



July 18, 2019

Via Email Only

Mr. Brad McVay
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Dear Mr. McVay:

We are writing to you on behalf of Common Cause Florida, the Lawyers' Committee for Civil Rights Under Law, and Fair Elections Center to express our strong opposition to the sudden roll-out of the amended voter registration application form DS-DE39, and the [Online Voter Registration](#) implementation of the same, based on the 2019 passage of [SB7066](#) now Chapter No. [2019-162](#). The forms are already posted on the [Forms & Publications Forms/Forms](#) and [Publication](#) web pages as well as the [Voter Registration/Register to Vote or Update your Information](#) web page.

F.S.A. §§ 97.052(1), relating to the state's uniform statewide voter registration application, clearly states: "The department shall prescribe *by rule* a uniform statewide voter registration application for use in this state." (emphasis added). The Florida [Administrative Procedure Act](#) (A.P.A.) therefore applies to amendments made to form DS-DE39.¹ The A.P.A. provides that "[r]ulemaking is not a matter of agency discretion,"² and that each rule must be adopted according to the procedures provided by the Act, which are extensive and detailed.

Among other procedures, the A.P.A. requires notice both during development of the rule,³ and of the intended adoption of the final rule at least 28 days prior to its adoption.⁴ This notice must include "a detailed written statement of the facts and circumstances justifying the proposed rule,"⁵ as well as the procedure for requesting a public hearing on the proposed rule, among other information.⁶

¹ See F.S.A. § 120.52(16) ("Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. **The term also includes the amendment or repeal of a rule.**" (emphasis added)). We also note that the last update to the voter registration application form in 2013 was made through formal rulemaking, and in 2016 the rule in process was withdrawn.

² F.S.A. § 120.54(1)(a).

³ F.S.A. § 120.54(2)(a).

⁴ F.S.A. § 120.54(3)(a); *id.* § 120.54(3)(a)2.

⁵ F.S.A. § 120.54(3)(a)4.

⁶ F.S.A. § 120.54(3)(a)1.

Contrary to these clear statutory requirements, there has been no public notice whatsoever⁷ provided of the amendments to form DS-DE39, either on flrules.org⁸ or the Division of Elections' [Rules](#) web pages. Despite text included on the new form, stating "Part 2 – Form (DS-DE #39, RIS-2.040, F.A.C.) (eff. 7/2019)", the new form has not in fact been published in the [Florida Administrative Code](#).⁹

The A.P.A. does provide for emergency rulemaking if the Department of State determined that the enactment required immediate update of the form.¹⁰ But the emergency rulemaking procedure is not without its own requirements, including that "[t]he agency *publish[] in writing at the time of, or prior to, its action* the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances."¹¹ Moreover, emergency rules may only remain in effect for up to 90 days, and going through the full rulemaking procedure is required in order for the rule to become permanent.¹²

We therefore request that you remove immediately the current posted forms and online implementation, restore the versions prior to this posting and implementation, and begin the emergency rulemaking process, followed by the full rulemaking process, including scheduling of public meetings, workshops, and hearings. This is necessary to allow for the procedural protections required by statute and the Florida State Constitution.

Since you are now engaged in this process, we also would like to inquire how you are proceeding with implementing the new form under the National Voter Registration Act and state statute. These statutes provide that an applicant may register to vote through certain agencies while accessing their services and at other voter registration agencies, including the process to renew one's driver license online through the Florida Department of Highway Safety and Motor Vehicles' online renewal system.

In addition, Progress Florida, a partner organization, has reviewed the state's new online voter registration form and identified issues within the system as it pertains to returning citizens,¹³ and has provide the following commentary:

If you check "yes" that you have never been convicted of a felony, then the next two questions about felon rights restoration are made null/unanswerable and not required to be answered. If you try to answer them you get a  symbol on both answer options which makes it sort of clear you don't have to answer these two questions.

⁷ The only notice of any kind of the amendments to form DS-DE39 and the online tool was an email sent from Division of Elections to county Supervisors of Elections on July 2, 2019, informing them that the "final" forms would be available online later that day.

⁸ See attachment 1sFAR7162019.

⁹ See attachment FAC1s2040.

¹⁰ F.S.A. § 120.54 (4).

¹¹ F.S.A. § 120.54(4)(a)1-3 (emphasis added).

¹² F.S.A. § 120.54(4)(c).

¹³ See <https://registertovoteflorida.gov/en/Registration/Eligibility>.

