

# STATE BOARD OF ELECTION COMMISSIONERS

501 Woodlane, Suite 401N  
Little Rock, Arkansas 72201  
(501) 682-1834 or (800) 411-6996

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## RULES ON POLL WATCHERS, VOTE CHALLENGES, AND PROVISIONAL VOTING

The State Board of Election Commissioners held a public hearing on July 6, 2011 following a thirty-day public comment period to adopt revisions to the “Rules on Poll Watchers, Vote Challenges, and Provisional Voting” that set forth the procedures for poll watchers, challenging votes, and for issuing, processing, and counting provisional ballots. Below is a summary of the initial revisions that were approved by the Board on May 25, 2011 for the public comment period, followed by a list of persons commenting on the rule, a summary of the comments, the agency’s responses to the comments, and the changes to the rules as a result of the public comments.

Initial changes included: 1) changing the title and “Scope of Rules” section of the rules from “Rules on Provisional Voting” to more accurately reflect the full scope of these rules; 2) addressing a legislative change in the definition of “County Board of Election Commissioners”; 3) revising the definitions of “Poll Watcher” and “Poll Watcher Authorization Form” to comport with subsequent revisions dealing with a candidate’s ability to be a poll watcher; 4) clarifying that candidates may not be poll watchers and challenge votes at early voting but may be present to observe, in line with code provisions; 5) providing for certain restrictions on candidates who are present as observers at early voting; and 6) changes in language for clarity.

### PERSONS COMMENTING ON THE RULE

Stu Soffer (email: Friday, June 03, 2011)  
Garland County Election Commissioner Twila Brown (email: Monday, June 13, 2011)  
Jefferson County Board of Election Commissioners (fax: Thursday, June 23, 2011)  
Pope County Election Commissioners (email: Friday, June 17, 2011)  
Stone County Election Commissioner Vern Humphrey (email: Sunday, June 12, 2011)  
Washington County Election Coordinator Jennifer Price (email: Thursday, June 23, 2011)  
Chase Dugger, Executive Director of the Republican Party of Arkansas (email: Friday, June 24, 2011)

### SUMMARY OF COMMENTS

Rule 900(i) regarding the definition of First-time Voter Registered by Mail on page 4:  
A comment was made about the probabilities of voter fraud in voter registrations resulting from voter registration drives being treated as delivered in person and, therefore, eliminating the requirement that the individuals show identification when voting for the first time – a request was made that the appropriate references in the code or constitution be provided or the statement deleted from the rule.

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Another comment made on the definition was that a person who provides a social security or driver's license number on an application is not automatically considered as having provided identification – that the license or social security number must be matched “with an existing state identification record bearing the same number, name and date of birth as provided in the registration.” A request was made that the sentence be changed to comply with the Arkansas Code that states that “First-time voters registered by mail” who provided a driver's license number or the last four (4) digits of their social security number on their voter registration form are considered as having provided identification if a state or local election official can match the driver's license or social security number with an existing state identification record bearing the same number, name and date of birth as provided in the registration. It was also recommended that the last sentence in paragraph (i) be omitted since there is nothing in the Arkansas Code which allows an exception for “registration applications arriving in bulk” or “delivered by leaders of voter registration drives” to be considered to have been delivered in person and therefore not subject to the identification requirement and since the statement is not consistent with Arkansas or Federal law. (See Agency's Responses and Rule Changes below)

Rule 903B regarding Poll Watcher Challenges on page 8: A comment was made stating that the proposed change that adds the word “ineligible” should not be made on the grounds that the poll watcher can challenge not only ineligible votes, but those who have previously voted in the election. While it can be argued that both are “ineligible” the statute uses the word “eligible” only with a voter who is at the wrong precinct. Ark. Code Ann. § 7-5-313 (g) (**should be 7-5-312**) states: “A poll watcher may challenge a voter only on the grounds that the voter is not eligible to vote in the precinct or that the voter has previously voted at that election.” (See Agency's Responses below)

Rule 906 regarding Notice to Provisional Voters beginning on page 9: Comments were made regarding the use of the terminology “provide” versus “give” with regards to notifying a provisional voter on election day and whether a county violates the Help America Vote Act (HAVA) if its poll workers do not hand the voter a separate piece of paper to take home that tells the voter that he/she will be notified by mail. Requests were made to amend Rule 906 to require that poll workers give provisional voters a piece of paper to take with them telling them the reason they had to vote provisionally and telling them how they will be notified whether their vote was counted and if not, the reason it was not. A comment was made that there is not a great deal of difference between the words “give” and “provide” according to Webster's Dictionary. (See Agency's Responses below)

Rule 907 regarding Preliminary Review of Provisional Ballots beginning on page 10: A comment was made that the sixth paragraph under this section should be deleted because the language goes beyond the scope of the law and inappropriately opens the door for fraud by not following the clear Arkansas law concerning identification by first-time voters. It was recommended that the language in the rules that reads, “When reviewing the provisional ballot of first-time voter who registered by mail and did not provide identification when registering or voting, the county board should not base its preliminary determination of whether or not to count the ballot solely on the provisional voter's failure to provide identification. The provisional ballot should be rejected

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only if there is an indication, independent of the failure to show identification, that the person who voted is not the person who registered. The county board must notify the provisional voter of his or her right to a hearing before a final determination is made.” be deleted since Arkansas law clearly requires identification for first-time voters and this language is contrary to the Arkansas law. (See Agency’s Responses below)

