June 22, 2007

Marci Andino, Executive Director
South Carolina Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Ms. Andino:

We understand from your letter that the South Carolina Election Commission (the "Commission") seeks the advice of this Office in regard to section 7-13-1620(A) of the South Carolina Code, governing the Commission's certification of electronic voting systems. You informed us that "the certification of a new version of software and firmware is before the Commission. The software was certified by a testing laboratory that is now accredited by the Federal Election Assistance Commission; however, the software was certified prior to the EAC taking over administration of the certification program on 1/1/2007." Thus, we assume you inquire as to whether the Commission may approve a voting system for use in South Carolina under these circumstances.

Law/Analysis

Section 7-13-1620(A) of the South Carolina Code (Supp. 2006) provides:

> (A) Before any kind of voting system, including an electronic voting system, is used at an election, it must be approved by the State Election Commission, which shall examine the voting system and make and file in the commission's office a report, attested to by the signature of the commission's executive director, stating whether, in the commission's opinion, the kind of voting system examined may be accurately and efficiently used by electors at elections, as provided by law. A voting system may not be approved for use in the State unless certified by a testing laboratory accredited by the Federal Election Assistance Commission as meeting or exceeding the minimum requirements of federal voting system standards.

(emphasis added).

In order to address your question, we must determine whether a voting system certified by a laboratory, which has since been accredited by the EAC, but that was not accredited at the time it certified the software is in compliance with section 7-13-1620(A). Thus, we must look to the rules of statutory interpretation in reading section 7-13-1620(A). As our Supreme Court stated in a recent opinion:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Vaughan v. McLeod Regional Medical Center, 372 S.C. 505, 510, 642 S.E.2d 744, 746-47 (2007).

Based on a plain reading of section 7-13-1620(A), we are of the opinion that a testing laboratory must be accredited by the Federal Election Assistance Commission (the "EAC") when it certifies the voting system. We believe in passing this provision, the Legislature intended to create a standard for laboratories to be eligible to certify voting systems by specifying EAC accreditation. Thus, to read the statute as allowing any laboratory, which at any point in time is certified by the EAC, to certify voting systems would run afoul of the Legislature's intent and in our opinion, the plain language used in the statute. Thus, we do not believe software certified by a laboratory, which was not accredited by the EAC at the time of the certification, but which since became accredited, may be approved by the State.

However, in reviewing your inquiry and speaking with you about the EAC accreditation requirement, we discovered this portion of section 7-13-1620(A) raises constitutional issues concerning the unlawful delegation of legislative power to a federal agency. With regard to the delegation of legislative power, our Supreme Court in South Carolina State Highway Dept. v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) stated:

> It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing

> rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

However, as courts in other jurisdictions recognize:

> although statutes adopting laws or regulations of other states, the federal government, or any of its agencies, effective at the time of adoption, are valid, attempted adoption of future laws, rules or regulations of other states, or of the federal government, or of its agencies, is unconstitutional as an unlawful delegation of the legislative power.

State v. Grinstead, 206 S.E.2d 912, 919 (W. Va. 1974). See also, Florida Indus. Comm'n v. State ex rel. Orange State Oil Co., 21 So.2d 599, 603 (Fla. 1945) ("[I]t is within the province of the legislature to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body, that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future."); State v. Julson, 202 N.W.2d 145 (N.D. 1972) (finding a statute adopting by reference the law of the federal government and the regulations promulgated thereunder not unconstitutional because it did not attempt to adopt future laws, rules, or regulations of the federal government).

The Legislature enacted section 7-13-1620 as it reads today in May of 2005. Based upon information you provided to us, the EAC did not adopt its guidelines with respect to laboratory accreditation until December of 2005. Thus, these guidelines were not in effect upon the passage of section 7-13-1620 adopting these guidelines. Accordingly, the portion of section 7-13-1620, making reference to laboratories accredited by the EAC, appears to create an unlawful delegation of legislative power to the EAC. However, our courts recognize that "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). Furthermore, as we stated on numerous occasions only a court, not this Office, may declare a statute unconstitutional. Op. S.C. Atty. Gen., January 24, 2007. Therefore, section 7-13-1620 remains valid and enforceable until a court rules otherwise.

Conclusion

Based on the plain language of the terms used in section 7-13-1620(A) and our understanding of the Legislature's intent in enacting this provision, we are of the opinion that the State cannot approve a voting system certified by a laboratory, which at the time of certification was not

accredited by the EAC. However, we find the provision requiring certification by such a laboratory constitutionally suspect as a possible unlawful delegation of legislative power to a federal agency.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General