



DIRECTIVE 2020-09

May 1, 2020

To: All County Boards of Elections
Board Members, Directors, and Deputy Directors

Re: Post-Election Cure Period and Provisional Ballots in the March 17, 2020 Primary Election

SUMMARY

Ohio's legislature passed House Bill ("H.B.") 197 to conclude the 2020 presidential primary election. H.B. 197 allowed in-person voting on April 28, 2020, only for those individuals with a disability or inability to receive mail.¹ H.B. 197 required other voters to request an absentee ballot by noon on April 25, 2020 for this election. The Act did not expressly contemplate federal and permanent state law pertaining to a voter's access to cast provisional ballot in-person on April 28, 2020. Under the provisions set forth in H.B. 197, federal law, and permanent state law, the Secretary of State instructed boards to provide a provisional ballot to a voter who appeared at a board of elections to vote but did not claim to have a disability or inability to receive mail.

This Directive provides instructions regarding the remainder of the post-election cure period and the analysis boards of elections must undertake when determining the eligibility for counting provisional ballots cast in-person on April 28, 2020.

PART ONE – POST-ELECTION CURE PERIOD

As stated in [Directive 2020-08](#), each board of elections must continue to be available to the public on each of the seven calendar days immediately following the last day of voting to allow voters to cure a deficiency on an absentee or provisional ballot.² If the board of elections is in a building generally closed to the public, it must still enable voters to cure deficiencies via drop box, appointment, or any other appropriate means identified by the board of elections. Boards should continue following the [Stay Safe and Healthy at Home Order](#) from the Ohio Department of Health Director as it relates to board operations and the health and safety protocols outlined in [Directive 2020-08](#). Boards may contact the Secretary of State for assistance if they need help securing additional personal protective equipment beyond what has already been provided.

Every board of elections should review [Chapter 5, pages 30-32 of the Election Official Manual \("EOM"\)](#) regarding incomplete or non-conforming absentee ID envelopes. As in previous elections, if a board of elections cannot determine the voter's eligibility without the missing or

¹ H.B. 197, Section 32(D) (133rd General Assembly).

² H.B. 197, Section 32(F); [R.C. 3505.181\(B\)\(7\)](#) and [R.C. 3509.06\(D\)\(3\)](#). See also *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (holding that the seven-day post-election cure period for absentee and provisional ballots established in state law is constitutional).

nonconforming information, the board must contact the absentee voter to give the voter an opportunity to supplement the voter's identification envelope so the voter's ballot can be tabulated. The board must meet this requirement by issuing [Form 11-S](#) with a courtesy reply envelope to voters who cast a ballot by the deadline. The voter has until May 5, 2020, to provide the necessary information to the board.

A provisional voter who needs to provide identification or additional information to the board must provide the necessary identification or information no later than May 5, 2020. According to [R.C. 3505.181](#), a deficient provisional ballot can be cured only when identification is missing or the voter was successfully challenged under [R.C. 3505.20](#).

PART TWO – COUNTING PROVISIONAL BALLOTS

Provisional voting is a failsafe that allows a voter whose identity or eligibility is in question to cast a ballot and permit time for the board of elections to later verify the voter's eligibility to determine whether that vote should be counted. Provisional voting ensures that no eligible elector is denied the opportunity to cast a ballot in an election. In addition to state law requiring provisional ballots,³ the Help America Vote Act (“HAVA”) requires every state to offer provisional voting in each federal election.⁴ These laws are the basis for the Secretary's instructions for provisional voting in [Directive 2020-08](#).

