



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA • James Nobles, Legislative Auditor

Date: October 10, 2013

To: Senator David Hann
Senator Scott Newman
Representative Kurt Daudt
Representative Tim Sanders

From: Jim Nobles, Legislative Auditor

Subject: Online Voter Registration

A handwritten signature in black ink, appearing to be 'J. Nobles'.

In a letter dated September 30, 2013, you expressed concerns about Secretary of State Mark Ritchie's decision to implement online voter registration. You requested that the Office of the Legislative Auditor (OLA) "...review the statutory authorization for the online registration system and review the system for possible security risks." I offer the following response to your request.

First, I have reviewed the legal analysis the Secretary of State's Office prepared on its authority to establish an online voter registration system. Given the fact that the Secretary of State's Office proceeded to implement the system based on that analysis, it is not surprising that the analysis supports that action. However, since the Secretary of State claims that analysis is not public based on "attorney-client privilege," I cannot provide you with a copy.

On the other hand, I have enclosed a copy of the legal analysis prepared by Matt Gehring at the House of Representatives Research Department. Mr. Gehring's analysis is public and, therefore, available for all interested parties to assess its merits. My assessment is that Mr. Gehring's analysis and conclusion is compelling not only in substance but also because it was prepared by a more neutral, nonpartisan professional. As you will see, Mr. Gehring questions the Secretary of State's use of the Uniform Electronic Transaction Act as his authority to establish an online voter registration system, and he adds the following: "...implementing online voter registration through [a] legislative enactment is the more sound legal approach to this type of policy change."

Given Mr. Gehring's thorough and independent assessment of the Secretary of State's action, I do not think OLA can add anything of significance. Indeed, I think the House and Senate committees with jurisdiction over election legislation will be well served by using Mr. Gehring's analysis and conclusion as a basis for legislative oversight of the Secretary of State's action.

Second, my staff and I share your concerns about data security in state government. As you know, we are currently investigating a data breach at MNsure. In addition, our three-person data security team recently completed an audit at the Department of Education, and they are currently conducting security audits at the Department of Human Services and the state's mainframe

Over....

computer system. After these audits are completed, we will reassess our data security audit schedule. As part of that process, we will give priority consideration to the Secretary of State's online voter registration system, but we must also consider the need to conduct a more comprehensive security audit of MNsure's health insurance exchange data systems (our current investigation is limited to the unauthorized disclosure of private data by a MNsure employee using the state's e-mail system).

Please feel free to contact me if you have questions or additional concerns.

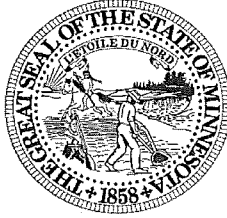
Enclosure

cc: Mark Ritchie, Minnesota Secretary of State
Members, Legislative Audit Commission
Matt Gehring, House Research (letter only)

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Minnesota House of Representatives

TO: Interested Parties

FROM: Matt Gehring, 651-296-5052

RE: Online Voter Registration

A number of members have asked for thoughts on whether the secretary of state has sufficient authority, under current law, to implement a system of online voter registration without the need for further action by the legislature. The secretary of state announced implementation of this system on September 26, 2013.

The secretary of state's view is that additional legislation is unnecessary. In my opinion implementing online voter registration through legislative enactment is the more sound legal approach to this type of policy change.

I've described below what I understand to be the arguments for existing authorization, the basis for my conclusion that authorization by legislative enactment would be legally preferable, and some other practical considerations that deserve mention.¹

Arguments that Current Law Authorizes Online Registration

The view that online voter registration is already authorized in statute is based on a reading of the Uniform Electronic Transactions Act (UETA), contained in Minnesota Statutes, chapter 325L. This uniform law, enacted in Minnesota in 2000, is designed to facilitate contracts and other commercial transactions and exchanges using electronic records and electronic signatures.

Within the uniform law, a "transaction" is specifically defined to include an:

[A]ction or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.²

The definition of "person" within the law specifically includes a "governmental agency."³

¹ The views that are ascribed in this memo to the secretary of state are based on a phone conversation I had with Bert Black in February 2013. I do not know if Bert's views, or the views of the secretary of state's office have changed since that conversation took place.

