

NEW MEXICO JUSTICE PROJECT

Public Comments on Proposed Amendments to NMAC 1.10.12.8 regarding MAILED BALLOT (ABSENTEE) APPLICATIONS

Senate Bill 180, which was signed into law in 2023, amended Section 1-6-4 (A) NMSA 1978, which now provides:

"1-6-4. MAILED BALLOT APPLICATION-

- A. *In a statewide election, application by a voter for a mailed ballot shall be made only on the official form approved by the secretary of state or its online equivalent accessed through a website authorized by the secretary of state. The form shall identify the applicant and contain information to establish the applicant's qualification for issuance of a mailed ballot under the Absent Voter Act. (emphasis added)*

The Proposed Rule, Section 1.10.12.8(A), however, changes the "shall" to "may", as follows:

- A. *An application for a mailed ballot may be made on the official form prescribed by the secretary of state, either on paper with an original signature or through the official electronic mailed ballot application portal.*

In addition, the Proposed Rule contains a provision which is not provided for or allowed by Section 1-6-4 NMSA, above. That section of the Proposed Rule states:

The form may not be altered, to include the pre-population of voter information, without prior approval from the secretary of state. Completed applications shall require the information specified in the Election Code, Section 1-6-4 NMSA 1978.

Comment: The Proposed Rule would allow the application to be altered and pre-populated by either third parties or county clerks at the discretion of the Secretary of State.

There is no place in statute which offers any kind of authorization whatsoever for the Secretary of State to exercise discretion in deciding who can and cannot provide the voter's information on the ballot application. The statutes do not allow the Secretary of State, a county clerk, or any other official, or a third party, to pre-populate an absentee ballot application. Instead, the statute specifically limits the application process for a mailed ballot to be one which is initiated and completed "by a voter."

There is compelling state interest in complying with this language: 1) the statewide voter file in New Mexico (and for that matter in every state) is in a constant state of flux, with voters changing addresses, moving out of state, dying, or otherwise being stricken from the rolls; 2) because of moves, deaths, and other changes, at any point in time, there can be as many as 20-30% of registered voters whose "voter information" is incorrect; 3) that being the case, the addition of pre-population authorization inevitably results in a situation which directly contradicts the statutory purpose of the mailed ballot application provision.

How does the proposed rule directly contradict the statutory purpose? It does so because it interferes with the process which is supposed to be one between the voter and the elections system. There must be an unmolested communication between an actual voter expressing his or her personal desire to vote on a mailed ballot in the election and the county clerk's office in that voter's county. The voter indicates his or her intent to vote by mail by filling out the mailed ballot application—on which the voter will personally provide the voter's name, address, year of birth and signature.

When someone else, at the discretion of the Secretary of State, is allowed to fill out this information by prepopulating the voter's name, address, and year of birth, it makes it too easy for a mailed ballot application to be processed in a voter's name, which the voter did not actually request. This is because the only other element of identification—the voter's signature—is not checked against the voter file. A mailed ballot application in which the voter's publicly available name, registration address and year of birth are pre-populated, and which contains any signature is required to be accepted under Section 1-6-5 NMSA and the Proposed Rule 1.10.12.8. Such a provision does not provide any degree of protection for the voter, or the integrity of the election itself. It violates the Secretary of State's duty to provide for elections security and integrity found in the New Mexico Constitution, Article VII, Section 1, which states:

“The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise.”

The same requirement is reiterated in NMSA Section 1-1-1.1:

“It is the purpose of the Election Code to secure the secrecy of the ballot, the purity of elections and guard against the abuse of the elective franchise. It is also the purpose of the Election Code to provide for efficient administration and conduct of elections.”

Voters who wish to vote in person at an early voting site or on election day may find that an absentee ballot application was submitted in their names, and a mailed ballot was sent to them. Voters may receive multiple copies of prepopulated mailed ballot applications from third parties, creating voter confusion and anger directed toward county clerks' offices, voter confusion and disenfranchisement.

All of this is because allowing anyone to prepopulate the voter's information raises the logical question as to whether ballot application was genuinely initiated by the voter or was ginned up by third parties (who may be engaged in partisan efforts to get out the vote of one party or the other). The clear purpose of the statute is to ensure that a mailed ballot application is initiated by an actual, live voter, who is eligible to vote and who wants to vote by mail rather than in person.

If the voter completes the ballot application, a ballot will be mailed to the voter. If third parties or even the county clerks are auto-filling or pre-populating the ballot application, with no signature verification, it means that inevitably there will be ballots requested and mailed out to voters who did not actually express any desire to vote by mailed ballot—and who may well be voting by other methods.

Conclusion: The Proposed Rule must be amended to provide that only the voter can complete the Mailed Ballot (Absentee) Ballot Application, and that the Applications cannot be pre-populated by any party.

The Secretary of State's self-appointed discretion to allow pre-population must be stricken from the Rule.

In addition to the significant issues identified above, there is no description for how the Secretary of State's self-appointed discretion would be exercised, or what standards will be employed by the Secretary of State in determining which third party groups will be allowed to pre-populate the mailed ballot applications.

The language of the Proposed Rule raises the question of whether certain county clerks will be allowed to pre-populate the mailed ballot applications and mail them to all voters, including those who did not request them.

Without any published criteria for when pre-population of the applications is allowed, it can be granted by the Secretary of State in a non-transparent, arbitrary and capricious manner.

The Secretary of State has an obligation under the Election Code to "obtain and maintain uniformity in the application, operation and interpretation of the Election Code." The Rules adopted by the Secretary must carry out these purposes. The Proposed Rule should be amended to provide that mailed ballot applications shall not be pre-populated under any conditions by striking the phrase "without prior approval from the Secretary of State."

Allowing Mailed Ballot Applications to be Submitted "Electronically."

Senate Bill 180, also amended Section 1-6-4 (B), as follows:

B. Each application on a paper form for a mailed ballot shall be signed by the applicant and shall require the applicant's printed name, registration address and year of birth. When submitted by the voter, the county clerk shall accept an application for a mailed ballot pursuant to this subsection regardless of whether the application for a mailed ballot is delivered to the county clerk on paper or by electronic means. When submitted by a third party, the county clerk shall not accept an application for a mailed ballot pursuant to this subsection if the application for a mailed ballot is delivered by electronic means.

Comment: There is no definition of "electronic means" in the statute or the Proposed Rule. Does "electronic means" refer to the official mailed ballot application portal, or does it mean faxed or emailed Mail Ballot Application forms?

Conduct of Third Parties

The Proposed Rule does not contain any clarification regarding the conduct of third-party agents and groups who send out and collect completed mailed ballot applications as allowed by the Election Code. The Proposed Rule should be amended to provide clear rules and regulations governing the conduct of any third parties who handle any election materials, including mailed ballot applications to prevent fraud, voter confusion and disenfranchisement by these groups.