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## Summary of Revisions to the RULES ON POLL WATCHERS, VOTE CHALLENGES, AND PROVISIONAL VOTING

The State Board of Election Commissioners met on June 23, 2015 and approved for public comment revisions to the “Rules on Poll Watchers, Vote Challenges, and Provisional Voting”. The public comment period ended on August 10, 2015. The State Board of Election Commissioners met again on October 30, 2015 to approve revisions to the “Rules on Poll Watchers, Vote Challenges, and Provisional Voting”.

Below is a summary of the rules that were approved by the Board on June 23, 2015 for the public comment period, followed by a list of persons commenting on the rule, a summary of the comments, the agency’s response to the comments, and the changes to the rules as a result of the public comments.

Initial changes include:

- 1) Section 900: removing definitions for “Additional Identification Requirement”, “Administrator”, “Documentation from the Administrator” and “Proof of Identity”; 2) redefining “Election Official” as a result of Act 1042 of 2015; 3) redefining “Provisional Ballot” to remove failure to present proof of identity as a reason for voting provisionally; 4) adding the definition of electronic poll book and clarifying that a precinct voter registration list may include an electronic poll book;
- 5) Section 901: removing language added as a result of Act 595 of 2013 for proof of identity and other identification requirements;
- 6) Section 903: adding language to clarify that poll watchers may use one poll watcher authorization form for multiple polling sites;
- 7) Section 906: amending the “at-the-poll” notice requirement to remove information added as a result of Act 595 of 2013;
- 8) Section 907: removing the procedures added as a result of Act 595 of 2013 for the consideration of provisional ballots cast by voters who failed to present proof of identity at the polls;
- 9) removing language on the provisional ballot forms that was originally added to account for changes made in Act 595 of 2013; and
- 10) changes in language for clarity.

### PERSONS COMMENTING ON THE RULE

Dennis Bosch – Garland County Election Commissioner (via email on August 7, 2015)

Bryan Poe - Director of Pulaski County Election Commission (via email on August 7, 2015)

## SUMMARY OF COMMENTS

§901: Forms – Commenter states that the first sentence might be better worded as follows: “Poll workers must ASK voters for identification, however DO NOT ask for a specific type of identification. The following forms of identification are acceptable. ----”

§902: In the first, sentence – the commenter suggests rather than the using, the word “*provides*” use “states”. Using the word provides might imply a hard copy form of identification rather than giving an oral answer.

§903: Commenter states that “there is no reference or explanation of the rights of newspaper photographers, who wish to take pictures of voters, and who may or may not disrupt the process. Is a polling site a public or private place?”

§907: Commenter states that the last two paragraphs use the phrase “who registered by mail”. Not all-first time voters register by mail, eliminating this phrase may reduce any misunderstanding.

In addition, these two paragraphs infer that first voters who did not provide ID either when registering or at the poll may be allowed to vote. We do not understand on basis on which this inference is made.

§908: Commenter asks if the wording in the first paragraph should be changed to “County Election Commission” rather than “County Board” to eliminate any confusion with the county Quorum Court or any other board the counties may have established?

In addition, should Voter Registration status, which forbids any person, convicted of a felony from voting be noted or referenced? These individuals are often registered in the correct precinct but have their voting rights restricted.

§910: Commenter asks “since the law allows voters to refuse to provide an ID at the poll, this section in effect suggests we (or the County Clerk) send a list of all voters who refused to provide ID to the Prosecuting Attorney. Is this realistic?”

§§ 900, 905, 907, 909: Essentially, commenter asserts that the proposed Rules on ...Provisional Voting that require the county election commission to sign off on each provisional ballot envelope indicating its determination regarding the validity of the provisional ballot is burdensome, particularly in primary and general elections. Commenter notes that their county received 638 provisional ballots in the 2012 general election and 485 provisional ballots in the 2014 general election.

## AGENCY’S RESPONSE TO COMMENTS

§901: The relevant portion of the proposed rule states:

### ***§ 901 Documentary Voter Identification***

*Poll workers must ASK all voters to provide one of the following forms of identification:*

- 1) A current and valid photo identification (such as a driver’s license),*
- 2) A copy of a current utility bill showing the voter’s name and address,*
- 3) A copy of a bank statement showing the voter’s name and address,*
- 4) A copy of a government check or paycheck showing the voter’s name and address, or*
- 5) A copy of a government document showing the voter’s name and address*

This portion of the rule is unchanged from several previous versions.

