

The State of Texas



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TEXAS SECRETARY OF STATE'S ADOPTION OF FEDERAL MOVE ACT

The Office of the Secretary of State, Elections Division, adopts the repeal of existing §81.39, and simultaneously adopts new §81.39, concerning the e-mailing and tracking of balloting materials to military and overseas voters pursuant to the federal Military and Overseas Voter Empowerment Act ("MOVE"), 42 U.S.C. 1973ff. The rule is adopted with changes to the text as proposed in the June 4, 2010 issue of the Texas Register (35 TexReg 4541).

SUMMARY OF COMMENTS AND AGENCY RESPONSE

Comment: Ms. Tina A Smith, McCulloch County Clerk, expressed a concern that her county does not possess scanners capable of scanning a ballot into their system. Ms. Knoxie Mathis, Potter County Elections Manager, expressed the same concern.

Response: No changes were made. The Office of the Secretary of State believes the rule as currently written provides methods for counties other than scanning the ballot to forward the electronic ballot to the FPCA applicant, such as using a PDF copy of the ballot proof. As also discussed in the task force meeting, counties will have opportunities to draw on HAVA funds as necessary to comply with the MOVE act; the Office of the Secretary of State will contact county election officials to inform them of their eligibility to purchase equipment and hire temporary personnel.

Comment: Ms. Barbara Agnew, Burnet County Elections Administrator, questioned whether the rule was clear enough on the method by which an applicant could request an e-mailed ballot.

Response: A sentence was added to 81.39(a)(1) to clarify that the request for e-mail ballot may be submitted to the early voting clerk by separate e-mail or on the FPCA itself.

Comment: Both Ms. Linda Streicher, Fayette County Elections Administrator, and Ms. Vona McKerley, Tom Green County Elections Administrator, suggested the rule should address what the early voting clerk should do if the e-mailed ballot is returned as a bad address.

Response: New § 81.39(e) was added to require the early voting clerk to print out and notate on the balloting materials that the e-mail address was invalid. This should be done after first eliminating any data entry error.

Comment: Capt. Morgan Little, USNR (ret.), Chair, Texas Coalition of Veterans Organizations, suggested clarifying use of the phrase "uninformed" services voters. Along with Mr. John German, Harris County Administrator of Elections, Capt.. Little suggested the phrase "blank"

ballot was misleading. He suggested this be changed to the term “unmarked” ballot. Capt. Little also suggested the early voting clerk be required to forward an e-mail to FPCA applicants already on file to inform them of the new e-mail options under MOVE.

Response: The use of “unmarked” services voters was changed to correspond to Capt. Little’s suggestion. The phrase “unmarked” ballot was also changed to address Capt. Little and Mr. German’s concerns. No change was made based on his second suggestion. It is the Office of the Secretary of State’s belief that informing the FPCA applicants of their options will be better carried out by the Federal Voting Assistance Program’s educational activities. Individual counties may forward such information to FPCA applicants on file at their discretion.

Comment: Capt. Morgan Little, USNR (ret.), Chair, Texas Coalition of Veterans Organizations, also suggested a change to § 81.39(d)(1) as it refers to the Adobe Acrobat .pdf file format. He suggested it should instead refer to “*.pdf where ‘*’ equals a file name.”

Response: § 81.39(d)(1) was amended to refer to “PDF” format which corresponds to usage in other administrative rules.

Comment: Ms. Dorothy Person, Lampasas County Elections Administrator, suggested the rule should clarify what was meant by limiting the use of e-mailed ballot transmission to federal elections. Ms. Person also asked whether the requirement for early voting clerks to submit information to the Office of the Secretary of State on FPCAs submitted after September 1, 2010 within two working days after receipt could be lengthened.

Response: § 81.39(a)(4) has been slightly rewritten to indicate e-mail ballot transmission is available in an election in which an office of the federal government is on the ballot or a joint election ballot containing an election for an office of the federal government. The two day turnaround has been extended to three days in response to Ms. Person’s comment. The Office of the Secretary of State believes that extending the period by one day should not negatively affect the ballot transmittal information appearing on the SOS tracking site in a timely manner.

Comment: Ms. Dina Bell, Fayette County Elections Administrator, suggested that § 81.39(a)(1) needed to clarify that an applicant may request an e-mailed ballot even though a ballot has already been mailed to the applicant.

Response: No change was made. The Office of the Secretary of State believes that the eligibility to apply for an e-mailed unmarked ballot set out in § 81.39(b)(7), including that a voted marked ballot has not yet been received by the early voting clerk, already addresses this issue.

