

ADR 2012-33
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2012 SEP 25 PM 3:49
OFFICE OF GENERAL
COUNSEL

September 25, 2012

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RE: AOR on behalf of the Pennsylvania Democratic Party

Dear Mr. Herman:

This Advisory Opinion Request is submitted on behalf of the Pennsylvania Democratic Party ("PDP"). We request that the Commission issue an opinion within 30 days of this request in accordance with its informal practice to expedite "certain highly significant time sensitive requests." See Advisory Opinion Procedure, 74 Fed. Reg. 32160, 32162 (July 7, 2009).

The PDP wishes to disseminate mailings that expressly advocate the election of only non-federal candidates. A representative mailing is attached to this request and it should be assumed that the amount and size devoted to persuasion content will be the same for all such mailings and that the PDP wishes to allocate a half panel in each of these mailings to educate readers regarding Pennsylvania's recently enacted voter identification law). The PDP further wishes to pay for these mailings exclusively with funds that are in a non-federal account and are regulated exclusively by Pennsylvania law.

On March 15, 2012, the State of Pennsylvania enacted one of the most restrictive Voter Identification laws in the country (General information regarding Pennsylvania's Voter ID Law is attached to this request). The November, 2012 general election is the first election that this law will be in effect. The PDP is concerned that many voters will not be able to vote on election day because they do not have proper identification and would like to include information regarding the new Voter Identification law in mailings that it will undertake between now and election day. Other than the Voter ID information and a reference to Election Day, the mailings will not contain any other voting information (such as when times polling places are open or the location of polling places).

QUESTIONS PRESENTED

- 1) Whether the exhortation to vote in the proposed mailing is “incidental” in accordance with 11 C.F.R. § 100.24(a)(3)(ii).
- 2) If the answer to Question 1 is Yes, does the inclusion of information regarding the new Pennsylvania Voter ID law require that the mailing be paid for as a “federal election activity.”

DISCUSSION

As part of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Congress required that state party committees pay for certain communications that solely reference federal candidates with either federal funds or a combination of federal and limited non-federal funds commonly referred to as “Levin Funds.” 2 U.S.C. §§ 431(20)(A) & 441i(b). However, public communications that solely reference non-federal candidates may be paid exclusively with non-federal funds so long as the communication does not otherwise qualify as a federal election activity. 2 U.S.C. § 431(20)(B)(i). Specifically, in this request, the PDP seeks to determine whether the proposed mailing is, or is not covered, by the Commission’s definition of get-out-the-vote as defined by 11 C.F.R. § 100.24(a)(3).

The Commission’s definition of “federal election activity” was recently amended in light of Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir 2008). As part of the Commission’s amended definition, the Commission interpreted the Court’s decision to require that all communications that merely encourage someone to vote be defined as “get-out-the-vote,” unless such exhortation was “incidental” to the communication. See Definition of Federal Election Activity, 75 Fed. Reg. 55257, 55263-55264 (September 10, 2010). In addition, the Commission also refined the regulation to provide a specific list of activities that would constitute “get-out-the-vote” activities, including informing potential voters about times when polling places were open, providing assistance with early voting or absentee ballots, offering or arranging transportation to the polls and any other activities that “assist” potential voters to vote. 11 C.F.R. § 100.24(a)(3)(i)(B)-(D).

- 1) The Exhortation to Vote in the proposed mailing is “incidental”

It is clear that the exhortation to vote in the mailing “Vote for Democratic Sean Wiley November 6” meets the “incidental” standard in the Commission’s regulations. First, the mailing consists two pages. One entire page of the mailing contains several paragraphs of information regarding Sean Wiley’s positions on issues and biographical information regarding the state candidate. The exhortation is one sentence on the mail panel and is clearly “incidental” to the entire piece. Of course, this mailing appears to be exactly the type of mailing provided for in the Commission’s regulations as “incidental” at 11 C.F.R. § 100.24(3)(ii)(A) in which “[a] mailer praises the public service record of mayoral candidate X and/or discusses his campaign platform. The mailer concludes by reminding recipients to “Vote X on November 4th.”