The suggested change is not necessary as the rule correctly states the statutory procedure. The goal of the comment is to make sure that poll workers do not mistakenly turn away voters for failure to show ID, a concern that is appropriately addressed in training materials.

§902: The relevant portion of the rule states:

*A. Voter's Name Missing*

*When a voter provides his or her name, address, and date of birth to a poll worker, and the voter's name is not on the precinct voter registration list, the poll worker must: ...*

This portion of the rule is unchanged from several previous versions.

This is an existing rule, and the SBEC has not proposed a change in this rule. Therefore, this comment is not germane to the rulemaking proposed by the board and the subject matter of this comment period. However, staff notes that the suggested change is not necessary. The commenter apparently believes that someone reading the rule would interpret it to require the voter to hand over a document stating the name address and date of birth of the voter. Staff believes that such an interpretation cannot be made in the context of these rules either as a definitional matter or by any reasonable legal interpretation.

However, use of the word “states” instead of “provide” would perhaps be a better way to say the same thing and the SBEC might want to consider that change as part of a future rulemaking.

§903: The relevant portion of the proposed rule states:

....  
*A poll watcher may list multiple sites on one poll watcher authorization form or write the word “all” in lieu of listing each polling site, if the poll watcher intends to be a poll watcher at multiple polling sites in the county.*

This rule is intended to regulate only those persons attending polls who represent a candidate, political party or issue group who are present to observe the voting process on behalf of their sponsors and who may challenge voters' eligibility. It is not intended to, and does not, regulate news media, who may be in polling places only with the permission and under any restrictions set by the county election commission under A.C.A. § 7-5-310(a)(3).

§907: The relevant portion of the proposed rule states:

**§ 907 Review of Provisional Ballots**

*The county board of election commissioners shall determine whether provisional ballots are valid before certifying the election.*

....  
*When reviewing the provisional ballot cast at the polls by a flagged first-time voter **who registered by mail** and did not meet the additional identification requirement when registering or voting, the county board should not base its initial determination of whether or not to count the ballot solely on the provisional voter's failure to meet the additional identification requirement. The provisional ballot should be rejected if there is a determination, independent of the failure to meet the additional identification requirement that the person who voted is not eligible to vote in the precinct.*

*When reviewing the provisional absentee ballot of a flagged first time voter **who registered by mail** and did not meet the additional identification requirement when registering or voting, the county board should not base its initial determination of whether or not to count the ballot solely on the provisional voter's failure to meet the identification requirement. The provisional ballot of a flagged first time voter should be rejected if the voter failed to provide the required*

*identification and there is a determination independent of the failure to meet the identification requirement that the person who voted is not eligible to vote in the precinct or that the person failed to meet any of the other statutory requirements that would cause a voter's absentee ballot to be rejected.*

The commenter states that “not all first-time voters register by mail,” and he suggests removing the phrase “who registered by mail” to avoid confusion. The comment seems to assume that first-time voters who register other than by mail (for instance, in person at the clerk’s office or in a voter registration drive) are subject to the voter ID requirement. This is not the case. Arkansas law requires that only first-time voters who register “by mail” and fail to include identification documents, their driver’s license number or the last four numbers of their social security number with their VR application to show ID or else vote a provisional ballot. See A.C.A. § 7-5-201(d); Amendment 51 Section 6(a)(7).

Commenter also questions whether the rule is consistent with state law because it allows “voters who did not provide ID either when registering or at the polls ... to vote.” The comment apparently refers to the rule forbidding the election commission from basing its determination on the voter’s provisional ballot solely on the ID requirement, and requiring that the commission instead determine whether the voter is eligible to vote in the precinct and has met other requirements of law.

This rule is based on A.C.A. § 7-5-308(d)(2) which states that “a provisional ballot shall be counted if it is cast by a registered voter and is the correct ballot, according to the precinct listed on the voter’s eligibility affirmation, for the precinct of the voter’s residence.” This is the only provision in the election code for assessing the validity of provisional ballots and nothing in the code suggests that a first-time voter’s provisional ballot can be treated differently.

