, including Iowa, New Hampshire, North Carolina, Virginia and Wisconsin, permit candidate initiated recounts at little or no cost to the candidate if the margin of victory between the leading candidates is similarly small. For some perspective, five states saw the presidential contest decided by less than 0.5% in 2000.¹
- Start and completion dates of recounts vary dramatically from state to state. In Florida, the recount must be completed within twelve days of the general election if it is to be counted. In other states, such as Ohio, the recount can be completed within days of December 17, when Presidential Electors must meet and vote.
- In most states, the initial recount will be conducted primarily or entirely by machine. Only New Hampshire requires a hand recount of all ballots.
- In three states — Colorado, Pennsylvania and Virginia — substantial numbers of citizens will vote on machines without paper records, meaning that there will be no independent voter-verified paper record to check against the software tally of votes.
- Most states require review of under and overvotes in recounts. These are votes the machine cannot read because it either detects no vote in a contest (undervote) or too many (overvote). Such votes are frequently the subject of dispute during recounts. While the Election Assistance Commission no longer provides data on over and undervotes, we know that Florida saw an unusually high number of overvotes in 2008, particularly in Miami-Dade County.² Voting machines can provide overvote and undervote warnings and give voters an opportunity to correct their ballots, so polling places will generally have fewer overvotes and undervotes than absentee votes.

¹ Florida, Iowa, New Mexico, Colorado, and Wisconsin. FEDERAL ELECTION COMMISSION, 2000 PRESIDENTIAL GENERAL ELECTION RESULTS, *available at* <http://www.fec.gov/pubrec/2000presgeresults.htm>.

² MARY GARBER, EXAMINING FLORIDA’S HIGH INVALID VOTE RATE IN THE 2008 GENERAL ELECTION (2009) *available at* http://www.ffec.org/documents/Invalid_Vote_Report_Revised_23June2009.pdf.

The Role of Provisional and Absentee Ballots in a Recount

Absentee and provisional ballots are frequently the subjects of litigation in tight recounts.³ That is because, unlike regular ballots cast in a polling place, there are several legal reasons to challenge the counting of such ballots, including the failure of a voter to properly fill out the ballot envelope.

The Brennan Center estimates that in the 2008 and 2010 general elections, hundreds of thousands of these ballots were not counted for technical reasons.⁴ When both parties know the results of an election, including the margin of victory, the conflict over whether certain ballots should be disqualified or counted is often greatly increased.

Some important facts about provisional and absentee ballots relevant to potential recounts in these states:

- In several of the potential tipping point states, including Colorado, Florida, North Carolina, and Pennsylvania, tens of thousands of provisional ballots have been cast in the most recent federal elections, and will be again in 2012. In Ohio alone, over 200,000 provisional ballots were cast in 2008, and there is reason to believe substantially more will be cast in 2012.⁵ These ballots cannot be counted until after Election Day. In some cases, as in Ohio, they cannot be reviewed for ten days after Election Day.⁶
- In at least one state, Ohio, the rules for whether certain provisional ballots can be counted are still unsettled as of the writing of this report.⁷
- All of the states except for New Hampshire have rejected several thousand absentee ballots in the last two federal elections. In a closely-contested election, the legitimacy of such ballots would almost certainly become a subject of dispute between the parties. The ten states we examine rejected a total of 87,396 absentee ballots in the 2008 election.⁸
- At least six states — Colorado, Florida, Iowa, Ohio, Pennsylvania and Wisconsin — will continue to count military and overseas absentee ballots received for some period of time after Election Day, so long as they were postmarked by November 5 or 6. In these states, 189,729 UOCAVA ballots were submitted in 2008.⁹ It is very likely that several thousands of UOCAVA ballots will not be counted until after November 6, 2012.

³ See Michael Falcone, *Campaigns Focus on Absentee Ballots in Minnesota*, N.Y. TIMES (Dec. 2, 2008), available at <http://thecaucus.blogs.nytimes.com/2008/12/02/campaigns-focus-on-absentee-ballots-in-minnesota/>; Ian Urbina, *At the Polls: Lines and Lapses*, N.Y. TIMES (Nov. 4, 2008), available at <http://thecaucus.blogs.nytimes.com/2008/11/04/at-the-polls-lines-glitches-and-enthusiasm/>.

⁴ LAWRENCE NORDEN, BETTER DESIGN, BETTER ELECTIONS 1(2012) available at http://brennan.3cdn.net/147762dc29873b8a43_yim6yh95t.pdf.

⁵ Darrel Rowland, *Election May Not Wrap Up Tuesday*, COLUMBUS DISPATCH (Oct. 31, 2012), available at <http://www.dispatch.com/content/stories/local/2012/10/31/election-may-not-wrap-up-tuesday.html>. (A new Ohio program intended to encourage absentee voting may result in tens or even hundreds of thousands more provisional ballots than in past years. Absentee ballot applications were sent to every voter in the state. Voters who apply for absentee ballots but decide to vote in person will be given provisional ballots at the polls.)

⁶ Ohio Secretary of State, Directive 2012-51 (Oct. 24, 2012) (setting a timeline for the official canvass), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-51.pdf>.

⁷ *SEIU v. Husted*, No. 12-4264 (6th Cir. Oct. 31, 2012) (order staying the district court's requirement that provisional ballots be counted if they are cast in the wrong polling place due to poll worker error).

⁸ U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY at Table 33 (2009) [hereinafter 2008 EAC].

⁹ *Id.* at Table 25.

I. COLORADO

A. RECOUNT TRIGGERS

- Automatic
 - If the margin is less than or equal to 0.5% of the apparent winner's vote total, an automatic recount occurs.¹⁰
 - Unlike other states, the margin between the apparent winner and the runner-up is compared to the apparent winner's total, not the total vote.
- Candidate initiated
 - Candidates and other interested parties may submit requests for recounts in cases where an automatic recount is not triggered.¹¹
 - Costs
 - The election official shall determine the cost of the recount within one day of receiving the request, notify the interested party of the cost, and collect the cost of conducting the recount from the interested party, who will have one day to provide the cost of the recount.
 - If the recount reverses the election, or the new count would have prompted an automatic recount, the election official will refund the interested party.¹²

B. VOTING RECORDS

- Colorado has thirty-four counties that use a mix of paper ballots and DREs with VVPAT and twenty-eight counties that use only DREs with VVPAT.
- Jefferson County, however, uses iVotronic machines without VVPAT.
 - There are 381,164 registered voters in Jefferson County.¹³
 - It is the fourth most populous county in the state.

C. RECOUNT PROCEDURE

- What is the timeframe?
 - The Secretary of State has until thirty days after an election to compile results, determine whether an automatic recount is necessary, and if so, order one.¹⁴
 - A candidate has thirty-one days to request a recount in situations in which an automatic recount is not required.¹⁵
 - If an automatic recount is triggered, the recount is to be completed no later than thirty days after the election.¹⁶

¹⁰ COL. REV. STAT. § 1-10.5-101 (2012).

¹¹ *Id.* § 1-10.5-106.

¹² *Id.*

¹³ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

¹⁴ COL. REV. STAT. § 1-10-103 (2012).

¹⁵ *Id.* § 1-10-106.

- Candidate-initiated recounts must be completed within thirty-seven days of the election.¹⁷
- Who conducts the recount?
 - The recount is conducted by the canvass board that officiated in certifying the official abstract of votes cast.¹⁸
 - The county canvass board is made up of the county clerk and recorder, and one or more registered electors appointed by the county chairpersons of each of the two major political parties, in a manner prescribed by the clerk and recorder.¹⁹
- How is the recount conducted?
 - All voting equipment to be used in the recount must be tested prior to the recount.²⁰
 - The canvass board chooses at random 5.0% of voting devices containing votes from the election, which are affected by the recount, for the test.²¹
 - The proportion of Optical Scan devices to DRE devices selected for the test must match the proportion of machines used in the election.
 - At least one device selected for the test must be a central count/mail-in ballot scanner.
 - If the test deck totals differ from the hand count totals, and the discrepancy cannot be accounted for by voter error, all ballots containing the recounted contest are tallied by hand following procedures for paper ballot recounts. If the totals are exactly the same, the recount tabulation is conducted in the same manner as the original ballot count.²²
 - The procedure for a hand-recount is:
 - Totals of recounted ballots are processed, counted, and reported as follows:
 - Sum total of votes cast for each candidate, under-votes, and over-votes for all precincts;
 - Sum total of votes cast for each candidate, under-votes, and over-votes for all mail-in ballots (a combined total, not totaled by individual precincts or locations, unless the voting system so allows);
 - Sum total of votes cast for each candidate, under-votes, and over-votes for all early voting precincts (a combined total, not totaled by individual precinct or locations, unless the voting system so allows);
 - Grand total of ballots cast by early voting, mail-in voting, and precinct voting.
 - If mail-in ballots were originally counted with early voting ballots, then the recount will be a combined total of early and mail-in ballots.
 - Ballot boxes or containers are opened one at a time, ballots are counted into groups of twenty-five to ensure that the number of ballots recounted matches the number originally

¹⁶ *Id.* §§ 1-10.5-102; 1-10.5-103.

¹⁷ *Id.* §§ 1-10.5-102; 1-10.5-103

¹⁸ *Id.* § 1-10.5-107.

¹⁹ *Id.* § 1-10-101.

²⁰ 8 COLO. CODE REGS. 1505-1 Elections Rule 14.6.1.

²¹ *Id.* at 14.6.2

²² *Id.* at 14.6.4; COL. REV. STAT. § 1-10.5-102(3)(b) (2012).

counted, and ballots are counted by individual hash marks in twenty-five count sections by two different judges.²³

- A clear audit trail must be maintained throughout the recount including, but not limited to, a log of seal numbers on transfer cases or ballot boxes and the corresponding numbered seal used as a replacement for the original seal when the recount is completed.²⁴

D. DETERMINING VOTER INTENT

- In general:
 - “If a voter uses a consistent alternate ballot marking method that deviates from the method specified by the voting instructions (such as circling or placing a check mark behind a candidate’s name or ballot response) and does not place an ‘X,’ check or other appropriate mark in the target area(s), the voter will be considered to have voted for the appropriate candidates and or ballot responses and the ballot shall be duplicated; except that, if a voter marks any of his/her choices by placing an ‘X,’ check or other appropriate mark in any target area on the voter’s ballot, only those choices where the target area has been marked shall be counted.”
 - “A ballot that has a mark correctly in the target area that partially extends into another target area shall be counted as a vote for the candidate or ballot response so marked.”
 - “When resolving an overvoted race, marks indicating the voter’s intent shall include, but not be limited to, circling the candidate’s name and strike-outs or corrections of choices.”²⁵
- For **paper ballots**, “A defective or an incomplete cross mark on any ballot in a proper place shall be counted if no other cross mark appears on the ballot indicating an intention to vote for some other candidate or ballot issue.”²⁶ “Ballots not counted because of the election judges’ inability to determine the elector’s intent for all candidates and ballot issues shall be marked ‘defective’ on the back, banded together and separated from the other ballots, returned to the ballot box, and preserved by the designated election official” as election records.²⁷
 - “When the election judges in any precinct discover in the counting of votes that the name of any write-in candidate voted for is misspelled or omitted in part, the vote for that candidate shall be counted” if the writing otherwise meets the requirements for a valid write-in candidate.²⁸
- For **electronic voting**, “A defective or an incomplete mark on any ballot in a proper place shall be counted if no other mark is on the ballot indicating an intention to vote for some other candidate or ballot question or ballot issue.”²⁹
 - The Secretary of State’s guidance states, “If a voter designates a vote for a named candidate on the ballot and writes in the name of the same candidate in the write-in area, the vote shall be counted.”³⁰

²³ 8 COLO. CODE REGS. 1505-1 Elections Rule 14.5.