2) Providing general information on Voter ID Laws should not be covered by the “get-out-the-vote” rules

The widespread enactment of voter identification laws by the states is a relatively new phenomenon that has generally occurred subsequent to the passage of the BCRA. When the FEC originally promulgated its definition of “get-out-the-vote,” the regulation was generally understood to cover those activities that “assisted” a voter in the act of voting. Some of these activities were obvious, such as transporting, or offering to transport voters to the polling place. Others involved informational activities, such as providing information regarding the time of polling places were open, and the location of polling places. The Commission has now revised and refined this portion of its regulation at 2 U.S.C. § 100.24(3)(i)(B)–(D). This portion of the regulation includes three general categories of activity including an informational section, a “facilitation” section and a “catch all” section. Each of the information provisions provide information on how to vote, and each of the facilitation sections provide actual assistance in the act of voting. Thus, despite the amendment of the “get-out-the-vote” regulation to address the concerns of the *Shays III* court, the standard understanding of “get-out-the-vote” activities that were intended to “facilitate” the actual act of voting were generally left untouched by the Commission. Thus, it is clear that the Commission’s regulations are clearly aimed at regulating those activities that are intended to increase voter turnout.¹ In this instance, the information provided by the party is not intended to increase turnout but rather to ensure that the voter can legally exercise their right to vote once they arrive at the polls.

The provision of voter identification activity does not appear to be covered by the Commission’s regulations. Rather than facilitating or assisting the voter in casting their vote, providing general legal information about the recently enacted voter identification law is more akin to “protect the vote” activities that ensure that a voter is not “disenfranchised” by knowing their rights or ensuring that they understand their requirements to be eligible to vote. Such activities have generally been understood to be administrative costs of a party committee and not subsumed within the Commission’s “get-out-the-vote” regulations. It would certainly be an absurd result to federalize a communication regarding non-federal candidates merely because of the inclusion of information regarding an individual’s voting rights.

¹ It should be noted that we can locate no reference to the provision of Voter ID information as a “get-out-the-vote” activity can be located in any of the discussion within the administrative record of the revised or original regulations. In addition, it should be noted that, despite the catch-all language found in subsection (D) of the revised regulation, the Commission did characterize the new regulation as a “comprehensive list of covered activities.” 75 Fed. Reg. at 55263. Thus, while there was a catch-all provision added to the GOTV regulations subsequent to the Notice of Proposed Rulemaking, no apparent explanation was provided as to the purpose of the catch-all provision.

Thank you for your time and prompt attention to this matter. If you have any questions regarding this request, feel free to contact me at (202) 479-1111.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'NR', written in a cursive style.

Neil Reiff
Counsel to the Pennsylvania Democratic
Party

Fold for and authorized by
 Pennsylvania Democrat State Committee
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 Harrisburg, PA 17101
 www.pdofpa.com

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 State Committee

VOTE FOR DEMOCRAT SEAN WILEY NOVEMBER 6

*It's time to bring
 Erie Values to Harrisburg*



Sean and Stephanie with their three children
 in Erie, Pennsylvania

THE LAW HAS CHANGED:

