



**Florida Fair Elections Coalition**  
**Deland, FL**  
[www.ffc.org](http://www.ffc.org)

**Analysis Supporting  
Volusia County Council's Decision  
to Reject Purchase of the Diebold TSX<sup>1</sup>**

**July 6, 2005**

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for Florida Fair Elections Coalition**

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<sup>1</sup> The content of this document has not been altered; however, minor editorial corrections, clarifications, and formatting changes were made before posting to the FFEC website.

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## FINDINGS:

### **I. The Diebold TSX voting system as certified by the Florida Division of Elections is not a complete voting system and therefore should never have been certified. It should immediately be decertified statewide.**

- All evidence indicates that the “blended” voting system comprised of Diebold optical-scan voting machines and Diebold TSX touch-screen machines, approved March 29, 2005 by the Florida Division of Elections under Certificate #0305Diebold-01 does not blend. There is currently no way to integrate data in the precincts between the two voting systems. Additionally, integration of data between the two systems at the GEMS central tabulator will require an upgrade to the GEMS software. These separate voting systems should never have been certified by the Division of Elections as one “blended” system and should be immediately investigated. Any upgrades needed to “blend” the two systems will require a completely new certification process, resulting in a new system.
- Internal Diebold emails from January 2003 show that the company has not been able to find a way to blend the two systems. The memos also state that any upgrade to GEMS to blend the two systems will require re-certification of the entire system.
- Exhibit Three of the Contract, Paragraph 7(b) states:  
“DESI shall release DESI Software improvements that add to or change the functionality characterizing the DESI Software as of the Effective Date (“Upgrades”). Upgrades do not include later released versions of the DESI Software with a higher (GEMS) version number.”  
Any software upgrade to GEMS requires a new certification process.<sup>2</sup>
- The Optical Scan Accumulator Adaptor listed in Exhibit One of the Volusia County contract<sup>3</sup> under “Optional Equipment.” The line item reads: “Optical Scan Accumulator Adaptor (OSAA) – Pending Certification.” This is the device that is supposed to integrate the data (vote totals) between the optical scan voting machine and the touch-screen voting machine in each precinct. However, Diebold has, by its own admission, not yet figured out how to get this device to actually work, as explained below. Florida Statute 101.5606 states: “No electronic or electromechanical voting system shall be approved by the Department of State unless it is so constructed that...it uses a precinct-count tabulation system.”<sup>4</sup> The Optical Scan Accumulator is the device that is supposed to produce a precinct-count tabulation system.
- An information sheet<sup>5</sup> on the Optical Scan Accumulator Adaptor (OSAA) was handed

<sup>2</sup> Florida Voting Systems Standards, Effective January 12 2005, Page 6

<sup>3</sup> Proposed Contract between Diebold Election Systems, Inc. (DESI) and Volusia County (Exhibit 2)

<sup>4</sup> Florida Statute 101.5606(14)

<sup>5</sup> Optical Scan Precinct / TSX Description Sheet (Exhibit 3)

out at the demonstration of the Diebold machine in Pasco County as part of the information packet on the Diebold voting-machine system. This information sheet states that the Optical Scan Accumulator Adaptor is the device that will integrate the data between the optical scan system and the touch-screen system.