²⁴ *Id.* at 14.6.5.

²⁵ 8 COLO. CODE REGS. 1505-1 Elections Rule 27.7.

²⁶ COL. REV. STAT. § 1-7-309 (2012).

²⁷ *Id.*

²⁸ *Id.* §§ 1-7-309; 1-7-114 (1).

²⁹ *Id.* § 1-7-508.

³⁰ 8 COLO. CODE REGS. 1505-1 Elections Rule 27.7.4.

E. PROVISIONAL BALLOTS

- 2012 election
 - The designated election official must complete the verification and counting of all provisional ballots within fourteen days after a general election. The designated election official must count all mail-in ballots cast in an election before counting any provisional ballots cast by electors who requested mail-in ballots.³¹
- 2008 presidential election
 - 51,824 provisional ballots were cast.
 - 8,234 (15.9%) of which were rejected.³²
- 2010 midterm election
 - 39,361 provisional ballots were cast.
 - 3,667 (9.3%) of which were rejected.³³

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **postmarked by November 6th** and **received by November 14th** in order to be counted.³⁴
- 2008 presidential election
 - 1,516,677 domestic absentee ballots were submitted.
 - 8,003 (0.5%) of which were rejected.³⁵
 - 12,375 UOCAVA ballots were submitted.³⁶
- 2010 midterm election
 - 1,260,035 domestic absentee ballots were submitted.
 - 7,901 (0.6%) of which were rejected.³⁷
 - 4,378 UOCAVA ballots were submitted.³⁸

³¹ COL. REV. STAT. § 1-8.5-105(5) (2012).

³² 2008 EAC at Table 35, *supra* note 8.

³³ U.S. ELECTION ASSISTANCE COMM'N, 2010 ELECTION ADMINISTRATION AND VOTING SURVEY at Table 35 (2011) [hereinafter 2010 EAC].

³⁴ 2011-2012 *Guide for Military and Overseas Electors*, Colo. Sec'y of State Elections Div., available at http://www.sos.state.co.us/pubs/elections/UOCAVA_Info/Guide.pdf (revised Aug. 15, 2011).

³⁵ 2008 EAC at Table 33, *supra* note 8.

³⁶ *Id.* at Table 25.

³⁷ 2010 EAC at Table 32, *supra* note 33.

³⁸ *Id.* at Table 28B.

II. FLORIDA

A. RECOUNT TRIGGERS

- Automatic
 - When the margin is less than or equal to 0.5% of the total votes cast for a given office, an automatic recount is triggered.³⁹ If this initial recount results in a margin of 0.25% or less, it then triggers a manual recount of the overvotes and undervotes cast.⁴⁰ The Secretary of State is responsible for ordering recounts in federal, state, and multicounty races.⁴¹
 - The losing candidate can request in writing that a recount not be undertaken.⁴²
- Candidate initiated
 - Florida law does not provide for candidate-initiated recounts.⁴³
 - However, candidates, electors, and taxpayers can contest the certification of an election in court on the basis of misconduct, fraud, corruption, bribery, ineligibility of the successful candidate, or receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.⁴⁴

B. VOTING RECORD

- All counties in Florida use paper ballots. Four counties use only paper ballots. Every other county uses paper ballots as its primary polling place equipment and DREs without VVPATs as its accessible units.⁴⁵

C. RECOUNT PROCEDURE

- What is the timeframe?
 - The Secretary of State is responsible for ordering a recount for federal, state, and multicounty offices if the margin is less than or equal to 0.5% of the total votes cast. Unofficial returns must be submitted to the Department of State no later than noon on the fourth day after any general election.⁴⁶
 - For any general election in which a recount was ordered by the Secretary of State, the canvassing board must submit unofficial recount returns no later than 3:00 p.m. on the 9th day after the general election.⁴⁷ If required, a manual recount is ordered after the canvassing board submits these unofficial recount returns,⁴⁸ and should commence as “soon as practicable.”⁴⁹ If the board

³⁹ FLA. STAT. § 102.141(7) (2012).

⁴⁰ *Id.* § 102.166.

⁴¹ *Id.* §§ 102.141(7); 102.166.

⁴² *Id.* §§ 102.141(7); 102.166.

⁴³ *See, e.g., Id.* § 102.141(7) (describing automatic recount procedure); *see also* ELECTIONLINE.ORG, RECOUNTS: FROM PUNCH CARDS TO PAPER TRAILS 13 (2005), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/ERIP_Brief_1005.pdf.

⁴⁴ FLA. STAT. § 102.168 (2012).

⁴⁵ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

⁴⁶ FLA. STAT. § 102.141(5) (2012).

⁴⁷ *Id.* § 102.141(7)(c).

⁴⁸ *Id.* § 102.166(1).

- is unable to complete the initial recount by this time, it must continue the recount and provide a detailed explanation as to the reasons for the delay.
- In order to be counted, the recount must be completed and official county returns must be filed by noon on the twelfth day following the general election.⁵⁰ If the returns are not received by the Department of State by this time, the results on file are certified by the Department.
 - Who conducts the recount?
 - The county canvassing board conducts recounts.⁵¹ The county canvassing boards are composed of the supervisor of elections, a county court judge, who acts as chair, and the chair of the board of county commissioners.⁵²
 - In the event a manual recount is ordered, the county canvassing board appoints “as many counting teams of at least two electors as is necessary to manually recount the ballots.”⁵³ When possible, a counting team must have members of at least two political parties.⁵⁴
 - If the counting team cannot determine whether there is a clear indication of voter intent or if there is an objection to a ballot by a representative of a candidate or political party, it will be set aside to be determined by the county canvassing board, which will make its determination by majority vote.⁵⁵
 - How is the recount conducted?
 - The initial recount is done by machine. The canvassing board reruns ballots through the automatic tabulating equipment, or where touchscreen ballots were used, and the canvassing board reviews the counters on the precinct tabulators. With respect to touchscreen ballots, if there is a discrepancy between the overall election return and the counters of the precinct tabulators, the counters of the precinct tabulators are presumed correct.⁵⁶
 - If the initial recount results in a margin of 0.25% or less, a manual recount is required for all ballots recorded as having undervotes or overvotes for the office in question. A manual recount will not occur if “the number of overvotes and undervotes is fewer than the number of votes needed to change the outcome of the election.”⁵⁷

D. DETERMINING VOTER INTENT

- Florida law states: “A vote for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice.”⁵⁸
- During a manual recount, if a voter failed to mark a contest as specified in the ballot instructions, review of the voter’s markings on a ballot is required to determine whether there is a clear indication

⁴⁹ FLA. ADMIN. CODE. ANN. 1S-2.031(3)(d), *available at* <http://election.dos.state.fl.us/rules/adopted-rules/pdf/1S2031.pdf>.

⁵⁰ FLA. STAT. § 102.112 (2012).

⁵¹ *Id.* § 102.141(7).

⁵² *Id.* § 102.141(1).

⁵³ *Id.* § 102.166(5)(a).

⁵⁴ *Id.*

⁵⁵ *Id.* § 102.166(5)(c); FLA. ADMIN. CODE. ANN. 1S-2.031(1)(j), (p).

⁵⁶ FLA. STAT. § 102.141(7) (2012).

⁵⁷ *Id.* § 102.166.

⁵⁸ *Id.* § 102.166(4)(a).

that the voter has made a definite choice in a contest. The canvassing board must look at the entire ballot for consistency.⁵⁹

- When a voter consistently uses an incorrect means of marking a ballot (e.g., circling the candidate), the incorrect marking will be used to determine voter intent. If, however, a voter marks some contests correctly and others incorrectly, the incorrect marks are not considered to indicate voter intent. If a voter uses several different incorrect markings, it is not clear which markings are meant to indicate intent, so they will not be counted.⁶⁰
- Assuming consistency, the following incorrect markings will be counted as indicating voter intent:
 - circling or underlining the oval or arrow next to the candidate's name;
 - circling or underlining the candidate's name;
 - circling or underlining the party abbreviation associated with the candidate;
 - using an X, check mark, cross, plus sign, asterisk, or star in the oval or within the blank space between the head and tail of an arrow next to the candidate's name (as long as the mark does not enter another oval or space between an arrow);
 - drawing a diagonal, horizontal, or vertical line which intersects two points on the oval and does not intersect another oval at any two points (if it is a horizontal line, it must not cross out the candidate's name);
 - drawing a diagonal or vertical line that intersects an imaginary line extending from the center of the head of a single arrow to the center of the tail of the same arrow, provided the line does not intersect the imaginary lining joining another arrow;
 - the voter marks all the choices for a race but further clarifies a choice for a particular candidate by placing an additional mark;
 - striking out all the choices for candidates except for one and leaving the write-in line blank;
 - writing words such as "Vote for [candidate's name]," "Count this one" or "I want this one" provided that there are no other markings in the race that would constitute a valid vote for a different candidate;
 - filling in the majority of an oval or the majority of the distance between the head and tail of an arrow;
 - drawing an arrow from the arrow head to a particular candidate or drawing an arrow on the tail end of the arrow;
 - darkening or bolding the arrow head and tail;
 - punching the oval or void between the arrow head and tail;
 - marking two or more choices and additionally writing comments such as "not this," "ignore this," "don't want," or "wrong."⁶¹
- A voter is determined to have made a definite choice for a named candidate if the voter indicates a vote for a named candidate and also writes in the name of the same candidate in the write-in space.⁶²

⁵⁹ FLA. ADMIN. CODE. ANN. 1S-2.027(4), *available at* <http://election.dos.state.fl.us/rules/adopted-rules/pdf/1S2027-final.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.* at 1S-2.027(4)(c).

