

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

Comments of

Wendy Weiser,
Deputy Director, Democracy Program

and

Myrna Pérez,
Counsel, Democracy Program

Brennan Center for Justice at NYU School of Law

Regarding Administrative Transfer of National Voter Registration Act Regulations

submitted to the

Election Assistance Commission

December 3, 2007

The Brennan Center for Justice at NYU School of Law thanks the EAC for seeking public comment on whether the EAC should transfer the regulations adopted and maintained by the Federal Election Commission (FEC) in connection with responsibilities originally delegated to the FEC under the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1 et seq. (NVRA). The regulations at issue, pertaining to the format and contents of the national mail voter registration form and the biannual report to Congress, have implications important to the voting rights of Americans.

The Brennan Center understands that the EAC proposes to administratively transfer the regulations previously adopted and maintained by the FEC regarding the NVRA to the EAC's code of Federal Regulations site and only to make technical changes to the mailing address and contact information for the responsible federal and state agencies. The Brennan Center supports such a transfer and urges the EAC to act to correct as necessary the EAC and state addresses and contact information.

The Help America Vote Act (HAVA) wholly transfers the FEC's responsibilities and obligations with respect to the national mail voter registration form to the EAC. When, as in the current situation, (a) the regulations sought to be transferred were properly adopted under the underlying statute and the Administrative Procedure Act (APA), and (b) the entirety of the issuing agency's entire rulemaking responsibility under the statute has been transferred to a new agency, the transferring of the regulations poses little concern and need not invoke a lengthy

rulemaking process. On the other hand, failure to transfer the regulations could cause unnecessary public confusion.

In this case, it is especially appropriate to expeditiously transfer the NVRA regulations and to correct the address and contact information for the federal and state agencies in order to effectuate the statute's purpose of facilitating voter registration. When Congress enacted the NVRA, it set forth its primary purpose as establishing procedures that will increase the number of eligible citizens who register to vote in elections for Federal office. Elections are looming in the months ahead and incorrect addresses on the mail registration form could cause prospective eligible voters to be disenfranchised, thus impeding Congress' primary purpose.

To be clear, providing the public with notice and an opportunity to comment on EAC activity, in addition to being required by law in numerous instances, may present the EAC with valuable insight as to the legality, practicality, and consequences of its activities. Not only should the EAC exercise restraint in seeking to invoke the statutory exceptions under the APA to the notice and comment requirements for rulemaking, but the EAC should voluntarily provide notice and comment opportunities even when doing so is not required by law and does not invoke unreasonable costs in terms of time and expense.

The Brennan Center is concerned, however, with any suggestion that the EAC may make other "technical" changes to the mail registration form and the accompanying state instructions. Although the correction of addresses and contact information is a ministerial change, virtually all other changes to the form and instructions are substantive in nature and must be subject to the formal APA notice and public comment process. To the extent that the EAC would like to classify other categories of changes as "technical" or ministerial, it should provide public notice of, and opportunity to comment on, its proposed procedures.

We again thank the EAC for seeking comments on this topic.