



HENRY McMASTER
ATTORNEY GENERAL

May 12, 2009

Marci Andino, Executive Director
South Carolina Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Ms. Andino:

We understand from your letter that you desire advice from this Office as to “the impact of the Uniform Electronic Transaction Act of 2004 on county registration and election offices accepting voter registration applications and applications for absentee ballots via facsimile or email.” Specifically, you ask whether a faxed or emailed application satisfies the requirement in section 7-5-155(d) of the South Carolina Code, which you state “requires the original voter registration application remain on file in the voter registration office.”

Law/Analysis

The Uniform Electronic Transfer Act of 2004 (the “Act”) is found in chapter 6 of title 26 of the South Carolina Code (2007). According to section 26-6-10 of the South Carolina Code, explaining the purposes of the Act: “Consistent with the provisions of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7002(a), this chapter provides alternative procedures or requirements for the use of electronic records to establish the legal effect or validity of records in electronic transactions.” As we noted in a previous opinion, the Act “does not require anyone to use an electronic document, but merely authorizes their use.” Op. S.C. Atty. Gen., October 31, 2005. In order for parties to conduct transactions by electronic means, they must both “agree to conduct transactions by electronic means.” S.C. Code Ann. § 26-6-50. Moreover, section 26-6-170 of the South Carolina Code states: “Each governmental agency of this State shall determine if, and the extent to which, it will create and retain electronic records and convert written records to electronic records.” Therefore, county registration and election offices are certainly not required to accept applications for voter registration through electronic means. However, if county offices wish to do so, we believe they must follow the procedures and requirements set forth under the Act.

Section 26-6-30 of the South Carolina Code indicates that the Act applies to all electronic records and signatures except for a limited number of specified transactions listed in subsection (B)

of this provision. This list does not include voter registration. Therefore, we presume that the Act applies to applications for voter registration made through electronic means. Nonetheless, we note that the Legislature, in enacting the Act, clarifies that transactions subject to the Act are “also subject to other applicable substantive law.” S.C. Code Ann. § 26-3-30(D). Moreover, throughout the Act, the Legislature carefully notes that the provisions of the Act are to be consistent with other applicable law. S.C. Code Ann. §§ 26-6-50(E) (“Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable laws.”); 26-6-60 (“This chapter must be construed and applied to: . . . facilitate electronic transactions consistent with other applicable law . . .”). Thus, we also must consider the law governing voter registration when considering whether applications for voter registration may be sent via facsimile or email.

Section 7-5-170 of the South Carolina Code (Supp. 2008) specifically requires that applications for voter registration be in writing and on a form proscribed by the Executive Director of the State Election Commission.

(1) Written application required. --No person may be registered to vote except upon written application which shall become a part of the permanent records of the board to which it is presented and which must be open to public inspection. However, the social security number contained in the application as required by this section must not be open to public inspection.

(2) Form of application. -- The application must be on a form prescribed and provided by the executive director and shall contain the following information: name, sex, race, social security number, date of birth, residence address, mailing address, telephone number of the applicant, and location of prior voter registration. The applicant must affirm that he is not under a court order declaring him mentally incompetent, confined in any public prison, has never been convicted of a felony or offense against the election laws, or if previously convicted that he has served his entire sentence, including probation and parole time, or has received a pardon for the conviction. Additionally, the applicant must take the following oath: “I, do solemnly swear (or affirm) that I am a citizen of the United States and that on the date of the next ensuing election, I will have attained the age of eighteen years and am a resident of South Carolina, this county, and of my precinct. I further swear (or affirm) that the present residence address listed herein is my sole legal place of residence and that I claim no other place as my legal residence.”

Any applicant convicted of fraudulently applying for registration is guilty of perjury and is subject to the penalty for that offense.

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S.C. Code Ann. § 7-5-170. As you mentioned in your letter, section 7-5-155 of the South Carolina Code (Supp. 2008) allows voter registration by mail. This provision states, in pertinent part:

(a) Notwithstanding any other provision of law, the following procedures may be used in the registration of electors in addition to the procedure otherwise provided by law.

(1) Subject to the provision of § 7-5-150, any qualified citizen may register to vote by mailing or having delivered a completed state registration by mail application form or a completed national registration by mail application form prescribed by the Federal Election Commission not later than thirty days before any election to his registration board. The postmark date of a mailed application is considered the date of mailing. If the postmark date is missing or illegible, the county board of voter registration must accept the application if it is received by mail no later than five days after the close of the registration books before any election.

...

(d) The original applications must remain on file in the office of the county board of registration.

....

S.C. Code Ann. § 7-5-155. Neither this provision, nor section 7-5-170, specifically allows for applications for voter registration to be received via facsimile or email. However, these provisions do not prohibit the submission of an application through electronic means.

Both sections 7-5-170 and 7-5-155 contemplate the existence of a written application that must be kept on file with the appropriate county board of registration. Section 26-6-80 of the South Carolina Code, contained within the Act, allows transactions, which usually require the delivery of a written instrument, to be conducted through an electronic means so long as the recipient of the

information can retain the electronic record of the information when received. Thus, as long as the county registration or election offices are capable of retaining the application sent through electronic means, section 26-6-80 allows this method of transmission.

As you mentioned in your letter, subsection (d) of section 7-5-155 requires that “original applications must remain on file in the office of the county board of registration.” You are concerned as to whether this requirement can be satisfied if potential electors send their applications for voter registration in by email or facsimile. Section 26-6-120 of the South Carolina Code, contained within the Act, provides a mechanism by which laws requiring a record to be maintained may be satisfied. This provision states, in relevant part:

(A) A law requiring a record to be retained is satisfied by retaining an electronic record of the information that:

- (1) accurately reflects the information in the record after it was first generated in its final form as an electronic record or otherwise; and
- (2) remains accessible for later reference.

...

(D) A law requiring a record to be presented or retained in its original form, or providing consequences if the record is not presented or retained in its original form, is satisfied by an electronic record retained in accordance with subsection (A).

....

S.C. Code Ann. § 26-6-120. According to this provision, if the facsimile or email accurately reflects the information in the application and the facsimile or email is accessible for later reference, the requirement that the original application remain on file in the office of the county board of registration is satisfied.

Conclusion

According to the Act, as long as the county registration and election offices can insure that an application sent via facsimile or email accurately reflects the information provided by the person registering and are able to access the information sent by facsimile or email for later reference, the

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requirement in section 7-5-155 of the South Carolina Code that original applications for voter registration remain on file in the voter registration office is satisfied. Accordingly, we are of the opinion that county registration and election offices complying with the provisions under the Act may receive applications for voter registration via facsimile or email.

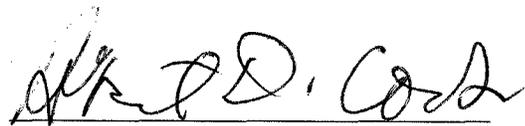
Very truly yours,

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