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**RULE PROPOSALS**

**LAW AND PUBLIC SAFETY  
OFFICE OF THE ATTORNEY GENERAL**

*40 N.J.R. 1772(a)*

**Pre-Proposed New Rules: *N.J.A.C. 13:17-7***

**Notice of Pre-Proposal**

**Credentialing Rules for Exit Polling**

Authorized By: Anne Milgram, Attorney General of New Jersey.

Authority: *N.J.S.A. 19:34-6, 19:34-7, and 19:34-15*; and *N.J.S.A. 52:17B-98*.

Pre-Proposal Number: PPR 2008-1.

Submit written comments by June 1, 2008 to:

Donna Kelly, Assistant Attorney General

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**Take notice** that the Attorney General of New Jersey intends to adopt new rules to continue or, if appropriate, to revise or supplant the existing Statewide procedure by

which persons authorized by law to do so may obtain credentials to conduct exit polling on election days, while an election is in progress, within the 100-foot protected zones surrounding polling places. See *N.J.S.A. 19:34-6*, 7, and 15 (defining the 100-foot protected zones and proscribing expressive and other activities therein). In accordance with *N.J.S.A. 52:14B-4(e)* and *N.J.A.C. 1:30-5.3(b)* and (c), the Attorney General seeks comments to assist her in determining what the rules should be. The new rules will codify the existing credentialing process set forth in the Attorney General's July 18, 2007, "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups" (hereinafter, "Directive"), copy appended in Appendix A; or, if appropriate, the new rules will revise or supplant the credentialing portion of this Directive so as better to further the goals of simplifying and coordinating the credentialing process; assuring that voters are as free from interference as possible during their exercise of the right to vote; preventing conduct that unlawfully violates, among other statutes, *N.J.S.A. 19:34-6*, 7, and 15; and simplifying the responsibility of the lay election officials of the more than 6,000 district election boards in this State to ensure that expressive activity within the 100-foot zones does not unlawfully violate these statutes and instead constitutes exit-polling activity being conducted by persons who have been issued appropriate credentials; or any other appropriate goals that may be suggested in the comments about this pre-proposal.

This notice of pre-proposal includes, for the purposes of comment and discussion, the text of proposed rules that would codify the credentialing portion of the Directive; but this text should be considered merely a preliminary draft, and any and all comments and ideas regarding the appropriate method of credentialing persons authorized to conduct exit polling are welcome. Although the method of credentialing set forth in the Directive has worked well, the Attorney General is not committed to this or any particular method.

The Attorney General issued the Directive in her dual capacity as the State's Chief Law Enforcement Officer and the Chief Election Official. In January of this past year, the Legislature enacted and the Governor approved P.L. 2007, c. 254, §2, amending *N.J.S.A. 19:31-6a* to designate the Secretary of State, rather than the Attorney General, as the Chief Election Official.

A short recitation of the history of the Directive may assist interested persons in forming comments that will be helpful to the rulemaking process. Several provisions of statutory law restrict expressive activity directed at voters in the vicinity of polling places. Among these, *N.J.S.A. 19:34-6(a)* criminally proscribes the "obstruct[ion] or

interfere[nce] with any voter"; "loiter[ing] in or near the polling place"; and "electioneering within any polling place or within one hundred feet thereof." Similarly, *N.J.S.A. 19:34-7* criminally proscribes "within the polling place or within a hundred feet thereof, loiter[ing], electioneer[ing], [and] solicit[ing] any voter." And *N.J.S.A. 19:34-19* proscribes "display[ing], sell[ing], giv[ing], or provid[ing] any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room" (but excepts official badges furnished by the county board). As to the interior of the polling place itself, *N.J.S.A. 19:15-8(a)* proscribes not only speech, but also the actual presence of anyone in the polling place or room other than voters and certain select persons. Additionally, *N.J.S.A. 19:34-15* proscribes, within the polling place or room or within a distance of 100 feet of the outside entrance to the polling place or room, the distribution and display of printed matters, the offer of suggestions, and the solicitation of support for any candidate, party, or public question.

Prior to 1988, the Attorney General interpreted these statutes as embodying a legislative intent that voters have complete freedom of movement entering and leaving the polls and that no one, for whatever purpose, would be allowed, within the 100-foot protected zones, to loiter, display or distribute literature, or solicit any voter for any purpose; and the Attorney General enforced these statutes without exception. However, in 1988, in response to questions from and concerns raised by the news media, the Attorney General concluded that persons representing the press and the news media have a First Amendment right to conduct exit polling within these zones. This conclusion was set forth in a June 2, 1988, letter-opinion from Attorney General Cary Edwards to the Honorable Jane Burgio, Secretary of State. Thereafter, a widespread but informal process took place by which county boards of election issued credentials to members of the news media to identify them as persons permitted to conduct election polling within the 100-foot protected zones.

