

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #4

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OFFICE OF THE
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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Secretary of State TITLE NUMBER: 153

CITE AUTHORITY: 3-3A-3

AMENDMENT TO AN EXISTING RULE: YES NO

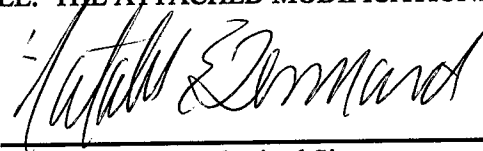
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 39

TITLE OF RULE BEING PROPOSED: Vote by Mail Pilot Project Phase 2: Voting by Mail

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



Authorized Signature

Title 153
Legislative Rule
Secretary of State

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2009 NOV -5 PM 3: 30

SERIES 39
Vote-by-Mail Pilot Project Phase 2:
Voting by Mail

OFFICE OF THE VIRGINIA
SECRETARY OF STATE

§ 153-39-1. General.

1.1. Scope. -- This rule governs Phase 2 of the West Virginia Vote By Mail Pilot Program, created by the Legislature in regular session, 2009. Phase 2 of the pilot program begins with the primary election of 2011 and terminates January 1, 2014, unless sooner terminated by the Legislature. The Secretary of State may authorize five municipalities, selected in accordance with this rule, to participate in the Pilot Program.

This rule establishes the guidelines to be used by the municipal recorder or other officer, who is authorized to conduct municipal elections, to conduct municipal elections by mail; including, but not limited to, program participation selection criteria, procedures for conducting voting by mail, requirements for places of deposit and security of ballots and ballot deposit locations.

1.2. Authority.- W.Va. Code § 3-3A-3.

1.3. Filing Date. --

1.4. Effective Date. --

§ 153-39-2. Definitions.

2.1. For the purposes of this rule:

2.1.a. "Assistance in voting" as used in this rule means assistance in

physically marking the official early voting by mail ballot for a voter, or reading or directing the voter's attention to any part of the official early voting by mail ballot.

2.1.b. "Authorized personnel" means those individuals designated to conduct the election whose duties are identified in the plan required by §3.1.d.2. The authorized personnel are selected by the municipal clerk and must be at least two in number and may not be registered with the same political party affiliation or may not both be with no political party affiliation.

2.1.c. "Ballot packet" means all information mailed to the voter pursuant to section five of this rule.

2.1.d. "Clerk" means the municipal recorder or other officer authorized by charter or ordinance to conduct voting for any election held entirely within a municipality.

2.1.e. "Counting Board" means those election officials appointed by the clerk pursuant to W.Va. State Code §§ 3-1-28, 3-1-29, and 3-1-30.

2.1.f. "Mail" means delivered by the U.S. Postal Service or by other express delivery service.

2.1.g. "Master Election List" means the municipality's voter history records,

obtained from the clerk of the county commission, as described in W.Va. Code §3-1-28, necessary to conduct the election.

2.1.h. "Non Affiliated Voter" or "NAV" means a properly registered voter who is not registered as a member of any political party.

2.1.i. "Program" means Phase 2 of the Vote by Mail Pilot Program as authorized by W. Va. State Code § 3-3A-3.

2.1.j. "Received by the clerk" means properly received by the clerk in the designated post office box or official ballot deposit box or clerk's office.

2.2. All references to time of day in this rule mean local time.

§ 153-39-3. Program Participant Selection Process.

3.1. Each municipality choosing to participate in the program shall submit to the Secretary of State the following information:

3.1.a. A copy of a resolution duly passed by the municipality's governing body stating:

3.1.a.1. The municipality's intent to participate in the program; and

3.1.a.2. That it is the duty of all officials designated to supervise and conduct the program, other municipal officials, and all election commissioners to abide by the Secretary of State's rules, orders and instructions and to use the forms, lists and records prescribed by the Secretary of State.

3.1.b. Official voter participation statistics for the most recent two municipal election cycles;

3.1.c. Information relating to the total expenses of the previous two election cycles; and

3.1.d. The municipality's plan, in accordance with the provisions of this Rule, for the conduct of the election including:

3.1.d.1. Method of voting (i.e. direct recording electronic, optical scan, or hand-counted paper ballot);

3.1.d.2. Officials designated to conduct the election, including duties of each official;

3.1.d.3. Proposed number and locations for ballot deposit locations;

3.1.d.4. Provisions for ballot and ballot box security at each ballot deposit location;

3.1.d.5. The date of the next-scheduled municipal election; and

3.1.d.6. The process by which the municipality will notify the public, no later than sixty (60) days prior to the election day, of the change in the administration of the election, if selected to participate in the program.

