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6820-KF

ELECTION ASSISTANCE COMMISSION

Notice and Request for Public Comment on State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form

AGENCY: U.S. Election Assistance Commission (EAC)

ACTION: Notice for Public Comment

SUMMARY: The United States Election Assistance Commission ("EAC") seeks public comment on whether to amend the State-specific instructions applicable to Arizona, Kansas, and Georgia on the National Mail Voter Registration Form ("Federal Form"). Those States have requested that the EAC modify their State-specific instructions on the Federal Form to include State law requirements that, as a precondition to registering to vote in Federal elections, voter registration applicants provide additional proof of their United States citizenship beyond that already required by the Federal Form. EAC is voluntarily soliciting public comment on these requests from Arizona, Kansas, and Georgia.

DATES: Comments must be in writing and must be submitted no later than 5:00 p.m. EST on January 3, 2014.

ADDRESSES: You may submit comments, identified by docket number EAC-2013-0004 and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the online instructions for submitting comments. Do not submit electronically any

personally identifiable information (such as full Social Security numbers, full dates of birth, and full driver's license numbers) if its disclosure is restricted by statute. Such information should be redacted to include only the last four digits of an individual's Social Security number or other taxpayer identification number, driver's license number, or account number, and only the year of an individual's birth.

Mail or Courier Delivery: ATTN: NVRA Federal Form Comments, U.S. Election Assistance Commission, 1335 East West Highway, Suite 4300, Silver Spring, MD 20910. Please do not send duplicate copies via mail or courier of comments that were submitted electronically via the Federal eRulemaking Portal.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Lynn-Dyson, Director, Office of Research, Policy, and Programs, at (301) 563-3919 or 1-866-747-1471 (toll-free), U.S. Election Assistance Commission, 1335 East West Highway, Suite 4300, Silver Spring, MD 20910.

SUPPLEMENTARY INFORMATION:

Background: The EAC is the Federal agency charged with developing, maintaining, and, where necessary, modifying the National Mail Voter Registration Form mandated by Section 9(a) of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-7(a). Pursuant to Sections 4(a)(2) and 6(a) of the NVRA, *id.* §§ 1973gg-2(a)(2) and 1973gg-4(a), States covered by the NVRA must accept and use the Federal Form for registration of voters in elections for Federal office.

As originally enacted, the NVRA assigned authority to the Federal Election Commission "in consultation with the chief election officers of the States" to "develop a mail voter registration

application form" and to "prescribe such regulations as are necessary to carry out" this responsibility. 42 U.S.C. § 1973gg-7(a). The FEC undertook this responsibility, in consultation with the States, and issued the original regulations on the Federal Form in 1994. NVRA Final Rule Notice, 59 Fed. Reg. 32,311 (June 23, 1994). In the Help America Vote Act of 2002 ("HAVA"), the FEC's responsibilities regarding the Federal Form were transferred to the EAC. 42 U.S.C. § 15532.

The EAC's discretion in developing the content of the Federal Form is constrained by several statutory requirements, including those found in Section 9(b) of the NVRA, 42 U.S.C. § 1973gg-7(b), and Section 303(b)(4) of HAVA, *id.* § 15483(b)(4). The EAC has promulgated regulations that further delineate the contents and format of the Federal Form. *See* 11 C.F.R. Part 9428, Subpart B. The EAC commissioners have delegated to the Executive Director of the EAC the day-to-day responsibilities of implementing and interpreting EAC regulations and policy, answering questions from stakeholders regarding the application of NVRA or HAVA, and maintaining the Federal Form consistent with the NVRA and EAC Regulations and policies.

State Requests to Modify State-Specific Instructions: The chief election official of each State is responsible for notifying the EAC within 30 days of any change in the State's voter eligibility requirements or any other information reported under 11 C.F.R. § 9428.6. Pursuant to those requirements, the FEC and later the EAC received numerous requests over the years from States to modify the Federal Form's State-specific instructions in various respects.

In recent years, the EAC has received requests from three States to include State-specific instructions on the Federal Form requiring voter registration applicants from their states to supply additional proof of their United States citizenship as a precondition to registration. These changes

were requested as a result of the passage of State laws requiring such additional proof of citizenship. Arizona first submitted its request to the EAC to include such an instruction in 2005, as a result of the State's passage in 2004 of a voter initiative known as Proposition 200, later codified at Ariz. Rev. Stat § 16-166(F). Kansas first submitted its request to the EAC to include such instructions in 2012, as a result of the State's passage in 2011 of amendments to its voter registration laws, codified at Kan. Stat. Ann. § 25-2309(*l*). Georgia first submitted its request to the EAC to include such instructions in 2013, as a result of the State's passage in 2009 of amendments to its voter registration laws, codified at Ga. Code Ann. § 21-2-216(g).

On March 6, 2006, the EAC denied Arizona's original 2005 request to include additional proof of citizenship instructions on the Federal Form, finding that the form already required applicants to attest to their citizenship under penalty of perjury and to complete a mandatory checkbox indicating that they are citizens of the United States. The EAC also found that Congress had specifically considered but ultimately rejected a provision in the NVRA that would have allowed states to require documentary proof of citizenship, because such a provision was, in Congress's words, "not necessary or consistent with the purposes of" the NVRA. On the basis of these findings, the EAC concluded that Arizona's proof of citizenship law was preempted by Federal law, and that Arizona must accept the Federal Form for voter registration in Federal elections, without requiring additional proof of citizenship.

In July 2006, after receiving a request from Arizona's Secretary of State, the EAC's then-chairman requested that the EAC commissioners grant an accommodation to Arizona by reconsidering the Executive Director's March 6, 2006, final decision on behalf of the agency and granting Arizona's request to include its requested proof-of-citizenship instructions in the State-specific instructions on

the Federal Form. On July 11, 2006, the EAC commissioners denied the chairman's motion for an accommodation by a tie vote of 2-2.

Private parties filed litigation against Arizona, challenging, among other issues, Arizona's compliance with the NVRA, and this litigation reached the Supreme Court during the 2012 Term. In June 2013, the Supreme Court ruled that the NVRA preempts inconsistent State law and States must accept and use the Federal Form for voter registration purposes in elections for Federal office. *Arizona v. Inter Tribal Council of Arizona, Inc.*, ___ U.S. ___, 133 S. Ct. 2247, 2253-60 (2013) (hereinafter "*Inter Tribal Council*").

The EAC deferred consideration of the requests by Kansas and Georgia pursuant to internal operating procedures put in place in 2011 by the former EAC Executive Director. These procedures provided that requests that "raise issues of broad policy concerns to more than one state" would be deferred until the EAC regained a quorum of its commissioners, so that they would have the opportunity, if they desired, to provide additional policy guidance to the Executive Director and staff. Currently all four seats on the EAC are vacant.

Following the Supreme Court's decision in *Inter Tribal Council* in June 2013, Arizona and Kansas renewed their requests to the EAC to change the State-specific instructions on the Federal Form to include additional proof-of-citizenship requirements, and the EAC likewise deferred those renewed requests, in accordance with the 2011 EAC internal procedures. Kansas and Arizona officials then initiated litigation against the EAC in the United States District Court for the District of Kansas, challenging the EAC's deferral of these requests. *See Kobach v. EAC*, No. 5:13-cv-4095 (D. Kan. filed Aug. 21, 2013). On December 13, 2013, as part of this litigation, the district court remanded

the Kansas and Arizona matters to the EAC with instructions that the EAC render a final agency action on the Kansas and Arizona requests to change the Federal Form by no later than January 17, 2014. The Court's order provided that if the EAC has not acted by January 17, 2014, the States' requests will be deemed by the Court to have been denied. The Georgia request is not part of this pending federal court litigation.

Request for Public Comments: The EAC invites public comments on the requests from Arizona, Kansas and Georgia to modify the State-specific instructions for those States on the Federal Form to require additional proof of citizenship under their respective state laws beyond the existing requirements on the Federal Form. The EAC invites public comments on any issues that commenters believe are relevant to the EAC's consideration of these State requests. Comments must be in writing and must be submitted no later than 5:00 p.m. EST on January 3, 2014.

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Alice Miller
Chief Operating Officer and Acting Executive Director
U.S. Election Assistance Commission

DATED: December 19, 2013

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