#### §908 Hearing

In regard to commenter’s first comment, the relevant portion of the proposed rule states:

*Provisional voters shall be allowed to appear before the county board to contest the county board's initial decision to disqualify their ballots and to present evidence that they were registered to vote and voted the correct ballot for the precinct of their residence.*

Commenter suggests that the reference to “county board” be changed to “County Election Commission.” Staff recommends no change in this language. Due to the nature of these rules and the context in which the term “county board” appears here, the only reasonable legal interpretation is that this rule refers to the county board of election commissioners. These terms are used, in different variations, interchangeably throughout SBEC’s rules and there is no danger, in staff’s opinion, of a legal interpretation that would allow some county agency besides the county board of election commissioners to make the determination contemplated by the rule.

However, the SBEC might wish to consider standardizing the use of these terms in future rulemaking.

Commenter’s second suggestion apparently concerns the second paragraph of the rule, which provides for rejected provisional voters to present proof of registration in order to have their votes counted. Commenter suggests that the fact that a felon cannot be a registered voter should be referenced here.

Staff recommends no change in this rule. The suggested change is not necessary to allow a county board to reject a felon’s vote. A convicted felon who has not discharged his/her sentence would not be able to present evidence of a valid registration at a hearing conducted by the county board.

§910: The rule states:

*Following each election, the county board of election commissioners may review the precinct voter registration lists for voters not providing identification at the polls and forward the*

*information to the prosecuting attorney for investigation of possible voter fraud. If, upon examination of any provisional ballot, the county board suspects that a violation of election laws has occurred, the county board may refer the matter to the prosecuting attorney for that county.*

This is an existing rule, and the State Board has not proposed a change in this rule. Therefore, this comment is not germane to the rulemaking proposed by the board and the subject matter of this comment period. However, staff notes that the review of poll books by county election officials and supplying the prosecutor with information regarding voters who failed to provide ID **is not mandatory**, and that the rule is consistent with A.C.A. § 7-5-308(e).

§§ 900, 905, 907, 909:

Commenter suggests that the rules be amended to allow county clerks to certify the registration status of provisional voters either on the provisional ballot envelope or on a list, and allow the election commission to note its determination of the validity of provisional ballots either on the envelope or on a list. The changes to relevant rules are shown in the “Rule Changes as a Result of Comments” section below.

#### RULE CHANGES AS A RESULT OF PUBLIC COMMENTS

§§ 900, 905, 907, 909:

##### **§ 900 Definitions**

(a) *Provisional Voter Envelope* – an envelope used by poll watchers for voter challenges and by poll workers for voter qualification issues containing information relating to provisional voters, including a provisional voter’s eligibility affirmation, the reason for voting provisional, the ballot style voted, a space for the county clerk’s certification of the provisional voter’s registration status, and a space for the disposition of the provisional ballot upon review by the county board of election commissioners. A “provisional voter envelope” shall have printed on it all the information sought by Attachment “A”.

##### **§ 905 Voting a Provisional Ballot**

*Provisional ballots cast at the polls during early voting or on election day shall be handled as follows:*

- 1) *If as a result of a poll watcher challenge, the poll watcher must notify a poll worker of the challenge before the voter signs the precinct voter registration list and must complete a “challenged ballot form” (See Attachment “A”), and a poll worker must inform the voter that his or her ballot is being challenged*
- 2) *If as a result of failure to meet an identification requirement, a poll worker must inform the voter of the reason the voter is not allowed to cast a regular ballot.*
- 3) *The provisional voter must execute a written eligibility affirmation in the presence of the poll worker stating that he or she is both a registered voter in the precinct in which he or she desires to vote and eligible to vote in the election.*
- 4) *The poll worker shall initial the back of the ballot, remove the ballot stub from the provisional ballot, and place the stub in the stub box provided*
- 5) *The provisional voter shall mark his or her ballot.*
- 6) *The provisional voter shall place his or her voted ballot in a ballot secrecy envelope marked “PROVISIONAL BALLOT” and seal the envelope (nothing else goes in this envelope).*
- 7) *The provisional voter shall then place the sealed ballot secrecy envelope marked “Provisional Ballot,” containing his or her voted provisional ballot in a “provisional voter envelope”, seal it, and give it to the poll worker.*
- 8) *The poll worker must provide the provisional voter a copy of the notice prescribed in*

§906 (a).