Recently, the American Civil Liberties Union, the Asian American Legal Defense and Education Fund, and the New Jersey Appleseed Public Interest Law Center urged the Attorney General to clarify that groups other than the media may also conduct exit polling. In response to this and other requests, the Attorney General solicited and reviewed a wide range of comments from these groups as well as from county election officials, members of the Legislature, the New Jersey Association of Election Officials, the Department of the Public Advocate, and the Lawyers' Committee for Civil Rights.

After careful consideration, the Attorney General concluded that not only non-obstructive members of the news media, but also non-obstructive non-partisan public interest groups should be permitted within the 100-foot zones to conduct exit polling. Although the 1988 opinion focused on the media because the inquiry was prompted by media concerns, the Attorney General concluded that the rationale of the opinion applied as well to other entities newly seeking to conduct exit polling. These conclusions were set forth in a July 18, 2007, letter from Attorney General Milgram (by Assistant Attorney General Donna Kelly) to county election officials.

Because new entities and persons would be conducting exit polling within the 100-foot protected zones, and because it would be important for election officials easily to distinguish persons lawfully conducting exit polling from other person unlawfully engaged in other expressive activity proscribed by *N.J.S.A. 19:34-6*, 7, and 15, the July 18, 2007, letter was accompanied by the Directive, which established a credentialing process as follows:

1. At least two weeks before an election, a representative of a media outlet or a non-partisan interest group [seeking to conduct exit polling] must submit a letter to the applicable county board of election, identifying polling place locations where the exit polling is to be conducted.
2. The county board of elections must provide an authorization letter for exit polling to the media and/or non-partisan interest group. This letter is to include the procedures that are set forth in this directive.
3. Any person conducting an exit poll must display credentials, provided by the applicable county board of elections, that identify his or her name and the organization that is conducting the exit polling.

Thus, the Directive placed members of the news media and non-partisan interest groups on equal footing. The interval of two weeks was chosen to comport with *N.J.S.A. 19:7-3*, requiring challengers to register with boards two weeks prior to the election, a reasonable period of time in view of the tasks facing boards prior to elections.

On October 1, 2007, the American Civil Liberties Union filed a Notice of Appeal challenging, as a final agency decision, the entirety of the Directive. *In Re: Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups" Issued July 18, 2007*, Docket No. A-543-07T1. The American Civil

Liberties Union is arguing, among other matters, that the credentialing and two-week notice requirement of the Directive should have been promulgated in accordance with the rulemaking procedures of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. On January 23, 2008, the Appellate Division of the Superior Court entered an order denying the application of the American Civil Liberties Union for a preliminary injunction restraining enforcement of the Directive, and the February 5, 2008, primary election proceeded without incident insofar as the Directive is concerned. Oral argument on the merits of the American Civil Liberties Union's appeal is currently scheduled for March 12, 2008.

The Attorney General remains persuaded that the promulgation of the Directive was in all respects appropriate and that it should remain in full force and effect notwithstanding the arguments of the American Civil Liberties Union. However, the complexity of the credentialing issue among the 21 counties and of the two-weeks' notice requirement have persuaded the Attorney General to reconsider that portion of the Directive dealing with the credentialing and two-weeks notice requirement. The Attorney General is not re-considering her construction of the statutes and her analysis of the First Amendment by which she concluded that all expressive activity within the 100-foot protected zones, save exit polling, is proscribed; and that certain persons other than members of the news media have a First Amendment right to conduct exit polling within the protected zones. However, the Attorney General will reconsider the credentialing and two-weeks' notice portion of the Directive, and among the matters under consideration are (a) whether there is a need for a Statewide uniform standard, or whether the matter could better be resolved on the county level; (b) whether methods of credentialing other than with county boards of election are advisable; and (c) whether the period of two weeks should be revised.

The Attorney General is employing the rulemaking process so as to obtain more input on these issues than that which likely would be provided by the option of informal inquiry. In the interim, the Directive will remain in force.

The Attorney General submits herewith, for consideration, proposed rules that codify the credentialing and two-weeks notice portion of her Directive. The Attorney General emphasizes that the following rules should be considered merely a preliminary draft, and that any and all comments and ideas regarding the appropriate method of credentialing persons authorized to conduct exit polling including, and in addition to, those issues specifically enumerated above, are welcome.