Comment: Both Ms. Bell, Fayette County Elections Administrator, and Mr. John German, Harris County Administrator of Elections, suggested that clarification is needed on the proper procedures for FPCAs already on file that have the e-mail option checked as the preferred method to receive a ballot, specifically whether these applicants need to submit a new request for the November 2010 general election for state and county officers.

Response: The Office of the Secretary of State agrees and language has been added to the rule at § 81.39(b)(8) to require requests for e-mail ballot transmission to be submitted on or after October 28, 2009, the effective date of the MOVE Act.

Comment: Ms. Bell, Fayette County Elections Administrator, questions the applicability of Federal Write-in Ballot requests to § 81.39(b)(6).

Response: No change was made in response to this comment. The rule applies specifically to e-mail transmissions of the ballot, and does not impact the Federal Write-In Ballot procedures.

Comment: In regard to §§ 81.39(c)(3)&(4), Ms. Bell, Fayette County Elections Administrator, notes that the Federal Assistance Voting Project (FVAP) website does not provide instructions but only a file of the postage free return envelope. She asks whether the Office of the Secretary of State will provide uniform instructions for all counties to use.

Response: The Office of the Secretary of State agrees and language was added to require the Office of the Secretary of State to provide information on how to use the FVAP website to print a return envelope for the marked ballot.

Comment: Ms. Bell, Fayette County Elections Administrator, notes that ballots are generally on 8 ½ x 14 legal-size paper and questions whether the e-mailed unmarked ballots should be required to be provided to the applicant on the more common 8 ½ x 11 size.

Response: In recognition of the differing technological capabilities of Texas' counties, the Office of the Secretary of State has attempted in the rule to avoid setting requirements counties may not be able to meet. No requirements in the rule were added as a result of this comment, but language was added at § 81.39(d)(4) in the form of a recommendation that the e-mail ballot be transmitted for 8 ½ x 11 regular sized paper. The Office of the Secretary of State has contacted vendors who print ballots to confirm that while the provided file or proof may originate as a legal sized (8 ½ x 14) document, applicants will be able to print the ballot on the more common 8 ½ x 11. Practically, counties will be duplicating all the ballots received from applicants voting under this rule (or manual counting), which further mitigates the need to require the ballot be provided on the smaller paper size.

Comment: Ms. Bell, Fayette County Elections Administrator, suggests that § 81.39(f)(6) should clarify how the 2nd ballot is to be treated when the applicant returns both a ballot by mail and the e-mailed ballot.

Response: Language was added to § 81.39(f)(6) to clarify that the mailed ballot is to be treated as a ballot not timely returned and preserved by the early voting clerk for the records retention period.

Comment: Ms. Knoxie Mathis, Potter County Elections Manager, suggested that where both a regular mail and an e-mail ballot from the voter are received before the deadline, the mail ballot should be counted. § 81.38(f)(6) currently provides that the e-mail ballot is counted by the ballot board.

Response: No change was made in response to this comment. The Office of the Secretary of State believes that the e-mail ballot is more likely the latest expression of the voter's intent and is therefore the ballot that should be counted.

Comment: Ms. Bell, Fayette County Elections Administrator, suggests that § 81.39(i)(7) should require the letter indicating a ballot by mail was rejected to be mailed to the voter's FPCA mailing address instead of their residence address.

Response: The Office of the Secretary of State agrees that the FPCA residence address should not be used and language was added to § 81.39(i)(7) to require the rejection letter to be e-mailed to the appropriate e-mail address since it is likely to be the most current means of communication with the voter.

Comment: Ms. Bell, Fayette County Elections Administrator, suggests that required categories of each FPCA record submitted to the Office of the Secretary of State from the counties should indicate whether the FPCA was mailed or e-mailed to the voter.

Response: No change necessary. The rule as written will require the county to provide information on whether the ballot was received by mail or e-mail or the rejected ballot had been mailed or e-mailed. Further, the actual program counties will use to submit the information to the Office of the Secretary of State will clarify any confusion for counties as to the required information.

Comment: During a presentation of the proposed rules at the June 2010 Texas County and District Clerks' Summer Conference, several county clerks in attendance commented that the secrecy of an FPCA voter's ballot will be compromised if the e-mailed blank ballot has a unique identifying number on it. Ms. Knoxie Mathis, Potter County Elections Manager, also expressed this concern.

Response: The Office of the Secretary of State agrees that the identifying number could have the effect of impinging on voter secrecy and has deleted the requirement. The Office of the Secretary of State believes adequate security is provided through the connection between the e-mail address and the voter's FPCA on file with the county.

