



Project Vote

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September 27, 2007

Dear Chair Davidson:

Project Vote appreciates the time and thought that you and your fellow Commissioners are devoting to how best to implement the Election Assistance Commission's limited regulatory authority while ensuring a seamless transition from the Federal Election Commission's administrative process. We write to offer our views for your consideration as you deliberate on matters that bear directly upon the credibility of and public confidence in our election system. As we noted in our submitted testimony on September 6, 2007, the EAC's rulemaking authority is restricted to two matters: the federal mail registration form; and the agency's bi-annual report to Congress. (National Voter Registration Act, 42 USC § 1973gg-7(a)) This limited authority was acknowledged by Juliet Hodgkins, General Counsel of the EAC, in her testimony as well.

Currently, some regulations relating to the responsibilities of the Election Assistance Commission appear in the Federal Register listings of its predecessor agency, the Federal Election Commission. We believe that the most transparent and efficient way to update these regulations would be a two-step process. First, publish a Federal Register notice of the proposed transfer of the relevant FEC regulations to the EAC section of the Federal Register. (It will not be necessary to publish the FEC regulations themselves, as long as their Federal Register citation is included in the Notice.) Second, after the transfer is finalized, propose any revisions or updates relative to the mail form or the bi-annual report in a process that meets the requirements of the Administrative Procedure Act and the EAC's enabling statutes (NVRA and HAVA). This process must involve, at a minimum, consultation with state election officials, notice of proposed regulations, and a comment period before final rulemaking and publication in the Federal Register.

As we recommended in our September 6 submission, the EAC should make additional efforts to ensure transparency and accountability beyond what is minimally required by federal law. For example, all communications with state election officials should be "on the record" and timely posted on the EAC website. We would also encourage the EAC to convene study groups, comprised of academics, public officials, and members of the advocacy community, in order to have the benefit of the most informed guidance as it carries out its important mission. Since much of the jurisdiction over voting resides in the states, numerous and disparate rules, equipment, and systems have been employed over many years with varying degrees of success. These experiences are indispensable in

the EAC's ongoing work of improving elections and recommending "best practices." They should be shared in a public process.

It is clear, based upon all of the relevant federal legislation, that the EAC's rulemaking authority is narrowly circumscribed and limited to the two issues noted above: namely, the federal mail registration form and the bi-annual reporting requirement. The National Voter Registration Act further limits the scope of the EAC's power with respect to the federal form, prescribing with some specificity what the form may and may not include. (42 USC § 1973gg-7(b)) Consequently, many of the laws and procedures that states have recently enacted that restrict the acceptance and use of the federal form are patently impermissible, and further interpretation of the NVRA's "accept and use" clause (42 USC § 1973gg-4(a)(1)) is unnecessary. The EAC should decline to exercise its authority in this area.

Should the agency nevertheless choose to promulgate regulations to interpret the plain language of the NVRA with regard to the acceptance and use of the federal mail registration form, we urge you to propose the following procedures:

- The federal mail registration form shall be laid out clearly and unambiguously in at least 12-point type and shall demand no more information than that described in 42 USC § 1973gg-7(b)(1).
- States shall make the federal form available on their websites and in hard copy.
- Federal forms shall be available at motor vehicle offices, public agencies, and any other facility that is required by law to be or is regularly supplied with state forms and in comparable quantities to state forms.
- States must take affirmative steps to make federal forms available in facilities serving low income and minority citizens.
- In those agencies where distribution of voter registration forms is required, language assistance and assistance to disabled applicants shall be available.
- States must take affirmative steps to make federal forms available to organized voter registration drives.
- States may not limit the number of forms distributed at any one time to organized voter registration drives.
- States may not restrict methods of collection or transmission of forms by groups conducting voter registration drives.
- State instructions for using the federal form shall be simple, understandable, and printed in plain English, as well as every language spoken in the state by 5% or more of the state's voting age population.
- State instructions for using the federal form shall be no longer than one half of one page (for each language).
- Federal forms may be returned to any state motor vehicle office, public agency, or any other state or federal facility that is required by law to be or is regularly supplied with voter registration forms, or may be mailed, postage prepaid.
- Each state or federal office must transmit forms to the appropriate election office within 10 days of receipt; or, if the date of receipt is within 30 days of an election,

within 5 days of receipt; and must transmit on the day before the election any forms remaining in its possession.

- States may not impose eligibility, identification, or attestation requirements beyond those set out in 42 USC § 1973gg-7(b).
- States must accept the federal form as a notification of change of the voter's address and process it within a reasonable time.

Again, Project Vote is pleased that the EAC has embarked upon a careful consideration of its responsibilities under the NVRA, and we would be more than willing to lend our expertise as you proceed in implementing your regulatory authority. Please do not hesitate to get in touch with me at 503-375-9377 or by email at m Slater@igc.org.

Sincerely,

Michael Slater
Deputy Director