² Minn. Stat. § 325L.02, para. (p).

³ Minn. Stat. § 325L.02, para. (l).

The law permits an electronic transaction to occur in place of a paper transaction, retaining the same legal effect, if all parties to the transaction agree to conduct it by electronic means.⁴

A key to the conclusion that the current law supports implementation of an online voter registration system without additional authorization is section 325L.18, which provides in paragraph (a):

Except as otherwise provided in section 325L.12, paragraphs (f) and (g), each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

In short, the argument that an online registration system is already authorized is based on the status of the secretary of state as a “governmental agency” and the language in this law granting discretion to the secretary, as a governmental agency, to determine whether to send and accept electronic records and signatures and to make that determination within the context of its election-related transactions.⁵

Arguments that Online Registration is Not Authorized in Current Law

Statutory Construction. While the UETA generally is constructed in a manner that encourages increased use of electronic transactions, it does also contain several exceptions. These exceptions weaken the argument that chapter 325L can be read to authorize online voter registration without additional legislative action.

The following are relevant excerpts from section 325L.08:

(b) If a law other than this chapter requires a record ... (ii) to be sent, communicated, or transmitted by a specified method, ... the following rules apply:

(2) except as otherwise provided in paragraph (d), clause (2) [this exception is printed below], the *record must be sent, communicated, or transmitted by the method specified in the other law...*

...

(d) (2) [this is the exception noted above] a requirement under a law other than this chapter to send, communicate, or transmit a record by first-class mail, postage prepaid, or regular United States mail *may be varied by agreement to the extent permitted by the other law.*

Within the chapters of election law, section 201.061, subdivision 1 contains the statutory procedures for registering to vote prior to election day. This subdivision reads, in part:

⁴ Minn. Stat. §§ 325L.05, para. (b); 325L.07, para. (a).

⁵ The “except as otherwise provided...” phrase in the cited language references two paragraphs that are not relevant to the analysis here.

Subdivision 1. **Prior to election day.** At any time except during the 20 days immediately preceding any regularly scheduled election, an eligible voter or any individual who will be an eligible voter at the time of the next election may register to vote in the precinct in which the voter maintains residence by completing a voter registration application as described in section 201.071, subdivision 1, and *submitting it in person or by mail* to the county auditor of that county or to the Secretary of State's Office.

...

For purposes of this section, *mail registration is defined as a voter registration application delivered to the secretary of state, county auditor, or municipal clerk by the United States Postal Service or a commercial carrier.*

Reading sections 325L.08 and 201.061, subdivision 1 together leads to a reasonable conclusion that the specific delivery procedures contained in the election registration statute (“in person or by mail”) constitute a “method specified in ... other law” which supersedes the electronic transaction provisions of chapter 325L, as specified in section 325L.08, and therefore do not permit an electronic form of registration.

“Commercial carrier” analysis. According to the secretary of state’s office, the allowance in section 201.061 for mail registration “by the United States Postal Service or a commercial carrier” may be broad enough, in their view, to include an internet service provider as a “commercial carrier.” If an accurate interpretation, this would mean that the current law would authorize internet service providers, as “commercial carriers” to carry electronic voter registration transactions between voters and elections officials under the existing law.

The “commercial carrier” language was enacted into the election registration law in 2004.⁶ While it may be the case that internet service providers increasingly provide an avenue for delivery of business transactions (through email, website forms, etc.) it is not clear that the law has caught up sufficiently so that a court would read a “commercial carrier” to include internet utilities in addition to standard physical delivery services akin to the Postal Service.

Even if a court were willing to take a more expansive view of “commercial carrier,” it may be reluctant to do so in this context considering that, with a 2004 enactment date, the legislature would have had some knowledge of the possibilities of the internet and electronic communications and therefore could reasonably have been expected to be more clear in its wording if an allowance for online transactions was part of the intent of the law.⁷

⁶ See Laws 2004, Chapter 293, Article 1, section 3.