- At a demonstration of the Diebold TSX voting machine at the annual Supervisors of Election Conference in Pasco County, Mark Earley, Support Services Specialist for Diebold, said the Optical Scan Accumulator Adaptor had not yet been invented and that Diebold had not yet figured out a way to integrate the data between the two systems.<sup>6</sup> Without any ability to integrate the optical scan system with the touch-screen system, the Diebold system is not a complete system and should never have been certified by the Division of Elections. It would have been illegal for the county to purchase such a system.
- Florida Voting System Standards (Form DS-DE), effective January 12 2005, states the following on Page 19 under the Section entitled “Post-Voting Functions:” “In the event that more than one voting device is used in a polling place, the system shall provide a means for consolidating the data in each voting device into one report for the polling place.”
- Tim Augustine, Operations Supervisor for the Volusia Supervisor of Elections Office, told Susan Pynchon in a conversation on June 27, 2005, that the data would be integrated at the central tabulator using an “upgrade” to the software for the Global Election Management System (GEMS) central tabulator. Any software upgrade to GEMS means the entire system would have to be re-certified.<sup>7</sup> The Diebold voting system certified by the Division of Elections currently cannot integrate data between the optical scan system and the touch-screen system and therefore should never have been certified by the Division of Elections. Even an uncertified software upgrade to GEMS would not solve the lack of a precinct-count tabulation system as required by F.S. 101.5606(14).
- Current state and federal testing procedures require recertification of every upgrade with each specific system. Therefore, since Tim Augustine, Operations Supervisor, has stated that the two systems will integrate data through a software upgrade to GEMS, the contract needed to provide for any certification upgrade with the exact configuration of equipment being purchased by Volusia County. If Diebold were to now offer the contract in the same manner it was presented to the County Council, it would be a third degree felony due to a new state law<sup>8</sup> that went into effect July 1, 2005.
- The voting-machine system presented to Volusia County for purchase is not a complete system and should never have been certified by the Division of Elections. If this is the same system certified by the state, then an investigation should be conducted as to how such a system could have received certification in light of the issues delineated in this section.

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<sup>6</sup> Report by Spencer Lane (Exhibit 4)

<sup>7</sup> Diebold Internal Memos (Exhibit 5) State Law

<sup>8</sup> Laws of Florida, Chapter 2005-277, Section 32

- The price of the Optical Scan Accumulator is included in the total purchase price of \$879,040.00. Since the Optical Scan Accumulator Adaptor is not certified by the Division of Elections, it would be illegal for the county to include the device in its purchase contract. Only certified equipment may be purchased under state law.<sup>9</sup>
- The system as presented does not work as a “voting system” as defined in Section 301(b)(1) of HAVA, which states:

“Voting System Defined.--In this section, the term “voting system” means— (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used--

- (A) to define ballots;
- (B) to cast and count votes;
- (C) to report or display election results; and
- (D) to maintain and produce any audit trail

The Diebold TSX “blended” voting system does not represent a total system used “to cast and count votes” and is not HAVA compliant.

## **II. The Diebold contract proposed for Volusia county is fatally flawed and the Volusia County Council was right to reject it as against the public interest.**

- The contract is for a system that does not exist. There is no way for the optical scan system to integrate data with the touch-screen system. Therefore, it is not a complete system and should never have been certified by the State of Florida. The contract would not have been valid.
- The contract has no subject. The contract never states exactly what is being purchased by the County. There is no description of the voting system being purchased other than AccuVote-TSX. There are several different versions of the AccuVote-TSX voting system. The contract does not give the “GEMS” version being provided, which is critical to determining what system is being purchased, and whether the software has been properly certified. It does not list all the numbers of the components being provided. The only way to assure a certified system is to compare all component numbers and make sure they are identical to what is being purchased.
- The contract makes no mention of Volusia County’s existing optical scan system and makes no warranties that the proposed touch-screen system will work with, or integrate data between, the optical scan system and the touch-screen system.

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<sup>9</sup> Florida Statute 101.294(1)