If you have been convicted of a felony and you answer the next question:

“If I have been convicted of a felony, I affirm my voting rights have been restored by the Board of Executive Clemency. _Yes _No

If your answer is YES, then you do not have to answer the third AND NEW question:

“If I have been convicted of a felony, I affirm my voting rights have been restored pursuant to s. 4 , Art. VI of the State Constitution upon the completion of all terms of my sentence, including parole or probation. _Yes _No

If you were a YES to the “restored by the Board of Executive Clemency” question then it should be clear you don’t have to also answer this third, and potentially confusing question. But there’s no indication to the user that they don’t have to answer it. There’s no ☉ symbols or any indicator, unlike what happens for people who affirm they were never convicted of a felony.

The way it should work is if you answered yes to any question that makes additional questions not applicable, those non-applicable questions should disappear or at least be greyed out or at the very least, use the ☉ symbol consistently. Otherwise, you potentially further confuse eligible voters who have been cleared through the executive clemency process who then get stumped on the NEW 3rd felony question thinking they have to answer it as well.

Please advise us as to how you intend to address these issues. We offer our assistance in any way we are able.

Thank you for your consideration and anticipated cooperation.

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Attachments:

1sFAR7162019
FAC1s2040



Florida Department of State

FLORIDA ADMINISTRATIVE CODE & FLORIDA ADMINISTRATIVE REGISTER

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Notice / Adopted	Section	Description	ID	Publish Date
	Workshop 15-2.009	The purpose of the workshop is to discuss amendments to Rules 15-2.009 & 15-2.0091 to conform the rules to statutory changes in HB 5 (Chapter August 30, 2019, 9:00 a.m. Heritage Hall (Department of State Auditorium), R.A. Gray Building,	22114659	7/10/2019 Vol. 45/133
	Development 15-2.009	The purpose of rulemaking is to conform the rules to statutory changes in HB 5 (Chapter 2019-64, Laws of Florida) which amends sections 97.021 and 100.371, Florida Statutes. The bill, among other things, requires paid petition	22097102	7/9/2019 Vol. 45/132
	Development 15-2.032	This rule will require statewide use of Spanish language ballots because the state's Puerto Rican American population has increased since the devastation of Hurricane Mana in September 2017, but there is currently no uniformity	20964142	4/25/2019 Vol. 45/81
	Development 15-2.034	This rule will amend the incorporated polling place procedures manual to require statewide Spanish-language assistance at the polls because the state's Puerto Rican American population has increased since the devastation	20964239	4/25/2019 Vol. 45/81
	Withdrawal 15-2.034	Polling Place Procedures Manual	20937370	9/26/2018 Vol. 44/188
	Proposed 15-2.034	The rule is being amended to make the text within the incorporated polling place procedures manual more plain, clear and unambiguous, ensure uniformity in the procedures in the polling place, and address common problems	20424725	6/8/2018 Vol. 44/112
	Development 15-2.034	The rule is being amended to make the text within the incorporated polling place procedures manual more plain, clear and unambiguous, ensure uniformity in the procedures in the polling place, and address common problems	20269137	4/18/2018 Vol. 44/76
	Change 15-2.0001	Designation of Division of Elections as Filing Office for Department of State; Requirements for Candidate Qualifying Papers; Withdrawal of Candidacy	19718953	11/22/2017 Vol. 43/226
	Development 15-2.043	The amendment to this rule results from Ch. 2017- 45, Laws of Fla., which permitted a voter whose vote-by-mail ballot is returned with a mismatched signature to cure the defective ballot in the same manner when the vote-by-mail	19613514	10/26/2017 Vol. 43/208
	Proposed 15-2.0001	This rule is being amended to clarify the requirements of the rule relating to the qualifying office and financial interests form, to include the correct oaths on forms incorporated by reference, and to reduce the number	19501673	10/12/2017 Vol. 43/198



Florida Department of State

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Notice / Adopted	Section	Description	ID	Publish Date
	Final 1S-2.040	Statewide Uniform Voter Registration Application	13644813	Effective: 10/24/2013
	Final 1S-2.040	Statewide Uniform Voter Registration Application	10851698	Effective: 01/02/2012
	Final 1S-2.040	Statewide Uniform Voter Registration Application	4853024	Effective: 01/01/2008
	Final 1S-2.040	Statewide Uniform Voter Registration Application	980299	Effective: 11/29/2005



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Re: Amendments to section 97.052, Florida Statutes

We received your letter dated July 18, 2019, regarding changes to section 97.052, Florida Statutes, that were recently made by SB 7066, which requires additional information be elicited from persons registering to vote, effective July 1, 2019. Mr. McVay asked that I respond.