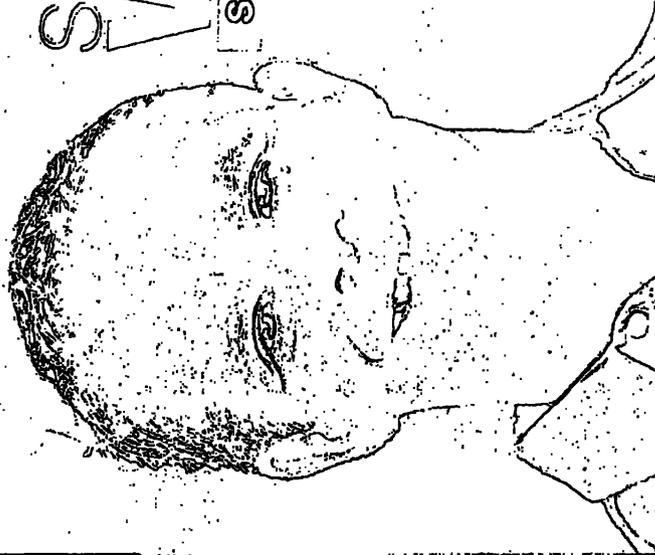
VOTERS NOW NEED A PHOTO ID

A NEW LAW REQUIRES ANY AND ALL VOTERS TO PRESENT A VALID PHOTO ID WITH AN EXPIRATION DATE IN ORDER TO CAST A BALLOT IN NOVEMBER.

- The United States government, e.g., a U.S. passport
- The Commonwealth of PA, e.g., a driver's license (NOTE: An expired driver's license is okay as long as it is within 12 months after the expiration date)
- PA municipality (e.g., city, county, borough, incorporated town) to municipal employees
- An accredited PA public or private institution of higher learning, e.g., a student card
- A PA care facility, which includes a long-term care nursing facility, an assisted living residence or a personal care home
- U.S. Armed Forces branches or their reserves, including the PA National Guard (NOTE: The ID holder can be a veteran or current member; the expiration date can be indefinite.)

SEAN WILEY

STATE SENATE



*"If we're going to
 create jobs and
 improve education,
 we need leaders like
 Harrisburg who
 will focus on results,
 not politics."*

FROM ERIE, FOR ERIE



FROM ERIE, FOR ERIE

A native of Erie, Sean Willey is dedicated to making our community a place where families want to live and raise their children, just as he is raising his here. Born into humble beginnings, Sean's early years were spent on Erie's west side, days filled with family, a commitment to the community and hard work. After graduating college, Sean began his career in the building material industry and capped a thirteen-year career by accepting an opportunity to serve the greater Erie community as the Director of Administration of Erie County.

Sean returned to the private sector as Director of the Saint Vincent Foundation and Government Affairs at the Saint Vincent Health System, but he remains a committed community leader, serving on the Allied Pediatric Health Steering Committee, the Northwest Pennsylvania Workforce Investment Board, Youth Leadership Institute of Erie, Erie County Industrial Development Authority, Erie County Economic Development Committee and the Sons of Lake Erie.

In the State Senate, Sean Willey will represent Erie's values, not Harrisburg's. As your State Senator, Sean will have five priorities:

CREATING JOBS

Sean has the experience in the private sector and government to create a business-friendly environment in Pennsylvania so good jobs are not sent overseas. In the state Senate, Sean will fight the outsourcing of jobs by backing a 'Made in Pennsylvania' tax credit, help to close corporate tax loopholes that hurt Pennsylvania workers and support new tax credits, eliminate regulation and cut taxes to help small businesses grow.

IMPROVING HEALTH CARE

As an expert in healthcare and hospital administration, Sean knows that both patients and doctors need to find common ground in the healthcare debate. As State Senator, Willey will fight to ensure that people throughout Pennsylvania have access to quality, affordable healthcare, while medical providers can function effectively.

SUPPORTING SCHOOLS

Sean and his wife have enrolled their three children in the Millcreek Public School System. He believes that the Commonwealth has a responsibility to provide every child with a quality education. As State Senator, Sean will fight to restore education funding for Erie schools and ensure that every child is offered a better future.

HOLDING THE LINE ON TAXES

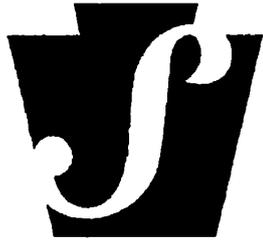
Sean's experience in government and working in the private sector have given him an understanding of the balance needed between government and taxes. In the Senate, Sean will ensure that our tax dollars are used efficiently and effectively to provide needed services without waste.

MAKING EVERY COMMUNITY SAFER

Sean believes that everyone, every man, woman and child, deserves to be safe from violence. In the State Senate, Sean will lead efforts to provide our law enforcement officers and educators with the equipment and training they need to ensure that our children are protected at home, in school and online.

