family in the hospital or want to vote absentee because they would be out of the precinct during the election for any number of reasons. ... Was it the intent of the Author of the implementing legislation to leave absentee voters out of this section? That should be clarified.”

Staff Response: This comment is apparently asking for a rule allowing residents of long-term care facilities to be able to submit documentation from an administrator instead of the documentary ID required for other absentee voters.

As mentioned in the previous comment (Comment 12), the SOS rule that specifically states that the documentation may be used for absentee voting is a great aid to voters. The proposed SBEC rule is currently silent on this issue. However, in discussions with SOS, a reasonable argument has developed that Act 595 intends to allow this documentation to be used by absentee voters in long-term care facilities. Staff and SOS believe that voters should receive the benefit of any doubt on voter ID issues.

If approved, appropriate changes should be reflected in §800 and in §810.

14. Comment (RPA): Sec. 802(5), regarding name changes vis-à-vis POI – “If the voter’s name is different from the name in the precinct voter registration list, there is a specific procedure to follow in [A.C.A. §] 7-5-321 of the Act. If these rules do not follow and include that procedure they are outside the scope of the enabling legislation.”

AND

15. Comment (Watson Garland Co. CBEC): §802(5)poll worker Assessment... change language in the rule to clarify that voter must submit name change before receiving the ballot (“issue... a regular ballot after [instead of ‘if’] the voter completes a voter registration application form”)

Staff Response: Staff recommends the adoption of Garland County’s suggestion to change “If” to “after”.

Regarding RPA’s comment, note that the purpose of this rule is to address the POI requirement as it relates to voters who have changed their names since they registered to vote – usually, recently married voters.

Act 595 does not directly address name changes. Name changes are addressed in A.C.A. §7-5-305(a)(6) and A.C.A. §7-5-306(a). The procedure RPA addresses, A.C.A. §7-5-321 deals with voters who fail to provide proof of identity. Proposed §802(5) deals with voters who have provided proof of identity.

16. Comment (AARP): §802, Commenter asks for a rule addressing how poll workers will be trained to carry out with fairness and consistency the task of comparing photo [ID]... to the physical characteristics of the voter standing before them...”

AND
17. Comment (Soffer): §802 Poll Worker Assessment of Validity of Proof of Identity remove (7)
because the Act does not contain any provision for a poll judge to make a call in the event there
is a dispute whether the photo identification presented is that of the voter or not. The Act is
clear if there is doubt, the individual is voted on a provisional ballot and the county board makes
the determination. The alternative is asking the voter to provide a second form of identification
to substantiate who they are. Not necessarily a photo ID but perhaps a credit card, and this can
be covered in training.

Staff Response: Regarding AARP’s comment, §802(3) requires poll workers to compare the photo on
the POI to the person standing before them “considering hair color, glasses facial hair, cosmetics, weight
and other physical characteristics.” When there is doubt, the election judge is the final arbiter. Staff will
recommend for the training materials to stress that poll workers must approach this task with the
understanding that these characteristics can change over a period of time and that they must be applied
fairly and consistently.

Regarding Commissioner Soffer’s proposal to remove §802(7), first note that the purpose for many of
these rules, including this one, is to assure uniformity and consistency in the application of Act 595
statewide. If §802(7) is removed, the interpretation of Act 595 could vary from poll-to-poll and county-
to-county, and there would be no basis for training one way or the other.

18. Comment (Washington Co. CBEC: §802(2), requiring a poll worker to compare the registrant ID
number on a clerk-issued ID card against the poll book, “if the card came from the county clerk’s
office, then the numbers should be the same as what is in the [poll book].”

Staff Response: Staff is not sure whether the commenter is asking that this language be changed or
removed. Staff can only note that SOS requested this language.

19. Comment (RPA): §803, regarding the additional ID requirement for flagged first-time voters –
“Federal law must be followed for this section and it appears it has been but this should be
confirmed.”

Staff Response: The Bureau of Legislative Research, which reviews proposed rules prior to submission
to the legislative committee, raised the same question that this comment poses regarding federal law’s
interaction with the additional first-time voter requirement. Here is how staff responded to a question
from Jessica Sutton of BLR, in part addressing the federal law issue:

Q. I’m really confused how this “additional identification requirement for certain first-time
voters” works. Are they required under every circumstance to provide proof of identity? Or
are you saying that if they don’t have proof of identity, they can provide any of the other
items, like utility bill, bank statement, etc. The voter id rules state that if their photo id is
expired, they can provide one of those other things. But what if they don’t have proof of
identity, current or otherwise? If you could just clarify this for me, I would appreciate it.
A. Our proposed rule would require flagged first-time voters to provide POI if their POI is also a current and valid photo ID (an unexpired driver license, for instance) that is all they are required to present, as an unexpired DL is a "current and valid photo identification."

