

DIRECTIVE 2008-69

August 21, 2008

TO: All County Boards of Elections

RE: Remake of Optical Scan Ballots

This directive provides instructions to boards of elections on the proper procedure to remake optical scan ballots that cannot be accurately read by automatic tabulating equipment. Our intent is to ensure every valid cast ballot is properly counted. It is important that such valid cast ballots may be counted by automatic tabulating equipment to assure a uniform method of tabulating ballots in an election.

There are several reasons why an optical scan ballot may not be readable by automatic tabulating equipment. For example, a voter may have marked the ballot in a different manner than provided in the instructions printed on the ballot; the timing marks on the ballot may not have been properly aligned with the voting marks; or the ballot may have been folded, torn or mutilated.

To provide an efficient procedure for board members to confirm which ballots must be remade, designated team(s) consisting of an equal number of board employees from each major political party may stack like ballots into separate ballot stacks for board members to review. For example, all ballots that have been marked correctly, but are torn or mutilated may be placed in one stack. Another stack could consist of ballots that voters have consistently circled all the ovals instead of filling in the oval. These stacks can then be presented to the board members for confirmation of voter intent.

Confirming Voter Intent Where Voter has Followed Instructions – Folded, Torn or Mutilated Ballot; or Misaligned Timing Marks on Ballot

If an equal number of board employees from each major political party determine that a voter has marked his or her ballot according to the ballot marking instructions contained on the ballot, but the ballot is unreadable by automatic tabulating equipment because the ballot is folded, torn or mutilated, or the timing marks on the ballot are misaligned, the board employees may remake the ballot in anticipation of board determination of voter intent.

- **Procedures For Remaking an Optical Scan Ballot Where Voter has Followed Instructions**

If the board of elections staff has determined a ballot needs to be remade because the automatic tabulating equipment cannot read it, the board staff must abide by the following procedures:

1. An equal number of board employees from each major political party should remake the ballots.

2. One member of the team shall read the voter's choice for a particular office or question/issue.
3. The other member shall fill in the corresponding oval or complete the appropriate arrow for the voter's choice.
4. The original ballot shall be marked with an identifying mark or code such as "OVB1" (Original Voted Ballot 1).
5. The remade ballot shall be marked with an identifying mark or code to identify this remade ballot with the original ballot such as "RB1" (Remade Ballot 1).
Note: Place the identifying mark or code in an area on the ballot that will not interfere with the tabulation process.
6. Once all the selected ballots have been properly remade, the original ballots and the remade ballots shall be presented to the board for confirmation of voter intent.

No remade ballot may be tabulated unless and until the board of elections has, by majority vote in public session, confirmed or determined voter intent. The board of elections, by majority vote in public session, must still *confirm* voter intent prior to the remade ballots being tabulated.

Determining Voter Intent Where Voter Fails to Follow Instructions

R.C. 3506.21 authorizes a board of elections to determine the intent of a voter who marked his or her entire ballot contrary to the instructions contained on the ballot and remake the ballot to reflect that intent.

However, it is important to note that this statute prohibits a board from determining voter intent and remaking a ballot if the voter marked part of that ballot according to the ballot marking instructions contained on the ballot, and part of the ballot contrary to those instructions. (R.C. 3506.21(B)(2).) Under this scenario, the board shall tabulate the ballot using the automatic tabulating equipment, which will record only the votes that the voter marked in accordance with the ballot marking instructions contained on the ballot.

Thus, in accordance with R.C. 3506.21(B)(1), if a voter did *not* mark any of the ballot according to the ballot marking instructions contained on the ballot, the board of elections, by majority vote in public session, must *determine* voter intent prior to remaking the optical scan ballot. Voter intent is determined by examining the ballot for a consistently made mark contrary to voting instructions.

If a voter marks the entire ballot contrary to the instructions contained on the ballot, R. C. 3506.21(B)(1) provides the following for determining voter intent on that ballot:

(B)(1) *** any of the following marks, if a majority of those marks are made in a consistent manner throughout an optical scan ballot, shall be counted as a valid vote:

- (a) A candidate, question, or issue choice that has been circled by the voter;
- (b) An oval beside the candidate, question, or issue choice that has been circled by the voter;
- (c) An oval beside the candidate, question, or issue choice that has been marked by the voter with an "x," a check mark, or other recognizable mark;
- (d) A candidate, question, or issue choice that has been marked with a writing instrument that cannot be recognized by automatic tabulating equipment.

Once voter intent is determined by a majority of board members in public session, the board shall then follow the procedures for remaking the optical scan ballot contained in this directive.

- **Procedures For Remaking an Optical Scan Ballot Where Voter Fails to Follow Instructions**

If the board of elections has determined a ballot needs to be remade because it could not be read accurately by the automatic tabulating equipment used for counting optical scan ballots, and a majority of board members has *confirmed* or *determined* voter intent in public session using the guidelines contained in this directive, the board must abide by the following procedures:

1. The board of elections must chose team(s) consisting of an equal number of board employees from each major political party to remake the ballots.
2. One member of the team shall read the voter's choice for a particular office or question/issue.
3. The other member shall fill in the corresponding oval or complete the appropriate arrow for the voter's choice.
4. The original ballot shall be marked with an identifying mark or code such as "OVB1" (Original Voted Ballot 1).
5. The remade ballot shall be marked with an identifying mark or code to identify this remade ballot with the original ballot such as "RB1" (Remade Ballot 1).
Note: Place the identifying mark or code in an area on the ballot that will not interfere with the tabulation process.
6. Once all the selected ballots have been properly remade, the ballots shall be tabulated.

No remade ballot may be tabulated unless and until the board of elections has, by majority vote in public session, confirmed or determined voter intent.

If Voter Intent Cannot Be Determined

If a majority of the board members cannot agree on determining voter intent as to any choice on the ballot as provided by law, the ballot shall not be counted.

Retention of Original and Remade Ballots

All boards of elections remaking any ballots under these procedures shall, after tabulation, attach together both the original voted ballot and the corresponding remade ballot and keep both for the duration of the applicable document retention period.

If you have questions concerning this directive, please contact the elections counsel assigned to your county.

Sincerely,

Jennifer Brunner