

DIRECTIVE 2008-81

September 5, 2008

TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

RE: Guidelines for Provisional Voting

This directive supersedes Section III appearing on page 9 of Directive 2007-06. This directive is intended to clarify Ohio's provisional voting requirements as applied by Ohio's boards of elections, Ohio election officials and poll workers in Ohio.

During the 2006 general election, 21% of all provisional ballots cast throughout Ohio were rejected (23,062 out of 106,212). While the percentage of Ohio voters having to cast provisional ballots has decreased, as has the percentage of voters whose provisional ballots have been rejected, reducing the number of provisional voters will aid enfranchisement for all electors. Prior to Directive 2007-06, many instructions or the lack thereof erred in favor of having a voter cast a provisional ballot, when not at all times was this necessary. Ohio's requirements for processing provisional ballots require the expenditures of both voter and poll worker time on Election Day and can add to the length of time it takes to vote, slowing down the process for other voters as well. Unnecessary provisional ballots increase the administrative time and effort for boards of elections after Election Day and increase the anxiety for voters who are uncertain whether their vote counted.

All boards of elections shall implement the instructions provided in this directive.

The Secretary of State's office has incorporated the instructions contained in this directive in its Poll Worker Manual of Instructions and its Poll Worker Quick Reference Guide, which is provided to boards of elections and referenced in Directive 2008-77. Presiding judges must be provided with a copy of this directive, and the Secretary of State's office offers further assistance to boards of elections in interpreting or applying this directive through the elections attorneys at the Secretary of State's office assigned to county boards of elections.

CONTINUING PROHIBITION AGAINST PROVISIONAL VOTING ON DRE'S

No person, other than a person eligible to vote on a DRE because of a disability, may vote a provisional ballot on a DRE machine. Voting provisional ballots on DRE machines has been prohibited since May 9, 2007, and that prohibition remains in place. All provisional ballots must be cast on paper optical scan ballots regardless of the type of voting machine or method used for regular voting.

This prohibition is based on the difficulty of conducting recounts using VVPATs containing provisional ballots (as evidenced by the procedures set forth in prior Directive 2006-05) and based on the risks to the secrecy of the ballot created by those procedures and VVPAT technology (resulting in failure to randomize first voted ballots).

GENERAL RULES FOR PROVISIONAL VOTING

Ensure Voters are in the Correct Precinct or Location

Generally speaking, on any given Election Day Ohioans must cast their ballots, whether regular or provisional, at their assigned precinct polling locations. More specifically, federal law, Ohio law and federal case law provide that boards of elections cannot count provisional ballots cast in a precinct to which the voter has not been assigned, in a precinct that is not assigned to the voter's current residence address or at a board of elections office on Election Day, unless the law allows for the voter to cast a provisional ballot there.

The single most common reason provisional ballots cast in Ohio are rejected by boards of elections is that the voter cast the provisional ballot at an incorrect location. During the 2006 general election, 46% (10,610) of the provisional ballots rejected statewide were rejected for being cast in an incorrect precinct.

For this reason, **before any poll worker or election official offers a voter a provisional ballot, that poll worker or election official must first seek to ensure that the voter is in his or her correct precinct or voting location** based on the voter's situation calling for voting a provisional ballot and the voter's current residence address. Poll workers or election officials assisting voters with provisional ballots must verify what are the voters' correct precincts or voting locations **by referring to a "precinct voting location guide."** **Every board of elections must ensure that its office and every precinct in every polling location in the county are equipped with a precinct voting location guide, pursuant to R.C. 3505.181(C) and (E).**

If the voter is not in the correct precinct, the poll worker is required to determine the correct precinct for the voter based on the current residence address provided, AND must advise the voter of both of the following:

- that the voter is in an incorrect precinct; and
- the location of that voter's correct polling location and precinct, as determined by referring to the precinct voting location guide and/or in consultation with the county board of elections, if appropriate.

If the voter clearly indicates to the election official that the voter still desires to vote in that precinct, the election official must notify the voter of both of the following:

- The voter has the right to cast a **provisional** ballot at that precinct; **AND**
- That, according to law, all provisional ballots cast at an incorrect precinct **shall not** be counted.