3.2. The Secretary of State shall collect and evaluate all information submitted by the municipalities pursuant to subsection one of this section to determine the viability of each municipality's proposal using the following criteria:

3.2.a. The municipality has legally passed an ordinance stating all information required in 3.1.1. of this rule;

3.2.b. There is sufficient historical voter participation information provided to allow for comparison of voter turnout with elections conducted in the program;

3.2.c. There is sufficient historical expense information provided to allow for comparison of expenses associated with elections conducted in the program;

3.2.d. The proposed number and locations of ballot deposit locations is reasonable, sufficient and convenient in relation to the number of registered voters in the municipality;

3.2.e. The provisions for security at each ballot deposit location are sufficient to ensure the integrity of ballots and prevent fraud; and

3.2.f. The process by which the municipality will notify the public of the change in the administration of the election is reasonable to ensure the voters in the municipality will know and understand the change.

3.3. If the Secretary of State determines that the information submitted by a municipality is deficient in any way, he or she shall give notice in writing to the municipality outlining the area or areas of deficiency. Such notice shall also state the municipality has five (5) business days to correct the deficiencies and return the information to the Secretary of State before the end of business on the fifth day for continued consideration for program participation.

3.4. If the Secretary of State determines that the information submitted or corrected and resubmitted by a municipality is sufficient, it will be eligible to participate in the program.

3.5. If more than five (5) municipalities are eligible to participate in the program, the five (5) program participants shall be selected using a drawing by lot by the Secretary of State to be held the first Monday in December next preceding the election: *Provided*, That there be no more than two (2) municipalities selected from each size classification unless there are spaces available.

3.6. If five (5) or fewer than five (5) municipalities have submitted the required information to be considered for program participation, all such municipalities shall be considered as having been selected to participate in the program and no drawing by lot will be necessary.

3.7. The Secretary of State shall notify each program participant of their selection into the program in writing within fourteen (14) business days of the selection.

§ 153-39-4. Determining Eligibility to Receive a Ballot.

4.1. All citizens legally registered to vote in the municipality in accordance with the provisions of W.Va. State Code §3-2, shall be eligible to receive a ballot by mail for the municipal election.

4.2. If non-affiliated voters are permitted by party rules to vote in the primary of a major party, a non-affiliated voter desiring to vote a partisan ballot must notify the clerk of their intention no later than the twentieth (20th) day prior to the election.

§ 153-39-5. Mailing Ballots; Receipt by Clerk

5.1. No sooner than eighteen (18) days nor later than fourteen (14) days before the election, the clerk shall mail the following ballot packet to all voters determined eligible to vote in the municipal election per the provisions of section four of this rule:

5.1.a. One of each type of official ballot the voter is eligible to vote, prepared according to law and signed by two election officials of opposite parties;

5.1.b. One envelope, unsealed, which may have no marks except the designation "Voter's Ballot Envelope No. 1";

5.1.c. One mailing envelope, unsealed, designated "Voter's Ballot Envelope No. 2";

5.1.d. Instructions for voting by mail including:

5.1.d.1. Instructions for marking and folding the ballot, to place it in the secrecy envelope (Envelope No. 1) and the ballot return envelope (Envelope No. 2) and how to sign the ballot return envelope;

5.1.d.2. A warning that the ballot return envelope must be signed or the ballot will not be counted;

5.1.d.3. A warning that signing someone else's ballot return envelope is illegal;

5.1.d.4. An alternative procedure for any person who is unable to sign a ballot return envelope;

5.1.d.5. Instructions for returning a spoiled ballot should the voter make a mistake or otherwise need a new ballot; and

5.1.d.6. A prominently displayed notice that each ballot must be received by the clerk by 8:00p.m. on election day in one of the following three ways:

5.1.d.6.A. By mail;

5.1.d.6.B. By casting the ballot at an official ballot deposit location; or

5.1.d.6.C. By hand delivering the ballot to the clerk or clerk's designee.