- If a voter writes in the name of named candidate, but does not mark the candidate on the ballot, the vote will count. But, if a voter marks a named candidate and writes in another candidate, this will be counted as an overvote.⁶³

E. PROVISIONAL BALLOTS

- 2012 election
 - “The return printed by the automatic tabulating equipment, to which has been added the return of write-in, absentee, and manually counted votes and votes from provisional ballots, shall constitute the official return of the election upon certification by the canvassing board.”⁶⁴ These returns must be filed by noon on the twelfth day following the general election.⁶⁵
- 2008 presidential election
 - 35,635 provisional ballots were cast.
 - 18,321 (51.4%) of which were rejected.⁶⁶
- 2010 midterm election
 - 13,181 provisional ballots cast.
 - 3,391 (25.7%) of which were rejected.⁶⁷

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **postmarked by November 6th** and **received by November 16th** in order to be counted. ⁶⁸
- 2008 presidential election
 - 1,850,502 domestic absentee ballots were submitted.
 - 18,456 (1.0%) of which were rejected.⁶⁹
 - 97,278 UOCAVA ballots were submitted.⁷⁰
- 2010 midterm election
 - 1,244,395 domestic absentee ballots were submitted.
 - 17,977 (1.4%) of which were rejected.⁷¹

⁶² *Id.* at 1S-2.027(5).

⁶³ *Id.*

⁶⁴ FLA. STAT. § 101.5614(8) (2012).

⁶⁵ *Id.* § 102.112.

⁶⁶ 2008 EAC at Table 35, *supra* note 8.

⁶⁷ 2010 EAC at Table 34, *supra* note 33.

⁶⁸ *2011-2012 Dates to Remember*, Fla. Div. of Elections, *available at* http://election.dos.state.fl.us/publications/pdf/2012/2011_2012ElectionDatesToRemember.pdf (last visited Oct. 31, 2012).

⁶⁹ 2008 EAC at Table 33, *supra* note 8.

⁷⁰ *Id.* at Table 29B.

- 30,908 UOCAVA ballots were submitted.⁷²

III. IOWA

A. RECOUNT TRIGGERS

- No automatic recounts
- Candidate initiated
 - Any candidate on the ballot in any election may request a recount.⁷³
 - Candidates must file their request no later than three days after the canvass.⁷⁴
 - The board conducting the recount must finish the count no later than eighteen days after the initial canvass.⁷⁵
 - For a presidential race, the candidate requesting a recount must post a bond of \$1,000 unless the vote margin is less than the greater of fifty votes or one percent of the total number of votes cast for the office or nomination in question.⁷⁶
 - The bond will be refunded if the apparent winner before the recount is no longer the winner after the recount.⁷⁷
- Election official initiated
 - If the election official responsible for conducting an election suspects that voting equipment used in the election malfunctioned or that programming errors may have affected the outcome of the election, the commissioner may request a recount.⁷⁸

B. VOTING RECORD

- There is a voter-verified paper record of every vote in every county.

C. RECOUNT PROCEDURE

- What is the timeframe?
 - The commissioner must appoint the first two members of the recount board by the seventh day following the county board's canvass of the election in question. If those two members cannot agree on the third member by the ninth day following the canvass, they must immediately notify the chief judge of the judicial district in which the canvass is occurring, who will appoint the third member not later than the eleventh day following the canvass.⁷⁹

⁷¹ 2010 EAC at Table 32, *supra* note 33.

⁷² *Id.* at Table 28B.

⁷³ IOWA CODE § 50.48(4)(b) (2011).

⁷⁴ *Id.* § 50.48(1)(a).

⁷⁵ *Id.* § 50.48(4)(c).

⁷⁶ *Id.* § 50.48(2)(a).

⁷⁷ *Id.* § 50.48(2)(b).

⁷⁸ *Id.* § 50.50.

⁷⁹ IOWA CODE § 50.48(3)(b) (2011).

- The deadline to request a recount is 5:00 p.m. on the third day after the county board of supervisors' canvass of votes for the election. The recount board must “undertake and complete the required recount as expeditiously as reasonably possible” and must complete the recount and file its report no later than the eighteenth day following the board of supervisors' canvass.⁸⁰
- Who conducts the recount?
 - In each county, a three-person recount board conducts the recount.⁸¹ When the person requesting the recount is not the apparent winner, the first member of the recount board is chosen by the candidate who filed the request for the recount, the second member is chosen by the apparent winner, and the third member of the board is mutually agreed upon by the first two members.⁸²
- How is the recount conducted?
 - The board may open only the sealed ballot containers from the precincts specified to be recounted in the request or by the recount board and must recount only the ballots which were voted and counted for the office in question, including any disputed ballots, but not spoiled ballots or absentee or provisional ballots that were rejected before the ballot envelope was opened.⁸³
 - If automatic tabulating equipment was used to count the ballots, the recount board may request the commissioner to retabulate the ballots using the automatic tabulating equipment. The same program used for tabulating the votes on Election Day must be used at the recount unless the program is believed or known to be flawed.⁸⁴ The county commissioner retains custody of the ballots and is responsible for running any electronic tabulation.⁸⁵
 - Any member of the recount board may at any time during the recount proceedings extend the recount of votes to any other precinct or precincts in the same county, or from which the returns were reported to the commissioner.⁸⁶
 - At the conclusion of the recount, the recount board must file with the commissioner a written report of its findings, signed by at least two members of the recount board.⁸⁷
 - If the recount board's report shows that the county board's initial canvass was incorrect, the commissioner must at once notify the county board and the board must reconvene within three days after being notified and correct its proceedings.⁸⁸

D. DETERMINING VOTER INTENT

- When there is a conflict between a straight party vote and the vote for a particular candidate of another political party, the mark next to the name of the candidate controls, and the straight party vote does not apply as to that office.⁸⁹

⁸⁰ *Id.* §§ 50.48(4)(a), (c).

⁸¹ *Id.* § 50.48(3).

⁸² *Id.*

⁸³ *Id.* § 50.48(4)(a) (2011); IOWA ADMIN. CODE § 721.26.104(1), available at: <http://www.legis.state.ia.us/asp/ACODocs/ruleList.aspx?pubDate=3-10-2010&agency=721&chapter=26>.

⁸⁴ IOWA CODE § 50.48(4)(a) (2011).

⁸⁵ IOWA ADMIN. CODE § 721.26.105(2).

⁸⁶ IOWA CODE § 50.48(4)(b) (2011).

⁸⁷ *Id.* § 50.48(4)(c).

⁸⁸ *Id.* § 50.48(5).

- If the choice of the voter is clear from the marks for any office or question, the vote is counted as the voter has indicated.⁹⁰ A voter's definite choices are counted even if the recount board determines that the voter's choices differ from the votes as counted by the tabulating device.⁹¹
- If for any reason it is impossible to determine the choice of the voter for any office or question, the vote for that office or question is not counted.⁹²
- If a voter uses both the prescribed mark and other marks, only the prescribed marks are counted as votes.⁹³
- If the voter uses or places marks on the ballot in a consistent manner, the marks are counted as votes.⁹⁴
- If a write-in vote duplicates an otherwise correctly cast vote for a candidate whose name appears on the ballot, the write-in vote is counted.⁹⁵

E. PROVISIONAL BALLOTS

- 2012 election
 - The commissioner must reconvene the election board of the special precinct not earlier than noon on the second day following the election.⁹⁶
 - This special precinct board determines whether to count provisional ballots, and also canvasses absentee ballots received after Election Day.
 - The provisional ballots which are accepted are counted in the manner prescribed by law.⁹⁷
 - The commissioner may not make public the number of provisional ballots rejected and not counted, at the time of the canvass of the election.⁹⁸
- 2008 presidential election
 - 4,307 provisional ballots were cast.
 - 386 (9.0%) of which were rejected.⁹⁹
- 2010 midterm election
 - 1,991 provisional ballots were cast.
 - 349 (17.5%) of which were rejected.¹⁰⁰

⁸⁹ IOWA CODE § 49.98 (2011).

⁹⁰ IOWA ADMIN. CODE § 721.26.15, available at <http://www.legis.state.ia.us/asp/ACODocs/ruleList.aspx?pubDate=3-10-2010&agency=721&chapter=26>.

⁹¹ *Id.* § 721.26.104(3).

⁹² *Id.* § 721.26.15.

⁹³ *Id.* § 721.26.16.

⁹⁴ *Id.* § 721.26.18.

⁹⁵ *Id.* § 721-26.20(49).

⁹⁶ IOWA CODE § 50.21 (2011).

⁹⁷ *See id.* § 53.23 (5).

⁹⁸ *Id.* § 50.22.

⁹⁹ 2008 EAC at Table 35, *supra* note 8.

¹⁰⁰ 2010 EAC at Table 34, *supra* note 33.

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **postmarked by November 5th** for overseas¹⁰¹ and military¹⁰² voters who return their ballots by mail, and must be received by **November 6th** for UOCAVA voters who return their ballots via email or fax. Mail ballots for civilian¹⁰³ and military¹⁰⁴ voters must be **received by November 13th** in order to be counted.
- 2008 presidential election
 - 593,082 domestic absentee ballots were submitted.
 - 4,321 (0.7%) of which were rejected.¹⁰⁵
 - 4,368 UOCAVA ballots were submitted.¹⁰⁶
- 2010 midterm election
 - 365,904 domestic absentee ballots were submitted.
 - 4,280 (1.2%) of which were rejected.¹⁰⁷
 - 1,446 UOCAVA ballots were submitted.¹⁰⁸

¹⁰¹ Iowa Sec’y of State, *Overseas Civilian Voting*, available at <http://sos.iowa.gov/elections/voterinformation/uocava/overseascivilian/returnballot.html> (last visited Oct. 31, 2012).

¹⁰² Iowa Sec’y of State, *Military Voting*, available at <http://sos.iowa.gov/elections/voterinformation/uocava/returnballot.html> (last visited Oct. 31, 2012).

¹⁰³ *Overseas Civilian Voting*, *supra* note 101.

¹⁰⁴ *Military Voting*, *supra* note 102.

¹⁰⁵ 2008 EAC at Table 33, *supra* note 8.

¹⁰⁶ *Id.* at Table 29B.

¹⁰⁷ 2010 EAC at Table 32, *supra* note 33.

¹⁰⁸ *Id.* at Table 28B.