However, POI is not required to be current and valid. For instance, an expired driver's license can be acceptable POI if it expired no more than four years before the election. Other forms of acceptable POI may not contain an expiration date or any other facial evidence of its currency and validity. So, if a flagged first-time voter presents POI that is not "current and valid" the voter, under our proposed rule, must additionally submit a current and valid photo ID or a utility bill, bank statement, government check, etc.

If a flagged voter does not present POI and either does or does not present a (non-POI) current and valid photo, utility bill, bank statement, etc. the ballot would be made provisional, but it would be considered as non-POI provisional ballots are considered — if the voter is determined to be a registered voter (usually by signature check against the voter registration signature) the provisional ballot would count.

This is very confusing. The confusion stems partly from the legislative decision to retain both the additional identification requirement for flagged first-time voters as required by the Help America Vote Act and (42 U.S.C. Sec. 15483(b)) and the requirement that notice of the "additional identification requirements" appear on the voter registration form. See Amendment 51 Section 6(a)(7)(C) and 42 U.S.C. Sec. 15483(b)(4). Arguably, these provisions did not have to be retained in state law upon the passage of the more strict requirements of Act 595 (see 42 U.S.C. Sec15484). Some states that have passed ID laws retain the additional requirements and some do not.

The difficulty lies in trying to discern legislative intent from the statutory (and constitutional) scheme in place after the passage of Act 595, and this rule represents our best efforts to do so. However, if BLR has different ideas regarding this issue we would be most grateful to be able to discuss them and I'm sure our board would be interested in and thoughtfully consider any different viewpoint(s).

20. Comment (Washington Co. CBEC): §805 regarding post-election submission of POI, the commenter suggests a rule prohibiting voters from bringing POI to the clerk until the Wednesday after the election day.

Staff Response: Act 595 states in Section 5 (new A.C.A. §7-5-321(c)) that a provisional ballot of a voter who failed to present POI at the polls "shall be counted if... the voter returns ...by 12pm on the Monday following the election" and provides POI or an affidavit. So, Act 595 does not rule out election day "returns" and legislation would be required to accomplish the commenter's goal.
21. Comment (RPA): §810 regarding the absentee voting ID requirement, commenter suggests establishing a procedure for returning and “protecting” original ID documents such as drivers licenses and student ID’s that might be sent in with absentee ballots.

Staff Response: Staff suggests that perhaps the board could better ascertain whether there is a need for such a rule after an election cycle has passed.

22. Comment (RPA): §810, eliminate the requirement to include notice of the absentee voter ID provisions in the absentee ballot application form and the voter statement because the requirement exceeds the authority of and varies from past practice of the SBEC. In support of this objection to the rule, commenter asserts:

(a) That current law spells out what can appear on the application and voter statement. The proposed rule exceeds the scope of that legislation and the SBEC does not have specific authority to regulate absentee ballot applications and voter statements by adding requirements in those areas. This is a substantive area where the legislature has provided specific details as to how to handle “that substantive area of law.”

(b) Voters or groups” may create their own absentee ballot application” which will be accepted if the application includes the information required by the statute. It will be confusing for voters, clerks and third party organizations that create their own applications if the rule is adopted because there is no specific statutory authority for SBEC to promulgate rules regulating applications and voter statements; litigation could result;

(c) A bill was filed in the 2013 legislative session that would have provided for notice of the ID requirement on the voter statement and since that bill did not pass, SBEC cannot make a rule requiring notice of the ID requirement on the application or voter statement;

(d) The board has not traditionally regulated areas like applications and voter statements.

Staff Response: Staff responds to RPA’s comment as follows:

Staff’s reason for the rule

First, it is important to fully explain the reasons for the proposed rule. Staff believes that absentee voters need to be informed of the new absentee ID requirement in the most effective way possible.

