



COMMONWEALTH of VIRGINIA

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MEMORANDUM

To: Robert H. Brink
Chairman, Virginia State Board of Elections

Christopher E. Piper
Commissioner, Virginia Department of Elections

From: Carol L. Lewis
Assistant Attorney General

Date: May 24, 2021

Subject: Letter of Assurance for Periodic Review of Regulations – Absentee Voting [1 VAC 20-70]

Pursuant to the Code of Virginia and Executive Order 14 (as amended July 16, 2018), a periodic review of a regulation every four years shall include an examination by the Office of the Attorney General to ensure statutory authority. In that regard, I have reviewed the State Board of Elections regulations referenced above. In my view, as counsel to the State Board of Elections and Department of Elections, these regulations may be promulgated pursuant to Title 24.2 *et seq.* of the Code of Virginia (Code). The regulations do not appear to conflict with the Constitution of the United States or the Constitution of the Commonwealth of Virginia, nor do they appear to conflict with any federal law.

The regulation 1 Va. Admin. Code 20-70-20 should be amended. Subsection (B)(7) of that provision requires that if a voter's witness did not sign Envelope B, that is **always** a material omission. Ch. 235 of the Acts of Assembly was passed during the 2021 Special Session and states, “[a] voter's failure to have a witness sign the absentee ballot return envelope for any election held during a declared state of emergency related to a communicable disease of public health threat **shall not be considered a material omission** and shall not render his ballot void.” (emphasis added). Accordingly, this provision must be modified.

Additionally, the Legislative Information System does not display this information, but the SBE voted on February 23, 2021 to amend the language of 1 Va. Admin. Code 20-70-20 to comport with the ruling in *Reed v. ELECT* (Cir. Ct. Frederick Co., Case No. CL20-622) regarding postmarking of ballots. If administrative procedures have not been taken to ensure that the regulation has been appropriately published, they must be taken.

This memorandum addresses legal matters only and is not intended to serve, nor should it be construed, as a comment for or against the merits of the regulations.