- The proposed voting machines are being purchased to meet the requirements of Section 301<sup>10</sup> of the Help America Vote Act of 2002<sup>11</sup>. Section 301 of HAVA becomes effective January 1, 2006. The federal funds allocated to Volusia County (as a pass-through through the State of Florida) are being allocated to meet the requirements of Section 301 of HAVA. The proposed contract between Diebold and Volusia County makes no mention of HAVA compliance and does not offer any guarantee of HAVA compliance.
- Article 4.7 states “The Contractor shall provide to the County only hardware, firmware and/or software that has State of Florida certification.” It does not state that the entire system as contracted for is state certified. There is no state certification number made part of the contract. There is no state “Certification” form made part of the contract. (The state “Certification” form issued by the Bureau of Voting Systems Certification shows all components that are certified as part of the voting system).
- The Voting System proposed by Diebold for purchase by Volusia County is not federally certified. In order for a system to be federally certified, all component numbers, including the GEMS version, must be identical to the component numbers on the NASED website.<sup>12</sup>
- There is no claim of federal certification (“NASED qualification”) in the contract. There is no federal certification number made part of the contract for reference. In fact, Diebold specifically refused to guarantee federal certification in the contract.
- There is no description or “version number” of the GEMS upgrade required to make the voting system work.
- There is no guarantee of HAVA compliance, even though HAVA funds are being used for the voting system purchase.
- Article 17 states, in part: “The County and Contractor agree to enter into good faith negotiations regarding modifications to this Contract which may be required in order to implement changes...due to change in law.” There is going to be a change in law. That change is the implementation of Section 301 of HAVA, which will go into effect on January 1, 2006. This sentence protects Diebold from having to pay for any features of the system that are not currently HAVA compliant and places the burden on the County to pay for, or at least negotiate with Diebold, the cost of any changes necessary to upgrade the system to make it HAVA compliant.
- There are inadequate warranties in the contract. In fact, the contract expressly disclaims any and all representations of warranties, express or implied, other than those specifically stated in the contract. The language is not “conspicuous” as required by Section 2-316 of the Uniform Commercial Code, but is tucked away in Article 33: Entire Contract.
- During the Special Meeting, the Diebold representative responded in the affirmative (at

<sup>10</sup> Section 301 of HAVA (Exhibit 6)

<sup>11</sup> The Help American Vote Act of 2002 (Exhibit 7)

<sup>12</sup> NASED warning found on the NASED website at <http://www.nased.org> (Exhibit 8)

least two times) that the voting equipment to be provided by Diebold under the proposed contract satisfied the requirements of the Help America Vote Act of 2002 (HAVA). The proposed contract contains no representations no mention of HAVA, HAVA requirements, or HAVA compliance, and yet it is HAVA funds that are being used to pay for the system. The whole reason for this purchase is to comply with HAVA requirements.

- Notwithstanding all of the representations offered at the Special Meeting, prior to the Special Meeting, whether orally or in writing, HAVA compliance is not part of the “basis for the bargain” reflected in the proposed contract. In fact, Diebold intends to “add” a sip-puff feature to make it more accessible before the HAVA deadline. This would require yet another certification and more Volusia County funds expended. This offer occurred because of the manually disabled who expressed dissatisfaction with the Diebold TSX.<sup>13</sup>
- The price of the Optical Scan Accumulator, listed under “Optional Equipment” in Exhibit One of the Contract, is included in the total purchase price of \$879,040.00. Since the Optical Scan Accumulator Adaptor is not certified by the Division of Elections, it would be illegal for the county to include the device in its purchase contract. Only certified equipment may be purchased under state law.<sup>14</sup>
- The price of the “Printer Module,” listed under “Optional Equipment” in Exhibit One of the Contract, is included in the total purchase price of \$879,040.00. Since the Printer Module is not certified by the Division of Elections, it would be illegal for the county to include the device in its purchase contract. Only certified equipment may be purchased under state law.<sup>15</sup>
- To contract for the Printer Module subject to its certification would be the same as contracting for the AutoMark Voter Assist Terminal (the competing system preferred by the County) subject to its certification. Both are printers. Both are components of the overall system. It is illegal to contract for the purchase of an uncertified component. If the county is able to include the Printer Module in the contract subject to its certification, it should be similarly able to contract for the purchase of the AutoMark subject to its certification.

### **III. The Division of Elections has shown preferential treatment to some voting machine vendors.**

- The Diebold TSX voting system proposed for purchase by Volusia County is not federally certified. This in itself is not remarkable, since Florida does not require federal

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<sup>13</sup> Daytona Beach News Journal editorial by Aleda J. Davies, published in “Community Voices” on June 22, 2005 (Exhibit 9)

<sup>14</sup> Florida Statute 101.294(1)

<sup>15</sup> Florida Statute 101.294(1)

certification as a prerequisite to state certification. What is remarkable is that personnel of the Division of Elections have stated on numerous occasions that a competing system, the AutoMark Voter Assist Terminal, must receive federal certification before the state certification process can begin. This double standard (setting federal certification as a prerequisite for state certification of the AutoMark while not doing the same for Diebold) has prevented AutoMark from doing any business in Florida whatsoever due to unnecessary delays in its certification.