LEARN MORE AT WWW.VOTEWILEY.COM | 3830 LIBERTY ST., ERIE, PA 16509 | 814.384.3250 | INFO@VOTEWILEY.COM | [TEXTING INFO](https://www.facebook.com/VOTEWILEY) | [@VOTEWILEY](https://www.instagram.com/VOTEWILEY) | [VOTEWILEY](https://www.youtube.com/VOTEWILEY)

PAID FOR BY THE REQUEST FOR A DEMOCRATIC PARTY.



pennsylvania
DEPARTMENT OF STATE

PENNSYLVANIA'S VOTER ID LAW

A Guide to ACT 18 of 2012

**Governor Tom
Corbett**

**Carol Secretary
Aichele**

FAQ – GENERAL INFORMATION ON VOTING IN PERSON:

<p>What are the changes to the law and when do they go into effect?</p>	<p>➤ Starting with the November 2012 General Election, Pennsylvania law now requires voters to show an acceptable photo ID to vote at the polls.</p>
<p>What is an acceptable form of ID?</p>	<p>➤ All IDs must contain a NAME, a PHOTO, and an EXPIRATION DATE that is CURRENT, unless noted otherwise. Acceptable IDs include:</p> <ul style="list-style-type: none"> • Photo IDs issued by the U.S. Government or the Commonwealth of Pennsylvania, including: <ul style="list-style-type: none"> ○ Pennsylvania driver's license or PennDOT photo ID card (valid for voting 12 months past expiration date) ○ U.S. passport ○ U.S. military ID (active duty and retired military IDs may designate an expiration date that is indefinite). Military dependents' IDs must contain a current expiration date. • Employee photo identification issued by Federal, Pennsylvania, Pennsylvania County, or Pennsylvania Municipal government • Photo identification issued by an accredited Pennsylvania public or private institution of higher learning • Photo identification issued by a Pennsylvania care facility, including long-term care facilities, assisted living residences and personal care homes <p>➤ In the case of a voter who has a RELIGIOUS OBJECTION to being photographed, acceptable IDs include the following:</p> <ul style="list-style-type: none"> • Pennsylvania valid without-photo driver's license • PennDOT valid without-photo identification card
<p>What if a voter does not have an acceptable form of ID?</p>	<p>➤ A person who is registered to vote, but does not have an acceptable form of ID, may obtain a FREE PENNDOT PHOTO ID for voting purposes at a PennDOT Driver's License Center.</p>



How does a voter obtain a FREE PENNDOT PHOTO ID for voting?

- For a registered voter who PREVIOUSLY HAD a Pennsylvania driver's license or a PennDOT photo identification card that has been expired for one year or longer:
 - Visit a PennDOT Driver's License Center with a completed Application for Initial Photo Identification Card (Form DL-54A) – there is no need to bring any supporting documentation since identity and residency were previously validated by PennDOT. The voter should provide his or her current address on the application.
 - Obtain and sign an affirmation form, affirming that the voter does not have another acceptable form of ID for voting purposes. The form is available on PennDOT's website or at a PennDOT Driver's License Center.
 - A voter who still has his or her expired Pennsylvania driver's license or PennDOT photo identification card should bring it along to the Driver's License Center. However, if the voter no longer has it, PennDOT will be able to determine if the voter has an expired product.
 - If a voter has a Pennsylvania driver's license or PennDOT photo identification card that expired PRIOR TO 1990, the voter should call PennDOT's CUSTOMER CALL CENTER at 1-800-932-4600 to verify whether his or her record is still in PennDOT's system.
- For a registered voter who has NEVER HAD a Pennsylvania driver's license or a PennDOT photo identification card:
 - Visit a PennDOT Driver's License Center with a completed Application for Initial Photo Identification Card (Form DL-54A) and the following:
 - ✓ Social Security Card AND one of the following:
 - Certificate of U.S. Citizenship
 - Certificate of Naturalization
 - Birth Certificate with a raised seal
 - PLUS
 - ✓ Two proofs of *residency, such as lease agreements, current utility bills, mortgage documents, W-2 form, tax records