Act 595 requires that the voter include a copy of her/his ID document when they return their absentee ballot – if ID is not included the ballot is rejected. On belief, many voters will not have ready access to a copy machine. Some of those voters will not wish to send in their only copy of a bank statement, utility bill, current and valid photo ID, etc. Therefore the sooner in the process that a voter receives direct notice of the ID requirement, the more likely the voter will be able to lay hands on the proper ID and get it copied in time to send it in with his/her ballot. Staff believes this early, direct notice of the ID requirement on a document that the voter must sign in order to get an absentee ballot could save many absentee ballots from rejection.

Comments & Responses for Rules on Voter Identification Page 7
Likewise, Staff believes that the instruction should appear directly on the voter statement, which must be signed by the voter. This is the best way to remind absentee voters to include ID when they send in their ballots and thus avoid rejection of their ballots.

While SOS has informed Staff that SOS has a plan for voter education that would include absentee voter ID, and Staff has no reason to believe that SOS’s efforts will not be as effective as such a campaign can possibly be, staff nonetheless believes it is critical that information about the new ID requirement be at absentee voters’ fingertips both when they are applying for an absentee ballot and when they are returning it to the clerk.

Objection: (a) Current law spells out what can appear on the application and voter statement, the proposed rule exceeds the scope of that legislation, and the SBEC does not have specific authority to regulate absentee ballot applications and voter statements by adding requirements in those areas; This is a substantive area (presumably absentee applications and voter statements) where the legislature has provided specific details as to how to handle “that substantive area of law”

RPA first objects to the proposed rule on the grounds that the rule is contrary to statutes setting out the information that must appear on the absentee ballot application and the voter statement. RPA cites A.C.A. §7-5-410, which states that it is “unlawful for any person to place any notice, advertising material, or other advice with the material delivered or mailed to the applicant, other than instructions as to the method of casting an absentee ballot including a procedure to be followed by absentee voters such as express information covering the type or types of writing instruments which may be used to mark the absentee ballot, preferably pen or indelible pencil, the consequences of voting for more than one (1) candidate for a particular office, and notice of the last day on which the ballot may be received and counted. The instructions and notice shall not be signed by the name of any person.” They assert that A.C.A. §§7-5-404 (which essentially establishes deadlines and other procedures for the delivery of the application – RPA may intend to refer to §7-5-405, which states that the SOS prescribed form “shall contain the following information,” and goes on to list the information) and 7-5-409 (which in (b)(4)(ii)-(v) states that the “voter statement shall include” specific items which follow) set out specifically and exclusively what must be included in the absentee ballot application and the voter statement.

Staff response to objection (a)

Staff respectfully disagrees with RPA’s assertion that the proposed rule is contrary to law.

A.C.A. §7-5-410, cited by RPA, specifically contemplates and allows “Instructions as to the method of casting an absentee ballot including a procedure to be followed by absentee voters . . . .” The statute goes on to list examples, but not an exclusive list of allowable topics of instruction (“including a procedure to be followed by absentee voters such as express information covering the type or types of writing instruments which may be used to mark the absentee ballot, preferably pen or indelible pencil, the consequences of voting for more than one (1) candidate for a particular office, and notice of the last day on which the ballot may be received and counted.” (emphasis supplied’)).
The proposed rule is for instructions to be included on the application form ("an absentee ballot application form shall include instructions regarding the absentee voter identification requirement") and the voter statement ("a voter statement under A.C.A. §7-5-409 shall include instructions regarding the absentee voter identification requirement"). Such instructions are clearly permitted by §7-5-410.

It might be that RPA is asserting that even if voter ID instructions are allowed "with" the materials delivered to the clerk, as per the language in §7-5-410, they are not allowed on the forms themselves. Staff believes there is substantial legal support for adding the instruction to the forms themselves. The question is whether A.C.A. §§7-405 and 7-409, by listing certain information that must be included on them, purport to exclude instructions about absentee voter ID from the face of applications and voter statements.

First, it must be noted that SBEC’s rule-making authority is broad—it may adopt "all necessary rules to assure ... fair and orderly election procedures." As noted above, Staff believes that the proposed rule is necessary to assure that the absentee ID requirement is implemented fairly.

Second, the statutes setting out the contents of the application and voter statements contain no language that indicates the legislature wished to exclude additional information relating to the absentee voting process. Indeed, traditionally, the absentee ballot application and other election-related documents have long contained information in addition to that prescribed in the code. For instance, the current prescribed application form includes, in addition to the requirements of §7-5-405, information regarding bearer limitations, a note that anyone may distribute blank absentee ballot applications, a note to the effect that the form may be distributed by the county clerk beginning 60 days before the election, a note to return the application to the county clerk, a title ("Application for Absentee Ballot"), a revision date, a notation "For Office Use Only", a space for a Precinct #", and The County Clerk’s name, office address and telephone and fax numbers.

