



**WEST VIRGINIA
SECRETARY OF STATE**

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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6/28/2017 10:30:13 AM

OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

**FORM 1 -- NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 1)**

AGENCY Secretary Of State
RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE-SERIES 153-
RULE NAME Procedures for Handling Ballots and Counting Write-In Votes in Counties Using Optical
Scan Ballots
CITE AUTHORITY 3-1A-6, 3-4A-27, 3-6-4a, 3-6-5

COMMENTS LIMITED TO
Written

DATE OF PUBLIC HEARING

LOCATION OF PUBLIC HEARING

DATE WRITTEN COMMENT PERIOD ENDS
Friday, July 28, 2017 10:00 AM

WRITTEN COMMENTS MAY BE MAILED TO
Donald M. Kersey, III
Office of the WV Secretary of State
State Capitol Building
Charleston, WV 25304

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes
Stephen Robert Connolly -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 153-27



Rule Id: 16563



Document: 49534



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**FORM 1 -- NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 2)**

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PROVIDE A BRIEF SUMMARY OF YOUR PROPOSAL

Proposed changes do not alter substance of the Rule. Changes include updating Rule language for outdated language referencing out-of-date voting systems (e.g. punch cards and lever machines), and removed language relating to now-prohibited straight ticket voting. Changes also fix various citation typos.

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 1)

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CITE AUTHORITY 3-1A-6, 3-4A-27, 3-6-4a, 3-6-5

PRIMARY CONTACT

Donald Kersey
State Capitol Building

Charleston, WV 25305

SECONDARY CONTACT

Steven Connolly
State Capitol Building

Charleston, WV 25305

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SUMMARIZE IN A CLEAR AND CONCISE MANNER WHAT IMPACT THIS MEASURE WILL HAVE ON COSTS AND REVENUES OF STATE GOVERNMENT.

None.

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FISCAL NOTE DETAIL -- SHOW OVER-ALL EFFECT IN ITEM 1 AND 2 AND, IN ITEM 3, GIVE AN EXPLANATION OF BREAKDOWN BY FISCAL YEAR, INCLUDING LONG-RANGE EFFECT.

Effect Of Proposal	Current Increase/Decrease (use ' - ')	Next Increase/Decrease (use ' - ')	Fiscal Year (Upon Full Implementation)
--------------------	--	---------------------------------------	--

ESTIMATED
TOTAL COST

PERSONAL SERVICES

CURRENT EXPENSES

REPAIRS AND
ALTERATIONS

ASSETS

OTHER

ESTIMATED
TOTAL REVENUES

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 3)

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3. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT). PLEASE INCLUDE ANY INCREASE OR DECREASE IN FEES IN YOUR ESTIMATED TOTAL REVENUES.

N/A.

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 4)

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PLEASE IDENTIFY ANY AREAS OF VAGUENESS, TECHNICAL DEFECTS, REASONS THE PROPOSED RULE WOULD NOT HAVE A FISCAL IMPACT, AND OR ANY SPECIAL ISSUES NOT CAPTURED ELSEWHERE ON THIS FORM.

The proposed changes to the existing Rule merely reflect updates to the W. Va. Code that were passed after the promulgation of this Rule. Changes also fix typos relating to inaccurate citations within the Rule and improper subsection/subparagraph numbering. No fiscal impact will result from these changes.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

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FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 1)

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SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE.

Changes are proposed to the following sections:

- §2.1. Removed word punch, which refers to outdated voting systems.
- §2.3. Removed language referencing outdated punch card voting systems. Current voting systems automatically electronically separate flagged write-in ballots.
- §2.4. Removed language referring to filing fees to be paid by write-in candidates because W. Va. Code § 3-6-4a no longer requires filing fee be paid by such candidates. See also Phillips v. Hechler, 120 F.Supp.2d 587 (2000) (holding that W. Va. Code requirements for write-in filing fees is unconstitutional).
- §2.8.1. Removed word punch, which refers to outdated voting systems; also added and to correct typo in subsequent subsection.
- §2.8.2. Removed word and to correct typo.
- §2.10. Removed words punch card, which refer to outdated voting systems, and added ballot to clarify what must be duplicated or hand counted in the event of an electronic malfunction; also removed word for to correct typo.
- §3.2. Corrected typo referring to Section 2.3., which should read Section 2.8. Also reworded provision for clarity and referenced W. Va. Code § 3-6-5, which provides extensive instructions for processing write-in votes.
- §3.4. Removed language referring to outdated voting systems.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes
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FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 2)

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SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE.

§4.3.3.Corrected typo referring to Section 2.3., which should read Section 2.8.; also updated all subsections to read 4.3.3.a, 4.3.3.b, and 4.3.3.c., to account for formatting requirements set forth in 153CSR6.
§4.3.3.c.A.Removed language referring to straight ticket vote, which is prohibited by W. Va. Code § 3-6-2(g); also updated subparagraph format to 4.3.3.c.1 to reflect formatting requirements in 153CSR6.
§4.3.3.c.B.Removed language referring to straight ticket vote, which is prohibited by W. Va. Code § 3-6-2(g); also updated subparagraph format to 4.3.3.c.2 to reflect formatting requirements in 153CSR6.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes
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Title-Series: 153-27



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TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 27
PROCEDURES FOR HANDLING BALLOTS AND COUNTING WRITE-IN
VOTES IN COUNTIES USING OPTICAL SCAN BALLOTS

§153-27-1. General.