TIME FRAME AND LOCATIONS FOR PROVISIONAL VOTING

Before Election Day

For any election other than a presidential primary election, provisional voting begins twenty-eight (28) days before the election. R.C. 3503.16(B), (C). For presidential primary elections, provisional voting begins twenty-five (25) days before the election.

Any voter needing to vote a provisional ballot may do so by appearing “at anytime during regular business hours on or after the twenty-eighth day prior to the election in which that registered elector wishes to vote . . . through noon of the Saturday prior to the election at the office of the board of elections,” or “at any time during regular business hours on the Monday prior to the election at the office of the board of elections . . .”

On Election Day

Certain Persons Permitted to Vote at Board of Elections Offices on Election Day

Generally speaking, on Election Day Ohioans may not vote at a board of elections office.

More specifically, under Ohio law no one may cast a regular ballot at a board of elections office on Election Day, and only certain people may cast provisional ballots at a board of elections office on Election Day. Those persons are:

ELECTORS WHO MOVE FROM ONE PRECINCT TO ANOTHER WITHIN A COUNTY: Registered electors who **move from one precinct to another within a county** and who, on or before the day of a general, primary, or special election, have not filed a notice of change of residence address with the board of elections at least 30 days before the election. Such voters must also complete a voter registration change of address form. Such voters may vote either at the polling location for their current residence address or at the board of elections office;

ELECTORS WHO MOVE FROM ONE PRECINCT TO ANOTHER WITHIN A COUNTY AND CHANGE THEIR NAME: Registered electors who **move from one precinct to another within a county** and who, on or before the day of a general, primary, or special election, have not filed a notice of change of residence address with the board of elections at least 30 days before the election **and** who have **changed their name** and have not filed a notice of change of name with the board of elections at least 30 days before the election. Such voters must also complete a voter registration change of address form and a voter registration change of name form. Such voters may vote on either at the polling location for their current residence address or at the board of elections office;

ELECTORS WHO MOVE FROM ONE COUNTY TO ANOTHER COUNTY WITHIN OHIO: Registered electors who **move from one county to another county within the state** on or before the day of a general, primary, or special election and have not registered to vote at least 30 days before the election in the county to which that registered elector moved. Such voters must also complete a voter registration change of address form. Such voters may vote on either at the polling location for their current residence address or at the board of elections office.

Those persons listed immediately above must vote a provisional ballot. They may vote their provisional ballot at a board of elections office or at the correct precinct polling location.

Persons Required to Vote at Precinct Polling Location on Election Day

ELECTORS WHO CHANGE THEIR NAME BUT HAVE NOT MOVED: Registered electors who present themselves to vote on Election Day who **changed their name** on or before the day of a general, primary, or special election, and who have not filed a notice of change of name with the board of elections at least 30 days before the election, **and did not move**, must appear at their **assigned precinct polling location**. They must, in addition to voting a provisional ballot, complete a voter registration change of name form.

ELECTORS WHO HAVE MOVED WITHIN A PRECINCT (NO NAME CHANGE): Registered electors who present themselves to vote on Election Day who **moved within a precinct** on or before the day of a general, primary, or special election, and who have not filed a notice of change of residence address with the board of elections at least 30 days before the election, must appear at their assigned precinct polling location. They may vote a **regular ballot** and must complete a voter registration change of address form.

REGULAR VOTERS: Voters who are voting a regular ballot on Election Day must vote in their assigned precinct, unless a court order provides otherwise (e.g. in the event a court order were issued because flooding or other natural disaster would prevent the voter from reaching his or her assigned precinct polling location.)

OTHER REASONS REQUIRING THE CASTING OF A PROVISIONAL BALLOT

1. Voter's name does not appear in poll list

A voter whose name does not appear in the poll list or signature poll book must vote a provisional ballot. The general rules for provisional voting must be followed.