	<p>*Students at least 18 years of age: Accepted proofs of residency include the room assignment paperwork (considered a lease) and one bill with their dorm room address on it. Bank statements, paystubs and credit card bills are all acceptable.</p> <p>*Other Individuals who may not have any bills, leases or mortgage documents in their name may bring the person with whom they are living along with that person's driver's license or photo ID to a Driver's License Center as one proof of residence plus at least one more piece of official mail with their name and address.</p> <p>*Homeless individuals can use the address of a shelter as their residence provided they visit a Driver's License Center with an employee from the shelter that has an employee photo identification issued by the shelter and a letter on the shelter's letterhead indicating that the homeless individual stays at the shelter.</p> <ul style="list-style-type: none"> • Obtain and sign an affirmation form, affirming that the voter does not have another acceptable form of ID for voting purposes. The form is available on PennDOT's website or at a Driver's License Center. <p>➤ VISIT PennDOT's WEBSITE FOR MORE INFORMATION.</p>
<p>How does a voter who has a religious objection to being photographed obtain a Pennsylvania valid without-photo driver's license or PennDOT valid without-photo identification card?</p>	<p>➤ A voter who has a religious objection to being photographed should visit a PennDOT Driver's License Center or call PennDOT's Customer Call Center at 1-800-932-4600 to request an AFFIDAVIT IN SUPPORT OF EXEMPTION FOR SINCERELY HELD RELIGIOUS BELIEFS.</p> <p>➤ The voter should complete the Affidavit and mail it to the address included with the instructions. PennDOT will then make contact with the voter.</p>
<p>What if a voter born in Pennsylvania does not have a certified copy of his or her birth certificate?</p>	<p>For a Pennsylvania-born registered voter, who does not already have a certified copy of his or her birth certificate and needs a photo ID for voting purposes PennDOT will forward requests for birth record certification to the Department of Health. This certification process will take approximately ten days and is FREE OF CHARGE.</p> <p>When visiting the PennDOT driver license center, a person</p>



Tom Corbett, Governor
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PENNSYLVANIA'S VOTER ID LAW

	<p>must:</p> <ul style="list-style-type: none"> • Tell the PennDOT customer service representative he or she was born in Pennsylvania and needs a photo ID for voting purposes, and does not have a certified copy of his or her birth certificate. • Sign an affirmation that the registered voter does not have an acceptable form of ID for voting purposes and the photo ID is needed for voting purposes. • Show a Social Security card and two proofs of residence, such as a deed, lease, tax bill, or utility bill. • Fill out a DL-54A form requesting a non-driver photo ID. • Complete the HD01564F (Request for Certification of Birth Record for Voter ID Purposes Only) form, which collects information such as birth name, mother and father's name, and place of birth. <ul style="list-style-type: none"> ◦ If the Department of Health can certify the voter's birth record, the voter will receive a letter in the mail from PennDOT which the voter can bring, along with the documents detailed above, to a Driver's License Center IN PLACE OF a birth certificate with a raised seal. ◦ If the Department of Health cannot certify the voter's birth record, the voter will receive a letter in the mail from PennDOT asking them to contact the Bureau of Vital Records at the Department of Health. <p>However, as noted above, a registered voter who previously had a Pennsylvania driver's license or a PennDOT photo identification card that has been expired for one year or longer may not need supporting documentation, such as a birth certificate, because identity and residency were previously validated by PennDOT</p> <ul style="list-style-type: none"> ➤ If a voter has questions regarding PennDOT's identification verification process, the voter should call PennDOT's Customer Call Center at 1-800-932-4600.
<p>What if a voter shows up at the polling place without an acceptable</p>	<ul style="list-style-type: none"> ➤ The voter will be able to vote by provisional ballot. However, in order for the ballot to count, a voter must, within six days after the election, provide the county