No provisional ballot envelope may be opened and no provisional ballot may be counted until the board has voted on the eligibility of each provisional ballot cast in the election.⁵ Board staff, working in bipartisan teams, may begin examining provisional ballot envelopes prior to May 9, 2020, as long as the board has adopted a provisional ballot policy allowing its staff to do so.⁶ The bipartisan teams may categorize provisional ballots into groups of like ballots (e.g., ballots that have been verified and eligible to be counted, provisional affirmations that are missing the voter's signature, etc.) for the board members to consider. However, the board must not begin opening provisional ballot envelopes or counting provisional ballots until the start of the official canvass, which may begin no earlier than May 9, 2020.⁷

As in every election, only the board members can determine the validity of each provisional ballot. In a properly-noticed public meeting, the board members must verify the eligibility of each person who cast a provisional ballot and the validity of each provisional voter statement. Boards must follow the Step-by-Step Process in [Chapter 6 of the EOM](#) in deciding whether to count each provisional ballot. Each board must work closely with its legal advisor, the county prosecuting attorney, to review the provisional ballots cast in the 2020 Primary Election.

³ [R.C. 3505.181](#) to [R.C. 3505.183](#).

⁴ [52 U.S.C. 21082\(a\)](#).

⁵ [R.C. 3505.183\(F\)](#).

⁶ [R.C. 3505.183\(G\)\(1\)](#).

⁷ [R.C. 3505.32](#).

The remainder of this Directive describes the analysis boards of elections must undertake when determining the eligibility for counting provisional ballots cast in-person on April 28, 2020, by voters who were not granted in-person absentee voting access by H.B. 197.

If a voter cast a provisional ballot in-person on April 28, 2020, and the voter was not eligible to vote in-person absentee under H.B. 197, the board must consider the following questions:

1. Did the board receive an absentee ballot application by the noon Saturday, April 25, 2020 deadline?

A board must determine whether a voter submitted an absentee ballot application by the deadline of noon on April 25, 2020.⁸ The application may be incomplete, but the board must be able to discern that the application was submitted by the same person who cast the provisional ballot on April 28, 2020. If there was not a notation in the pollbook or voter registration system, the board must search its records for applications.

If the board of elections received an absentee ballot application by the deadline of noon on April 25, 2020, it should proceed to conduct the analysis under Question #2 below. If the board did not receive an application from the voter by the deadline, the board does not need to proceed with the remainder of the Step-by-Step Process in the EOM. **STOP: The provisional ballot is not eligible for counting if the voter was not eligible to vote in-person absentee under H.B. 197 and the voter did not apply for an absentee ballot by noon on April 25, 2020.**

2. If the board received an absentee ballot application by the deadline, did the voter cast an absentee or provisional ballot by mail?

If the board of elections received an absentee ballot application by noon on April 25, 2020, but the voter did not cast an absentee or provisional ballot by mail, and the voter did appear at the board of elections on April 28, 2020 and cast a provisional ballot in-person, the board must proceed with the remaining steps of the Step-by-Step Process in the EOM to determine whether the provisional ballot cast in-person should be counted. If the voter cast an absentee or provisional ballot by mail, the board must reject the provisional ballot cast in-person on April 28, 2020 unless one of the following exceptions apply:

1. If the board determines that the absentee or provisional ballot cast by mail is invalid because the elector's signature on the absentee voter's identification envelope or the provisional affirmation statement does not match the signature on file with the board of elections, the board must proceed with the remaining steps of the Step-by-Step Process in the EOM to determine whether the provisional ballot that was cast in-person should be counted.
2. If the board of elections did not receive the voter's absentee or provisional ballot by mail by May 8, 2020 (10th day following the election), the board must proceed with the

⁸ For purposes of this Directive and consistent with [R.C. 3505.181](#), the term "absentee ballot application" includes a request for a uniformed services or overseas absent voter's ballot.

remaining steps of the Step-by-Step Process in the EOM to determine whether the provisional ballot that was cast in-person should be counted.

H.B. 197 required boards of elections to send a provisional ballot by mail when an absentee ballot application was determined invalid because the voter moved or changed their name without updating their voter registration as set forth in [R.C. 3503.16](#), or for any other reason.⁹ A provisional ballot that was issued by mail and returned by the deadline for casting a ballot must be reviewed according to the same standard as provisional ballots cast in-person on a regular Election Day.

If the board has any questions regarding this Directive, please contact the Secretary of State's elections counsel at (614) 728-8789.

Yours in service,



Frank LaRose
Ohio Secretary of State

⁹ H.B. 197, Section 32(C)(7).