Comment: Mr. John German, Harris County Administrator of Elections, suggests that ballots should be accepted via e-mail from voters in war zones and hostile fire pay zones with a password protected ballot e-mailed directly to the early voting clerk.

Response: The Office of the Secretary of State does not believe that it has the authority to adopt this change. The MOVE Act requires the state to adopt a means to forward a ballot electronically to the voter; however, it does not require the state to accept the returned ballot electronically. Under current law, a military voter in a war zone/hostile fire pay zone has the right to apply for the ballot to be e-mailed and to return the ballot by facsimile under Chapter 105, Texas Election Code. To allow the ballot to be returned by e-mail would take legislative action.

Comment: Mr. German, Harris County Administrator of Elections, questioned whether e-mail ballots would receive the same deadline period for ballots to be returned as ballots sent by regular mail.

Response: For the sake of clarity, language was added to § 81.39(f)(1) to expressly state the deadline for a ballot to be received by the early voting clerk is the same as set out in § 86.007, Texas Election Code.

The repeal is adopted under the Texas Election Code, § 31.002, which provides the Office of the Secretary of State with the authority to maintain uniformity in the application, operation, and interpretation of the Texas Election Code and of the election laws outside the Texas Election Code. MOVE is effective for the November 2, 2010 General Election. Accordingly, this rule is necessary for compliance until the Texas Legislature can statutorily address implementation of MOVE.

Statutory Authority: Election Code §31.002.

Cross Reference to Statute: Texas Election Code, Chapter 101 is affected by this rule.

§81.39. Procedures for Pilot Program for Emailing Ballots to FPCA Voters.

The new rule is adopted under the Texas Election Code, § 31.002, which provides the Office of the Secretary of State with the authority to maintain uniformity in the application, operation, and interpretation of the Texas Election Code and of the election laws outside the Texas Election Code. MOVE is effective for the November 2, 2010 General Election. Accordingly, this rule is necessary for compliance until the Texas Legislature can statutorily address implementation of MOVE.

Statutory Authority: Election Code §31.002.

Cross Reference to Statute: Texas Election Code, Chapter 101 is affected by this rule.

§81.39.E-mailing and Tracking Balloting Materials Required by the Federal Military and Overseas Voter Empowerment Act (MOVE).

(a) Authorization for e-mailing of unmarked ballots to absent uniformed services voters, including their spouse and dependents (collectively “uniformed services voters”), absent from their county of residence and overseas voters in elections for federal office.

(1) Pursuant to § 578(a) of the MOVE Act, uniformed services voters, temporarily residing outside their county of residence and United States citizens currently residing overseas ("overseas citizen") may request by e-mail the e-mail transmission of blank balloting materials from the appropriate county early voting clerk for an election in which a federal office is on the ballot. The request may be submitted to the early voting clerk by e-mail or, if the e-mail is different from the one shown on the federal postcard application (FPCA) on file, on a newly-submitted FPCA.

(2) If no preference for ballot transmittal is indicated, the early voting clerk shall send the balloting materials to the applicant via regular mail.

(3) E-mail addresses are not subject to public disclosure to the extent provided by §552.337 of the Texas Government Code. Early voting clerks shall ensure that the voter's e-mail address is excluded from public disclosure.

(4) The e-mail transmission of ballots shall be limited to elections in which an office of the federal government is on the ballot. Ballots for other elections shall be mailed to the applicant in the usual manner, unless the election is part of a joint election ballot containing a federal office.

(b) Voters are eligible to request ballots via e-mail if the following conditions in paragraphs (1) - (7) of this subsection are met:

(1) The voter meets the eligibility requirements of voting by mail pursuant to §101.001 of the Texas Election Code (hereinafter referred to as applicant);

(2) The voter has submitted a valid FPCA;

(3) If the applicant is an overseas citizen, he/she must provide a current mailing address that is located outside of the United States, and the applicant must be voting from outside of the United States;

(4) If the applicant is an absent uniform services voter, he/she must provide a mailing address that is located outside his or her county of residence, and he/she must be voting from outside the county of residence;

(5) The applicant must provide an e-mail address to which the unmarked ballot shall be transmitted that corresponds to the e-mail address provided on his or her previously filed FPCA. If the applicant wishes the unmarked e-mail ballot to be transmitted to an e-mail address other than the one provided on his or her FPCA on file at the time of the request, the applicant must submit a new, signed FPCA which contains that e-mail address;

(6) The voter submits the request that his or her ballot be e-mailed on or before the 7th day before election day; and

(7) A marked voted ballot for the requested election has not yet been received from the applicant by the early voting clerk.

