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**Confidential Attorney-Client Privileged**

August 23, 2012

MEMORANDUM

TO: Members of the State Board of Elections  
FROM: Jeffrey L. Darsie  
RE: State Board Approval of Absentee Ballot Applications

The Attorney General's opinion being issued today approves use of the State Board's proposed ballot-marking wizard without voting system certification. The opinion mentions, but does not decide, the related issue of the State Board's authority to deliver absentee ballots electronically to non-UOCAVA voters, including domestic absentee voters with disabilities.<sup>1</sup> This issue is relevant to the State Board's decision whether to approve an absentee ballot application form that offers electronic delivery of ballots to voters with disabilities, or the application form that offers this option only to UOCAVA voters.

In my opinion, the State Board has *very likely not* been delegated authority by the General Assembly to transmit ballots electronically to non-UOCAVA voters, including to voters with disabilities. Title 9, subtitle 3 of the Election Law Article ("EL"), Md. Code Ann., includes specific directions on delivery of ballots to absentee voters and clearly contemplates use of envelopes and specially printed ballot cards for absentee voters. *See, e.g.*, EL §§ 9-306(b)(2), 9-307, 9-310; *see also* EL §§ 9-207, 9-215 (regarding ballot printing). The State Board's authority to deliver ballots by fax, email, or online through a website may be implied only with respect to UOCAVA voters and directly in consequence of federal law.

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<sup>1</sup> "UOCAVA" or "non-UOCAVA" voters refers to absentee voters covered or not covered by the Uniformed and Overseas Civilian Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff to 1973ff-6 ("UOCAVA"), as amended by the 2009 Military and Overseas Voter Empowerment ("MOVE") Act. The MOVE Act amendments included a requirement that states offer UOCAVA voters a choice to receive their absentee ballots via electronic transmission. *See* 42 U.S.C. § 1973ff-1(a)(7).

This conclusion is different from the advice I had previously given in a confidential memorandum of January 28, 2010. Objections raised to use of the ballot wizard resulted in a re-examination of this issue and as a result I no longer believe that electronic delivery of ballots would be regarded as the equivalent of mail delivery. It remains my opinion that a Court would be unlikely to reject voted absentee ballots solely because they were delivered by an unauthorized method, but to the extent that memo concludes that a Court would also find that SBE has authority to deliver ballots electronically, I now disavow that conclusion. Rather, as stated in my January 2010 memo, "the OAG has recommended that the State Board pursue legislation that would specifically authorize [this practice] for domestic absentee voters."