IV. NEVADA

A. RECOUNT TRIGGERS

- No automatic recounts
- Candidate initiated
 - The deadline for a candidate to request a recount is three working days after the results are certified.¹⁰⁹
 - The candidate demanding the recount must pay a deposit equal to the estimated cost of the recount,¹¹⁰ which is refunded if the candidate prevails in the recount.¹¹¹ If the candidate does not prevail and the sum deposited was less than the actual cost of the recount, the candidate must, upon demand, pay any deficiencies. If the sum deposited is in excess of the actual cost, the excess must be refunded to the candidate.¹¹²
 - Before a full recount is ordered for a statewide race, a recount from a sample of 5.0% of the total number of precincts must show a discrepancy with the original canvass equal to or greater than 1.0% for the candidate demanding the recount or the candidate who won the election. The candidate demanding a recount designates the precincts to be sampled. In the event there is a discrepancy equal to or greater than 1.0% percent, the Secretary of State determines whether the candidate is entitled to a full recount.¹¹³

B. VOTING RECORDS

- The entire state uses DREs with VVPAT. Paper ballots are used for absentee and provisional ballots.¹¹⁴

C. RECOUNT PROCEDURE

- What is the timeframe?
 - The recount must begin within five calendar days (including Sundays and holidays) after the demand is received.
 - Once a recount has begun, it must be completed within five days.¹¹⁵
- Who does the recount?
 - The county clerk of each county affected by a recount is required to employ a recount board to conduct the recount; the clerk serves as chair of the board.¹¹⁶ The recount board must not

¹⁰⁹ NEV. REV. STAT. § 293.403(1) (2011).

¹¹⁰ *Id.* § 293.403(1)(a).

¹¹¹ *Id.* § 293.405(2).

¹¹² *Id.* § 293.405(1).

¹¹³ *Id.* § 293.404(7).

¹¹⁴ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012); Bradley Scott Schragger, *Post-Election Law and Procedure in Nevada: Recounts and Election Contests*, NEVADA LAWYER, Sept. 2012, available at: <http://nvbar.org/articles/sites/default/files/NevLawyer>.

¹¹⁵ NEV. REV. STAT. § 293.405(3) (2011); *State of Nevada Recount and Contest Information 2012*, Sec'y of State Ross Miller, available at <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=2079> (last visited Oct. 31, 2012).

¹¹⁶ NEV. REV. STAT. § 293.404(1)(a) (2011).

- consist solely of members of the same political party.¹¹⁷ The law does not specify the size of the board or its party breakdown.
- The candidates affected by the recount may be present in person or by an authorized representative, but may not be a member of the recount board itself.¹¹⁸
 - Members of the general public are permitted to observe the recount.¹¹⁹ At the request of the county clerk, the Secretary of State will designate a representative to observe a recount of votes.¹²⁰
 - There is no appeal process for recounts. However, a candidate or registered voter of the appropriate political subdivision may contest the election of any candidate (including presidential electors), except for the office of United States Senator or Representative in Congress. For presidential electors, a written statement of contest must be filed with the district court.¹²¹
- How is the recount conducted?
 - The recount board reviews the ballots, including duplicate or rejected ballots, to determine whether they were marked in accordance with Nevada law. Valid ballots are then recounted in the same manner in which they were originally tabulated.¹²²
 - With respect to votes made by DRE machine, “the cartridges containing the electronic records of the votes on each machine are run through computer counters a second time, and the recounted results are compared to the original tallies.”¹²³ Although the county clerk is required to print a record of votes from the electronic voting machines in the event of a recount,¹²⁴ the law does not provide a clear mechanism for reviewing these receipts.¹²⁵

D. DETERMINING VOTER INTENT

- Nevada law does not allow election officials to undergo a subjective analysis of ballot marks to decipher voter intent.¹²⁶ Officials may count only those ballots where “the designated space is darkened or there is a writing in the designated space, including, without limitation, a cross or check allowed by statute.”¹²⁷ Other writings or marks on the ballot may not be counted as a vote.¹²⁸

¹¹⁷ NEV. ADMIN. CODE § 293.361.

¹¹⁸ NEV. REV. STAT. § 293.404(2) (2011).

¹¹⁹ Sec’y of State Ross Miller, *supra* note 115, at 5.

¹²⁰ NEV. ADMIN. CODE § 293.371.

¹²¹ NEV. REV. STAT. § 293.407 (2011).

¹²² *Id.* § 293.404(5) (2011).

¹²³ Schrage, *supra* note 114, at 17.

¹²⁴ NEV. REV. STAT. § 293B.400 (2011).

¹²⁵ Schrage, *supra* note 114, at 17.

¹²⁶ Nevada Secretary of State, Interpretation No. 100201, (Sept. 9, 2010), *available at*: <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1784>.

¹²⁷ NEV. REV. STAT. § 293.3677 (2011).

¹²⁸ *Id.*

E. PROVISIONAL BALLOTS

- 2012 election
 - The county and city clerks cannot open any envelope containing a provisional ballot before 8:00 a.m. on the Wednesday following Election Day. As with other ballots, the canvass of provisional ballots must be completed on or before the sixth working day following the election, i.e., November 14th.¹²⁹
- 2008 presidential election
 - 6,603 provisional ballots were cast.
 - 3,822 (57.9%) of which were rejected.¹³⁰
- 2010 midterm election
 - 2,992 provisional ballots were cast.
 - 1,387 (46.4%) of which were rejected.¹³¹

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be received by the close of polls on **November 6th** in order to be counted.¹³²
- 2008 presidential election
 - 86,123 domestic absentee ballots were submitted.
 - 5,453 (6.3%) of which were rejected.¹³³
 - 3,488 UOCAVA ballots were submitted.¹³⁴
- 2010 midterm election
 - 57,667 domestic absentee ballots were submitted.
 - 955 (1.7%) of which were rejected.¹³⁵
 - 1,787 UOCAVA ballots were submitted.¹³⁶

¹²⁹ *Id.* §§ 293.387, 293.3085.

¹³⁰ 2008 EAC at Table 35, *supra* note 8.

¹³¹ 2010 EAC at Table 34, *supra* note 33.

¹³² NEV. STAT. ANN. § 293D.400 (2011); OVERSEAS VOTE FOUNDATION, NEVADA STATE-WIDE VOTER INFORMATION, (updated Aug. 24, 2012), *available at* <https://www.overseasvotefoundation.org/vote/svid.htm?submission=true&stateId=31&cx=27&y=23>.

¹³³ 2008 EAC at Table 33, *supra* note 8.

¹³⁴ *Id.* at Table 29B.

¹³⁵ 2010 EAC at Table 32, *supra* note 33.

¹³⁶ *Id.* at Table 28B.

V. NEW HAMPSHIRE

A. RECOUNT TRIGGERS

- No automatic recounts
- Candidate-initiated
 - A presidential recount may be initiated by a candidate whose vote margin is less than twenty percent in the towns where the votes for that office are to be recounted.¹³⁷
 - Candidates must file for a recount no later than the Friday following the election, and the Secretary of State is required to begin the recount on the Wednesday following the Friday application deadline, but there is no deadline for completing the recount.¹³⁸
 - The fee, which varies by the office being elected and the vote margin —increasing as the vote margin increases — must be paid by the initiator.¹³⁹

B. VOTING RECORD

- There is a voter-verified paper record of every vote in every county. New Hampshire law requires all elections to be conducted with paper ballots, to facilitate recounts.¹⁴⁰

C. RECOUNT PROCEDURE

- What is the timeframe?
 - A recount must be filed for by a candidate by the Friday following Election Day.¹⁴¹
 - The actual recount must occur on a date selected by the Secretary of State, which cannot be later than the following Wednesday (this year, November 14th).¹⁴²
 - There is no date specified for the conclusion of the recount.
 - Any candidate who loses the recount may appeal to the ballot law commission within three days of the declaration of the result of the recount.¹⁴³ The ballot law commission is a five-member body. Two members are appointed by the speaker of the house of representatives two are appointed by the president of the senate, with partisan balance.¹⁴⁴ The remaining member is an expert in election procedure appointed by the governor.¹⁴⁵ The decision of the ballot law commission may be appealed to the state supreme court within five days.¹⁴⁶

¹³⁷ N.H. REV STAT. ANN. § 660:1 (2012).

¹³⁸ *Id.* §§ 660:1, 4.

¹³⁹ *Id.* § 660:2.

¹⁴⁰ *Id.* § 656:1-a.

¹⁴¹ N.H. REV STAT. ANN. § 660:1 (2012).

¹⁴² *Id.* § 660:4.

¹⁴³ *Id.* § 665:8(II).

¹⁴⁴ *Id.* § 665:1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 665:16.

- Who conducts the recount?
 - The recount shall be conducted by the Secretary of State and such assistants as the Secretary may require.¹⁴⁷
- How is the recount conducted?
 - All recounts in New Hampshire must be conducted by hand.¹⁴⁸

D. DETERMINING VOTER INTENT

- If a cross “X” is marked on a ballot in an imperfect manner, it is counted if it is possible to determine the intent of the voter from the mark.¹⁴⁹
- The mark is valid outside the square if it is near enough to the square or in line with the name such that it indicates the intent of the voter.¹⁵⁰
- The uniform use of a mark other than “X” is clearly a valid marking of the ballot.¹⁵¹
- When there is a different kind of mark (i.e. a ballot marked with checks and crosses intermingled) the marks may be valid.¹⁵²
- When two candidates have marks and one of the marks is erased or obliterated, the ballot counts for that office only if the erasure or obliteration is complete.¹⁵³
- When examining a questionable mark, an election official is to look at the pattern of marking used in other areas of the ballot to reveal the intent of the voter.¹⁵⁴
- In the case of a write-in vote for a candidate whose name also appears on the ballot as a nominee of a party for the same office, the ballot is counted as one vote for that candidate for that office.¹⁵⁵

¹⁴⁷ *Id.* § 660:5.

¹⁴⁸ *Id.*

¹⁴⁹ *New Hampshire Election Procedure Manual 2012-2013*, N.H. Dep’t of State, available at <http://nhvotes.sos.nh.gov/file.php/1/EPM-2012-3.pdf> (last visited Oct. 31, 2012).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ N.H. REV STAT. ANN. § 659:67 (2012).

E. PROVISIONAL BALLOTS

- New Hampshire does not have provisional voting because it has same-day voter registration.

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **received by 5:00 p.m. on November 6th** in order to be counted.¹⁵⁶
- 2008 presidential election
 - 70,064 domestic absentee ballots were submitted.
 - 1,269 (1.8%) of which were rejected.¹⁵⁷
 - 3,462 UOCAVA ballots were submitted.¹⁵⁸
- 2010 midterm election
 - 29,539 domestic absentee ballots were submitted.
 - 672 (2.3%) of which were rejected.¹⁵⁹
 - 1,237 UOCAVA ballots were submitted.¹⁶⁰

¹⁵⁶ N.H. REV. STAT. ANN. §§ 657:20, 657:22, 659:47 (2012); *see also* OVERSEAS VOTE FOUNDATION, NEW HAMPSHIRE STATE-WIDE VOTER INFORMATION, *available at* <https://www.overseasvotefoundation.org/vote/svid.htm?submission=true&stateId=32&cx=31&y=11> (last visited Oct. 30, 2012).