You have asked that we immediately initiate the rulemaking process to adopt these changes on the paper statewide voter registration application that is incorporated in Rule 1S-2.040, as form DS-DE 39. We have always intended to initiate rulemaking to adopt the changes, and recently, we formally began that process. A notice of development of rulemaking was published on July 23, 2019, in Volume 45, Number 142, of the Florida Administrative Register. I will have your letter added to the rulemaking record.

I hope this addresses your concerns. We look forward to your participation in the rulemaking process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ashley E. Davjs".

Ashley E. Davjs
Deputy General Counsel

cc: Brad McVay



July 26, 2019

Via Email Only

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Dear Ms. Davis and Mr. McVay:

Thank you for your letter received July 24, 2019 in response to our July 18, 2019 letter, attached for your reference. We write again regarding your compliance with the requirements of the Florida Administrative Procedure Act (APA) in amending Rule 1S-2.040, voter registration form DS-DE 39, and the corresponding Online Voter Registration (OVR) form.

We understand that you initiated the rulemaking process by publishing a notice of development of rulemaking in the Florida Administrative Register on July 23, 2019. We look forward to working with you and Florida citizens affected by the proposed rule change in ensuring that the final rule, when adopted, enables all eligible Florida citizens to register to vote without creating additional barriers for certain classes of voters.

However, while the new rule is being developed, in the absence of an emergency rule, the old rule must remain in place. As of today, a new version of form DS-DE 39 is still accessible from the [Voter Registration](#) and [Forms & Publications](#) web pages, and a new version of the corresponding [OVR](#) form remains active. Because these forms did not go through the rulemaking process, their continued use is a *per se* violation of the APA and an invalid exercise of delegated legislative authority.¹

Moreover, because the OVR form in particular is confusing, including as noted in our July 18, 2019 letter,² there is a serious risk that eligible Florida citizens—and in particular returning

¹ F.S.A. § 120.52(8)(a) (agency action invalid where “[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter”). *See also* F.S.A. § 120.68(7) (providing for judicial injunction and remand where “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure”).

² *See* attached. The OVR form also prompts voters to answer “Yes” or “No” to three questions about their status respecting prior felony convictions, rather than offer check boxes as does form DS-DE 39 and as mandated by SB 7066.

citizens—will be subject to heightened burdens that will prevent them from registering to vote in violation of their constitutional rights. Urgent action is required to ensure that no eligible Florida citizens be subjected to these heightened barriers to voter registration.

Accordingly, you must discontinue immediately the use of the new forms and revert to the old forms until a final rule is adopted pursuant to the rulemaking process, or an appropriate emergency rule consistent with the Florida APA goes into effect.

In addition, we demand that you comply with the other requirements of the APA, including providing notice directed specifically at returning citizens and the returning citizen community³ so that they may fully engage with the rulemaking process, and providing both public workshops⁴ during development of the rule and public hearings⁵ prior to adoption of the final rule.⁶

Finally, we again request information as to how you intend to ensure the amended rule and forms are implemented in compliance with the National Voter Registration Act and state statute, and that this information be added to the rulemaking record.

We again offer our assistance in ensuring that the rulemaking process is open and accessible to affected individuals, and that the final rule, when adopted, implements the changes required by SB 7066 while ensuring equal access to voter registration for all eligible Florida citizens.

Thank you for your consideration and prompt attention to this urgent matter.

Liza McClenaghan
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³ F.S.A. § 120.54(3)(a)3 (Notice must be “give[n]... to those particular classes of persons to whom the intended action is directed.”).

⁴ F.S.A. § 120.54(2)(c).

⁵ F.S.A. § 120.54(3)(c). Once development is completed, notice of the intended adoption of the final rule must be given at least 28 days prior to its adoption. F.S.A. § 120.54(3)(a); *id.* § 120.54(3)(a)2.

⁶ *See* F.S.A. § 120.525 for procedures governing rulemaking meetings, hearings, and workshops.

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Attachments:

July 18, 2019 Letter to Brad McVay

July 24, 2018 Letter to Liza McClenaghan, Michelle E. Kanter Cohen, and Julie M. Houk



September 26, 2019

Via Email Only

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Dear Ms. Davis and Mr. McVay:

We write to express our concerns regarding your process for amending Rule 1S-2.040, voter registration form DS-DE 39, the Spanish-language form DS-DE 39, and the Online Voter Registration (OVR) form.

