U.S. Election Assistance Commission
1225 New York Ave. – Suite 1100
Washington, DC 20005

September 8, 2005

EAC Advisory 2005-005: Lever Voting Machines and HAVA Section 301(a)

The U.S. Election Assistance Commission (EAC) has recently received numerous inquiries regarding whether lever voting machines meet the requirements of Section 301(a) of the Help America Vote Act (HAVA) (42 U.S.C. §15481). After careful review of HAVA Section 301(a), the EAC concludes that lever voting systems have significant barriers which make compliance with Section 301(a) difficult and unlikely.[1]

HAVA does not specifically outlaw the use of lever machines, per se. However, the statute does require that the voting system meet the standards found in HAVA Section 301(a).[2] This section, titled *Voting Systems Standards*, sets minimum statutory requirements all voting systems must meet if they are to be used in an election for Federal office. In applying these requirements to lever voting machines, the EAC has identified a number of areas which create compliance problems for these voting systems. These areas of non-compliance would have to be addressed and remedied before a lever system could be lawfully used in an election for Federal office on or after January 1, 2006. EAC's concerns are fourfold.

Audit Capacity. Section 301(a) requires that all voting systems used in an election for Federal office "produce a permanent paper record with a manual audit capacity..." (HAVA Section 301(a)(2)(B)(i)). This paper record must be available for use as an official record in recount proceedings. (HAVA Section 301(a)(2)(B)(iii)). While most lever machines in use today do not have the capability to produce a paper record, a few systems have the facility to create a limited record. Such systems can record the total number of votes cast on a given machine by imprinting the raised numbers on the counters at the close of an election.

Clearly, those lever voting systems that are not capable of producing a paper record are not in compliance with HAVA Section 301(a)(2)(B). Similarly, it is the position of the EAC that those machines which produce a limited paper record (documenting only vote totals) also do not meet these requirements. HAVA makes it clear that the reason it requires a paper record trail is to

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[1] The EAC is the Federal agency charged with the administration of HAVA. HAVA requires the Commission to draft guidance to assist states in their implementation of Section 301(a). Although EAC's administrative interpretations do not have the force of law associated with legislative rules, the Supreme Court has long held that the interpretations of agencies charged with the administration of a statute are to be given deferential treatment by Courts when faced with issues of statutory construction. York v. Secretary of Treasury, 774 F. 2d 417, 419 – 420 (10th Cir. 1985) (citing Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 153 – 154 (1963)); See also Christian v. Harris County, 529 U.S. 576 (2000); Edelman v. Lynchburg College, 122 S. Ct. 1145 (2002).

[2] A State's acceptance or repudiation of Federal Funds to replace lever machines under HAVA Section 102 in no way affects its obligation to meet minimum voting system requirements under HAVA Section 301(a).

ensure all voting systems create a permanent, manually auditable record for use in a recount. (HAVA Section 301(a)(2)(B)(i) and (iii)). Given these facts, to meet HAVA's *Audit Capacity* requirement, systems must create a paper record that can serve as an audit trail. In other words, the document must be a "chain of evidence connecting... summary results to original transactions."[3] A document is not an appropriate audit tool when it is, itself, a summary that cannot show the original actions that make up its whole.
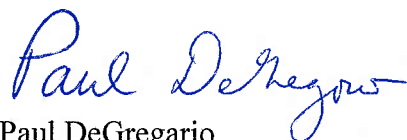
Error Rate. Section 301(a) requires that all voting systems have a test error rate that complies with error rate requirements "established under Section 3.2.1 of the voting systems standards issued by the Federal Election Commission, which are in effect on the date of the enactment of [HAVA]." (HAVA Section 301(a)(5)). That standard (in testing) is a maximum of one error for every 500,000 ballot positions.[4] Thus, in order to comply with HAVA Section 301(a), a voting system must have a tested error rate that falls below the one per 500,000 standard. The EAC is unaware of any lever voting system that has a documented, tested error rate. A lever voting system cannot meet the requirements of Section 301(a)(5) without a documented, tested error rate that meets the one per 500,000 standard.

Alternative Language Accessibility. Section 301(a) requires voting systems provide alternative language accessibility pursuant to the requirements of the Voting Rights Act of 1965 (42 U.S.C. § 1973aa-1a). While lever voting systems are capable of providing ballots in more than one language, the number of languages such systems may present is limited. Election officials must ensure that the number of languages a particular lever voting system can accommodate meets the number of alternative languages required in a given jurisdiction by the Voting Rights Act.

Accessibility for Individuals with Disabilities. Section 301(a) requires that, at a minimum, election officials provide at least one voting system equipped for individuals with disabilities at each polling place. Such systems must provide disabled individuals the same opportunity for access (including privacy and independence) as other voters. (HAVA Section 301(a)(3)). The EAC is unaware of any lever voting system that is presently capable of meeting the disability standards in Section 301(a)(3). No system may be used exclusively at a polling place unless it complies with Section 301(a)(3).

Gracia Hillman
Chair

Paul DeGregario
Vice Chairman

Ray Martinez III
Commissioner

Donetta Davidson
Commissioner

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[3] "Audit trail" as defined in Black's Law Dictionary 131 (6th ed. 1990).
[4] Voluntary Voting System Standards, Volume I: Performance Standards, Federal Election Commission (April 2002), Section 3.2.1.