Finally, Arkansas’s courts have long held that election laws are mandatory before an election but directory afterwards. This means that an election official can be ordered by a court to fix an error in a prescribed form before the election, but once an election is held the official’s error will not invalidate the election or call into question any voter’s ballot. This judicial maxim, along with the authority given to SBEC in A.C.A. §7-4-101(c)(6) to make rules assuring fair election procedures reflects Arkansas’s liberal policy in favor of legitimate voters being able to cast votes that will count.

In light of the critical need to make absentee voters aware of new ID requirements, SBEC’s broad authority to make rules to assure fair election procedures, the tradition of including relevant and necessary information on election-related forms, the policy of the state to interpret election laws broadly to ensure that every valid vote counts, and the extremely small likelihood (in Staff’s opinion) of litigation challenging this requirement, Staff asserts that the proposed rule would be a proper and desirable exercise of SBEC’s rule-making authority.

Objection (b), Voters or groups may create their own absentee ballot application which will be accepted if the application includes the information required by the statute.
This objection to the rule is grounded in the fact that some political groups send out flyers in the mail before elections urging the recipients to vote absentee, and include as part of the flyer an absentee ballot application “form” that is not the prescribed form, but usually supplies enough information to qualify as a “letter or postcard” application pursuant to A.C.A. §7.5-404(a)(6)(i). Commenter is concerned that it will be confusing to “voters, clerks and third party organizations that create their own absentee ballot applications” if the requirements are added by the rule.

Staff response to objection (b)

The current wording of the rule may indeed cause some confusion and Staff will recommend that the rule be changed to clarify that the requirement for the voter ID instruction is required to appear only on the forms sent out by the county clerks. Please note that the rule is not intended to nor would it cause any form to be rejected for lack of the instruction. Also note that the original version of the rule submitted to the SBEC required SOS to include the instruction on the form that office prescribes under A.C.A. §7.7-405, and the change to the current wording was made at the last SBEC meeting after discussion with SOS staff, who objected to the original wording of the rule.

Objection (c), a bill was filed in the 2013 legislative session that would have provided for notice of the ID requirement on the voter statement. Since that bill did not pass, SBEC cannot make a rule requiring notice of the ID requirement on the application or voter statement.

Staff response to objection (c)

HB 2068 was passed by the House and died in Senate committee. Staff is not aware of any legal authority for the proposition that a bill that did not pass has any evidentiary bearing on the issue of a regulatory agency’s ability to make a rule on the same subject matter, and commenter has cited no such authority. As noted above, Staff is of the opinion that the board has the authority to make this rule.

Objection (d) the board has not traditionally regulated areas like applications and voter statements.

Staff response to objection (d)

Commenter asserts that SBEC’s current rules dealing with “election-day procedures, poll workers counting votes, election monitors, filing fees for nonpartisan positions,...and... [reimbursement] for...election expenses,” should be sufficient and that SBEC should not “expand its rules to govern new areas like absentee ballot applications and voter statements” because that could appear to be “an effort to assume roles granted other areas of government.

In response, Staff notes that these proposed rules, and many of the other rules mentioned by commenter, were conceived and proposed in the spirit of the SBEC’s mandate to make rules to assure fair election procedures. With regard to the rule set out in §810, Staff saw that the existing statutory scheme offered an opportunity, through rule-making, to promote fairness in the legal procedure a voter undertakes to obtain an absentee ballot by instructing those voters on the newly enacted necessity to provide ID.
SBEC's rules have evolved over time. These proposed rules and the existing rules are there to assure fairness in elections through uniform application of the laws in all of our state's election jurisdictions. Here, it is absolutely critical that absentee voters be provided information about the ID requirement at every opportunity. Unlike voters at the polls who have a second chance to present ID, failure to provide ID with absentee ballots results in the rejection of those ballots. The proposed rule is how Staff proposes SBEC address a procedure for providing this necessary information.

23. Comment (SOS): §810, the requirement that notice of the absentee voter ID requirement be included in the absentee ballot application form – commenter objects to this requirement because “absentee ballot applications are generated by the electronic voter registration system” and it would take well into 2014 to “plan and implement the necessary coding” to include the notice on the form. Commenter “questions” changing the form between the primary and general elections, if the change is possible at all. Commenter also states that Act 595 did not include this requirement and no funds were appropriated for the changes that would result from the rule. The commenter expressed that SOS is committed to ensuring public awareness of Act 595's ID requirements.