ID?	board of elections with a copy of an acceptable ID and an affirmation that the voter is the same person who cast the provisional ballot. These documents may be mailed, faxed, sent electronically (email), or brought into the county election office.
What if a voter cannot afford to obtain acceptable ID? Can they still vote?	<ul style="list-style-type: none"> ➤ If a voter cannot obtain an acceptable form of ID due to indigency, including an inability to pay for a certified birth certificate to get a Free ID, the voter will still be able to vote by provisional ballot. ➤ However, in order for the ballot to count, the voter must, within six days after the election, provide the county board of elections with an affirmation that states that the voter is the same person who cast the provisional ballot, and that the voter is indigent and therefore unable to obtain proof of identification without the payment of a fee.

FAQ – GENERAL INFORMATION ON VOTING BY ABSENTEE BALLOT:

What are the changes to the absentee voting law and when do they go into effect?	➤ Starting with November 2012 General Election, Pennsylvania law now requires voters to provide proof of identification with an Application for Absentee Ballot.
Is anyone exempt?	➤ A qualified absentee voter is not required to provide proof of identification if the voter is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) or by alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act.
What is proof of identification for a qualified absentee voter?	<ul style="list-style-type: none"> ➤ For a voter who has a current and valid Pennsylvania driver's license or PennDOT photo ID card, the voter must provide the driver's license number or photo ID number on the Application for Absentee Ballot. ➤ For a voter who does not have a Pennsylvania driver's license or PennDOT photo ID card, the voter must provide the last four digits of his or her Social Security Number on the Application for Absentee Ballot. ➤ For a voter who has a RELIGIOUS OBJECTION to being photographed, the voter must provide the Pennsylvania valid without-photo driver's license number or PennDOT valid without-photo identification number on the Application for Absentee Ballot, OR the voter must provide a copy of either of these documents with the Application



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**PENNSYLVANIA'S
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	<p>for Absentee Ballot.</p>
<p>What if a voter does not have a Pennsylvania driver's license or Social Security Number?</p>	<ul style="list-style-type: none"> ➤ A voter without either must provide with his or her Application for Absentee Ballot a copy of an ID that shows a NAME, a PHOTO, and an EXPIRATION DATE that is CURRENT, unless noted otherwise, such as: <ul style="list-style-type: none"> • Photo IDs issued by the U.S. Government or the Commonwealth of Pennsylvania, including: <ul style="list-style-type: none"> ○ U.S. passport ○ U.S. military ID (active duty and retired military ID may designate an expiration date that is indefinite). Military dependents' ID must contain a current expiration date • Employee photo identification issued by Federal, Pennsylvania, Pennsylvania County, or Pennsylvania Municipal government • Photo identification issued by an accredited Pennsylvania public or private institution of higher learning • Photo identification issued by a Pennsylvania care facility, including long-term care facilities, assisted living residences and personal care homes
<p>What does the county board of elections do with a voter's proof of identification?</p>	<ul style="list-style-type: none"> ➤ A county board of elections must verify the proof of identification before counting an absentee ballot. If the board is unable to do so, the board will contact the voter so he or she will be able to provide acceptable proof of identification.
<p>What if the voter does not include proof of identification with the Application for Absentee Ballot?</p>	<ul style="list-style-type: none"> ➤ A voter who does not include proof of identification on or with the Application for Absentee Ballot will still receive an absentee ballot; however, the county board of elections will send a notice to the voter with the absentee ballot requiring the voter to provide proof of identification or the ballot will not be counted. ➤ A voter should provide the proof of identification as soon as possible so that the county board of elections can verify the information and the ballot can be counted. ➤ If the county board of elections has not received the proof of identification that can be verified by the sixth day after the election, the voter's absentee ballot will not be counted.



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PENNSYLVANIA'S VOTER ID LAW

Is proof of
identification
information public?

➤ Proof of identification on or provided with the Application for Absentee Ballot cannot be made public.

**For more information on Pennsylvania's Voter ID Law,
visit www.VotesPA.com or call 1-877-VotesPA (1-877-
868-3772)**