Rule 908 regarding a Hearing on page 11: The rule requires that provisional voters be notified by phone, if feasible, and mail of their opportunity for a hearing if their vote was rejected. A comment was made that notification by mail should be sufficient without placing an unnecessary burden on election staff to call the voters. (See Rule Changes below)

AGENCY’S RESPONSES TO COMMENTS

With regard to Rule 900(i) regarding the definition of First-time Voter Registered by Mail and the issue of first-time voters whose registration application is delivered “in bulk ... or by leaders of voter registration drives”, staff would note that the law requires documentary identification for a “first-time voter who *registers by mail*” in order for the voter to vote a regular (as opposed to provisional) ballot. 7-5-305(a)(8)(B)(ii) (emphasis supplied). Additionally, Amendment 51 to the Arkansas Constitution requires the VR form to contain a statement informing first-time voters without a valid DLN or SSN that “if your ... form is *submitted by mail* ...” (emphasis supplied) the voter must submit documentary identification in order to avoid “additional identification requirements” when voting for the first time. Section 6(a)(7)(C). Staff suggests that the rule be changed to clarify that if the application arrives in a bulk *mailing*, then the id requirement applies. The comment offers no support, however, for the proposition that applications that arrive by any method except by mail are subject to the documentary identification rule. If the rule is to be changed, legislative action is required.

Rule 903B regarding Poll Watcher Challenges: Staff interprets 7-5-312(g) to allow a poll watcher to challenge a voter on *any* eligibility grounds (felon status, age, citizenship, mental incompetence, etc, See Amendment 51 Section 11), not just residency. Including the word “ineligible” only serves to clarify that the challenge must be based on eligibility to vote, whether because of one of the Amendment 51, Section 11 eligibility rules or because the voter has previously voted. It should be noted here that not all voters who have previously cast a ballot in an election are ineligible to vote at their polling places on election day. A voter who casts an absentee ballot may nonetheless cast a provisional ballot at early voting or at the voter’s poll on election day, 7-5-305(a)(11). See Rule 907 regarding counting of such ballots.

Rule 906 regarding Notice to Provisional Voters: Legal Counsel addressed the legal notification requirements under HAVA, the affirmation form that is signed by the voter at the poll upon casting a provisional ballot that contains the federally-required written information, and the Secretary of State’s free access system that requires each county board to notify each provisional voter by first class mail whether his or her vote was counted and if not, the reason not counted. It is the opinion of Legal Counsel that since Arkansas has chosen a procedure of automatic notification that requires no action by the voter to determine whether his or her vote was counted, a separate piece of paper provided by the poll worker to the voter on election day is not legally required.

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The sixth paragraph of Rule 907 regarding Preliminary Review of Provisional Ballots only applies to voters who register by mail and do not have a valid DLN or SSN. Staff provides the following information about the rule as written:

The federal Help America Vote Act sets out the ID requirement for such voters but does not prohibit states from *counting* votes cast by such voters without documentary ID. State rules are to guide that decision; HAVA does not. The election code provides that a provisional ballot shall be counted if cast by a registered voter who voted at the voter's correct precinct. 7-5-308(d). Regarding first-time voters who vote at the polls, it should be noted that those voters are subject to the same ID requirement as other voters – they must state their address and date of birth, which must match the address and date of birth for the voter on the voter rolls. They must sign or make their mark on the voter list, and present documentary identification if they are able to do so. If they don't have documentary ID, this fact is noted on the voter list and the county election commission may turn their name over to the prosecutor if it suspects foul play. See 7-5- 305. Regarding first-time voters who vote absentee, the county clerk must be satisfied that the absentee ballot application is properly signed by the voter and that the voter is a qualified registered elector in the precinct. 7-5-409(a). Such an absentee ballot is counted only if the signature, name, date of birth and address on the voter statement and the absentee ballot application are the same.

### RULE CHANGES AS A RESULT OF PUBLIC COMMENTS

Rule 900(i): Amend the definition of First-time Voter Registered by Mail, pursuant to A.C.A. § 7-5-201(d)(2)(F), to read as follows:

- (i) First-time Voter Registered by Mail – any registered voter, except those exempted by Arkansas Code Annotated § 7-5-201(d)(2), who has not previously voted in a federal election in the state and whose registration application arrived at the county clerk's office or Secretary of State's office by mail.<sup>7</sup> “First-time voters registered by mail” who do not provide identification when registering are flagged by the county clerk for the identification requirement. “First-time voters registered by mail” who provided a valid driver's license number or the last four (4) digits of their social security number on their voter registration application form are considered as having provided identification if a state or local election official can match the driver's license or social security number with an existing state identification record bearing the same number, name and date of birth as provided in the registration. Registration applications arriving in bulk by means other than the mail at the registrar's office or delivered by leaders of voter registration drives are considered to have been delivered in person, not by mail, and are, therefore, not considered “first-time voters registered by mail” and not flagged by the county clerk for the identification requirement.

Rule 908 regarding a Hearing: Amend to read, “Having notified each provisional voter by first class mail of its preliminary determination and of a right to a hearing, the county board shall, as expeditiously as possible by telephone, if ~~feasible~~ necessary to provide sufficient notice, notify the provisional voters whose ballots were preliminarily rejected of the date, time, and place for a hearing to be held before a final determination is made.”