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Submission of Project Vote
United States Election Assistance Commission
Public Meeting and Hearing
September 6, 2007

Project Vote appreciates the opportunity to submit testimony relative to the Election Assistance Commission's consideration of its regulatory authority and approval of a process for adopting NVRA regulations.

Project Vote is a national nonpartisan, nonprofit corporation that provides research, guidance and technical assistance to voter participation and voting rights organizations. Project Vote regularly advises these organizations on the requirements of state and federal law as they apply to the conduct of elections. Of particular importance are the requirements imposed on state and federal officials by the National Voter Registration Act of 1993.

The National Voter Registration Act, 42 USC 1973gg, grants limited rulemaking authority to EAC under § 1973gg-7. Specifically, "EAC shall prescribe such regulations as are necessary" to (a) develop a mail registration form in consultation with State election officers and (b) report to Congress bi-annually on the impact of the NVRA on Federal elections, including recommendations or improvements in Federal and State procedures. With respect to the mail registration form, the statute is even more specific, prescribing what the form may and may not include (§1973gg-7(a)(2)). The limited scope of EAC's regulatory power is restated in the Help America Vote Act, in § 209 (42 USC § 15329), which reads:

The [Election Assistance] Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government [except with respect to the federal voter registration form and reporting to Congress].

Because consultation with the States is required under the NVRA's prescription of EAC regulatory responsibility, the appropriate process will be more complex than that typically demanded of federal administrative agencies.

Procedural Requirements for Rule Making

Within the strictures of NVRA and HAVA, as well as other generally-applicable federal legal principles, EAC must devise a process that is open, transparent, and responsive to input from

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both the States and the public. A minimal “road map” for doing so is contained in the Administrative Procedure Act itself, 5 USC § 553(b). Under that statute, the notice of a proposed rulemaking must be published in the Federal Register, and include the time, place, and nature of proceedings, reference to the legal authority under which the rule is proposed, and either the text or subject matter of the proposed rule.

After the notice is published, there must be a reasonable opportunity for interested persons to participate. If a hearing is held, then the provisions of the Sunshine Act apply. That Act, incorporated in the APA as 5 U.S.C. § 552b, requires that the agency make a public announcement of any meeting at least one week in advance, including the “subject matter of the meeting.” Any change in the subject matter may only be made by recorded majority vote and announced publicly “at the earliest practicable time.” Then, after consideration of what is submitted and/or any testimony, the agency must publish the final rule, including a statement of its basis and purpose. In general, a rule may only go into effect after 30 days after its publication in the Federal Register.

It should also be noted that, under longstanding principles of administrative law, any revision to or further proposals regarding the mail form or EAC’s biannual report to Congress are also subject to the notice-and-comment process, as the requirements of the APA, having attached, apply to all future considerations of the same subject matter.

Since the EAC’s regulatory authority (under §1973gg-7) requires the agency to consult with the States’ chief election officers, that consultation is necessary in addition to the above protocol and logically must precede it. In other words, public notice to the States and opportunity for input from chief election officers should be the first step in the process, and should inform the notice of proposed rulemaking that thereafter appears in the Federal Register.

Recommendations of Best Practices

While the process described above is that which is minimally required by federal law, we believe that EAC should go further in guaranteeing transparency and accountability, given the central importance of the agency’s mission in securing the fundamental right to vote. First, EAC’s communications with State election officials should be public and formal. Requests for State input, whether regarding the mail form, the report to Congress, or any other matter, should be “on the record” and published contemporaneously on the EAC website. State submissions should be posted as well. Any further responses to State election officials should be similarly handled. States should be given adequate time to participate in

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this public process, so that the ultimate product reflects the experience and best thinking of election officials at all levels.

There must be expeditious and reasonable advance notice of any deliberative process undertaken by EAC. Meeting notices, for example, have often in the past been so late as to discourage public attendance and participation. Drafts of advisories as well as rules under consideration, and any related studies, documents, or data should be posted to the EAC website in a manner that makes it clear what it relates to. The website should also include the timeline and updated developments in the process—from proposal to final disposition.

To the extent permitted by the Sunshine Act and other relevant statutes, the agency should construct a listserv of interested parties and organizations and regularly email notices of hearings, meetings, new information, or topics under discussion. Consideration should also be given to appointing working groups, composed of cross-section of advocates, academics, and election officials, to provide a range of guidance as the agency deliberates on matters within its mandate.

Finally, while the Election Assistance Commission's regulatory authority is clearly circumscribed, the agency nonetheless has the potential to contribute profoundly and positively to improving this country's election system. As experience has shown us in recent elections, the public's confidence in the process has been eroded—and with some justification. EAC should take this opportunity to implement the most transparent and responsible procedures possible as it sets about implementing its regulatory responsibilities under NVRA.