¹⁵⁷ 2008 EAC at Table 33, *supra* note 8.

¹⁵⁸ *Id.* at Table 29B.

¹⁵⁹ 2010 EAC at Table 32, *supra* note 33.

¹⁶⁰ *Id.* at Table 28B.

VI. NORTH CAROLINA

A. RECOUNT TRIGGERS

- No automatic recounts
- Candidate initiated
 - A presidential candidate has the right to request a recount where the vote margin is 0.5% of the total votes cast, or less than 10,000 votes, whichever is less.¹⁶¹
 - Requests must be filed by 12:00 p.m. the second business day after the county canvass, which is held on the tenth day after the election.¹⁶²
- Election official initiated
 - The county board of elections or the State Board of Elections may order a recount “when necessary to complete the canvass” in an election.¹⁶³
 - The county board may not order a recount where the State Board of Elections has already denied a recount to the petitioner.¹⁶⁴

B. VOTING RECORD

- There is a voter-verified paper record of every vote in every county.¹⁶⁵

C. RECOUNT PROCEDURE

- What is the timeframe?
 - The demand for a recount must be in writing and must be received by the State Board of Elections by noon on the second business day after the county canvass.¹⁶⁶
- Who conducts the recount?
 - The county board of elections of each county conducts the recount for its county.¹⁶⁷ Recounts are conducted by a bipartisan team of four. In conducting recounts of lever and direct record electronic machines, two officials (one from each of the two parties having the largest number of registered voters in the state) read and confirm the totals per machine and two officials (same) record the results simultaneously.¹⁶⁸ In conducting hand to eye recounts or recounts of paper ballots, two officials (same) will relay the results of each ballot, with one person reading the

¹⁶¹ N.C. GEN. STAT. §§ 163-182.4(b)(1), 163-182.7(c)(2) (2011).

¹⁶² *Id.* §§ 163-182.5(b), 163-182.7(c)(2).

¹⁶³ *Id.* § 163-182.7(a).

¹⁶⁴ *Id.*

¹⁶⁵ *See* N.C. GEN. STAT. § 163-165.7(a)(2011) (requiring voting systems to “generate either a paper ballot or a paper record by which voters may verify their votes before casting them and which provides a backup means of counting the vote that the voter casts”).

¹⁶⁶ *Id.* § 163-182.7(c).

¹⁶⁷ 8 N.C. ADMIN. CODE § 9.0106(g).

¹⁶⁸ *Id.* § 9.0106(e).

ballot and the other official observing, and two officials (same) recording the tally of votes for each candidate on paper.¹⁶⁹

- How is the recount conducted?
 - All recounts requested by a candidate are first conducted on the same equipment used for the initial count. This means that paper ballots cast on optical scan machines are retabulated, while votes cast on direct-recording electronic machines (DREs) are electronically reviewed.
 - *Optical scan ballots.* All ballots that were originally counted by the optical scan equipment are to be counted again by the optical scan equipment producing another machine count.¹⁷⁰
 - All ballots that were rejected by optical scan equipment for tabulation purposes are to be recounted by hand.¹⁷¹
 - If the apparent winner after the initial balloting is the apparent loser after the first recount, that candidate may demand a second recount of all ballots, by hand.¹⁷²
 - If the apparent winner after the initial balloting is the same as the apparent winner after the initial recount, but there is a discrepancy between the initial balloting and the first recount that the county board cannot reconcile or explain, the losing candidate is entitled to demand a second recount, by hand, of all ballots.¹⁷³
 - Detailed guidance for how to conduct hand recounts is listed in state rules.¹⁷⁴
 - *Direct record electronic and lever voting machines.* All ballots that were originally counted by DRE equipment are to be retabulated in the first recount.¹⁷⁵
 - If the apparent winner after the initial balloting is the apparent loser after the first recount, that candidate may demand a second recount.¹⁷⁶
 - If the apparent winner after the initial balloting is the same as the apparent winner after the initial recount, but there is a discrepancy between the initial recount and the first recount that the county board cannot reconcile or explain, the he losing candidate is entitled to demand a second recount.¹⁷⁷
 - Results of recounts can be appealed to the State Board of Elections.¹⁷⁸

D. DETERMINING VOTER INTENT

- Even improper marks by a voter shall count unless such marks make it impossible to determine the voter's choice.¹⁷⁹

¹⁶⁹ *Id.* § 9.0106(f).

¹⁷⁰ *Id.* § 9.0107(a).

¹⁷¹ *Id.*

¹⁷² *Id.* § 9.0107(b); *see also id.* § 163-182.7A.

¹⁷³ 8 N.C. ADMIN. CODE § 9.0107(b).

¹⁷⁴ *Id.* § 9.0109, available at <http://ncules.state.nc.us/ncac/title%2008%20-%20elections/chapter%2009%20-%20conduct%20of%20vote%20recounts%20by%20county%20boards%20of%20elections/08%20ncac%2009%20.0109.html>.

¹⁷⁵ *Id.* § 9.0108(a).

¹⁷⁶ *Id.* § 9.0108(b).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 9.0108(d).

¹⁷⁹ *Id.* § 9.0106(c).

E. PROVISIONAL BALLOTS

- 2012 election
 - “Provisional official ballots shall be counted by the county board of elections before the canvass.”¹⁸⁰
 - The canvass takes place at 11:00 a.m. on the tenth day after the election.¹⁸¹
- 2008 presidential election
 - 53,976 provisional ballots were cast.
 - 27,469 (50.9%) of which were rejected.¹⁸²
- 2010 midterm election
 - 26,257 provisional ballots were cast.
 - 10,563 (40.2%) of which were rejected.¹⁸³

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **either received by November 6th** in order to be counted, **or submitted for mailing or electronic delivery no later than 12:01 a.m.** (at the voter’s location) on **November 6th**.¹⁸⁴
- 2008 presidential election
 - 222,127 domestic absentee ballots were submitted.
 - 26,480 (11.9%) of which were rejected.¹⁸⁵
 - 12,540 UOCAVA ballots were submitted.¹⁸⁶
- 2010 midterm election
 - 53,983 domestic absentee ballots were submitted.
 - 745 (1.4%) of which were rejected.¹⁸⁷
 - 3,026 UOCAVA ballots were submitted.¹⁸⁸

¹⁸⁰ N.C. GEN. STAT. § 163-182.2 (2012); *see also id.* § 163-166.11(5).

¹⁸¹ *Id.* § 163-182.5.

¹⁸² 2008 EAC at Table 35, *supra* note 8.

¹⁸³ 2010 EAC at Table 34, *supra* note 33.

¹⁸⁴ N.C. GEN. STAT. § 163-258.10 (2012).

¹⁸⁵ 2008 EAC at Table 33, *supra* note 8.

¹⁸⁶ *Id.* at Table 28B.

¹⁸⁷ 2010 EAC at Table 32, *supra* note 33.

¹⁸⁸ *Id.* at Table 28B.

VII. OHIO

A. RECOUNT TRIGGERS

- Automatic
 - An automatic recount is triggered when the margin is less than or equal to 0.25% of the total votes cast in any statewide race.¹⁸⁹
 - Any recount for the election of presidential electors must be completed within six days before the meeting of the Electoral College.¹⁹⁰
- Candidate initiated
 - Any defeated candidate may file a written application with the Secretary of State's office for a recount of the votes cast in the race in any precinct in any county.¹⁹¹
 - The request must be filed within five days after the Secretary of State declares the official results of the election.¹⁹²
 - The candidate must file a deposit of \$55 per precinct to be recounted.¹⁹³
 - If the actual costs of the recount are less than \$55 per precinct, the candidate will be refunded.
 - If the election result is changed by the recount, or the total votes cast for the applicant in that precinct after the recount is 4.0% larger than the original count, the entire \$55 will be refunded.¹⁹⁴

B. VOTING RECORD

- Twenty-nine counties use paper ballots, six counties use a mix of paper ballots and DREs with VVPAT, and the rest use DREs with VVPAT.¹⁹⁵
- There is a paper record in all counties.

C. RECOUNT PROCEDURE

- What is the timeframe?
 - Upon a declaration by the Secretary of State that the number of votes cast for the declared winning candidate does not exceed the number of votes cast for the defeated candidate by a margin of one-quarter of one percent or more of the total vote, the board of elections must promptly fix a time, method, and place for the recount. The recount must occur no later than ten days after the day upon which such declaration is made.¹⁹⁶

¹⁸⁹ OHIO REV. CODE ANN. § 3515.011 (2012).

¹⁹⁰ *Id.* § 3515.041.

¹⁹¹ Ohio Secretary of State, Directive 2012-52 (Oct. 25, 2012) (detailing recount procedures), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-11115211.pdf>.

¹⁹² *Id.* at 4.

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

¹⁹⁶ OHIO REV. CODE ANN. § 3515.03 (2012); Directive 2012-52, *supra* note 191.

- “As required by 3 U.S.C. § 5, any recount of votes conducted under this chapter for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors.”¹⁹⁷
- The Electoral College will meet on December 17, therefore the recount must be completed by December 11th.
- Who conducts the recount?
 - “The recount must be conducted by teams of elections officials equally divided among the state’s two major political parties.”¹⁹⁸
 - If there is any disagreement as to how a ballot should be counted, it is submitted to the members of the board [of elections] for a decision on whether or to what extent the ballot should be counted.
 - If three of the members do not agree as to how any part of the ballot shall be counted, only that part of the ballot on which three of the members do agree is counted.¹⁹⁹
- How is the recount conducted?²⁰⁰
 - A recount team of at least two election officials compare the total number of votes cast in the candidate contests being recounted to the number of voters listed in the poll book, poll list, or signature poll book records. If more votes in a precinct appear for a particular contest than the number of marked names in the poll list, such occurrence must be documented.
 - Any chain of custody logs for the ballots, poll worker reconciliation results, and board of elections reconciliation results should also be reviewed for each precinct being recounted.
 - Sealed ballot envelopes must remain sealed; the actual ballot contained within the envelope shall not be viewed.
 - Ballots must be checked to verify that each candidate’s contest, question, or issue was properly displayed on the ballots.
 - The Board will randomly select precincts whose vote totals for the race or issue to be recounted equal at least 5.0% of the total vote in the race to be recounted.
 - For Paper Ballots:
 - The Board must select the paper ballots to be compared with the electronic results for the precincts randomly selected for the recount.
 - Ballots must be checked to verify that each candidate’s contest, question, or issue was properly displayed on the ballots.
 - Ballots selected must be inspected for mutilations and other irregularities not accounted for by ballot remakes.
 - For each candidate contest, question, or issue election to be recounted, a hand count of the votes cast on the optical scan paper ballots for each randomly selected precinct must be made by physical examination and hand count of the ballots. All types of ballots must be

¹⁹⁷ OHIO REV. CODE ANN. § 3515.041 (2012).