While the rulemaking process is now under way with respect to the English-language form DS-DE 39, an amended version of this form as well as the Spanish-language and OVR forms have already been promulgated, in clear violation of the Florida Administrative Procedure Act (APA).¹ Deficiencies in the amended versions of these forms² are already having real-world

¹ F.S.A. § 120.52(8)(a) (agency action invalid where “[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter”). *See also* F.S.A. § 120.68(7) (providing for judicial injunction and remand where “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure”).

² These include problems with both the printed and online-fillable versions of both the English- and Spanish-language forms.

impacts, causing confusion and creating additional barriers for returning citizens and Spanish-speaking citizens attempting to register to vote.

During the August 6, 2019 Rule 1S-2.040 workshop, Ms. Davis asserted that the Florida Department of State (DOS) has the authority to promulgate amended versions of these forms prior to completion of the rulemaking process, and without invoking emergency rulemaking authority and following that process.³ When asked to cite the legal authority she was referring to, Ms. Davis declined to do so,⁴ and we have been unable to find any Florida law that would permit the promulgation of these forms prior to the completion of the rulemaking process.

Promulgating amended versions of these forms constitutes a rulemaking, and is therefore governed by the procedural requirements of the APA. It is not enough that this process is now under way with respect to the English-language form—that flawed versions of these forms are already causing voter confusion illustrates why following the full rulemaking process is so important.

Even more concerning, when asked about the rulemaking process for the Spanish-language form, Ms. Davis asserted that this form is not subject to rulemaking at all.⁵ Because the Spanish-language form is “a uniform statewide voter registration application,” it must be prescribed by rule,⁶ and is therefore subject to the same requirements under the APA as the English-language form. Ms. Davis’ statement at the August 6 workshop that “I don’t know how we would go about workshopping a Spanish-language version, I certainly don’t speak Spanish well enough”⁷ illustrates both a lack of concern that these forms be translated accurately and a lack of capacity on the part of DOS to do so, making it clear that public input in developing the Spanish-language form is essential.

DOS in 2013 went through the full rulemaking process when amending these forms, and in 2016 took additional public comment on the Spanish-language form—DOS must do so again now. The OVR form is also “a uniform statewide voter application” and therefore subject to rulemaking.⁸ Each of these forms are separate and distinct, and each requires formal rulemaking.⁹

While the amended versions of these forms are deficient in important ways, and their promulgation prior to rulemaking constitutes an invalid exercise of agency authority under the APA, we recognize that rescinding them now may cause additional confusion for those

³ See Audio Recording of August 6, 2019 Rulemaking Workshops at 1:50:40-51:40, available at <https://www.dropbox.com/s/y4y9gnchunwh0mt/8.20.19%20Rulemaking.zip?dl=0>.

⁴ *Id.*

⁵ See *id.* at 1:51:44-52:50.

⁶ F.S.A. § 97.052(1) (“The department shall prescribe *by rule* a uniform statewide voter registration application for use in this state.”) (emphasis added).

⁷ See Audio Recording of August 6, 2019 Rulemaking Workshops at 1:51:44-52:50.

⁸ Deficiencies with the OVR form were detailed in our prior letters, which are attached for your reference.

⁹ This includes providing notice directed specifically at the returning citizen and Spanish-speaking communities, and providing both public workshops during development of the rule and public hearings prior to adoption of the final rule. See F.S.A. § 120.54(3)(a)3 (Notice must be “give[n]... to those particular classes of persons to whom the intended action is directed.”); see generally F.S.A. §§ 120.525, 120.54(2)(c), 120.54(3)(c), 120.54(3)(a), 120.54(3)(a)2.

attempting to register to vote using the new forms. Therefore, **we demand that you issue an emergency rulemaking in order to make it clear to all those affected that both the current, interim versions *and* the prior versions of both the English- and Spanish-language forms are currently valid, and should be accepted as such by all Supervisors of Elections pending final rulemaking on the new forms. We also demand that formal rulemaking be initiated forthwith for the new Spanish-language form and OVR form.**

Finally, we request information as to how you intend to ensure the amended rule and forms are implemented in compliance with the National Voter Registration Act and state law, and that this information be added to the rulemaking record.

We offer our assistance in ensuring that the rulemaking process is open and accessible to affected individuals, and that the final forms, when adopted, implement the changes required by Florida law while ensuring equal access to voter registration for all eligible Florida citizens.

Thank you for your consideration and prompt attention to this urgent matter.

Liza McClenaghan

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