⁷ In other contexts, the legislature has affirmatively allowed for limited electronic transactions of elections data. See Minn. Stat. § 203B.225, authorizing transmission of absentee ballots to military and overseas voters electronically. In other contexts, the legislature has prohibited it. See Minn. Stat. § 206.845, related to electronic transmittal of voting data from precincts using electronic voting systems.

Legislatively-authorized variation. The UETA does allow for the possibility that an underlying statute could authorize variation in the form of a transaction otherwise required to be delivered by hard-copy mail, and that such an authorization could permit an electronic transaction to occur by agreement of the parties to the transaction.⁸

In this case, however, there is no evidence that the legislature intended to authorize such variations for registration purposes, and given the very prescriptive and detailed nature of Minnesota's election laws, it is difficult to conclude that an online registration system is simply an implied authorization that the legislature intended to include in the law without further debate, public input, and oversight.

History of UETA. There are several explanatory materials posted by the Uniform Laws Commission related to development of the UETA. These materials do not contain any reference to the application of the UETA to elections and voting procedures.⁹

While certainly the designers of the law would argue that it is intended to have broad application in a variety of private and governmental contexts, its general scope seems to be intended to address transactional issues within the stream of business and commerce – a context that is significantly different than the process for registering to vote and casting a ballot in an election. Framing voter registration as a transaction with government, in the nature of a “contract” between two parties agreeing to conduct business, is not a commonly-used method for describing voting rights and the constitutional process for electing public officials.

Practical Considerations

In addition to the legal considerations that likely counsel in favor of enacting explicit authorization if the legislature determines that online voter registration is an appropriate policy for the state, from the perspective of the legislature there are a few other more practical considerations that also warrant consideration:

- **Permanence of the law.** An authorizing law ensures that the policy conforms to the intent of the legislature and has some degree of permanence in Minnesota elections law. An authorizing law would limit the ability of future secretaries of state to rescind the online registration process or to enact a system that contravenes the legislature's intent and creates confusion for voters.
- **Ability of legislature to participate in development.** As with any other enactment, a law authorizing online voter registration would give the legislature the opportunity for greater oversight over the system, its development, and its security and accessibility for voters. An authorizing law could be very detailed (prescribing the scope of online registration – new voters, address updates, etc. – the manner in which voters provide proof of residence and identification, handling of data collected online, and other policy

⁸ Minn. Stat. § 325L.08, paragraph (d) (2).

⁹ The documents are posted online at:
<http://uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act>

considerations inherent in an online registration system). Alternatively, the legislation could be very simple and defer these types of decisions to the secretary of state, or the legislature could authorize a limited pilot project to see how a wider system might work. A law could also remove ambiguity by explicitly prohibiting registration online.

- **Experience of other states.** At least 18 other states currently offer online voter registration, or are in the process of implementation. Nearly all of them appear to be based on some type of legislative enactment. A good summary of the status of online registration across the country has been compiled by NCSL and is available here: <http://www.ncsl.org/legislatures-elections/elections/electronic-or-online-voter-registration.aspx>. I have attached to this memo a table listing the statutory provisions available in each online registration state.

State Statutes Authorizing Online Voter Registration (Current as of 9/11/2013)