5.1.e. For electronic systems, a device for marking by electronically sensible pen or ink, as may be appropriate;

5.1.f. Notice that a list of write-in candidates upon request;

5.1.g. Any other supplies required for voting in the particular voting system;

5.1.h. Notice of the amount of postage required to return the ballot using First Class USPS postage;

5.1.i. The locations and available hours of all ballot deposit sites;

5.1.j. Notice that privacy booths are available at a designated location for optional use by voters; and

5.2. The clerk shall indicate on the poll book record of each voter who is sent a ballot that a ballot has been sent to the voter and the date it was mailed.

5.3. The voter shall mark the ballot alone: *Provided*, That the voter may have assistance in voting according to the provisions of W. Va. State Code §3-3-6.

5.4. After the voter has voted the ballot or ballots, the voter shall:

5.4.a. Place the ballot or ballots in Envelope no.1 and seal that envelope;

5.4.b. Place sealed Envelope no. 1 inside Envelope no. 2 and seal Envelope no. 2;

5.4.c. Complete and sign the forms on Envelope no. 2; and

5.4.d. Return the envelope to the clerk by mail using either the required amount of postage for the USPS or other express shipping service, or by delivering the voted ballot to an official ballot deposit location.

5.5. Ballots returned by USPS mail or other express shipping service are to be accepted if the ballot is received by the clerk no later than 8:00p.m. on election day. Ballots postmarked by election day but received by the clerk after 8:00p.m. on election day will not be counted.

5.6. Ballots received after the proper time which cannot be accepted are to be placed unopened in an envelope marked for the purpose and kept secure for twenty-two months following the election, after which time they are to be destroyed without being opened.

5.7. Ballots which are hand delivered are to be accepted if they are received by the clerk no later than 8:00p.m. on election day.

5.8. Prior to the election, the clerk shall arrange with the local Post Office to secure a Post Office box to be used only for the return of mailed ballots.

5.9. The clerk shall coordinate with the Post Office a regularly scheduled mail pick up time for each day and an 8:00p.m. pick-up time on election day.

§ 153-38-6. Assistance to Voter in Voting an Early Voting by Mail Ballot.

6.1. No voter shall receive any assistance in voting a ballot unless he or she makes a declaration at the time he or she applies for a ballot that because of blindness, disability, advanced age or inability to read or write he or she requires assistance in voting a ballot.

6.2. Upon receipt of a ballot by mail, the voter who requires assistance in voting such ballot and who has indicated he or she requires such assistance and the reasons therefore on the application may select any eligible person to assist him or her in voting.

6.3. The person providing assistance in voting a ballot shall make an affidavit on a form as provided by the Secretary of State, that he or she will not in any manner request, or seek to persuade, or induce the voter to vote any particular ticket or for any particular candidate or for or against any public question, and that he or she will not keep or make any memorandum or entry of anything occurring while assisting the voter, and that he or she will not, directly or indirectly, reveal to any person the name of any candidate voted for by the voter, or which ticket he or she had voted, or how he or she had voted on any public question, or anything occurring while

assisting the voter, except when required pursuant to law to give testimony as to such matter in a judicial proceeding.

§ 153-39-7. Official Ballot Deposit Locations.

7.1. Each municipality shall establish the number of official ballot deposit locations in the following manner:

7.1.a. Each Class I and Class II municipality must establish no fewer than three (3) official ballot deposit locations, including the location required by §6.2; and

7.1.b. Each Class III and Class IV municipality must establish no fewer than two (2) official ballot locations, including the location required by §6.2.

7.1.c. An official ballot deposit location must be maintained at the elections office of each municipality.

7.2. Proposed official ballot deposit locations shall be determined using the following criteria:

7.2.a. Security,

7.2.b. Concentration of population,

7.2.c. Convenience for voters,

7.2.d. Access for the physically disabled; and

7.2.e. Parking availability

7.3. Official ballot deposit boxes must be locked and secure from being moved or in view of authorized personnel.

7.4. Official ballot deposit boxes at staffed locations must be locked and

sealed and accessible only by authorized personnel or deputized staff. The box may be exchanged for a locked or sealed empty box on a predetermined schedule or it may be re-locked or re-sealed when emptied by at least two people of opposite parties authorized to handle the election material.