2. Voter lacks required identification to vote a regular ballot

All voters who present themselves to vote **at a polling place on the day of an election** must provide one of the acceptable forms of identification as is described in Directive 2008-80, prescribing requirements for voter identification for voting. A voter who is unable or unwilling to provide any of these forms of ID may still, under the law, vote a **provisional** ballot. In some cases provisional voters must provide required ID to the board of elections no later than 10 days after the election for their ballots to count.

3. Returned Notices from Board of Elections

Returned Acknowledgement Notice

If a board of elections has sent a newly registered voter an acknowledgement by nonforwardable mail as is required by law, and if that notification has been returned to the board of elections as undeliverable, the board of elections is obligated to investigate and send a confirmation notice to the voter's correct address.

If that confirmation notice is also returned to the board of elections as undeliverable, then at the first election thereafter, at which the voter named in the acknowledgement notice and confirmation notice seeks to vote, that voter must provide election officials with one form of the required identification and must vote a **provisional** ballot.

Returned Notice of Election

This section of this directive applies only to the November 2008 general election because the relevant provisions of R.C. 3501.19 do not apply to any subsequent election, unless subsequently extended by the Ohio legislature.

On the sixtieth (60th) day before General Election, every board of elections is required by law to send every registered voter in the county a Notice of Election by nonforwardable mail. The requirements of that notice are set forth in R.C. 3501.19(A).

If a voter's Notice of Election is returned to the board of elections as undeliverable, that voter's name shall be so marked in the poll list or signature poll book.

At the first election thereafter, at which the voter named in the returned Notice of Election seeks to vote, that voter must provide election officials with one proper form of identification (see Directive 2008-80). However, **in this limited circumstance**, any form of identification (even an Ohio driver's license or state ID card) must contain the **current address that matches the address shown for the voter in the poll list or signature poll book** for the voter to be permitted to cast a **regular** ballot. Otherwise, the voter must vote a **provisional** ballot. See R.C. 3501.19(C).

4. Voter Requested an Absent Voter's Ballot but Appears on Election Day or Before to Vote In Person

If a voter has requested an absent voter's ballot, his or her name must be marked to that effect in the poll list or signature poll book to prevent a voter from both voting an absentee ballot before Election Day and voting a regular ballot when appearing in person to vote on Election Day. Any voter whose name is so marked and who appears and attempts to vote at a polling location, including at the board of elections, whether on or before the date of an election, must vote a **provisional** ballot.

5. Challenged Voters

If election officials cannot determine a voter's eligibility to vote, or if a voter does not appear to be eligible to vote and that voter insists on voting, that voter must cast a **provisional** ballot. R.C. 3505.20

If an application for the correction of a precinct registration list is filed or if a challenge to a voter's right to vote is filed, after the thirtieth (30th) day before the day of an election, the law provides that the board may postpone the hearing on the filing until after the election.

The Secretary of State has advised in Advisory 2008-23 that boards should not postpone such hearings but rather hold a hearing to provide each voter due process in the event the board seeks to remove a voter's name from the list of registered voters or the signature poll book

A voter seeking to vote a party ballot at a primary election who refuses to make a statement of party affiliation (e.g. to complete Form 10X or 10W) and who a majority of precinct officials find either lacks the qualifications to vote or is not affiliated with the party whose ballot the voter desires to vote must cast a **provisional** ballot.

6. Non-Matching Signature

If the election officials determine that the signature of an individual who appears and attempts to vote does not match the signature on file for that voter, that voter must cast a **provisional** ballot. **However**, if the voter has a form of identification as set forth in Directive 2008-80 on Voter Identification his or her name and current address appearing in the poll list or signature poll book, election officials are discouraged from determining that the voter must vote a provisional ballot. H.B. 3 recognizes that a voter's signature may change over time and permits a voter to update his or her signature in the records of the board of elections. Nevertheless, in the case where there may be two individuals in the same household with the same name (e.g. "senior" and "junior"), election officials may with justification determine that a provisional ballot must be cast by that voter.