- The purpose of HAVA funding is to provide a voting machine in every precinct to meet the needs of voters with disabilities. By Emergency Rule<sup>16</sup>, Florida exempted an important disability feature, “simultaneous audio-visual,” for certain new voting systems being purchased by some Florida counties. This exemption created preferential treatment for Sequoia Pacific, the vendor of these exempted voting systems.
- By establishing July 1, 2005 as an arbitrary deadline, by which all counties were told they must have purchased new voting systems, the state prevented other vendors from competing in the marketplace. (More on the July 1 date below).

#### **IV. The Supervisor of Elections has appeared ill-informed and inaccurate on several occasions, thus leaving the County Council without proper advice.**

- The Supervisor of Elections wrote to the County Council that a respected local judge had a financial interest in the AutoMark Voter Assist Terminal but was forced to issue a retraction.
- The Supervisor of Elections told the County Council, during its June 29 meeting in front of the public, that the AutoMark Voter Assist Terminal would cost \$9,000 per unit, even though she had a written quote at \$5,000 per unit and even the AutoMark representative confirmed that the price would be \$5,000 per unit. The \$9,000 quoted by AutoMark was for a combined system of ES&S optical scan and AutoMark terminal per precinct.

#### **V. The policies and practices of the Division of Elections have prevented counties from getting competitive bids, as required by state law.**

- The Division of Elections has prevented counties from getting competitive bids, as required by state law, for the purchase of new voting systems in approximately 52 of Florida’s 67 counties, by establishing an early, arbitrary deadline for purchase of these systems and by delaying certification of any competing systems. The law reads as follows: “Any purchase of voting equipment (over \$25,000) by a governing body shall be by means of competitive sealed proposals from at least two bidders...”<sup>17</sup>

<sup>16</sup> Emergency Rule 1SER05-1, effective 4-2-05 (Exhibit )

<sup>17</sup> Florida Statute 101.293(1)

- The Division of Elections encouraged counties not to seek competitive bids in a letter, dated March 17, 2005, that was sent to the counties that were using Diebold optical scan systems (approximately 30 counties). The letter reads, in part, “Your immediate, and probably most cost effective, option is to upgrade your voting system to the Diebold Election Systems, Inc. 2003 B (Blended) + (Plus Audio) system as certified October 14, 2004 on certificate #1004Diebold-02).”

**VI. Many of Florida’s standards for voting system certification are in violation of state law and are not HAVA compliant.**

- Florida Statute 101.56063 requires that Florida’s certification standards for new voting systems shall “meet or exceed” federal requirements. Some of Florida’s certification standards for new voting systems are *less* stringent than federal requirements and therefore do not comply with state law.
- Some of the Florida’s voting-system certification requirements are less stringent than, or do not meet, the requirements of Section 301 of HAVA. This could result in Florida having to return funds, allocated for the purchase of new voting systems, to the federal government.
- Florida Statute 101.56063 states,
  - “It is the intent of the Legislature that this state be eligible for any funds that are available from the Federal Government to assist states in providing or improving accessibility of voting systems and polling places for persons having a disability. Accordingly, all state laws, rules, standards and codes governing voting systems and polling place accessibility must be maintained to ensure the state’s eligibility to receive federal funds. It is the intent of the Legislature that all state requirements must meet or exceed the minimum federal requirements for voting systems...”<sup>18</sup>

The Diebold TSX voting system, certified by the state and proposed for purchase by Volusia County, does not provide a full range of accessibility features, is not HAVA compliant, and therefore does not meet state or federal requirements nor qualify for federal funds.

