

- Common Cause New York • E-Voter Education Project
- New York Public Interest Research Group (NYPIRG)
- Task Force on Election Integrity, Community Church of NY
- VotersUnite.org • Yad HaChazakah-The Jewish Disability Empowerment Center, Inc.

June 15, 2009

Brian Heffernan, Esq.
Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7260
Washington, D.C. 20530

Jeffrey M. Dvorin, Assistant Attorney General
Office of the Attorney General
Litigation Bureau
The Capitol
Albany, NY 12224

Douglas A. Kellner, Co-Chair
James A. Walsh, Co-Chair
Evelyn J. Aquila, Commissioner
Gregory P. Peterson, Commissioner
Todd D. Valentine, Co-Executive Director
Stanley L. Zalen, Co-Executive Director
New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Re: New York Optical Scanner Pilot Program for 2009 Elections

Dear Mr. Heffernan, Mr. Dvorin, Co-Chairs Kellner and Walsh, Commissioners Aquila and Peterson and Co-Executive Directors Valentine and Zalen:

The New York State Board of Elections is now planning a pilot of uncertified optical scan voting systems to be used by up to 1.4 million voters in 46 counties in the upcoming 2009 Primary and General elections. These new systems have not yet been used in real elections anywhere in the country, and still have not completed either New York State or Federal EAC certification tests. Therefore, voters who use these systems cannot be assured that their votes will be counted as cast. We believe the failure to make meaningful changes to the pilot will raise serious questions about the results of these elections.

To help reduce the chance that voters using this equipment will be disenfranchised through the use of untested voting systems this Fall, we urge you to take the following steps to correct inadequacies in the planned pilot program and to ensure compliance with New York's Election Laws as well as the Help America Vote Act:¹

1. Provide a process by which counties can reduce their participation to 10% of registered voters, even if they earlier agreed to do a county-wide implementation.
2. If a county's pilot applies to 10% of or less its active registered voters, within fifteen days after each general, special or primary election, and within seven days after each village election, require the completion of 100% hand counts of all votes cast on paper ballots that were counted by the uncertified optical scanners. Require the paper ballots to be under continuous observation by party and/or independent representatives until the hand counts are complete.
3. If a county's pilot applies to more than 10% of its active registered voters, at the polls on election night require 100% hand counts of all votes cast on paper ballots that were counted by the uncertified optical scanners. Ensure the security of the paper ballots in compliance with New York's Election Law² by requiring the hand counts to be:
 - a) fully completed on election night (§ 9-100);
 - b) subject to all New York tally-verification requirements (§ 9-116 (2)); and
 - c) subject to all other statutory safeguards pertaining to the canvass of paper ballots at polling places.²
4. Determine and publish in advance the ballot security and chain-of-custody requirements to be used in the proposed pilot. In addition, the "Voting System and Ballot Marking Device Security Policy" being prepared by NYSTEC should include all measures outlined in the peer-reviewed voting system security paper implemented by the State of California, "You Go to Elections with the Voting System You Have: Stop-Gap Mitigations for Deployed Voting Systems" <http://citp.princeton.edu/pub/hrsw-evt08.pdf>
5. Develop a detailed contingency plan specifying backup and recovery procedures for all stages of the election that counties must follow in the event of scanner or other problems.
6. Evaluate the accuracy of the scanners to determine if they meet the Error Rate requirements of § 301(a)(5) of the Help America Vote Act of 2002 (42 U.S.C. § 15481(a)(5)), by comparing the tallies ascertained by hand counts to those produced by the scanners.³
7. Report the following prior to certification of election results:
 - a) the number of votes miscounted by each scanner used, as well as the effect of each miscounted vote on: the tally for each candidate, party or ballot question affected; the number of undervotes; and the number of overvotes; and
 - b) ballot accounting irregularities, such as discrepancies between the number of ballots found in each box and the number shown by the registration poll records (§ 9-108), and the effect of each irregularity on the tally of the vote.
8. Post the reports described in item 7 promptly on the County and State Board of Elections web sites in human-readable form, as well as machine-readable form such as a comma-separated values file. These reports should be analyzed by at least one person with verifiable expertise in the field of statistics and one other person with verifiable expertise in the field of auditing, to determine if the scanner system has met HAVA's § 301(a)(5) Error Rate requirements.³

9. Solicit, and publish on the State Board of Elections web site, public comments on the above reports and analyses; and transmit these reports, analyses and comments to the U.S. Department of Justice Civil Rights Division; the Attorney General of the State of New York; and Judge Gary L. Sharpe of the United States District Court for the Northern District of New York.
10. Develop and publish a plan for evaluating the 2009 pilot program after completion. The evaluations should be performed by an independent agency and should review all policies and procedures, counties' compliance, system performance and the auditing process.

In addition to the above steps to limit the risk of the experimental use of uncertified scanners in this year's elections, we urge the U.S. Dept of Justice and New York State Attorney General to require the State Board of Elections to develop adequate auditing provisions to govern the future use of scanner systems after their certification. Specifically:

Part 6210.18 of Subtitle V, of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York should be revised to require statistically-meaningful risk-limiting audits in accordance with best practices.⁴ Auditing experts should be consulted to determine the number of audited Election Districts appropriate for each contest, and circumstances under which a discrepancy between manual tallies and voting system tallies must require a further audit of additional Election Districts or a complete audit of all Election Districts. To further ensure public confidence in results, those candidates polling five percent or more in initial vote totals should be entitled to select for auditing at least one, but not more than one half of one percent, of the election districts in which such candidate appeared on the ballot.

We believe that implementation of the above proposals will greatly reduce the possibility of voter disenfranchisement raised by the planned pilot program and by the use of scanners in future elections.

We look forward to answering any questions you may have on this issue as well as to your response.

Sincerely yours,

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Any additional signers will be posted at:
<http://www.wheresthepaper.org/PilotLetterToDoJ&AG.pdf>

¹ This list incorporates the work of Bo Lipari of the Citizens' Election Modernization Advisory Committee, <http://www.nyvv.org/newdoc/LipariCEMACPilotComments.pdf>

² For each Election District (precinct), Article 9 requirements include but are not limited to:

- a) accounting for all paper ballots furnished, used, not used or spoiled;
- b) admitting duly accredited watchers to the polls;
- c) proclaiming the votes on each ballot and the overall election results in a loud and distinct voice;
- d) exhibiting voted ballots so that anyone entitled to be present may fully and carefully examine them;
- e) comparing the number of ballots used to the number shown by the registration poll books;
- f) accounting for and disposing of any excess or "stuffed" ballots found in the ballot boxes;
- g) identifying and allocating candidates' votes cast on behalf of each political party or independent body appearing on the ballot and endorsing one or more candidates;
- h) identifying and preserving inviolate any void, blank or disputed ballots;
- i) creating the official tally sheet; and
- j) performing a recanvass immediately to correct any error found, whenever the total number of votes tallied (including blank and void votes) for any office or party position, divided by the number of persons to be nominated or elected thereto, or tallied for any ballot proposal, does not exactly equal the number of ballots cast (including blank and void ballots).

³ HAVA § 301(a)(5): The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

Section 3.2.1 of the 2002 FEC Standards: Accuracy Requirements -- [T]he system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions.

⁴ Principles and Best Practices for Post-Election Audits, <http://electionaudits.org/principles>