Staff response: This objection to the requirement that the absentee ID instruction be included on the voter absentee ballot application is related to the way the county clerks supply applications to voters. As Staff understands the process, when a voter requests an application from the county clerk, the county clerk does not merely hand or send the voter a blank application. Rather, the clerk goes into the voter registration system and prints out an application that includes much of the information the voter would otherwise be required to fill in. By printing this pre-populated form from the system, the clerk is also able to keep track of voters to whom he/she has sent applications. The proposed rule would require a programming change to this application.

Staff submits the following alternatives for substitute language if the board decides to include this rule:

(a) The Secretary of State shall include on the prescribed absentee ballot application form under A.C.A. §7-5-405 instructions regarding the absentee voter identification requirement, including a statement that the voter's absentee ballot will not be counted if a copy of a proper voter identification document is not included when the voter returns the absentee ballot. OR

(b) Beginning no later than the date on which the electronic voter registration system is programmed to provide for the addition of an instruction under this rule, The Secretary of State shall include on the prescribed absentee ballot application form under A.C.A. §7-5-405 instructions regarding the absentee voter identification requirement, including a statement that the voter's absentee ballot will not be counted if a copy of a proper voter identification document is not included when the voter returns the absentee ballot. OR

(c) An absentee ballot application form provided to a voter by a county clerk shall either have printed on the form or attached to the form instructions regarding the absentee voter
identification requirement, including a statement that the voter's absentee ballot will not be counted if a copy of a proper voter identification document is not included when the voter returns the absentee ballot.

24. Comment (Watson Garland Co. CBEC): §810, absentee voting ID, require POI instead of the different ID requirement for absentee voters. The lesser requirement for absentee promotes absentee ballot fraud. Commenter also notes that absentee voters should try to go to the polls and vote because there are many mistakes on the absentee paperwork that cause ballots to be rejected.

Staff response: Act 595 does not allow this suggestion to be implemented.

25. Comment (AARP): Sections 804-809, commenter is concerned that many provisional ballots will not be counted or will be counted only after a candidate has conceded or declared victory, and asks for a rule establishing procedures to minimize the number of provisional ballots and to fully account for and explain any discrepancy between the number of provisional ballots submitted on election day and the number initially counted by noon on Monday after the election.

Staff response: Commenter suggests additional ballot accounting procedures that would impose a new reporting requirement on county election officials. A new public comment period in the context of a new rule-making process may be desired before consideration of such a rule.

Changes proposed by Staff

§800 add the definition of "Administrator" to wit:

Administrator - means the administrative head of a long-term care or residential care facility licensed by the state.

§802 change the first sentence of the first paragraph to state as follows:

The proof of identity shall be used ___-to verify the name and appearance of the voter, except that when a voter presents a voter identification card issued by the county clerk pursuant to Act 595 of 2013, the card shall also be used to verify the voter's identification number.
CRAIGHEAD COUNTY ELECTION COMMISSION

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Jonesboro, AR 72401

Commissioners
Scott McDaniel, Chair
Erika Krennerich Chudy
Keith L. Chrestman

Election Coordinator
Sandra Taylor
870-932-3407

January 27, 2014

The Honorable Mike Beebe
Governor of Arkansas
State Capitol, Room 250
Little Rock, AR 72201

The Honorable Mark Martin
Arkansas Secretary of State
State Capitol, Suite 256
Little Rock, AR 72201-1094

The Honorable Davy Carter
Speaker of Arkansas House of Representatives
P.O. Box 628
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The Honorable Michael Lamoureux
President Pro Tempore of Arkansas Senate
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The Honorable Robert Thompson
Arkansas State Senator
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The Honorable John Cooper
Arkansas State Senator
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The Honorable Butch Wilkins
Arkansas State Representative
2639 County Road 333
Bono, AR 72416

The Honorable Homer Lenderman
Arkansas State Representative
195 County Road 953
Brookland, AR 72417

The Honorable Harold Copenhaver
Arkansas State Representative
P.O. Box 19415
Jonesboro, AR 72403

The Honorable John K. Hutchison
Arkansas State Representative
P.O. Box 127
Harrisburg, AR 72432