- Volusia County should be able to rely on certification of a voting system by the Division of Elections as evidence that the voting system meets the requirements of state and federal law. This is not the case.
- Florida Statute 101.56063 requires that state certification of new voting systems shall “meet or exceed minimum federal requirements.” The voting systems approved by the Division of Elections and exempted by Emergency Rule<sup>19</sup> do not meet the disability requirements of HAVA and therefore do not meet minimum federal requirements, nor the requirements of state law.

<sup>18</sup> Florida Statute 101.56063

<sup>19</sup> Emergency Rule 1SER05-1, effective 4-2-05

- The purpose of HAVA funding is to provide a voting machine in every precinct to meet the needs of voters with disabilities. By Emergency Rule<sup>20</sup>, Florida exempted an important disability feature, “simultaneous audio-visual,” for certain new voting systems being purchased by some Florida counties. The exempted voting systems do not fully serve the needs of voters with disabilities and therefore not HAVA compliant.
- HAVA requires “each voting system used in an election for Federal office...shall produce a permanent paper record with manual audit capacity for such system.”<sup>21</sup> There is no such requirement in state law, even though state law is supposed to “meet or exceed” the requirements of federal law.
- Florida law states “Any county that receives funds...that is not in compliance with the accessibility requirements in Section 301(a)(3) Title III of the Help America Vote Act by January 1 2006 shall be required to return those funds to the State.”<sup>22</sup> The Diebold voting system proposed for purchase in Volusia County does not meet the requirements of Section 301(a)(3) of HAVA, which requires that “the voting system shall be accessible for individuals with disabilities ...in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”<sup>23</sup> The Diebold system proposed to Volusia County lacks a number of important disability features and is not, as presented to Volusia County, HAVA compliant. If Volusia County were to purchase the Diebold voting system, which is not HAVA compliant, it would have to return funds to the State as of January 1, 2006.
- Florida Statute 101.56062, which sets the standards for accessible voting systems, fails to require several disability features that are important to serve the whole disabled community. This law does not meet the requirements of Section 301 of HAVA and therefore does not ensure that the so-called “accessible” voting systems certified by the state are HAVA compliant.
- Florida’s maximum allowable error rate for voting systems is less stringent than the error rate mandated by HAVA(301)(5). Florida law requires that the certification of new voting systems shall “meet or exceed” federal requirements. The federal maximum-allowable error rate required for HAVA compliance is one error in every 500,000 votes cast.<sup>24</sup> The Florida maximum allowable error rate is one error in every 300,000 votes cast.<sup>25</sup> Since the more stringent federal error rate is required for HAVA compliance, it is possible that some of the voting systems certified by the State of Florida are not HAVA compliant. Also, Florida’s less stringent error rate breaks state law, which states that see above.

<sup>20</sup> Emergency Rule 1SER05-1, effective 4-2-05

<sup>21</sup> Help America Vote Act, Title III, Section 301(a)(2)(B)(i)

<sup>22</sup> Florida 2004-2005 General Appropriations Act, Chapter 2004-268, Section 2871-I

<sup>23</sup> Help America Vote Act, Title III, Section 301(a)(3)

<sup>24</sup> Federal Election Commission -- 2002 Voting System Standards

<sup>25</sup> Florida Voting System Standards, effective 1-12-05

- The purpose of HAVA funding is to provide a voting machine in every precinct to meet the needs of voters with disabilities. By Emergency Rule<sup>26</sup>, Florida exempted an important disability feature, “simultaneous audio-visual,” for certain new voting systems being purchased by some Florida counties. The exempted voting systems do not fully serve the needs of voters with disabilities and therefore not HAVA compliant.
- Florida Statute 101.56062 exempts one important disability feature for voting systems and therefore this law does not meet the requirements of HAVA. The disability feature exempted by F.S. 101.56062 is “audio and visual access approaches must be able to work both separately and individually.”<sup>27</sup> The same statute first requires<sup>28</sup>, then exempts, this feature<sup>29</sup>.
- The Division of Elections has thus far approved the voting systems of only 3 companies (Diebold, ES&S and Sequoia) that are supposedly HAVA-compliant voting systems. None of these voting systems offer a voter-verified paper trail and none, apparently, is HAVA compliant.