¹⁹⁸ Directive 2012-52 at 9, *supra* note 191.

¹⁹⁹ OHIO REV. CODE ANN. § 3505.27(D) (2012).

²⁰⁰ Directive 2012-52 at 9, *supra* note 191.

included in the hand count (regular, absentee of all types, and provisional, including remakes for any of these types of ballots).

- Optical Scan counties using DRE voting machines in an election must also include a hand count of the voter-verified paper audit trail for DREs used in the election in question, in the hand count of the precinct(s) randomly chosen for the initial 5.0%.
- At the conclusion of the hand count, the ballots must be run through the tabulator and the electronic results must be compared with the tally from the hand count. If the electronic results and the tally from the hand count are identical, then each ballot from each precinct on which the candidate contest, question or issue to be recounted appears must be run through the tabulator again using the electronic voting system (optical scan and/or DRE). It is not sufficient to re-upload media from the official canvass. A recount must start anew, as if no ballots have been scanned or tabulated.
- If the electronic results and the tally from the hand count are not identical, then the Board must ascertain whether the error is a result of the hand tally or the electronic tally. If, after three rounds of hand-tallying the ballots for each randomly-selected precincts still do not match, all ballots on which the candidate contest, question or issue to be recounted appears must be hand-tallied.
- In any case where the final electronic tabulation or hand tally of all ballots differs from the official certified results of that group of precincts, the official certified results must be amended consistent with the applicable re-counted results.
- If the optical scan ballots used in the election being recounted have been run through the tabulator during the recount, then at the conclusion of the recount the program must be re-tested using the pre-marked test deck.
- DRE Voting Machines
 - The voting system is tested in the same manner in which the Board performed its pre-election and pre-canvass public tests.
 - After the Board has randomly selected one or more precincts, the sum of whose total votes cast equals at least 5.0% of the total votes cast for the candidate contests, or question or issue elections being recounted, the Board must select the voter verified paper audit trail to be compared with the electronic results for the precincts randomly selected for the recount.
 - The voter-verified paper audit trail serves as the official ballot to be recounted for the ballots cast on a DRE voting machine. Sealed voter-verified paper audit trail canisters may be opened for the purposes of conducting the recount.
 - The Board must check the public counters to verify that the numbers on those counters correspond to the numbers on the voter verified paper audit trail and the poll book, poll list, or signature poll book records.
 - The Board must inspect the voter verified paper audit trail for mutilations and other irregularities.
 - The Board must verify optical scan ballots cast by absentee and provisional voters using the steps for optical scan counties.
 - At the conclusion of the hand count of the voter verified paper audit trail, the removable media (smart cards, compact flash memory cards, etc.) from each DRE for which a voter verified paper audit trail was inspected must be uploaded to the central tabulation system and a report generated for only those precincts having been randomly selected for the recount. If the electronic results and the tally from the hand count are identical, then all

removable media (smart cards, compact flash memory cards, etc.) from each DRE at any voting location in the county at which a voter was eligible to vote on the candidate, question or issue election to be recounted must be uploaded to the central tabulation system and a report generated.

- If the electronic results for one machine and the tally from the hand count of the voter verified paper audit trail from that same machine are not identical, then the Board must ascertain whether the error is a result of the hand tally of the voter verified paper audit trail or the electronic tally. If, after three rounds of hand tallying, the voter-verified paper audit trail for that DRE still does not match, the final hand tally of the voter-verified paper audit trail for that DRE must be the recounted tally for that candidate contest, question, or issue.
- In any case where the final electronic tabulation or hand tally of all voter-verified paper audit trail/DREs differs from the official certified results of that group of precincts, the official certified results shall be amended consistent with the applicable re-counted results.

D. RULES FOR DETERMINING VOTER INTENT

- In addition to marks that can be read by automatic tabulating equipment, the following is counted as a valid vote: circling a candidate, circling the oval beside a candidate, putting an “X” or a check mark in the oval, and using a writing instrument that cannot be read by the optical scanner.
- However, these marks will only count if the ballot contains no marks that can be scanned and read by the automatic tabulating equipment and if the marks are made in a consistent manner throughout the ballot.²⁰¹
- An overvote for centrally-counted optical scan ballots (generally mail ballots) does not exist if it is determined that a voter filled in the oval next to a candidate for an office and also cast a write-in vote for that same candidate for the same office by filling in the oval next to the blank space provided for write-in candidates.²⁰²

E. PROVISIONAL BALLOTS

- 2012 election
 - Provisional ballots are counted as part of the official canvass, which may begin no earlier than the 11th day after the election (Saturday, November 17, 2012), and must begin no later than the 15th day after the election (Wednesday, November 21, 2012).
 - Each board of elections must complete its official canvass and certify no later than the 21st day after the election (Tuesday, November 27, 2012).²⁰³
- 2008 presidential election
 - 204,651 provisional ballots were cast.
 - 39,390 (19.2%) of which were rejected.²⁰⁴

²⁰¹ OHIO REV. CODE ANN. § 3506.21(2012).

²⁰² Ohio Secretary of State, Directive 2012-49 (outlining unofficial canvass procedures), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-49.pdf>.

²⁰³ OHIO REV. CODE ANN. § 3505.32 (2012); Directive 2012-51, *supra* note 5.

²⁰⁴ 2008 EAC at Table 35, *supra* note 8.

- 2010 midterm election
 - 105,015 provisional ballots were cast.
 - 11,753 (11.2%) of which were rejected.²⁰⁵

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted must **be postmarked by November 5th** and **received by November 16th** in order to be counted.²⁰⁶
- 2008 presidential election
 - 1,645,618 domestic absentee ballots were submitted.
 - 25,950 (1.6%) of which were rejected.²⁰⁷
 - 36,913 UOCAVA ballots were submitted.²⁰⁸
- 2010 midterm election
 - 849,253 domestic absentee ballots were submitted.
 - 14,028 (1.7%) of which were rejected.²⁰⁹
 - 3,735 UOCAVA ballots were submitted.²¹⁰

²⁰⁵ 2010 EAC at Table 34, *supra* note 33.

²⁰⁶ Ohio Sec’y of State, *Absentee Ballot Deadlines*, available at <http://www.sos.state.oh.us/SOS/elections/overseas/deadlines.aspx> (last visited Oct. 31, 2012).

²⁰⁷ 2008 EAC at Table 33, *supra* note 8.

²⁰⁸ *Id.* at Table 29B.

²⁰⁹ 2010 EAC at Table 32, *supra* note 33.

²¹⁰ *Id.* at Table 28B.

VIII. PENNSYLVANIA

A. RECOUNT TRIGGERS

- Automatic
 - To trigger an automatic recount, the close vote margin must be 0.5% or less of all votes cast for the office.²¹¹
 - The Secretary of State must order such recounts by 5:00 p.m. on the second Thursday following the day of the election.²¹²
 - The recount must be held by the third Wednesday following the day of the election and completed by noon on the following Tuesday.²¹³
- Election official initiated
 - The board of registration commissioners in each county must compare the number of ballots cast in each district with the total number of registered voters and political party enrollment in each district.²¹⁴
 - If more ballots are cast in any election than the number of registered voters, or if a candidate of one party receives more votes than the number of voters enrolled in that candidate's political party, the board must conduct a recount.²¹⁵
- Voter initiated
 - If three voters of any district verify by affidavit that an error has been committed in the returns, a recount or recanvass must occur.²¹⁶
 - Voters must either deposit \$50 in cash or present a bond of \$100 with their petition for a recount for each election district.²¹⁷
 - If “fraud or substantial error” is not discovered during the course of the recount, the deposit petitioners or \$50 of the bond is forfeited to the county.²¹⁸

B. VOTING RECORD

- Fifty of the sixty-seven counties in Pennsylvania do not keep a voter-verified paper record of voter choices.²¹⁹
- These counties contain almost seven million voters.²²⁰

²¹¹ 25 PA. STAT. ANN. § 3154(g)(1) (2012).

²¹² *Id.* § 3154(g)(2).

²¹³ *Id.* § 3154(g)(5).

²¹⁴ *Id.* § 3154(b).

²¹⁵ *Id.*

²¹⁶ *Id.* § 3154(e).

²¹⁷ *Id.* §§ 3261(b); 3262(a.1).

²¹⁸ *Id.* §§ 3261(e); 3262(b.1).

²¹⁹ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

²²⁰ *Id.*

C. RECOUNT PROCEDURES

- What is the timeframe?
 - The Secretary of State must order such recounts by 5:00 p.m. on the second Thursday following the day of the election.²²¹
 - The recount must be held by the third Wednesday following the day of the election and completed by noon on the following Tuesday.²²²
- Who conducts the recount?
 - Each county board of elections conducts the recount for its county.²²³
- How is the recount conducted?
 - For districts that use electronically counted paper ballots, a recount or retabulation using a “manual, mechanical or electronic” means other than that used for the initial count may be used, and all ballots containing overvotes must be counted manually.²²⁴
 - For districts using electronic machines (DREs) without a verifiable paper trail (VVPAT), the total tapes on each machine are checked, and if there is a discrepancy between the total and the initial canvass of the returns, the machine’s counter is tested.²²⁵
 - Any ballots initially counted by hand must be recounted by hand.²²⁶

D. DETERMINING VOTER INTENT

- Only a cross (X) or check (✓) is counted.²²⁷
- Any erasure or defect in a mark will render that vote invalid.²²⁸
- A write-in vote counts, regardless of whether the voter placed a cross or check next to the write-in space.²²⁹
- Write-in votes cast for listed candidates may be counted so long as the voter’s intent is clear and there is no sign of fraud.²³⁰

E. PROVISIONAL BALLOTS

- 2012 election

²²¹ 25 PA. STAT. ANN. § 3154(g)(2) (2012).

²²² *Id.* § 3154(g)(5) (2012).

²²³ *Id.* § 3154(e).

²²⁴ *Id.* § 3154(e)(3).

²²⁵ *Id.* § 3154(e)(1).

²²⁶ *Id.* § 3154(e)(2).

²²⁷ *Id.* § 3063(a).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Shambach v. Bickhart*, 577577845 A.2d 793, 802 (2004).

