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DIRECTIVE 2012-01

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To: COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

Re: Determining the Validity of Provisional Ballots

SUMMARY

During the 2011 election year, a number of county boards of elections contacted this office with questions about how to process provisional ballots. Inevitably, 2012 will bring more provisional ballots and those ballots will be critical to determining the contest outcomes. This Directive introduces a revised simplified provisional ballot affirmation statement for the front of the provisional ballot envelope and a typical registration form to register or update information on the back of the provisional ballot envelope. Additionally, the Directive is issued to provide **uniformity** across Ohio's 88 county boards of elections in reviewing provisional ballot affirmations (provisional envelopes) to determine the validity of the ballots (counted) by providing county boards of elections with a **mandated** 5-step procedure.

PROVISIONAL BALLOT IDENTIFICATION ENVELOPE

Attached are a simplified provisional ballot affirmation statement for the front of the provisional ballot envelope and the registration form for the back of the provisional ballot envelope. All boards must use this updated material for the November 6, 2012 general election. I also encourage the boards to use the update material for the March 6, 2012 primary election. However, if boards have the current provisional ballot material in stock, the board may vote to use the remaining inventory for the 2012 primary election.

The provisional ballot envelope is also available at:

<http://www.OhioSecretaryofState.gov/sos/upload/elections/forms/12-B.pdf>

GENERAL REMINDERS ON PROCESSING PROVISIONAL BALLOTS

- Boards of elections may begin examining provisional ballot envelopes the day after the election.¹
- The board of elections must adopt a provisional ballot policy, under which they may designate bipartisan teams to examine and categorize provisional ballot envelopes; however, **only the board members themselves** determine the validity of each provisional ballot.
- A board of elections must not start counting **ANY** provisional ballot until **AFTER** the board members themselves have determined the validity or invalidity of **ALL** provisional ballots cast in that county.²

¹ R.C. 3505.183(E)(1)

² R.C. 3505.183(D)

- Boards must complete the examination and counting of provisional ballots no later than the twenty-first day after the election.³

DETERMINING THE VALIDITY OF PROVISIONAL BALLOTS

Step 1: Determine whether the affirmation statement provided on the provisional ballot envelope contains **both**:

- a) the voter's printed name on the provisional ballot envelope and;
 - b) either a valid **signature** after the affirmation or a note by the precinct election official on the signature line – that the voter **declined** to execute an affirmation.
- If the affirmation statement **contains both** the voter's printed name and either a valid signature or a note on the signature line that the voter declined to sign, then proceed to Step 2;
 - If the affirmation statement **does not contain both** the voter's printed name, a valid signature, or declination, but the voter provided last 4 digits of the voter's Social Security Number, then proceed to Step 2 (see NEOCH page 5);
 - If the affirmation statement **does not contain both** the voter's printed name and either a valid signature or declination, and the voter did not provide the last 4 digits of voter's Social Security Number as identification, then the Board must **reject the provisional ballot.**⁴

Step 2: Determine whether the provisional voter was **required** to provide additional information to the board of elections within ten days after the election.

There are **only four** reasons⁵ to require a provisional voter to provide additional information to the board of elections during the ten days after the day of an election:

1. The voter **possesses** a SSN or proper identification, but was **unable**⁶ to provide it to the precinct election official;
2. The voter **possesses** a SSN or proper identification, but **declined**⁷ to provide it to the precinct election official;
3. The voter **does not possess**⁸ a SSN or proper identification, and refused to sign a SOS Form 10-T;
4. The voter was **challenged**⁹ at the polling place and his or her eligibility to vote could not be determined by the precinct election officials;

³ R.C. 3505.32(A)

⁴ R.C. 3505.183(B)(4)(a)(iii)

⁵ R.C. 3505.181(B)(8)

⁶ R.C. 3505.181(A)(3)

⁷ R.C. 3505.181(A)(13)

⁸ R.C. 3505.181(A)(12)

⁹ R.C. 3505.181(A)(7)

- If the voter was not required to provide additional information then proceed to Step 3;
- If the voter provided the necessary information within ten days of the election, then proceed to Step 3;
- If the voter was required to provide additional information to the board of elections but failed to do so within ten days of the election, then the Board must **reject the provisional ballot.**¹⁰

Step 3: Determine whether the Board can **verify the identity** of the voter based on the voter's printed name, signature, and identification information provided on the provisional ballot envelope or by the voter within the ten day period.

- If the Board **can verify** the identity of the voter based upon the information provided on the provisional ballot envelope and/or provided by the voter within ten days of the election, then proceed to Step 4;
- If the Board **cannot verify** the identity of the voter based upon the information provided on the provisional ballot envelope and/or the information provided by the voter within ten days of the election, then the Board must **reject the provisional ballot.**¹¹

Note that verification of identity includes *at least* one search of the county's local voter registration database by entering as much or as little information as is available, and by including "wildcards" if available, *and* at least one search of all counties using the statewide voter registration database by entering as much or as little information as is available.

Unlike a voter registration card or absentee ballot application, **date of birth and address are not required** on a provisional ballot envelope. Therefore, a provisional ballot that does not have the voter's date of birth and/or address is **valid** so long as the board can verify the voter's identity and registration status in the State of Ohio.

Step 4: Determine whether the voter is a registered voter anywhere in the State of Ohio at least 30 days before the election.

- If the voter was registered to vote anywhere in the State of Ohio at least 30 days before the election, proceed to Step 5;
- If the voter was not registered to vote anywhere in the State of Ohio at least 30 days before the election, then the Board must **reject the provisional ballot.**¹²

Step 5: Determine whether the voter is a resident of the county and precinct in which the voter offers to vote.¹³

- If the voter moved and provided a new address within the precinct on the provisional ballot envelope, then the voter is considered a resident of the new county and precinct.

¹⁰ R.C. 3505.183(B)(4)(a)(v); R.C. 3505.183(B)(4)(a)(vii)

¹¹ R.C. 3505.183(B)(4)(b)(i); *State ex rel. Skaggs v. Brunner* (2008), 120 Ohio St. 3d 506.

¹² Ohio Constitution Article V, Section 1; R.C. 3505.183(B)(4)(a)(i); R.C. 3505.183(B)(4)(a)(iv); R.C. 3505.183(B)(4)(a)(vi)

¹³ R.C. 3503.01(A)

- If the voter is a resident of the county and precinct in which the provisional ballot was cast, then the Board must **accept and count the provisional ballot**;
- If the voter is not a resident of the county and precinct in which the provisional ballot was cast, and the voter provided **only** the last 4 digits of the voter's Social Security Number as identification, then move to the "Applying the NEOCH Exception" on this page;
- If the voter is not a resident of the county and precinct in which the provisional ballot was cast and the voter did not provide the last 4 digits of the voter's Social Security Number as identification, then the Board must **reject the provisional ballot**.¹⁴

APPLYING THE NEOCH EXCEPTION

Under the consent decree issued by the federal court in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896, ("NEOCH"), boards of elections **may not** reject provisional ballots cast by voters who use **only the last four digits of their Social Security number as identification** for any of the following reasons:

1. The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error;
2. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error; or
3. The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statutes.

If you have any questions concerning the examination and evaluation of provisional ballots, please contact the Secretary of State's Elections Counsel who is assigned to your county at (614) 466-2585. Thank you for your continued hard work.

Sincerely,

Jon Husted

¹⁴ R.C. 3505.183(B)(4)(a)(ii); R.C. 3505.183(B)(4)(b)(ii); *Sandusky Cty. Dem. Party v. Blackwell* (2004), 387 F.3d 565