## **VII. The Diebold voting system proposed to Volusia County is not HAVA compliant.**

- The Diebold voting system offered to Volusia County includes one “blind kit” in the proposed contract for purchase. There are no other accessible items or options listed: not a “sip/puff” device (sip to scroll through the ballot; puff to mark the ballot); not a foot pedal (push one side to scroll through the ballot, the other side to mark the ballot); and not a “joy stick” (push one way to scroll through the ballot and the other to mark the ballot). The Diebold voting machines do not serve the needs of voters with severe manual impairments. In fact, it is impossible for a voter with severe manual impairments to vote at all on the Diebold voting machines as they are currently configured, unless that voter has assistance. The lack of some or all of these features; the level of difficulty in using the Diebold machines for the disabled and the elderly; and the unacceptable length of time it takes to vote on them, makes them non-compliant with HAVA Section 301 requirements for accessibility for “all” voters
- When one visually-impaired voter tried out both the Diebold machine and the AutoMark at the Supervisors of Elections conference in Pasco County, it took her 31 minutes to vote on the Diebold machine and 9 minutes to vote on the AutoMark. The extended voting times were confirmed by other members of the Florida Fair Elections Board of Directors in individual tests. If 30 minutes is an average length of time for a visually-impaired voter to vote on the Diebold, and with only one Diebold machine planned for each precinct, it is quite possible that voters with disabilities, and/or elderly voters, would have to spend hours at a polling place waiting to vote, particularly since voters with disabilities or elderly voters often are driven in groups

<sup>26</sup> Emergency Rule 1SER05-1, effective 4-2-05

<sup>27</sup> Florida Statute 101.56062(1)(d)

<sup>28</sup> Florida Statute 101.56062(1)(d)

<sup>29</sup> Florida Statute 101.56062(1)(n)(12)

to the polls in vans or by Votran (the county bus service).

- The lack of some or all of these features; the level of difficulty in using the Diebold voting machines for the disabled and the elderly; and the unacceptable length of time it takes to vote on them, makes them non-compliant with HAVA Section 301 requirements for accessibility for “all” voters.

**VIII. The AutoMark, the system that Volusia County wants to purchase, offers a guarantee of 100% HAVA compliance.**

- The Division of Elections, by state law,<sup>30</sup> must approve or disapprove the AutoMark Voter Assist Terminal within 90 days of receiving its completed application.
- The AutoMark received federal certification in June, 2005.

**IX. The Bureau of Voting Systems Certification and the Division of Elections have not followed other requirements of state law.**

- Florida Statute 101.56063 states,  
“It is the intent of the Legislature that this state be eligible for any funds that are available from the Federal Government to assist states in providing or improving accessibility of voting systems and polling places for persons having a disability. Accordingly, all state laws, rules, standards and codes governing voting systems and polling place accessibility must be maintained to ensure the state’s eligibility to receive federal funds. It is the intent of the Legislature that all state requirements must meet or exceed the minimum federal requirements for voting systems...”<sup>31</sup>

The Diebold TSX voting system, certified by the state and proposed for purchase by Volusia County, does not provide a full range of accessibility features, is not HAVA compliant, and therefore does not meet state or federal requirements nor qualify for federal funds.

- Florida law requires that the Division of Elections shall “ensure that all new technologies are appropriately certified for all elections in a timely manner.”<sup>32</sup> The Division of Elections has not certified the AutoMark Voter Assist Terminal, which is a new technology, in a timely manner for all (or any) elections.
- Florida Statute 101.56063 requires that state certification of new voting systems shall

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<sup>30</sup> Florida Statute 101.5605(2)(d)

<sup>31</sup> Florida Statute 101.56063

<sup>32</sup> Florida Statute 101.015(7)

“meet or exceed minimum federal requirements.”<sup>33</sup> The voting systems approved by the Division of Elections and exempted by Emergency Rule<sup>34</sup> do not meet the disability requirements of HAVA and therefore do not meet minimum federal requirements nor the requirements of state law.