7.5. Official ballot deposit boxes at staffed locations must be in view of on-site staff and transported only by election or deputized staff to the elections office on a predetermined schedule or as needed.

7.6. Outdoor official ballot deposit boxes must be accessible only by keys in possession of authorized personnel.

7.7. The clerk shall establish a predetermined schedule (or more frequently if necessary) to empty outdoor official ballot deposit boxes. Voted ballots shall be transferred into a locked ballot box, bag or pouch and transported to the elections' office. The locked ballot box, bag or pouch must be locked, before transfer, with two separate locks. Each of two authorized personnel of different political party affiliation shall have one key to one lock. The ballot box, bag or pouch shall be locked by both personnel at the ballot deposit box location and unlocked at the elections' office only in the presence of the both authorized personnel and the clerk.

7.8. The official ballot deposit location at the elections office must be available for use beginning the first day ballots are mailed and must be accessible during regular business hours through the day next preceding the election; *Provided*, That the location be open and accessible on the final Saturday preceding election day beginning at 9:00a.m. and ending at 5:00p.m.

7.9. Official ballot deposit locations other than the elections office must be available for use no later than five calendar days before election day; *Provided*, That official ballot deposit locations must be open and accessible the Saturday next preceding election day beginning at 9:00a.m. and ending at 5:00p.m.

§ 153-39-8. Ballot Reception, Signature Verification and Sorting.

8.1. The clerk or clerk's designee shall keep a record of ballots delivered by the USPS or other express delivery service, ballots received from official ballot deposit locations, ballots returned unsigned and ballots returned as undeliverable.

8.2. If a ballot is returned in an unsigned envelope the clerk shall make a reasonable attempt to notify the voter that the ballot cannot be processed unless the envelope is signed prior to 8:00p.m. on election day. A signature may not be faxed or sent via other electronic means. The clerk may:

8.2.a. Issue a replacement ballot;

8.2.b. Have the voter sign the return identification ballot envelope (envelope no. 2) at the elections office; or

8.2.c. Mail the original unsigned envelope to the voter for a signature if time allows.

8.3. If, during a scheduled election, the voter returns a return identification ballot envelope for a previous election date the clerk shall make a reasonable attempt to notify the voter that the ballot cannot be processed unless the ballot is placed in the proper envelope prior to 8:00p.m. on election day. The clerk may:

8.3.a. Issue a replacement ballot; or

8.3.b. Mail the original envelope to the voter for the voter to return the ballot in the proper envelope.

8.4. When a ballot has been returned by the voter, the clerk or other authorized personnel shall check Envelope no. 2 for valid signatures and compare the voter's signature on Envelope no. 2 with the signature kept on file for the voter's registration. If the clerk or other authorized personnel are is able to determine that the same person signed Envelope no. 2 and the voter registration card, the ballot may be accepted and processed.

8.5. If the clerk or other authorized personnel initially determines that the signature on Envelope no. 2 and the voter's registration do not match a more detailed review, according to section 8.6, shall be made.

8.6. A different person, either the clerk or other authorized personnel, shall review all initially rejected signatures using the following criteria:

8.6.a. Capitol letters match;

8.6.b. Letters tail off alike;

8.6.c. Letter spacing is the same;

8.6.d. The beginning and ending of the signature and the slant are consistent;

8.6.e. Unique letters match; and

8.6.f. Overall appearances match.

8.7. If the second review determines that the signature on Envelope

no. 2 and the voter's registration do not match, the clerk shall issue a challenge to the ballot and send notice in writing to the voter that the ballot has been challenged and the reason for the challenge. If the second review determines that the same person signed Envelope no. 2 and the voter registration card, the ballot may be accepted and processed.

8.8. When a ballot has been returned by the voter and is accepted, it is included in the master list for the election. If the return identification envelope is unsigned and is returned to the voter for signature, the ballot is not posted until the signed envelope is returned.

8.8.a. Automated reports and computer programs may be used for the master list and logs that track reissued, replacement and challenged ballots.

8.8.b. Reissued and replacement ballots must be identified to ensure only the correct ballot is being counted.

8.8.c. Challenged ballots must be noted on the master list and processed separately according to provisions of section eight of this rule.