State Board of Election Commissioners
c/o Justin Clay, Director
501 Woodlane Drive, Suite 401 N
Little Rock, AR 72201

Dear Governor Beebe; Secretary Martin; Speaker Carter; President Lamoureux;
Senators Thompson & Cooper; Representatives Lenderman, Wilkins,
Copenhaver, & Hutchison; and Mr. Clay:

ATTACHMENT L

ADD. 310
We're writing you with the hope that a potential problem can be avoided. We suggest that the Election Code concerning proof of identity and absentee voting be changed. Under current law, the voter must provide this information when his or her absentee ballot is cast. We suggest changing the law so that this identification is provided when the voter applies for an absentee ballot.

As you know, Craighead County just completed its state senate district 21 election. This was the first and—to our knowledge—only election held under new statutory laws requiring proof of identity. Applying these statutes to the counting of absentee ballots became an issue. Of the 133 absentee-ballot packets received, only 70 contained the required proof of identity. So we faced the question of how to handle the remaining 63 ballots. Our own review of the law led us to conclude that reasonable people could differ about how these statutes should be implemented. This conclusion was confirmed when the Arkansas Board of Election Commissioners and the Secretary of State gave us conflicting interpretations of the law. The Board opined that the absentee ballots should not be counted. But the Secretary contended that, under Act 595 of 2013, we should give the voters an opportunity to show proof of identity. We chose to give our absentee voters the opportunity to show proof of identity.

In our election, the election-day vote difference between the two candidates was greater than the number of absentee votes cast. So regardless of how the absentee voters voted the outcome remained the same. But on the horizon are our 2014 primary and general elections. And in these elections, it's foreseeable that absentee voters could decide some contested races. If so, who—the Board or the Secretary—expresses the correct legal interpretation of the General Assembly's intent? Without clarification, Arkansas's 75 county election commissions are left to decide. And if they aren't uniform in their interpretations, absentee ballots in different counties could be treated differently.

To treat voters from different counties differently is wrong. This is a foreseeable problem. But fortunately it's a preventable problem too. We urge a brief special legislative session to take place at the end of the upcoming fiscal session to adopt legislation to solve this problem.
We believe that proof of identity should be presented at the time the absentee ballot is applied for. It can be done in person, by bearer, or by mail. This process gives the voter the opportunity to remedy any failure to provide proof of identification before a vote is cast. This will minimize confusion. And with minimized confusion comes greater public confidence and quicker election results.

Respectfully,

CRAIGHEAD COUNTY ELECTION COMM'N

Erika Kregnerich Chudy  
Majority Party

Scott McDaniel, Chair

Keith L. Chestman,  
Minority Party

cc: Jonesboro Sun
Sent: via FAX 870 972 9255 and U.S. mail

January 17, 2014

Mr. Scott McDaniel
Chairman, Craighead County Election Commission
2912 Clearwood Cove
Jonesboro, AR 72404

Re: Absentee Ballots

Dear Mr. McDaniel,

I write to follow up our telephone conversation of Wednesday, January 15, 2014 when we discussed how to handle absentee ballots that did not contain the required identification. My advice has not changed and the Office recommends in this circumstance, that absentee voters who failed to provide proper identification should be treated like voters who cast their ballots at a polling location and should be allowed the opportunity to provide identification to the county board of election commissioners or the county clerk within the cure period.

Some background may be helpful. Act 595 of 2013 established new identification requirements for Arkansas voters. For those voting early or on election day, the voter must provide photo identification which is clearly defined in Ark. Code Ann. § 7-1-101(30). For those voting by absentee ballot, Act 595 requires the voter to submit one of the following items:

A copy of a current and valid photo identification; or

A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter

During testimony when the bill was presented, the sponsor of Act 595 stated that he was concerned for older Arkansans who may be home-bound and not have a driver’s license or state-issued photo identification card, and wanted to provide additional options. The language adopted in Act 595 allowing the voter to provide a copy of a current utility bill etc. is consistent...
with identification requirements imposed on first-time voters who registered by mail and failed to provide proper identification when registering.¹

Section 5 of Act 595 provided the remedy for voters who fail to provide adequate identification. See Ark. Code Ann. § 7-5-321. Ballots should be considered provisional ballots and should be counted if the voter provides the necessary identification or an appropriate affidavit to the county board of election commissioners or the county clerk by noon on the Monday following the election. Ark. Code Ann. § 7-5-321(c).