**Full text** of the pre-proposal follows:

## SUBCHAPTER 7. EXIT POLLING

### 13:17-7.1 Purpose

This subchapter establishes the procedures by which persons authorized by law to conduct exit polling during an election within the 100-foot protected zones surrounding polling places may obtain credentials for that purpose. The goals of this subchapter include effecting a simple credentialing process; assuring that voters are as free from interference as possible during their exercise of the right to vote; preventing conduct that unlawfully violates, among other statutes, *N.J.S.A. 19:34-6*, 7, and 15; and simplifying the responsibility of the election officials of the district boards to ensure that expressive activity within the 100-foot zones does not unlawfully violate these statutes and instead constitutes exit-polling activity being conducted by persons who have been issued appropriate credentials.

### 13:17-7.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"County board of election" or "board" means the four members of the county board of elections of the county in which the credentialed exit polling is to take place, or one of them or another person designated by the board to assume the responsibilities of this subchapter subject to the board's approval.

"Protected zone" means any of the 100-foot zones surrounding a polling place as prescribed in *N.J.S.A. 19:34-6*, 7, or 15, within which expressive activity is constrained on election days while an election is in progress.

### 13:17-7.3 Two-weeks' notice and board credentialing

(a) An entity seeking to conduct exit polling within a protected zone shall, at least two weeks before an election, submit a letter to the county board of elections identifying the polling place locations where the exit polling is to be conducted and the person or persons who will or may conduct it. The letter shall provide sufficient information to allow the board to confirm that the entity is authorized by law to do so.

(b) If satisfied that the application is from an entity authorized to conduct exit polling within protected zones (including a non-partisan public interest group or news media), the board shall provide an authorization letter to the applicant. The board shall also provide credentials identifying the name of the person or persons conducting exit polling and the media or group with which she or he is affiliated.

(c) A person conducting exit polling within a protected zone must display credentials provided by the board pursuant to subsection (b) of this section.

#### 13:17-7.4 Limitation of authority

A board's issuing of credentials is for identification purposes only and does not confer any privilege or authority not authorized by law.

#### APPENDIX A

ATTORNEY GENERAL'S JULY 18, 2007, "DIRECTIVE ON EXIT POLLING:  
MEDIA AND NON-PARTISAN PUBLIC INTEREST GROUPS"

40 N.J.R. 1772(a)



**State of New Jersey**  
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DEPARTMENT OF LAW AND PUBLIC SAFETY  
PO Box 080  
TRENTON NJ 08625-0080

JON S. CORZINE  
Governor

ANNE MILGRAM  
Attorney General

July 18, 2007

County Boards of Election  
County Superintendents of Elections

Directive on Exit Polling:  
Media and Non-Partisan Public Interest Groups

In my dual capacity as the State's Chief Law Enforcement Officer and Chief Election Official, you are hereby directed to permit exit polling activity by representatives of the media and non-partisan public interest groups on election days.

The following guidelines apply to all exit polling activity within 100 feet of the outside entrance to a polling place:

1. At least two weeks before an election, a representative of a media outlet or a non-partisan public interest group must submit a letter to the applicable county board of election, identifying polling place locations where the exit polling is to be conducted.
2. The county board of election must provide an authorization letter for exit polling to the media and/or non-partisan interest group. This letter is to include the procedures that are set forth in this directive.
3. Any person conducting an exit poll must display credentials, provided by the applicable county board of election, that identify his or her name and the organization that is conducting the exit polling.
4. At all times, exit polling must be conducted in a way that does not obstruct any voter or other authorized individual who is entering or leaving the polling place.



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5. Exit polling must be conducted only when a voter is exiting the polling place, and the voter's participation is strictly voluntary.

6. Exit polling can be conducted within the 100 foot zone from the outside entrance to the polling place.

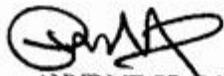
7. Exit polling cannot be conducted inside the polling place, including the passageway to the polling room and the room itself.

8. There can be no electioneering on behalf of any candidate, political party or group, or referendum within the 100 foot zone.

9. No campaign paraphernalia, signs or other insignia can be displayed by any person conducting an exit poll within the 100 foot zone.

10. Any person conducting an exit poll within the 100 foot zone must comply with any directive from an election official or authorized representative to assure the orderly conduct of the election.

11. Persons conducting an exit poll cannot poll, assist, or offer materials to voters entering the polling place.



ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY