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TO: The Honorable Mike Coffman
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RE: Incomplete voter registration forms (failure to check the box stating that an applicant does not have a Colorado driver's license or Department of Revenue ID)

We write in response to your request for an informal opinion. This memorandum contains only our opinion and is not an official opinion of the Attorney General.

QUESTION PRESENTED AND CONCLUSION

If an applicant for voter registration provides a social security number on the registration form instead of a Colorado driver's license number or Department of Revenue ID number, but fails to check the box affirming that the applicant does not have a Colorado driver's license or Department of Revenue ID, is that application deemed "incomplete" under § 1-2-509(2), C.R.S. (2008)?

Yes. Under § 1-2-204(2)(f.5), C.R.S. (2008), an applicant who has been issued a Colorado driver's license or identification card must provide that number on the form. If an applicant has not been issued a Colorado driver's license or identification card, the applicant "shall answer that he or she does not have a driver's license or identification card" and shall instead provide the last four digits of the applicant's social security number. The checkbox is the only place on the registration form for the applicant to state that he or she has not been issued a driver's license or ID card. The applicant's failure to check the box amounts to a failure to comply with § 1-2-204(2)(f.5) and therefore renders the application incomplete.

ANALYSIS

I. Relevant legal provisions and Election Rules

Article 2 of the Uniform Election Code of 1992 governs the qualifications and registration of electors. Under section 1-2-201(1), “[n]o person shall be permitted to cast a regular ballot at any election without first having been registered within the time and in the manner required by the provisions of [article 2].” § 1-2-201(1), C.R.S. (2008).

A. HAVA requirements

In 2002, Congress enacted the Help America Vote Act (“HAVA”). HAVA establishes a hierarchical preference for certain types of identification for all persons registering to vote in a federal election. Under HAVA, where an applicant for voter registration has been issued a valid driver’s license, the applicant must provide that license number; if the applicant has not been issued a valid driver’s license, then the applicant must provide the last 4 digits of the applicant’s social security number.¹ *See* 42 U.S.C. § 15483(a)(5)(A). The State may not accept or process an application for voter registration unless the applicant provides this information. *See id.* Notably, “the State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.” *Id.* § 15483(a)(5)(A)(iii) (emphasis added).

B. Colorado registration requirements

Under Colorado law, any elector registering to vote shall correctly answer a list of questions set forth in section 1-2-204(2), C.R.S., including the elector’s name, address, etc. *See* § 1-2-204(2), C.R.S. (2008); *see also* § 1-2-201(2), C.R.S. (2008) (“The elector shall answer the questions required by section 1-2-204”). Following the passage of HAVA, the Colorado General Assembly amended § 1-2-204(2) several times to comply with the new federal law requirements: once in 2003, *see* 2003 Colo. Gen. Sess. Laws ch. 326, § 8; and twice in 2004, *see* 2004 Colo. Gen. Sess. Laws ch. 139, § 2; 2004 Colo. Gen. Sess. Laws ch. 279, § 2. By 2005, after these changes, section 1-2-204(2)(f.5) provided that an applicant for voter registration shall correctly answer the following:

(f.5) In the case of an elector who has been issued a current and valid Colorado driver’s license, the elector’s Colorado driver’s license number or the last four digits of the elector’s social security number.

§ 1-2-204(2)(f.5), C.R.S. (2005) (emphasis added). In accordance with this provision, the Colorado voter registration form at that time likewise permitted an applicant to provide either a driver’s license number or a social security number.

¹ If the applicant has been issued neither a driver’s license nor a social security number, the State shall nevertheless assign the applicant a unique identifying number for voter registration purposes. 42 U.S.C. § 15483(a)(5)(A)(ii).

C. 2006 EAC correspondence with the Secretary's Office

According to email exchanges you have provided this office, the Election Assistance Commission (EAC) notified then-Director of Elections William Compton in February 2006 that the language on Colorado state voter registration form was not compliant with HAVA because it allowed an applicant to provide either a driver's license or social security number. The EAC insisted that the language in HAVA is a tiered preference and not an "either/or" requirement. Mr. Compton responded that Colorado would amend both the registration form and state law to comply with HAVA.

D. 2006 amendments to Colorado law under S.B. 06-170

Senate Bill 06-170, which became effective June 6, 2006, accomplished these necessary changes by amending § 1-2-204(2)(f.5). *See* 2006 Colo. Gen. Sess. Laws ch. 356, § 1. Including minor amendments in 2007, *see* 2007 Colo. Gen. Sess. Laws ch. 417, § 4, the provision now states that an applicant for voter registration shall correctly answer the following:

(f.5) In the case of an elector who has been issued a current and valid Colorado driver's license, [the elector shall provide] the elector's Colorado driver's license number. If, instead of a driver's license, the elector has been issued a current and valid identification card by the department of revenue . . . the elector shall provide the number of the identification card. If the elector has not been issued a current and valid Colorado driver's license or identification card, the elector shall answer that he or she does not have a driver's license or identification card and shall provide the last four digits of the elector's social security number. If the elector does not have a social security number, the elector shall answer that he or she does not have a social security number.

§ 1-2-204(2)(f.5), C.R.S. (2008) (emphasis added). Of critical importance here, the underlined language above in paragraph (f.5) now requires an applicant who has not been issued a driver's license or ID card to affirmatively answer that he or she does not have such identification.

Senate Bill 06-170 added subsection (2.7), which requires the registration form to contain a statement that the applicant "must comply with the requirements of paragraph (f.5) of subsection (2)." 2006 Colo. Gen. Sess. Laws ch. 356, § 1; § 1-2-204(2.7), C.R.S. (2008). Notably, it also added paragraph (3)(c), which holds that if the applicant fails to comply with these requirements, "the county clerk and recorder shall not register the elector." 2006 Colo. Gen. Sess. Laws ch. 356, § 2; § 1-2-204(3)(c), C.R.S. (2008) (emphasis added).

Finally, Senate Bill 06-170 also amended § 1-2-501(2), which governs additional procedures for mail and agency registration. These amendments also reflect the HAVA-mandated hierarchy for identification.² *See* 2006 Colo. Sess. Laws ch.356, § 5. Subsection (2) provides in relevant part:

(2)(a) [I]n addition to the identifying information required to be provided by the elector pursuant to subsection (1) of this section, a person who applies to register by mail in accordance with this part 5 shall submit with the registration application:

(I) In the case of an elector who has been issued a current and valid Colorado driver's license or a current and valid identification card issued by the department of revenue . . . , the number of the elector's Colorado driver's license or identification card; or

(II) In the case of an elector who has not been issued a current and valid Colorado's driver's license or a current and valid identification card issued by the department of revenue . . . , the last four digits of the person's social security number.

(a.5) If an applicant has not been issued a current and valid Colorado's driver's license, has not been issued a current and valid identification card by the department of revenue . . . , and does not have a social security number, the secretary of state shall assign the applicant a number for voter registration purposes in accordance with section 1-2-204(2.5).

§ 1-2-501(2)(a)(I)-(II) and (2)(a.5), C.R.S. (2008).

Subsection (2) makes clear that if an applicant has been issued a driver's license or identification card, the applicant must provide that number; only if the applicant has not been issued such identification shall the applicant instead provide the last four digits of his social security number.

Importantly, in 2007, the General Assembly added paragraph (2)(c), stating that if the elector does not comply with the requirements of subsection (2), "the county clerk and recorder shall not register the elector." 2007 Colo. Gen. Sess. Laws ch. 417, § 6; § 1-2-501(2)(c), C.R.S. (2008) (emphasis added). This provision mirrors § 1-2-204(3)(c) added by Senate Bill 06-170. In short, the General Assembly has made clear that if an applicant fails to comply with the

² While these state provisions appear to generally track HAVA section 15483(b) ("requirements for voters who register by mail"), section 15483(b) is not itself a federal registration provision. Rather, section 15483(b) requires individuals who registered by mail (instead of in person) to verify their identity in any one of three ways before casting a regular ballot. *See Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1169 (11th Cir. 2008). "Nothing in [§ 15483(b)] states or suggests that Congress intended to alter state registration requirements, and certainly nothing in the section suggests that voters can bypass state registration requirements entirely as long as they satisfy federal ID requirements for voting a regular ballot." *Id.* (emphases added).

hierarchical identification requirements, the applicant “shall not” be registered. *See* § 1-2-204(3)(c); § 1-2-501(2)(c).

E. 2006 changes to the Colorado registration form

In accordance with these changes to state law, the Secretary’s Office (in collaboration with the forms committee of the county clerks’ association), approved changes to Colorado’s voter registration form in 2006. The same form is used for both in-person and mail-in registrations. The identification section now provides the following instructions:

IDENTIFICATION (Required) DO NOT LEAVE THIS SECTION BLANK

Pursuant to Federal Law, your completed voter registration form must contain your State of Colorado Driver’s License Number or your Dept. of Revenue Identification Number. If you do not have a Driver’s License or Dept. of Revenue Identification number, then you must provide the last four digits of your Social Security Number. If you do not have a Driver’s License Number, a Dept. of Revenue Identification Number, or a Social Security Number, you must check the appropriate boxes. A unique identifying number will be assigned to you by the State and you will still be registered to vote.

NOTE: If the identification section is left blank and you do not check the boxes indicating you do not have identification, you will not be registered to vote.

See Colorado voter registration form (all emphases in original).

Across from these instructions, the form provides space to give the applicant’s driver’s license number or identification number, and below that, it provides a checkbox that states: “**I do not have a Colorado Driver’s License or Dept. of Revenue Identification Number.**” *See id.* (emphasis in original).

II. The “no driver’s license” checkbox carries out the state law affirmation requirement of § 1-2-204(2)(f.5) and furthers the intent of the HAVA hierarchical identification requirements.

The current Colorado registration form complies with the preference for driver’s licenses mandated by HAVA and §§ 1-2-204(2)(f.5) & 1-2-501(2)(a). In addition, the “no driver’s license” checkbox on the form fulfills the state law affirmation requirement in § 1-2-204(2)(f.5). The checkbox does not run afoul of the National Voter Registration Act (NVRA) because it is necessary for the county clerk to administer voter registration in compliance with state law. *See* National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-7(b)(1) (state voter registration

forms may require only such identifying information as is necessary to enable election official to assess eligibility of the applicant and administer voter registration and other parts of the election process); *see also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1215-16 (S.D. Fla. 2006) (checkboxes on Florida state registration form not prohibited by NVRA).

Although not mandated by HAVA, the checkbox enables county clerks to process voter registration forms in a manner that furthers the intent of the HAVA identification requirement. As discussed above, HAVA requires an applicant who has a driver's license to provide that license number for registration purposes. HAVA permits the use of a social security number only if the applicant does not have a driver's license. The checkbox affirmation assures the clerk that the applicant has provided a social security number because the applicant does not have a driver's license or ID number.

Put differently, if an applicant simply provides a social security number and no driver's license number, but fails to check the box, it is impossible for the clerk to tell whether the applicant does not have such identification, or instead simply overlooked (or intentionally disregarded) the obligation to provide that information. *See Lucas County Democratic Party v. Blackwell*, 341 F. Supp. 2d 861, 864 (N.D. Ohio 2004) (a person who leaves the identification box blank may either be refusing to provide the information or may not actually have the requested identification). Applicants who provide a social security number because they do not have a driver's license have complied with federal and state law identification requirements for registration, and should be registered. Applicants who do have a driver's license but fail to provide it, however, have not complied with federal and state law identification requirements for registration, and therefore should not be registered until the applicant provides the required information. *See* §§ 1-2-204(3)(c) & 1-2-501(2)(c), C.R.S. (2008); *Lucas County Democratic Party*, 341 F. Supp. 2d at 864 (if an identification box is left blank because the applicant did not want to provide the information, that person should not be registered to vote under HAVA). Without the checkbox affirmation, the clerk simply cannot tell whether the applicant who has filled out the form falls into the first or second category.

III. Failure to comply with the affirmation requirement renders the application incomplete, triggering the notification process under § 1-2-509(2) and Rule 2.6.3.

Under § 1-2-509(2), C.R.S., the county clerk shall verify if an application for registration is complete and accurate. If the application is incomplete or inaccurate, the county clerk shall notify the applicant, stating the additional information required.

Secretary of State Election Rule 2.6.3 (effective January 30, 2008) properly directs county clerks to treat as "incomplete" a registration form in which the applicant provides a social security number instead of a driver's license number but does not check the box affirming that the applicant does not have a driver's license. Under that Rule, which was approved by the Attorney General's Office on December 14, 2007, the county clerk shall notify the applicant that the form is incomplete and shall state the additional information required to complete registration. The applicant shall not be considered registered unless such information is

provided. (As set forth above, the registration form itself also notifies applicants that if they fail to provide necessary identification or check the appropriate boxes they will not be registered to vote.) If the additional information is provided any time prior to casting a vote, the applicant's registration will be deemed valid as of the date of the original application. The process established by Rule 2.6.3 is consistent with § 1-2-204(3)(c), § 1-2-501(2)(c), and § 1-2-509, C.R.S. (2008).³

The argument has been raised that a person who does not provide a driver's license but instead provides a social security number has "substantially complied" with the registration requirements and should therefore be registered and simply tagged as "ID-deficient", even if that applicant fails to check the "no driver's license" box on the form. We disagree.

In general, the Election Code requires only "substantial compliance" with its provisions. *See* § 1-1-103(3), C.R.S. (2008); *see also* *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994); *Meyer v. Lamm*, 846 P.2d 862, 875-76 (Colo. 1993). In determining whether there has been substantial compliance with a provision, the Colorado Supreme Court has held that a court should consider: (1) the extent of the non-compliance with the requirement; (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the non-compliance; and (3) whether it can be reasonably inferred that there was a good faith effort to comply with the requirement. *See* *Loonan*, 882 P.2d at 1384.

The issue here is whether the applicant has complied with the affirmation specifically required by § 1-2-204(2)(f.5). This affirmation is a material requirement; if an applicant fails to comply with the requirements of paragraph (2)(f.5), the county clerk "shall not register the elector." § 1-2-204(3)(c). Here, the only opportunity for the applicant to make that affirmation on the form is by checking the "no driver's license" box. Put simply, an applicant either makes the necessary affirmation (by checking the box) or he does not; there is no other way on the form to "substantially" comply with the affirmation requirement in a manner that would meet the test in *Loonan*.⁴ An applicant who does not provide a driver's license number and fails to check the box has failed entirely to comply with the affirmation requirement. Moreover, that applicant's non-compliance defeats the purpose of the affirmation, which is to confirm that the applicant has not provided a driver's license because that applicant does not have one, and not because the applicant overlooked (or intentionally disregarded) the mandate to provide that information on

³ Rule 30.5 does not conflict with Rule 2.6.3. Rule 2.6.3 specifically addresses the checkbox issue discussed in this opinion and conforms to the preferred hierarchy of identification required by HAVA and state law. Rule 30.5, on the other hand, guides clerks on what to do when the identification that has been provided (whether a driver's license or social security number) cannot be verified against an existing state record. Rule 30.5 does not, and cannot, purport to supersede the threshold hierarchy of identification required by HAVA and state statute.

⁴ It is possible to show "substantial compliance" with certain other requirements of § 1-2-204(2). For example, an applicant must also affirm that he is a U.S. citizen and at least 18 years old. *See* § 1-2-204(2)(c) & (e), C.R.S. (2008). The registration form provides checkboxes for the applicant to indicate that he meets these requirements. If the applicant fails to check these boxes but signs the general oath at the bottom of the form, he has substantially complied with the requirement because that general oath incorporates an affirmation that the applicant is a U.S. citizen and at least 18 years old. *See* Secretary of State Election Rule 2.7.

the registration form. Finally, where an applicant fails to check the box, it is impossible to reasonably infer that the applicant made a good faith effort to comply with the requirement. “[T]o hypothesize the reason for such [noncompliance] draws us too far into the realm of speculation to meet the standard of substantial compliance.” *Meyer*, 846 P.2d at 878. Indeed, “[t]o indulge in such speculation subverts the constitutionally recognized power of the General Assembly to pass legislation ‘to secure the purity of elections.’” *id.* (quoting Colo. Const. art. VII, § 11). Thus, under the scenario above, the applicant cannot be said to have “substantially complied” with the affirmation requirement in § 1-2-204(2)(f.5).

IV. The process for handling incomplete registrations does not disenfranchise Colorado voters.

The process in Rule 2.6.3 for handling incomplete registrations does not prevent any Colorado citizen from casting a vote. As set forth above, applicants are given written notice and may cure the insufficiency anytime prior to casting a vote by providing a driver’s license number or informing the county clerk that the applicant does not have a driver’s license. Those applicants are deemed registered as of the date of the original application, even if the missing information is provided after the registration deadline. Those persons can then request a mail ballot by the deadline, can vote in person during early voting, or can vote a regular ballot in person on Election Day. An applicant who ignores the county clerk’s letter notification will not receive a mail ballot; however, if that applicant appears in person to vote during early voting or on Election Day, he will be allowed to vote a provisional ballot. If the applicant provides the missing information, the provisional ballot will be counted because the applicant’s registration will be deemed effective as of the date of the original application. This process safeguards the applicant’s ability to vote, and properly complies with federal and state law concerning proper registration.

CONCLUSION

State law requires an applicant for voter registration who fails to provide a driver’s license number to affirmatively state that he or she does not have a driver’s license or ID card. The checkbox on the Colorado voter registration form is the only place on the form for an applicant to make that affirmation. If an applicant fails to provide a driver’s license number and fails to check the requisite box, the county clerk processing the registration form cannot know if the applicant has properly complied with state and federal registration requirements. The failure to check the box renders the application incomplete, which triggers the notification process set forth in § 1-2-509 and Secretary of State Rule 2.6.3. An applicant who provides the missing information prior to Election Day will be deemed registered as of the original application date and may vote a regular mail ballot (if requested by the deadline) or in person during early voting or on Election Day. If the applicant ignores the clerk’s notification and nevertheless appears in person to vote on Election Day, that applicant will still be able to vote a provisional ballot. If the applicant provides the missing information, he or she will be deemed registered as of the original application date and the provisional ballot will be counted.