(8) The request is received on or after October 28, 2009, the effective date of the MOVE Act.

(c) Balloting materials which must be transmitted via e-mail include:

(1) the appropriate ballot;

(2) ballot instructions, including instructions that informs voters that their ballots must be returned by mail in order to be counted;

(3) Office of the Secretary of State instructions on about how to print a return envelope from the Federal Voting Assistance Program (FVAP) website;

(4) Office of the Secretary of State instructions explaining how to create a carrier envelope for the ballot; and

(5) the list of certified write-in candidates, if applicable.

(d) Approved methods of e-mailing the ballot and accompanying materials include the following:

(1) an attached copy of the ballot in PDF format and accompanying materials;

(2) a scanned copy of the ballot and accompanying materials; or

(3) any other method of transmitting the ballot and accompanying materials approved in writing by the Office of the Secretary of State.

(4) The Office of the Secretary of State recommends that the ballot be transmitted in an 8 ½ x 11 format, if possible.

(e) If the initial e-mail transmission is unsuccessful, the clerk should print out the bounced e-mail and file it with the voter's original FPCA form. The early voting clerk then shall at least twice attempt to send the voter a notice without the ballot attachment to notify the voter the ballot was not successfully transmitted. In forwarding the notice, the early voting clerk shall take additional care to re-review the voter's indicated e-mail address on the original FPCA document. If the early voting clerk is able to verify a mistake on his or her part in the original e-mail transmission, or receives an acknowledgement from the voter that the e-mail address is correct, the clerk shall attempt to re-send the ballot to the correct address. If the early voting clerk is ultimately unable to forward the ballot e-mail to the voter, the clerk shall submit a notice by mail to the voter's FPCA mailing address or contact the voter by phone if the voter has provided a telephone number. The notice shall apprise the voter of his or her ability to submit a new FPCA either with a valid e-mail address or requesting the ballot to be sent by mail. The early voting clerk must provide a uniform level of contact with FPCA applicants. A failed e-mail transmission does not by itself authorize the clerk to forward the ballot to the voter by mail. To change the transmission method to mail, the voter would have to submit a new FPCA to the clerk by the appropriate deadline.

(f) Permissible method of returning ballot sent to applicant via e-mail.

(1) Applicants who receive balloting materials from the early voting clerk via e-mail must return their marked ballots by regular mail, unless eligible to return the ballot by facsimile under Chapter 105, Texas Election Code, which is limited to military voters in war zones and/or receiving hostile fire pay.

(2) Marked ballots may not be returned via e-mail. Any ballot returned via e-mail must be treated as a ballot not timely returned and is not forwarded to the early voting ballot board for processing.

(3) The deadline for a ballot to be received by the early voting clerk is the same as set out in § 86.007, Texas Election Code.

(g) Processing and qualifying ballots.

(1) Upon receipt of a voted ballot provided to the applicant via e-mail, the early voting clerk shall place the carrier envelope containing the marked ballot into a jacket envelope, in which the applicant's FPCA should already be included. If the applicant's ballot was returned by facsimile under Chapter 105, Texas Election Code, the signature sheet shall also be included in the jacket envelope.

(2) The early voting clerk shall note on the early voting by mail roster any ballots e-mailed to absent uniformed services voters and overseas citizens under this rule.

(3) All jacket envelopes containing marked ballots voted in compliance with this rule must be delivered to the early voting ballot board.

(4) The board should make sure that each jacket envelope contains:

(A) a copy of the applicant's FPCA;

(B) the envelope in which the applicant returned their ballot; and

(C) the carrier envelope containing the marked ballot.

(5) The board must compare the applicant's signature as it appears on the carrier envelope (or the signature sheet if the ballot was returned by facsimile under Chapter 105, Texas Election Code) with the applicant's signature as it appears on the FPCA. If the board determines that the signatures could have been written by the same person, the ballot shall be accepted.

(6) The early voting clerk must allow all applicable deadlines to expire before sending either an original mail ballot or an e-mailed ballot to the early voting ballot board. If within the applicable deadlines, an applicant returns both an original mail ballot and an e-mailed ballot, only the e-mail ballot may be accepted. The original mail ballot is not forwarded to the early voting ballot board, but instead treated as a ballot not timely returned, and but is retained for the elections retention period.

(7) If the applicant returned only the mail ballot by the applicable deadline, the mail ballot may be accepted.