- 9) *The poll worker must make and retain a separate list of the names and addresses of all persons casting a provisional ballot (see Attachment “B”).*
- 10) *The poll worker must preserve, secure, and separate all provisional ballots from the remaining ballot and forward all sealed “provisional voter envelopes” in a secured container provided for that purpose to the county board of election commissioners after the polls close.*
- 11) *The county board of election commissioners will forward in a secured container the sealed “provisional voter envelopes” to the county clerk’s office for certification of each provisional voters’ registration status.*
- 12) *Upon completion of the certification, the county clerk returns the secured container of sealed “provisional voter envelopes” to the county board for determination before certification of the election results as to whether the provisional ballots are valid and should be counted.*

*For an absentee ballot which becomes a provisional ballot, the absentee ballot canvassing official shall place the absentee ballot materials in a provisional voter envelope and should check the “Other” box and write the word “Absentee” next to the box marked “Other” on the form provided on the provisional ballot envelope (Attachment “A”). The absentee ballot canvassing official should also indicate the reason for making the absentee ballot provisional on the form provided on the provisional ballot envelope (Attachment “A”). When the absentee voter’s voter statement is inconsistent with the absentee ballot return envelope with regard to the identity of a bearer or agent the absentee ballot canvassing official should write “Inconsistent Bearer [or Agent]” after the word “Absentee” next to the “Other” box on the provisional ballot envelope.*

*When the absentee voter’s voter statement is inconsistent with the absentee ballot application the voter’s ballot is not counted.*

### **§ 907 Review of Provisional Ballots**

*The county board of election commissioners shall determine whether provisional ballots are valid before certifying the election.*

*The county board shall examine the sealed outer “provisional voter envelope” (see Attachment “A”), including the challenged ballot portion, if any, the eligibility affirmation of the provisional voter, if any, and the county clerk’s certification of the provisional voter’s registration status without unsealing the outer “provisional voter envelope” or removing or opening the inner ballot secrecy envelopes marked “PROVISIONAL BALLOT” containing the provisional voter’s voted ballot.*

*Based upon its examination of the “Provisional Voter Eligibility Affirmation,” the “Challenged Ballot Form,” if applicable, the “Reason for Voting Provisional,” the county clerk’s certification, and any additional information available, the county board shall make a determination of whether the provisional ballot was cast by an eligible voter and was the correct ballot for the precinct of the voter’s residence according to the precinct listed on the voter’s eligibility affirmation or the registration address of the absentee voter.*

*If the county board makes an initial determination that the provisional ballot will not be counted, the county board must notify the provisional voter of the reason for rejecting the provisional voter’s ballot and of the date, time, and place for a hearing and other information as provided in these rules before a final determination is made.*

*When reviewing the provisional ballot cast at the polls by a flagged first-time voter who registered by mail and did not meet the additional identification requirement when registering or voting, the county board should not base its initial determination of whether or not to count the ballot solely on the provisional voter’s failure to meet the additional identification requirement. The provisional ballot should be rejected if there is a determination, independent of the failure to meet the additional identification requirement that the person who voted is not eligible to vote in the precinct.*

*When reviewing the provisional absentee ballot of a flagged first time voter who registered by mail and did not meet the additional identification requirement when registering or voting, the county board should not base its initial determination of whether or not to count the ballot solely on the provisional voter's failure to meet the identification requirement. The provisional ballot of a flagged first time voter should be rejected if the voter failed to provide the required identification and there is a determination independent of the failure to meet the identification requirement that the person who voted is not eligible to vote in the precinct or that the person failed to meet any of the other statutory requirements that would cause a voter's absentee ballot to be rejected.*

*When reviewing the provisional ballot of any person who was delivered an absentee ballot according to the precinct voter registration list, but then chose to cast a provisional ballot at an early voting or election day polling site, the county board shall:*

- 1) Count the voter's absentee ballot rather than the provisional ballot cast at the polling site, if the absentee ballot was returned and processed for counting on election day before the time of counting provisional ballots, or*
- 2) Count the voter's provisional ballot cast at the polling site, if the voter's absentee ballot was not returned or was not processed for counting on election day by the time of counting provisional ballots.*

*The county board, through at least one of its members, must attest to the disposition of each provisional ballot, stating:*

- 1) Whether or not the ballot was counted, and*
- 2) If rejected, the reason for not counting the ballot.*

*The county board shall notify each provisional voter by first class mail as to whether or not his or her provisional ballot was counted.*

## **§ 909 Counting Provisional Ballots**

Provisional ballots are counted as follows:

- 1) the commission, through at least one of its members, either completes the election commission's portion of the list of provisional voters form from each precinct (see Attachment "B") or attests to a comprehensive list that shows the disposition of each provisional ballot in the election,*