- Florida Statute 101.015(7) states that the Division of Elections shall “develop methods to determine the will of the voters with respect to voting systems.”<sup>35</sup> The Division of Elections has not determined the will of the voters with respect to voting systems, nor has it developed any effective methods to do so.

**X. The July 1, 2005 deadline mandated by the state for purchase of new voting systems is an arbitrary deadline with no basis in Florida law.**

- The State has no legal basis for establishing July 1, 2005 as the date whereby all counties must have completed the purchase of new voting systems. The most conservative reading of the law,<sup>36</sup> even according to Division of Elections attorneys, would require such voting systems to be in place by the first election following July 1, 2005.<sup>37</sup> A more liberal reading of the various laws<sup>38</sup> in place on the subject of the deadline for compliance by Florida counties would establish January 1, 2006 as the deadline.
- The July 1, 2005 date is the date after which no new voting systems may be certified by the Bureau of Voting Systems Certification that do not meet the standards set forth in Florida Statute 101.56062, not the date by which counties must purchase such equipment. To demand each county purchase voting systems by July 1, the state has chosen to rely on a statute that does not even contain the word “county” or “purchase.”
- There is no Florida statute requiring counties to purchase new voting systems by July 1, 2005, and the Division of Elections has never established a rule requiring counties to purchase voting systems by July 1, 2005. Florida Statute 101.294 states “The Division of Elections shall adopt uniform rules for the purchase, use and sale of voting equipment in the state.”<sup>39</sup> Florida Statute 120.54 states “rulemaking is not a matter of agency discretion.”<sup>40</sup>
- By forcing counties to purchase voting systems by July 1, 2005, instead of the January 1, 2006 date mandated by HAVA, the Department of State has created a situation where

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<sup>33</sup> Florida Statute 101.56063

<sup>34</sup> Emergency Rule 1SER05-1, effective 4-2-05

<sup>35</sup> Florida Statute 101.56062(7)

<sup>36</sup> Note at end of Florida Statute 101.56062; Chapter 2002-281; 2004-2005 Florida General Appropriations Act, Section 2871-I

<sup>37</sup> Letter from Division of Elections to Leon County dated March 17, 2005 (Exhibit 10)

<sup>38</sup> Note at end of Florida Statute 101.56062; Chapter 2002-281; 2004-2005 Florida General Appropriations Act, Section 2871-I; State HAVA Plan

<sup>39</sup> Florida Statute 101.294(1)

<sup>40</sup> Florida Statute 120.54(1)(a)

voting systems that may not comply with HAVA are the only choices available for counties to purchase. At least one competing system was prevented from being considered by counties, in part by the establishment of an early, arbitrary deadline for purchase of new voting systems. However, the Florida legislature was quite clear that it wanted the money spent in a way that would meet HAVA requirements: “Any county that receives funds from Specific Appropriations 2871-I that is not in compliance with the accessibility requirements in Section 302(a)(3) Title III of the Help America Vote Act by January 1 2006, shall be required to return those funds to the State.”<sup>41</sup>

- By not specifying a statutory or regulatory date for the purchase of new voting systems, the state deprived citizens and officials alike of the ability to protest their lack of choices in a timely and orderly manner.
- The SOE continuously tried to describe the ability of the Diebold system to print paper ballots as evidence that it was comparable to the voter-generated paper ballots used in the optical scan system, even after being repeatedly corrected that those paper ballots were only a repeat of whatever data was produced on the original tape from the voting machine. She never disclosed that the printing of those “paper ballots” is prohibited by state law for that very reason.

## **XI. RECOMMENDATIONS**

- A full investigation should be done into the policies and procedures of the Bureau of Voting System Standards, Division of Elections, Florida Department of State.
- The Diebold systems purchased by approximately 30 Florida counties should be de-certified.

## **XII. DISCLAIMER**

The information provided above was researched in good faith with all efforts made to present information in an accurate and well-documented manner. Discussion of statutory law is a matter of legal opinion, which may vary.

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<sup>41</sup> 2004-2005 Florida General Appropriations Act, Section 2871-I