1.1. Scope. -- This rule provides guidelines for the counting of write-in votes in counties that use the optical scan ballot systems.

1.2. Authority. -- W Va. Code §§3-1A-6, 3-4A-27, 3-6-4a, and 3-6-5.

1.3. Filing Date. -- ~~May 7, 2007.~~

1.4. Effective Date. -- ~~May 7, 2007.~~

1.5. Sunset Provision -- This rule shall terminate and have no further force of effect upon the expiration of 10 years from its effective date.

§153-27-2. Definitions.

2.1. "Attempted write-in vote" means any ~~punch or~~ mark in a write-in voting position on a ballot or any writing, stamping or attaching by sticker of a name in the position provided for write-in votes to be entered for the voting system.

2.2. "Central counting center" means the room in the county courthouse where the ballot boxes are opened and the ballots processed and tabulated on election night.

2.3. "Inspection team" or "ballot box team" means two persons, one from each major political party, appointed and deputized according to §3-4A-27 by the clerk of the county commission for the purpose of opening ballot boxes, and verifying the statement of ballots used, ~~and for punch card voting systems, separating ballots with attempted write in votes from ballots without attempted write in votes, and for ballots without attempted write in votes, separating the ballot cards from the grey secrecy envelopes.~~

2.4. "Official write-in candidate" means one who has filed a write-in candidate's certificate of announcement, ~~paid the filing fee,~~ and has been certified according to the provisions of W. Va. Code §3-6-4a.

2.5. "Overvote" means a combination of votes for an office which results in the voter casting more votes for that office than there are persons to be elected. For example, a person who marks one party nominee and also casts an attempted write-in vote for the same office and only one person is to be elected has "overvoted," whether or not the write-in vote can be counted.

2.6. The "proper location for entering a write-in vote" shall mean:

2.6.1. for optical scan systems, on or near the blank line labeled "WRITE-IN, IF ANY" positioned under the office for which the vote is cast.

2.7. "Resolution team" means two persons, one from each major political party, appointed and deputized according to W. Va. Code §3-4A-27 by the clerk of the county commission of a county using an optical scan voting system, for the purpose of examining ballots isolated by the tabulator because of damages, flaws, unreadable marks, or other defects, and determining whether the ballot must be duplicated or hand counted in order to tabulate the ballot accurately.

2.8. "Valid write-in vote" means a vote cast for an official write-in candidate by permitted means which includes the following elements:

2.8.1. a ~~punch or~~ mark in the voting position specified for write-in votes for the office; and

2.8.2. an entry of the name of the official write-in candidate in the proper location, which shall include the first name, or last name, or both first and last names in such a way that the intention of the voter can be determined; ~~and~~

2.9. "Write-in counting team" or "counting team" for optical scan systems means two persons, one from each major political party, appointed and deputized according to W. Va. §3-4A-27 by the clerk of the county commission for the purpose of examining ballots containing attempted write-in votes, determining which of those votes are valid write-in votes, and determining whether the ballot must be temporarily altered or duplicated in order to tabulate the remaining offices accurately.

2.10. "Write-in counting team" or "counting team" ~~for~~ means two persons, one from each major political party, appointed and deputized according to W. Va. Code §3-4A-27 by the clerk of the county commission for the purpose of examining ballots containing attempted write-in votes, determining which of those votes are valid write-in votes, and determining whether the ~~punch-card~~ ballot must be duplicated or hand counted in order to tabulate the remaining offices accurately.

§153-27-3. Casting and Counting Write-in Votes.

3.1. Valid write-in votes may be cast and counted for the election for any official write-in candidate for election to an office or party position other than Delegate to National Convention, but not for the nomination of any candidate. Write-in votes for any person or name other than an official write-in candidate shall be disregarded.

3.2. An attempted write-in vote shall be counted when the write-in counting team or resolution team finds the vote meets the conditions of a "valid write-in vote" as defined in Section ~~2.3~~ 2.8 of this rule, as well as the provisions of W. Va. Code § 3-6-5, and does not create an overvote for the office.

3.3. Acceptable means of making a write-in vote include printing or writing with pen or pencil, imprinting with an inked rubber stamp, and attaching a sticker or gummed label.

~~3.4. In punch card voting systems, an attempted write-in vote found on a grey secrecy envelope which does not contain a punch card ballot signed by the poll clerks shall be disregarded.~~

§153-27-4. Procedures for Optical Scan Ballots.

4.1. The clerk of the county commission shall appoint the following teams of persons to process ballots at the central counting center:

4.1.1. As many inspection teams as are needed to efficiently sort the incoming ballots and complete the procedures for all precincts in the county;

4.1.2. As many write-in counting team as are needed to efficiently review the ballots containing attempted write-in votes and to complete the procedures for all precincts in the county.