- “Within seven calendar days of the election, the county board of elections shall examine each provisional ballot envelope that is received to determine if the individual voting that ballot was entitled to vote at the election district in the election.”²³¹
- 2008 presidential election
 - 32,898 provisional ballots were cast.
 - 14,527 (44.2%) of which were rejected.²³²
- 2010 midterm election
 - 9,636 provisional ballots were cast.
 - 3,726 (38.7%) of which were rejected.²³³

F. ABSENTEE BALLOTS

- For this election, UOCAVA ballots that are submitted need to be **postmarked by November 5th** and **received by November 13th** in order to be counted.²³⁴
- 2008 presidential election
 - 280,397 domestic absentee ballots were submitted.
 - 1,943 (0.7%) of which were rejected.²³⁵
 - 31,818 UOCAVA ballots were submitted.²³⁶
- 2010 midterm election
 - 123,903 domestic absentee ballots were submitted
 - 2,372 (1.9%) of which were rejected.²³⁷
 - 8,126 UOCAVA ballots were submitted.²³⁸

²³¹ 25 PA. STAT. ANN. § 3050(a.4)(4) (2012).

²³² 2008 EAC at Table 35, *supra* note 8.

²³³ 2010 EAC at Table 34, *supra* note 33.

²³⁴ State of Penn., *Members of the Military*, available at

<http://www.votespa.com/portal/server.pt?open=514&objID=1174126&mode=2>; (last visited Oct. 31, 2012); State of Penn., *Overseas Civilian Voters*, available at

<http://www.votespa.com/portal/server.pt?open=514&objID=1192209&mode=2> (last visited Oct. 31, 2012).

²³⁵ 2008 EAC at Table 33, *supra* note 8.

²³⁶ *Id.* at Table 29B.

²³⁷ 2010 EAC at Table 32, *supra* note 33.

²³⁸ *Id.* at Table 28B.

IX. VIRGINIA

A. RECOUNT TRIGGERS

- No automatic recounts
- Candidate initiated
 - Any defeated candidate in any election may apply for a recount if the difference between the apparent winning candidate and the apparent defeated candidate is one percent or less of the total vote cast for the two candidates, or, in the case of write-in candidates, if the margin is five percent or less of the total vote cast for the two candidates.²³⁹
 - A recount petition for an election for presidential electors must be filed no later than 5:00 p.m. on the second calendar day after the day the State Board certifies the result of the election. Presidential candidates who anticipate petitioning a recount are encouraged to notify the Board as soon as possible after Election Day.²⁴⁰
 - Recount initiators must post a \$10 per precinct bond, to be refunded if the recount alters the election outcome in their favor or shows the final vote margin between the two leading candidates to be not more than 0.5%. Otherwise, the initiator must forfeit his or her bond, and is liable for the complete cost of the recount.²⁴¹
- Voter initiated
 - A minimum of fifty voters may file a recount request on a ballot question, if the difference between the votes for and against a ballot question is fifty votes or less, or one percent or less of the total votes cast on the question, whichever is greater.²⁴²
 - Recount petitions on ballot questions must be filed within ten days after the appropriate board certifies the result of the election.²⁴³
 - Voter-initiated recounts are subject to the same bond rules as candidate-initiated recounts.²⁴⁴

B. VOTING RECORDS

- 101 of the 134 counties and independent cities in Virginia do not have a paper record of the vote; these counties total over four million voters.²⁴⁵

C. RECOUNT PROCEDURE

- What is the timeframe?
 - A recount petition for an election for presidential electors must be filed with the Circuit Court of the City of Richmond no later than 5:00 p.m. on the second calendar day after the day the State Board certifies the result of the election.²⁴⁶

²³⁹ VA. CODE ANN. § 24.2-800(B) (2012).

²⁴⁰ *Id.* § 24.2-801.1.

²⁴¹ *Id.* §§ 24.2-802 (E), (G).

²⁴² *Id.* § 24.2-800(C).

²⁴³ *Id.* § 24.2-801.

²⁴⁴ *Id.* §§ 24.2-802 (E), (G).

²⁴⁵ *The Verifier*, VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

- Any recount of an election for presidential electors must be held promptly and completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the Electoral College.²⁴⁷
- Who conducts the recount?
 - The chief judge of the Circuit Court of the County or Richmond, plus two other judges selected by the Chief Justice of the Supreme Court of Virginia.²⁴⁸
- How is the recount conducted?
 - Most counties in Virginia use DREs without a VVPAT.
 - For counties that use DREs, the printouts from the DREs are examined, and, if the printout is unclear, recount officials rerun the printout from the machine or examine the counters on the request of the court.²⁴⁹
 - Ballots initially counted by hand, ballots tabulated by optical scanners that contain “write-in votes, overvotes, and undervotes,” “any ballots not accepted by the tabulator, and any ballots for which a tabulator could not be programmed to meet the programming requirements,” are all recounted by hand.²⁵⁰
 - All other ballots tabulated by optical scanners are retabulated by machine, which must be tested prior to retabulation, and are set to count only the votes for the office or initiative in question.²⁵¹
 - All votes for an office or question may only be recounted once, and such recount is final and not subject to appeal.²⁵²
 - At the conclusion of the recount of each precinct, the recount officials write down the number of valid ballots cast for each of the two candidates and submit the ballots or the statement of results used to the court. The written statement of any recount official challenging a ballot is sufficient submission to the court. If, on all direct electronic voting devices, the number of persons voting in the election, or the number of votes cast for the office or on the question, totals more than the number of names on the pollbooks of persons voting on the devices, the figures recorded by the devices are accepted as correct. At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned ballots, and after hearing arguments, the court rules on the validity of all questioned ballots and votes. The court then certifies to the State Board and the electoral board or boards the result of the election.²⁵³

²⁴⁶ VA. CODE ANN. § 24.2-801.1 (2012).

²⁴⁷ *Id.*

²⁴⁸ *Id.* § 24.2-801.1.

²⁴⁹ *Id.* § 24.2-802(D)(2).

²⁵⁰ *Id.* §§ 24.2-802(C), (D)(3).

²⁵¹ VA. CODE ANN. § 24.2-802(D)(3) (2012).

²⁵² *Id.* §§ 24.2-802(D)(3), (H).

²⁵³ *Id.* § 24.2-802(D)(3).

D. DETERMINING VOTER INTENT

- If a write-in candidate is a party to the recount, a vote is counted for the write-in candidate if his name is written on the ballot under that office, even if the write-in square, oval or arrow is not marked, and provided that no other candidate is marked for that office.²⁵⁴
- A write-in vote for a candidate whose name appears on the ballot for the same office may not be counted.²⁵⁵
- A write-in vote in addition to a vote for another candidate for the office is an overvote and no vote is counted.²⁵⁶
- If the names of all but one candidate are stricken through, that ballot is counted for the one candidate whose name was not stricken through.²⁵⁷
- If there are identical marks for two or more candidates, clarified by an additional mark or marks that appear to indicate support, the ballot is counted as a vote for the candidate with the additional, clarifying marks.²⁵⁸
- Any ballot which has any mark or marks in the target or candidate area for one candidate only, including circling the target area and/or the candidate's name or making a mark through the target area or candidate's name, provided no other candidate for that office is similarly marked, is counted as a vote for that candidate unless the mark is a clearly negative or extraneous comment or a substantial part of the candidate's name is crossed through or stricken out.²⁵⁹
- Any ballot which has a mark or marks in the target area or candidate area for one candidate, which extend partially into one or more other target areas or candidate areas, is counted as a vote for the candidate so marked only if it is readily apparent that at least three-fourths of the mark is in that candidate's area or target area, and no other candidate is similarly marked.²⁶⁰
- Other such marks, extending across more than one candidate areas, may be counted if the lines of the "X" or the bottom point of the check mark (✓) clearly lie inside the box or on top of the name or party affiliation or candidate area of one candidate, and no other candidate is similarly marked.²⁶¹
- Any ballot which has any mark, as above, in the target area or candidate area for one candidate, and on which other marks in the target areas or candidate areas for any other candidates have been partially erased, scratched out, or otherwise obliterated, is counted as a vote for the candidate for which the mark was not erased, scratched out or otherwise obliterated, provided no other candidate is similarly marked.²⁶²

²⁵⁴ State Bd. of Elections, Commonwealth of Va, Standards for Recounts of Virginia Elections, *available at* http://www.sbe.state.va.us/cms/documents/Election_Laws/RecountStards_RevisedSept8_2008_ADOPTED.pdf (last visited Oct. 31, 2012).

²⁵⁵ *Id.* at 8.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

- Any other mark clearly opposite, next to or across the candidate's name, and not near another candidate's name, is recognized as a mark.²⁶³
- Any other writing or remark on the ballot (other than a write-in unless a write-in candidate is a party to the recount) which clearly indicates the voter's support for only one candidate for the office subject to the recount, and which cannot be interpreted as a remark in favor of any other candidate in that election, is counted as a vote for that candidate.²⁶⁴
- Writings or remarks which appear to be ranking the candidates (letters, numbers, +/-, etc.) are not considered valid marks unless only one candidate is marked and no other candidate is similarly marked.²⁶⁵
- A write-in vote for a candidate whose name appears on the ballot for the same office may not be counted. A write-in vote in addition to a vote for another candidate for the office is an overvote and no vote is counted.²⁶⁶

E. PROVISIONAL BALLOTS

- 2012 election
 - The electoral board meets on the day following the election and determines whether each person having submitted a provisional ballot was entitled to do so as a qualified voter in the precinct in which he voted.
 - If the board is unable to determine the validity of all the provisional ballots offered in the election, or has granted any voter who has offered a provisional ballot an extension to the following day, the board adjourns the following day. The board has no more than seven days after the date of the election to determine the validity of all provisional ballots.
 - On completion of its determination, the electoral board shall proceed to count such ballots and certify the results of its count.²⁶⁷
- 2008 presidential election
 - 9,354 provisional ballots were cast.
 - 6,738 (72.0%) of which were rejected.²⁶⁸
- 2010 midterm election
 - 2,440 provisional ballots were cast
 - 1,387 (56.8%) of which were rejected.²⁶⁹

²⁶³ *Id.*

²⁶⁴ *Id.* at 9.

²⁶⁵ *Id.*

²⁶⁶ Standards for Recounts, *supra* note 254.

²⁶⁷ VA. CODE ANN. § 24.2-653(B) (2012).

²⁶⁸ 2008 EAC at Table 35, *supra* note 8.

²⁶⁹ 2010 EAC at Table 34, *supra* note 33.

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **received by November 6th** in order to be counted.²⁷⁰
- 2008 presidential election
 - 509,062 domestic absentee ballots were submitted.
 - 6,722 (1.3%) of which were rejected.²⁷¹
 - 29,258 UOCAVA ballots were submitted.²⁷²
- 2010 midterm election
 - 108,156 domestic absentee ballots were submitted.
 - 542 (0.5%) of which were rejected.²⁷³
 - 5,451 UOCAVA ballots were submitted.²⁷⁴

²⁷⁰ State Bd. of Elections, Commonwealth of Va., *Military and Overseas Registrations*, available at <http://www.sbe.virginia.gov/militaryoverseasvoting.html> (last visited Oct. 31, 2012).