The language in new § 7-5-321 makes no distinction between "absentee voters," "early voters," or "election day voters." The Office recommends that counties should treat ALL ballots where the voter failed to provide appropriate identification as provisional and allow the voter the opportunity to provide identification to the election commission or the county clerk within the cure period. That is consistent with legislative intent.

Assuming the voter has not been challenged or required to vote a provisional ballot for another reason, and assuming the voter is properly registered and qualified, it would be consistent with the drafting, language and structure of Act 595 to count the provisional ballots of absentee voters who later provide the appropriate identification during the cure period.

Should you have questions, I would be happy to continue this discussion. Thank you for all of your work as an election commissioner to serve the people of Craighead County and the Great State of Arkansas.

Yours very truly,

Martha Adcock
General Counsel

cc: Keith Chrestman, Craighead County Election Commission
    Erika Krennerich Chudy, Craighead County Election Commission
    Sandra Taylor, Craighead County Election Coordinator

¹ Members of the uniformed services and the merchant marine along with their spouses and dependents who are absent from the county on election day because of the service of the member are exempt from the identification requirements and residents of a long-term care or residential care facility licensed by the state may provide a letter from the administrator of the facility in lieu of the identification requirement.
January 30, 2014

The Honorable Dustin McDaniel
Attorney General of Arkansas
200 Tower Building
Little Rock, AR 72201

Dear General McDaniel:

As the Pulaski County Board of Election Commissioners prepares for this year’s election process, Act 595 of 2013, which was approved on April 2, 2013, raises some concerns. The Act, as codified in Ark. Code Ann. §7-5-201, requires that a voter provide “proof of identity to the election official when appearing to vote in person either early or at the polls on election day.” When voting by absentee ballot, the voter is required to “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”

When the voter fails to provide proof of identity, Section 5 of Act 595, codified at Ark. Code Ann. §7-5-321, requires that the voter cast a provisional ballot which shall be counted if the “voter returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election” and provides proof of identity or an affidavit stating that the voter cannot provide proof of identity because of indigence or a religious objection to being photographed.

According to section 6 of the Act, codified at Ark. Code Ann. §7-5-418(d)(2), the procedure in Ark. Code Ann. §7-5-321 is to be followed for an early voter failing to provide identification. The Act is silent with regard to a remedy for an absentee voter that fails to “submit with the ballot” the required documentation concerning proof of identity.

The State Board of Election Commissioners has promulgated Rules for Voter Identification. Sections 805, 806, and 807 of those rules provide as follows:

§ 805 Postelection Submission of Proof of Identity or Affidavit of Indigence or Religious Objection

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1 Members of the uniformed services and the merchant marines, along with their spouses and dependents, who are absent from the county on election day because of service of the member are exempt from the identification requirements and residents of a long-term care or residential care facility licensed by the state may provide a letter from the administrator of the facility in lieu of the identification requirement.
A provisional ballot cast because a voter failed to present proof of identity when voting at the polls during early voting or on election day shall be counted and included in the certified results of the election if:

(1) The voter’s ballot is not successfully challenged for any other reason; and

(2) The voter provides to either the county clerk or the county board of election commissioners by noon on the Monday following the election either the voter’s proof of identity or an affidavit that the voter cannot provide proof of identity because of indigence or a religious objection to being photographed.

The voter may provide his or her proof of identity or his or her affidavit of indigence or religious objection to the county board by presenting the proof of identity or the affidavit at any meeting of the county board held before noon on the Monday following the election.

The voter may provide his or her proof of identity or his or her affidavit of indigence or religious objection to the county clerk by presenting the proof of identity or the affidavit to the county clerk before noon on the Monday following the election.

The voter shall present the proof of identity or deliver the affidavit of indigence or religious objection in person.

§ 806 Assessment of Validity of Proof of Identity Submitted Postelection

The county clerk or county board shall compare the photograph to the voter to determine whether the voter is the person depicted in the photograph, considering hair color, glasses, facial hair, cosmetics, weight, age, injury and other physical characteristics.

The county clerk or the county board receiving a proof of identity shall make a photocopy of the proof of identity and retain the copy with the voter’s provisional ballot envelope. The county clerk or the county board shall provide a receipt to the voter containing the following information:

(1) The name of the county clerk, or each county board member present at the meeting where the proof of identity was presented;
(2) The name of the voter who presented the proof of identity;
(3) The date and time the proof of identity was presented to the clerk or county board;
(4) If it is determined that the photograph on the proof of identity depicts the voter, then a declaration of that finding;
(5) If it is determined that the photograph on the proof of identity does not depict
the voter, then a declaration of that finding including the reason for that finding; and

(6) Any additional information the clerk or county board deems relevant.