4.1.3. One or more resolution teams as needed to efficiently complete the procedures and prevent delays in completing the tabulation for all precincts in the county.

4.2. Each inspection team shall handle the ballots of only one precinct at a time, so as not to intermingle the ballots of various precincts. Each team shall remove the ballots from the ballot box, sort the ballots into stacks of ballots with write-in votes and ballots without write-in votes, and complete any other procedures required or directed by the clerk of the county commission.

4.3. Each write-in counting team shall proceed as follows:

4.3.1. They shall handle the ballots of only one precinct at a time.

4.3.2. They shall examine the ballots containing attempted write-in votes one by one in order to determine whether the write-in vote shall be counted and whether any temporary alteration or duplication of the ballot is necessary.

4.3.2.a. They shall determine whether any official write-in candidates have filed for offices on the ballot in the precinct under consideration. If there are official candidates, they shall proceed to the next step, 4.3.2b. If not, the ballot shall be reviewed as an invalid write-in. (under step 4.3.3.b or c.)

4.3.2.b. They shall examine the attempted write-in vote to determine whether the name of an office to be filled in that election is given. If not, the attempted vote shall be disregarded, and the ballot placed in the stack to be tabulated. If an office to be filled is named, they shall proceed to the next step, 4.3.2.c.

4.3.2.c. They shall then determine if the vote is entered in the proper place for write-in votes. If the name is entered in the proper location, they shall proceed to the next step, 4.3.3. If not, the ballot shall be reviewed as an invalid write-in, step 4.3.3.b or c.

4.3.3. They shall examine the write-in vote to determine if it is a valid write-in vote, as defined in section ~~2.3~~ 2.8. of this rule.

4.3.3.a. If the counting team finds the entry is a valid write-in vote, they shall then examine the ballot to determine whether the voter has overvoted for the office for which the write-in vote was cast.

~~A.~~ 4.3.3.a.1. If there is no overvote, a tally mark shall be entered on the write-in record sheet for the precinct, and the ballot placed in the stack to be tabulated.

~~B.~~ 4.3.3.a.2. If there is an overvote, no tally mark shall be entered, and the ballot placed in the stack to be tabulated.

4.3.3.b. If the counting team finds the write-in position was marked but the name entered is not an official write-in candidate, they shall place the ballot placed in the stack to be tabulated.

4.3.3.c. If the counting team finds the write-in position was not marked, they shall then examine the ballot to determine whether the voter's intention for the office is clear.

~~A.~~ 4.3.3.c.1. If the attempted write-in would not have caused an overvote had it been a valid vote ~~and the ballot contains no straight ticket vote,~~ the voter's intention is clear. The ballot shall be

placed in the stack to be tabulated.

~~B. 4.3.3.c.2.~~ If the attempted write-in would have caused an overvote or would have caused a ~~straight ticket~~ vote to be rejected for that office had the vote been a valid write-in, the voter's intention is not clear. The write-in team shall place a black sticker over the write-in position or duplicate the ballot according to the provisions of W. Va. Code §3-4A-27(d), and mark the write-in position so as to cause the tabulator to reject the overvote ~~or straight ticket vote.~~ ~~[Note: If the straight ticket party has a vacancy on the ballot for the write in office which meant the write in would not have caused an overvote, or if the straight ticket party has no nominee for the office, the ballot may be counted by the electronic tabulator without alteration or duplication.]~~ The duplicate ballot shall be placed in the stack to be tabulated, or held in a separate stack until the group to be tabulated is complete.

4.4. A ballot shall be duplicated only if there is a mark which makes correct tabulation impossible, or the ballot is so badly damaged it will not go through the scanner;

4.4.1. All duplicated ballots shall be numbered in red ink corresponding to the original ballot beginning with one (1) and continuing in sequence (for example, if there are five (5) ballots to be duplicated for a precinct, the numbers assigned would begin with one (1) and end with five (5).);

4.4.2. When any ballot is duplicated, the original ballot shall be retained with the duplicate.

4.5. For each precinct, a careful tally of write-in votes and all other votes counted manually under this procedure shall be kept by each deputized person designated to count ballots containing write-in votes;

4.6. Once all the ballots are stacked for the tabulator and all valid write-in votes tallied, the ballots shall be delivered as directed by the clerk to the team in charge of the tabulator.

4.7. One resolution team shall be present at the tabulator to review any ballots isolated by the tabulator.

4.7.1. The resolution team shall begin the review of isolated ballots immediately, and shall complete the review and any necessary temporary alteration or duplication according to the procedures of subsection ~~5.4. 2.8.~~ and W. Va. Code § 3-6-5 in order to reflect the voter's intention and shall return the ballots for tabulation.

4.7.2. The results of the precinct tabulation shall not be posted until the resolution team has completed its work and all ballots from the precinct have been tabulated.

4.8. As soon as practical after the tabulation of the precinct, the tally of all tabulated and write-in votes for announced write-in candidates shall be posted for public inspection.