8.9. Ballots that have been accepted shall be processed in the following manner:

8.9.a. The clerk or clerk's designee shall mark the voter's record in the poll book indicating the voter has voted in the election; and

8.9.b. The ballot shall be sorted according to precinct and shall be placed in the ballot box designated for the precinct to be kept locked until opened according to provisions of section nine of this rule.

§ 153-39-9. Provisional Ballots.

9.1. Ballots issued pursuant to the rules of the Vote by Mail Pilot Program may be challenged and determined to be provisional ballots for any reason outlined in W.Va. Code §3-3-10.

9.2. Ballots determined to be provisional prior to mailing shall not be signed by the poll clerks, and notation must be made in the poll book that the voter has been mailed a provisional ballot.

9.3. When a voter returns a provisional ballot the record shall be updated in both the master list and poll book and the ballot shall be kept secure and remain sealed until canvass, but not placed in the ballot box.

9.4. If a ballot is challenged at the time it is returned to the clerk, the clerk shall update the record in both the master list and poll book and the ballot shall be kept secure and remain sealed until canvass, but not placed in the ballot box.

9.5. The clerk shall make every reasonable effort to obtain all information and documentation necessary to resolve challenges to a ballot prior to the start of canvass.

§ 153-39-10. Opening Ballot Return Envelopes.

10.1. The clerk shall appoint one or more Counting Boards as necessary for the efficient processing and counting of ballots on election day.

10.2. The clerk shall maintain a record of all Counting Board members, including each member's political party

affiliation, oath and board assignments. If there is more than one Counting Board the clerk shall maintain a record specifying the precincts processed by each counting board.

10.3. No sooner than 5:00p.m. on election day, the Counting Board or Boards may open the ballot boxes, process the ballots by removing the ballots from the envelopes and returning the ballots to the locked box for their specified precinct; *Provided*, That no ballot shall be unfolded or read prior to being returned to the ballot box.

10.4. Ballot envelopes received after 5:00p.m., but no later than 8:00p.m. on election day shall be accepted or rejected pursuant to provisions of section seven of this rule. Accepted ballot envelopes shall be processed by the Counting Board or Boards and the folded and unread ballots shall be placed in the appropriate ballot box.

§ 153-39-11. Ballot Counting Procedures in Paper Ballot Systems.

11.1. After all ballots determined to have been received by the clerk by 8:00p.m. on election day have been returned to the election office, they shall be accepted or rejected according to provisions of section seven of this rule. Accepted ballots shall be processed as outlined in §10.3 of this rule. The ballot box or boxes shall then be opened separately and all votes shall be tallied in the presence of the entire receiving board.

11.2. Ballots shall be counted and recorded pursuant to provisions of W.Va. State Code §§3-6-6, 3-6-8, and 3-6-8, unless otherwise provided for in this rule.

§ 153-39-12. Ballot Counting Procedures in Optical Scan Ballot Systems.

12.1. After all ballots determined to have been received by the clerk by 8:00p.m. on election day have been returned to the election office, they shall be accepted or rejected according to provisions of section seven of this rule. Accepted ballots shall be processed as outlined in §10.3 of this rule, except that the ballots shall not be folded. The ballot box or boxes shall be opened separately and the ballots prepared for counting.

12.2. Ballots shall be counted and recorded pursuant to provisions of W.Va. State Code §§3-4A-19, 3-4A-28, and 153 CSR 28, unless inapplicable or otherwise provided for in this rule.

§ 153-39-13. Ballot Counting Procedures in Direct Recording Electronic Systems.

13.1. After all ballots determined to have been received by the clerk by 8:00p.m. on election day have been returned to the election office, they shall be accepted or rejected according to provisions of section seven of this rule. Accepted ballots shall be processed as outlined in §10.3 of this rule, except that the ballots shall not be folded. The ballot box or boxes shall be opened separately and the ballots prepared for counting.

13.2. Ballots shall be counted and recorded pursuant to provisions of W.Va. State Code §3-3-8, unless inapplicable or otherwise provided for in this rule.

§ 153-39-14. Training of Election Officials.

14.1. The clerk, or his or her designee, of each municipality shall attend mandatory training provided by the

**Secretary of State or the municipality will
forfeit participation in the program.**