PROVISIONAL BALLOT AFFIRMATION STATEMENTS

Generally

Every voter who votes a provisional ballot must seal his or her provisional ballot in an envelope provided by the election officials administering the election. The envelope, as required by statute, must contain an **affirmation that must be executed by the voter for the vote to count**. The voter must sign the affirmation, which **must state both that**:

- **The voter is a registered voter in the jurisdiction in which the individual desires to vote; and**
- **The voter is eligible to vote in that election.**

Additionally, please note that other spaces may be provided on the envelope for information such as the voter's date of birth, the voter's current and former addresses, the voter's driver's license or state ID card number, or the last four digits of the voter's Social Security number.

Poll workers must ask every provisional voter to complete this additional information. While Ohio law does not specifically require that provisional voters complete this additional information, boards of elections may need it to verify the voter's identity before the vote may be counted.

If the voter does not provide required identification, including some of the additional information referred to above, either at the polling place or at the board of elections within ten (10) days after the election (see below), and the voter's identity cannot be verified using the information provided by the voter, the vote is not permitted by law to be counted.

Additionally, election officials must record, in the section of the provisional ballot ID envelope or form designated for election official use, all of the following that apply for every provisional voter:

- The **type of ID** provided, if any;
- The **last four digits of that voter's Social Security number**, if provided;
- The fact that the **affirmation** noted above was **executed**, if applicable; or

- That the voter **refused** to execute the affirmation.

The above information must be included with the voter's ballot if a provisional ballot is voted, or with the voter or address record information when transmitting ballots and materials to the county board of elections.

Reminder: Election officials must provide to every provisional voter a copy of the Provisional Voter Hotline Notice at the time the voter casts his or her provisional ballot. A copy of that notice is attached to this directive for your reference.

Provisional Ballot Affirmation Statements as Voter Registration Forms

The Secretary of State prescribed Provisional Ballot Affirmation Statement serves multiple purposes. For several years the form has served as a change of name or change of address form for already registered voters in addition to serving as an affirmation. However, the form has not served as a voter registration form for new voters. Because one of the leading statewide causes for rejection of provisional ballots has historically been that the person who voted the provisional ballot was not registered to vote, the most recent revision of the affirmation statement form (in June of 2008) also allows the form to be used as a voter registration form for new voters, if necessary.

Thus, while a provisional ballot cast by someone not registered to vote still cannot count, boards of elections may now use the information provided by the person who completed the form to register that person to vote for subsequent elections.

PROVIDING PROOF OF IDENTITY WITHIN 10 DAYS AFTER THE ELECTION

Before a provisional ballot can be included in the official count of an election, the board of elections must confirm the voter's eligibility to cast the ballot, as well as the validity of the ballot that was cast. In some cases, a provisional voter can establish his or her eligibility to vote by appearing in person at the board of elections office within 10 days immediately *after* Election Day and doing the following:

If the voter cast a provisional ballot because he or she **had – but could not provide to election officials at the time of voting – a required form of identification or the last four digits of his or her Social Security number**, the voter must provide to the board of the elections **one** of the following:

- **Required identification described in Directive 2008-80 on Voter Identification; or**
- **The last four digits of the voter's Social Security number.**

If the voter cast a provisional ballot because, at the time he or she voted, he or she **had – but declined to provide – a required form of identification or the last four digits of his or her Social Security number**, AND the voter **declined** to execute the written **affirmation statement**, the voter must provide to the board of the elections **one** of the following:

- **Required identification described Directive 2008-80 on Voter Identification; or**
- **The last four digits of the voter's Social Security number.**

If the voter cast a provisional ballot because, at the time of voting, he or she **did not have any required form of identification or a Social Security number**, **AND** the elector **declined** to execute the written **affirmation statement**, the elector must do **one** of the following:

- **Required identification described in Directive 2008-80 on Voter Identification; or**
- **The last four digits of the voter's Social Security number; or**
- **Complete the affirmation statement.**

If the voter cast a provisional ballot because the voter's right to vote was **challenged** at the polling place under **R.C. 3505.20**, and the election officials either determined that the voter was ineligible to vote, or they were unable to determine the voter's eligibility, the voter must **provide identification or other documentation required to resolve the challenge, relevant to the nature of the challenge.**

If you have questions about this directive, please contact your assigned elections counsel at 614-466-2585.

Sincerely,

Jennifer Brunner