State (Citation)	Notes	Relevant Statutory Excerpts (in most cases, significant additional implementation detail is omitted from these excerpts)
Arizona (Title 16, section 16-112)	Arizona appears to allow electronic registration as a component of its department of motor vehicles website. The law authorizing electronic transmittal of registration is contained within Arizona's motor voter statute.	<p>"The director of the department of transportation and the secretary of state shall consult at least every two years regarding voter registration at driver license offices. The director of the department of transportation and the secretary of state shall, after consultation with all county recorders, adopt rules to implement a system permitting driver license applicants to register to vote at the same time and place as they apply for driver licenses. Such rules shall:</p> <p>...</p> <p>4. Provide for the manual or electronic generation and transmittal of voter registrations and provide for electronic generation of changes in voter registration information, including address, in conformity with the confidentiality requirements of the national voter registration act of 1993 (P.L. 103-31; 107 Stat. 77; 42 United States Code section 394)."</p>
California (Election Code, §§ 2196)		<p>2196. (a) (1) Notwithstanding any other provision of law, a person who is qualified to register to vote and who has a valid California driver's license or state identification card may submit an affidavit of voter registration electronically on the Internet Web site of the Secretary of State.</p> <p>...</p>
Colorado (Rev. Stat. § 1-2-202.5)	It appears portions of the law were amended in 2013; the amendments are not reflected in this excerpt.	<p>(1) (a) An elector may register to vote, and a registered elector may change his or her residence in the registration record or change or withdraw his or her affiliation, by completing an electronic form on the official web site of the secretary of state if the elector's signature is stored in digital form in the database systems maintained by the department of state pursuant to <u>section 1-2-301 (1)</u> or accessible to the department of state in accordance with the requirements of <u>sections 1-2-302 (6) and 42-1-211 (1.5), C.R.S.</u></p>
Connecticut (Chapter 143, § 9-19k)	The Connecticut law is effective January 1, 2014.	<p>Sec. 9-19k. Online voter registration system. (a) The Secretary of the State shall establish and maintain a system for online voter registration. Such system shall also permit a registered elector to apply for changes to such elector's registration. An applicant may register to vote through this system, provided the applicant's (1) registration information is verifiable in the manner described in subsection (b) of this section, and (2) signature is in a database described in said subsection (b) and such signature may be imported into such system for online voter registration...</p>

State (Citation)	Notes	<p style="text-align: center;">Relevant Statutory Excerpts</p> <p style="text-align: center;">(in most cases, significant additional implementation detail is omitted from these excerpts)</p>
Delaware (Title 15, § 1302)		<p>(f) The State Election Commissioner, in collaboration with the Departments of Elections for the counties, may examine methods to streamline the voter registration process through the application of technology. The State Election Commissioner, in consultation with the Departments of Elections for the counties, may adopt and implement such technology. In the event that the process adopted conflicts with subsection (b) of this section, that subsection shall be considered null and void. These innovations may include adoption of a paperless or semi-paperless registration process.</p>
Georgia (Code § 21-2-221.2)		<p>(a) A person who is qualified to register to vote in this state and who has a valid Georgia driver's license or identification card may submit a voter registration application on the Internet website of the Secretary of State. The Secretary of State shall, in conjunction with the Department of Driver Services, design and implement a system to allow for such electronic voter registration.</p>
Hawaii (Rev. Stat. § 11-15.3)		<p>(a) Notwithstanding any law to the contrary, the clerk of each county may permit a person who has valid government-issued identification that is capable of electronic confirmation to submit an application to register to vote electronically in lieu of a traditional signed application by mail or in person.</p>
Illinois (Comp. Stat. 10/5 § 1a-16.5)	Must be fully implemented by July 1, 2014.	<p>(a) The State Board of Elections shall establish and maintain a system for online voter registration that permits a person to apply to register to vote or to update his or her existing voter registration. In accordance with technical specifications provided by the State Board of Elections, each election authority shall maintain a voter registration system capable of receiving and processing voter registration application information, including electronic signatures, from the online voter registration system established by the State Board of Elections.</p>
Indiana (Code § 3-7-26.7-5)	A full chapter of Indiana Code is devoted to procedures for online voter registration.	<p>Sec. 5. (a) The secretary of state, with the consent of the co-directors of the election division, shall establish a secure Internet web site to permit individuals described in section 1 of this chapter to submit applications under this chapter.</p>