The county clerk or county board shall retain a copy of the receipt.

§ 807 Postelection Submission of Affidavit of Indigence or Religious Objection

The county clerk or county board receiving an affidavit of indigence or religious objection shall make a photocopy of the affidavit, provide the copy to the voter and retain the original affidavit with the voter’s provisional ballot envelope. The county clerk or the county board shall provide a receipt to the voter containing the following information:

(1) The name of the county clerk, or each county board member present at the meeting where the affidavit was delivered;
(2) The name of the voter who delivered the affidavit;
(3) The date and time the affidavit was delivered to the clerk or county board; and
(4) Any additional information the clerk or county board deems relevant.

The county clerk or county board shall retain a copy of the receipt.

Like the Act, the Rules promulgated by the State Board of Election Commissioners do not address any remedy for absentee voters that fail to “submit with the ballot” the required documentation.

Additionally, it should be noted that Act 1424 of 2013, which was approved on April 22, 2013, amended Ark. Code Ann. §§7-5-412 and -416. These two statutes provide when an absentee ballot should be considered a “provisional ballot.” According to Ark. Code Ann. §7-5-412, a first-time voter who registered by mail and did not provide identification at that time, must submit a “copy of a current and valid photographic identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the first-time voter.” Failure of the first-time voter to meet the identification requirements of Ark. Code Ann. §7-5-412 may cast the ballot by mail, and the ballot is considered as a provisional ballot. Arkansas Code Ann. §7-5-416 provides that an absentee ballot shall be considered a provisional ballot under the same circumstances as set out in Ark. Code Ann. §7-5-412 and when the name and when the name and address of the bearer, agent or administrator written on the absentee return envelope does not match the information on the voter statement. Other than a challenge by a candidate or qualified poll watcher (Ark. Code Ann. §7-5-417), no

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2 The first-time voter who registered to vote by mail can also submit his or her driver’s license number or at least the last four (4) digits of his or her social security number at the time of registration if the information matches the information in an existing state identification record bearing the same number, name, and date of birth as provided in the registration.
other reason is provided for considering an absentee ballot to be a “provisional ballot.”

This raises several questions about the implementation of Act 595 in elections conducted by the Pulaski County Election Commission.

1) Pursuant to Act 595 of 2013, should an absentee voter that is not exempt from the identification requirements and fails to “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” have his or her ballot considered a provisional ballot and be allowed the opportunity to provide identification by 12:00 p.m. of the Monday following the election?

2) If the answer to Question 1 is “yes,” how is the voter to be notified of the need to provide identification? (According to Ark. Code Ann. §7-5-416, processing of absentee ballots may not begin before 8:30 a.m. on election day; therefore, depending on the number of absentee ballots processing may not be completed in time to mail notifications that same day.)

3) If the answer to Question 1 is “yes,” will the absentee voter be required to present “proof of identity” as defined in Ark. Code Ann. §7-1-101 rather than “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter?”

4) If the answer to Question 1 is “yes,” must the identification be provided in person as required by Ark. Code Ann. §7-5-321? Many people meeting the requirements to vote absentee (i.e., unavoidably absent from his or her voting place on the day of the election or unable to attend the polls because of illness or physical disability) would likely have the same difficulty appearing in person at the County Clerk’s office or an Election Commission meeting within the three and ½ business days between election day and the following Monday at noon.

5) If the answer to Question 4 is “no,” how will the County Clerk and Election Commission comply with Rules 806 and 807 promulgated by the State Board of Election Commissioners?
6) If the answer to Question 1 is “yes,” how should the election commission handle civilian overseas absentee ballots that are postmarked by election day but arrive after 12 p.m. on the Monday following the election (see Ark. Code Ann. §7-5-411) and do not contain the required identification documentation?

7) Would treating absentee voters differently from “in person” voters by denying them the right to submit the identification documentation at a later date create any problem under either the Arkansas or U.S. Constitution?

We are having a special election in Pulaski County on March 11, 2014, and would ask that you expedite your opinion.

Thank you for a prompt response.

Sincerely,

Leonard A. Boyle, Sr., Chairman
Pulaski County Board of Election Commissioners