(h) Counting ballots. The qualified, accepted ballot is handled in the following manner:

- (1) Open the carrier envelope and remove the ballot envelope.
 - (2) Place the unopened ballot envelope in a ballot box.
 - (3) Enter the applicant's name on the poll list for early voters.
 - (4) Place the copy of the applicant's FPCA, the carrier envelope, the signature sheet, and any accompanying papers back in the jacket envelope.
 - (5) Count the ballot(s), either by hand counting or electronically, in the manner established for the election by the early voting clerk.
- (i) Duplicating e-mailed ballots. At the discretion of the central counting station manager, after acceptance by the early voting ballot board, an e-mailed ballot may be duplicated under procedures set out in §127.126, Texas Election Code.
- (j) Rejecting ballots.
- (1) If the applicant's FPCA and carrier envelope do not meet all the requirements outlined in subsection (f) of this section, the ballot must be rejected and may not be counted.
 - (2) The rejected ballot should be processed by:
 - (A) Writing the word "Rejected" on the carrier envelope;
 - (B) Writing the word "Rejected" on the corresponding jacket envelope;
 - (C) Placing the unopened carrier envelope containing the rejected ballot in the large envelope or container marked "Rejected Early Ballots";
 - (D) Having the presiding judge sign and seal the "Rejected Early Ballot" envelope.;
 - (3) The presiding judge must also write the date and nature of the election on the envelope.
 - (4) A record must be kept of the number of rejected ballots placed in the "Rejected Early Ballot" envelope.
 - (5) A notation must be made on the carrier envelope of any ballot which was rejected after the carrier envelope was opened, stating the reason the carrier envelope was opened and rejected.
 - (6) The applicant's FPCA, signature sheet, and any other accompanying papers and affidavits must be placed in the jacket envelope.

(7) The presiding judge of the board must forward a notice of the reason for the rejection to the e-mail address to which the ballot was originally transmitted in addition to the mailed notice of rejection to the applicant's residence address required under § 87.0431, Texas Election Code.

(k) Tracking balloting materials. MOVE requires each state to develop a tracking system FPCA applicants may access to determine if their voted ballot has been received back by the early voting clerk. The Office of the Secretary of State will create a military and overseas voter ballot tracking website, and each county will be required to submit specific FPCA application and ballot status data, which will populate the FPCA tracking website.

(1) Submission of FPCA records. The early voting clerk must submit to the Office of the Secretary of State a voter record for each FPCA that is timely received for the November 2, 2010 general election. The three approved submission methods for submitting FPCA data are:

(A) Voter Import Method. The voter import is a prescribed, standard format issued and supported by the Office of the Secretary of State in which data may be submitted in mass to update the Texas Election Administration Management System ("TEAM"). The early voting clerk may submit the voter import or may work in cooperation with the county voter registrar to submit the voter import.

(B) TEAM Data Entry Method. The early voting clerk may directly input FPCA voters into the TEAM application.

(C) Spreadsheet Submission Method. The early voting clerk may submit a spreadsheet which contains required data for all effective FPCA voters. The spreadsheet format will be prescribed by the Office of the Secretary of State and sent to all counties by July 31, 2010, and will contain the following fields:

(i) County name;

(ii) Election name;

(iii) Voter last name;

(iv) Voter first name;

(v) Voter former name, if any;

(vi) Voter date of birth;

(vii) Voter residential zip code; and

(viii) FPCA status (military or spouse or dependent of military, U.S. citizen temporarily residing outside of U.S., or U.S. citizen indefinitely residing outside of U.S.).

(2) Deadline to submit FPCA voter record.

(A) Records for all FPCAs on file as of September 1, 2010 must be submitted to the Office of the Secretary of State no later than September 7, 2010.

(B) Records for FPCAs that are submitted to the early voting clerk after September 1, 2010, must be submitted to the Office of the Secretary of State within 3 working days of receipt by the early voting clerk.

(3) Submission of voted ballot status. The early voting clerk must submit to the Office of the Secretary of State the following information concerning the ballot status for each FPCA record:

(A) Date ballot mailed, e-mailed or both;

(B) Date ballot(s) received; if applicable;

(C) Date ballot Returned by the Post Office, if applicable;

(D) Whether the ballot(s) received was accepted or rejected.

(4) The early voting clerk may submit the ballot status data by one of the following three methods:

(A) Voting History Import to TEAM.

(B) Data Entry directly into TEAM.

(C) Updates to FPCA Spreadsheet.

(5) Deadline to submit ballot status data. The early voting clerk must submit the ballot status information required under paragraph (3) of this subsection within 3 business days of the status change.