²⁷¹ 2008 EAC at Table 33, *supra* note 8.

²⁷² *Id.* at Table 29B.

²⁷³ 2010 EAC at Table 32, *supra* note 33.

²⁷⁴ *Id.* at Table 28B.

X. WISCONSIN

A. Recount triggers

- No automatic recounts
- Candidate initiated
 - Any candidate may petition for a recount by filing a sworn petition with the clerk or body with whom nomination papers are filed for the office at issue (in the case of presidential candidates, this would be Wisconsin's Government Accountability Board), not later than 5:00 p.m. on the third business day following the last meeting day of the board of canvassers determining the result for the office.²⁷⁵
 - The petition must state that the petitioner is informed and believes that a mistake or fraud has been committed in a specified ward or municipality in the counting and return of the votes cast for the office at issue, or that another specified defect, irregularity, or illegality occurred in the conduct of the election.²⁷⁶
 - The petitioner may be charged a fee, depending on the total number of votes cast for the office at issue and the difference between the number of votes cast for the leading candidate and the recount petitioner. For offices where 1,000 or more votes were cast:
 - If the margin between the leading candidate and the petitioner is less than or equal to 0.5% of the total votes cast for the office, no fee is charged.
 - If the margin is greater than 0.5% but not more than 2.0%, the candidate must pay \$5 for each ward for which a recount is requested.
 - If the margin is greater than 2.0%, the candidate requesting the recount must pay for the actual cost of the recount.²⁷⁷

B. VOTING RECORDS

- Wisconsin's counties use either paper ballots (including optical scan ballots) or a mix between paper ballots and DREs with VVPAT. Those counties that use DREs with VVPAT use them for accessibility purposes; the standard polling place equipment in all counties is paper ballots.²⁷⁸

C. RECOUNT PROCEDURE

- What is the timeframe?
 - Upon receiving a valid petition and applicable fees, the Government Accountability Board must "promptly" order the county boards of canvassers to conduct the recount. The recount must commence by 9 a.m. on the second day after receipt of this order and conclude "as soon as possible but in no case later than 13 days from the date of the order of the board directing the recount."²⁷⁹

²⁷⁵ WIS. STAT. § 9.01(1)(a)(1) (2010).

²⁷⁶ *Id.* § 9.01(1)(a)(2)(b).

²⁷⁷ *Id.* § 9.01(1)(ag)(1)-(2).

²⁷⁸ *The Verifier*; VERIFIEDVOTING.ORG, <http://www.verifiedvoting.org/verifier/> (last visited Oct. 31, 2012).

²⁷⁹ WIS. STAT. § 9.01(1)(ar)(3) (2010).

- Who conducts the recount?
 - For state and federal elections, the county boards of canvassers for the counties in which the contested votes are cast conduct the recount.²⁸⁰
 - The petitioner, all opposing candidates, and interested persons are entitled to be present in person and by counsel to observe the proceedings.²⁸¹ The county board of canvassers is made up of the county clerk and 2 qualified electors of the county appointed by the clerk. One member of the board of canvassers shall belong to a political party other than the clerk's. Where there is a county board of election commissioners, it serves as the board of canvassers.²⁸²
 - Any candidate may appeal to the circuit court within five business days after the completion of the recount determination.
- How is the recount conducted?
 - The procedure for counting ballot depends on the form of the initial ballot cast.
 - Hand-Counted Paper Ballots:
 - Hand-counted paper ballots, including absentee ballots, are recounted by hand and the results are recorded on a duplicate tally sheet. If any person objects to any ballot, a majority of the board of canvassers decides whether the ballot is valid. The board of canvassers may consult with its legal counsel or the Government Accountability Board staff regarding any objection.²⁸³
 - Optical Scan Ballots
 - Optical scan ballots are recounted using the automatic tabulating equipment. Each ballot must be reviewed by the board of canvassers and may be inspected by the candidates or their representatives before being fed into the machine.²⁸⁴
 - If it appears that a ballot may not be recorded correctly by the tabulator, or if it is objected to, the ballot is set aside to be examined by the board of canvassers for voter intent and counted separately from the machine count.²⁸⁵
 - Any candidate may petition the circuit court for an order requiring optical scan ballots to be counted by hand or by another method approved by the court. The petitioner bears the burden of establishing that the results of a recount using automatic tabulating equipment will produce incorrect recount results and that there is a substantial probability that recounting the ballots by hand or another method will produce a more correct result and change the outcome of the election.²⁸⁶
 - DRE Voting Equipment

²⁸⁰ *Election Recount Procedures*, Wis. Gov't Accountability Bd., available at <http://gab.wi.gov/manuals/recount> (last visited Oct. 31, 2012).

²⁸¹ WIS. STAT. § 9.01(3) (2010).

²⁸² WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280; *see also* WIS. STAT. § 7.60 (2010).

²⁸³ WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at 10.

²⁸⁴ WIS. STAT. § 5.90(1) (2010); WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at 12.

²⁸⁵ WIS. STAT. § 5.90(1) (2010); WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at 12.

²⁸⁶ WIS. STAT. § 5.90(2) (2010).

- To review DRE votes, the board of canvassers removes the detachable paper record from the ballot container, and then manually counts the paper record for the election contest that is the subject of the recount. The results are recorded on duplicate tally sheets.²⁸⁷
 - The petitioner, candidates and representatives may observe the paper record as it is counted. If any person objects to any ballot, a majority of the board of canvassers decides whether the ballot is valid.²⁸⁸
 - Procedure prior to commencing recount
 - Before commencing the recount, the board of canvassers reviews the absentee ballot envelopes and applications. Any improperly rejected absentee ballots are added to the pool of ballots to be counted. If the board determines that defective absentee ballots were improperly counted, it must randomly remove an equal number of absentee ballots from the recount pool.²⁸⁹
 - Disparities between voters and ballots: Before commencing the recount, the board of canvassers determines the total number of recorded voters by reviewing poll lists and absentee ballot applications and envelopes. If the number of ballots exceeds the number of recorded voters, Wisconsin law provides a detailed method for removing ballots until the number of ballots equals the number of recorded voters, beginning with the removal of ballots with facial defects. If after this process the number of ballots still exceeds the number of recorded voters, a random set of ballots are removed and not counted.²⁹⁰

D. DETERMINING VOTER INTENT

- Votes must be counted as intended by the voter to the extent that the voter's intent can be determined, even if the voter has not fully complied with the provisions of the election law.²⁹¹
- If a voter writes a person's name in the proper space for write-in candidates for an office, it is a vote for the person written in for the office indicated, regardless of whether the voter also places a mark by the same or any other name printed on the ballot for the same office.²⁹²

E. PROVISIONAL BALLOTS

- 2012 election
 - The municipal clerk must deliver to the county clerk any additional provisional ballots no later than 4:00 p.m. on the Monday after the election.²⁹³
 - During a recount, the board of canvassers must determine whether all provisional ballots were correctly processed.²⁹⁴
- 2008 presidential election

²⁸⁷ WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at 12.

²⁸⁸ *Id.*

²⁸⁹ WIS. STAT. § 9.01(b) (2010).

²⁹⁰ *Id.* § 9.01(b).

²⁹¹ *Id.* § 7.50(2)(d); WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at Appendix 13.

²⁹² WIS. STAT. § 7.50(2)(d) (2010).

²⁹³ *Id.* § 7.51(5)(b).

²⁹⁴ WIS. GOV'T ACCOUNTABILITY BD., *supra* note 280, at 10.

- 211 provisional ballots were cast.
 - 117 (55.5%) of which rejected.²⁹⁵
- 2010 midterm election
 - 64 provisional ballots were cast.
 - 33 (51.6%) of which were rejected.²⁹⁶

F. ABSENTEE BALLOTS

- 2012 election
 - UOCAVA ballots that are submitted need to be **postmarked by November 6th and received by November 9th** to be counted.²⁹⁷
- 2008 presidential election
 - 639,902 domestic absentee ballots were submitted.
 - 2,739 (0.4%) of which were rejected.²⁹⁸
 - 6,977 UOCAVA ballots were submitted.²⁹⁹
- 2010 midterm election
 - 232,593 domestic absentee ballots were submitted.
 - 2,890 (1.2%) of which were rejected.³⁰⁰
 - 1,462 UOCAVA ballots were submitted.³⁰¹

²⁹⁵ 2008 EAC at Table 35, *supra* note 8.

²⁹⁶ 2010 EAC at Table 34, *supra* note 33.

²⁹⁷ Wis. Gov't Accountability Bd., *Military and Overseas Voters*, available at <http://gab.wi.gov/elections-voting/voters/military-overseas> (last visited Oct. 31, 2012).

²⁹⁸ 2008 EAC at Table 33, *supra* note 8.

²⁹⁹ *Id.* at Table 29B.

³⁰⁰ 2010 EAC at Table 32, *supra* note 33.

³⁰¹ *Id.* at Table 28B.

STAY CONNECTED TO THE BRENNAN CENTER

Sign up for our electronic newsletters at www.brennancenter.org/signup and visit our **Election 2012 page** at www.brennancenter.org/election2012.

Latest News | Up-to-the-minute info on our work, publications, events and more.

Voting Newsletter | Latest developments, state updates, new research, and media roundup.

Justice Update | Snapshot of our justice work and latest developments in the field.

Fair Courts | Comprehensive news roundup spotlighting judges and the courts.

Twitter | www.twitter.com/BrennanCenter

Facebook | www.facebook.com/BrennanCenter

NEW AND FORTHCOMING BRENNAN CENTER PUBLICATIONS

Voting Law Changes in 2012

Wendy R. Weiser and Lawrence Norden

The Challenge of Obtaining Voter Identification

Keesha Gaskins and Sundeep Iyer

Election Spending 2012: 25 Toss-Up House Races

Sundeep Iyer

Redistricting and Congressional Control: A First Look

Sundeep Iyer and Keesha Gaskins

Ballot Security and Voter Suppression

Wendy Weiser and Vishal Agraharkar

Empowering Small Donors in Federal Elections

Adam Skaggs and Fred Wertheimer

Better Design, Better Elections

Lawrence Norden with Whitney Quesenberry and David C. Kimball

State Restrictions on Voter Registration Drives

Diana Kasdan

Transparency for Corporate Political Spending: A Federal Solution

David Earley and Ian Vandewalker

Democracy & Justice: Collected Writings, Volume V

Brennan Center for Justice

For more information, please visit www.brennancenter.org.

BRENNAN
CENTER
FOR JUSTICE

at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646-292-8310
www.brennancenter.org