State (Citation)	Notes	<p style="text-align: center;">Relevant Statutory Excerpts</p> <p>(in most cases, significant additional implementation detail is omitted from these excerpts)</p>
Kansas (Stat. § 25-2309)	The Kansas statute does not explicitly reference online registration, but does permit application “by other delivery” on “a form approved by the secretary of state” which could be interpreted to include an electronic form.	(a) Any person may apply in person, by mail, through a voter registration agency, or by other delivery to a county election officer to be registered. Such application shall be made on: (1) A form approved by the secretary of state, which shall be provided by a county election officer or chief state election official upon request in person, by telephone or in writing; or (2) the mail voter registration application prescribed by the federal election commission.
Louisiana (Rev. Stat. § 18:115.1)		A. A person who has a valid Louisiana driver's license or Louisiana special identification card issued pursuant to R.S. 40:1321 may apply to register to vote or make changes to his existing registration by completing and submitting an electronic voter registration application on the secretary of state's website.
Maryland (Election Law § 3-204.1)		(a) The State Board may operate an online voter registration system that allows an individual to electronically: (1) apply to become a registered voter; or (2) change the individual's name, address, or party affiliation in the individual's existing voter registration record.
Nevada (Generally, §§ 293.485-293.567)	Nevada law contains various references to “registration by computer.”	1. Any elector residing within the county may register to vote: (a) Except as otherwise provided in <u>NRS 293.560</u> and <u>293C.527</u> , by appearing before the county clerk, a field registrar or a voter registration agency, completing the application to register to vote, giving true and satisfactory answers to all questions relevant to his or her identity and right to vote, and providing proof of residence and identity; (b) By completing and mailing or personally delivering to the county clerk an application to register to vote pursuant to the provisions of <u>NRS 293.5235</u> ; (c) Pursuant to the provisions of <u>NRS 293.524</u> or <u>chapter 293D</u> of NRS; (d) At his or her residence with the assistance of a field registrar pursuant to <u>NRS 293.5237</u> ; or (e) By submitting an application to register to vote by computer, if the county clerk has established a system pursuant to <u>NRS 293.506</u> for using a computer to register voters.

State (Citation)	Notes	<p>Relevant Statutory Excerpts</p> <p>(in most cases, significant additional implementation detail is omitted from these excerpts)</p>
<p>Oregon (Rev. Stat. § 247.019)</p>	<p>Online registration procedures are adopted by rule, pursuant to explicit legislative mandate for the rulemaking.</p>	<p>Electronic voter registration; rules. (1) The Secretary of State by rule shall adopt an electronic voter registration system to be used by qualified persons who have a valid:</p> <ul style="list-style-type: none"> (a) Oregon driver license, as defined in ORS 801.245; (b) Oregon driver permit, as defined in ORS 801.250; or (c) State identification card, issued under ORS 807.400. <p>(2) The electronic voter registration system shall allow a qualified person to complete and deliver a registration card electronically. A registration card delivered under this section is considered delivered to the Secretary of State for purposes of this chapter.</p> <p>(3) A person who completes a registration card electronically under this section consents to the use of the person's driver license, driver permit or state identification card signature for voter registration purposes.</p> <p>(4) The Department of Transportation shall provide to the Secretary of State a digital copy of the driver license, driver permit or state identification card signature of each person who completes a registration card under this section.</p>
<p>South Carolina (Code § 7-5-185)</p>		<p>Electronic applications for voter registration. (A) A person who is qualified to register to vote and who has a valid South Carolina driver's license or state identification card issued by the Department of Motor Vehicles may submit an application for voter registration electronically on the Internet website of the State Election Commission.</p>
<p>Utah (Code § 20A-2-206)</p>		<p>(1) The lieutenant governor may create and maintain an electronic system for voter registration and requesting an absentee ballot that is publicly available on the Internet.</p>
<p>Virginia (Code § 24.2-416.7)</p>	<p>Unclear whether law has been fully implemented.</p>	<p>A. Notwithstanding any other provision of law, a person who is qualified to register to vote may apply to register to vote by electronic means as authorized by the State Board by completing an electronic registration application.</p>

State (Citation)	Notes	Relevant Statutory Excerpts (in most cases, significant additional implementation detail is omitted from these excerpts)
Washington (Rev. Code § 29A.08.123)		(1) A person who has a valid Washington state driver's license or state identification card may submit a voter registration application electronically on the secretary of state's web site.

Compiled by Matt Gehring, House Research Department