

Jan. 3, 2006 9:19AM

Attorney General



U.S. Department of Justice
Civil Rights Division

Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

December 28, 2005

VIA E-MAIL, FIRST-CLASS MAIL AND FACSIMILE

Perry Zinn Rowthorn, Esq.
Assistant Attorney General
Special Litigation Department
Office of the Attorney General
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P.O. Box 120
Hartford, Connecticut 06141-0120

Dear Mr. Rowthorn:

Thank you for the information provided in your recent e-mail and in Theodore Bromley's December 16, 2005 letter. Although we appreciate this information, we do not believe that it addresses our inquiry about the ability of Connecticut's lever voting machines to meet the requirements of Section 301 of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. 15481.

As you will recall, by e-mail message of December 16, 2005, I specifically clarified that our inquiry was to the "error rate" of the machines and print attachment and not to the "reliability" of the machinery. The distinction is crucial.

First, we believe that the State's citation to the February 2005 Caltech/MIT Voting Technology Project report concerning residual voting fails to address that distinction, and accordingly does not assist this Department in determining Connecticut's compliance with HAVA. Mr. Bromley's letter opines that the report's analysis of residual votes supports a conclusion that lever machines are "substantially as reliable" as machines containing newer technology. While that may or may not be the case, in our view, a voting machine's "reliability" as defined in this study is not determinative of a voting system's compliance with the specific statutory requirements of HAVA. Indeed, as is made clear in the study you cite, at pages 5-6, "[t]he residual vote rate must be used alongside other measures of voting technology accuracy to gain a complete understanding of how well voting machines perform."

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A voting system's residual vote rate is not the equivalent of satisfying the specific requirement in Section 301(a)(5) of HAVA that voting systems meet an acceptable "error rate" standard. Section 301(a)(5) states that "[t]he 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 the date of the enactment of this Act." That standard is explained in Section 3.2.1 of the 2002 Voting Systems Standards, entitled "Accuracy Requirements." Section 3.2.1 defines "accuracy" in this context as "the ability of the system to capture, record, store, consolidate and report the specific selections and absence of selections, made by the voter for each ballot position without error" with "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." See http://www.eac.gov/election_resources/vss.html. We are aware of no study that has been conducted demonstrating that any model of a lever voting system meets the Section 3.2.1 standard. We would be interested in seeing the results of such a study if you are aware of one.

Second, with regard to HAVA's requirement in Section 301(a)(2) that a "voting system shall produce a permanent paper record with a manual audit capacity for such system", you have provided us with some information concerning a printing attachment for use with lever machines. However, this information does not indicate anything more than that you have received no "negative reports" about the technology. You have provided us with no information concerning the printing attachment technology, whether it is still available and, if so, how it works. In fact, based on the June 15, 2005 "New Voting Machine Update for Connecticut Municipalities," published by the Office of the Secretary of State, it appears that the State at that time thought it "very likely" that the State's lever voting machines could not meet HAVA's audit capacity requirements. Moreover, this June 15 update indicated that the State had not received a response, after two years or more, from a company which the State had contacted about whether a "Print-o-Matic" attachment could be retrofitted to Connecticut's lever voting machines. You also have provided us with no information concerning how many lever voting machines in the State are: 1) currently utilizing this technology, 2) how many machines potentially can be retrofitted with the technology, or 3) how many machines will have to be replaced because they cannot benefit from the technology. Finally, you lack information as to the age of the machines used in various jurisdictions. Under the circumstances, we are in no position to make any determination about your claim of HAVA compliance in this regard. If you have further information to provide us concerning this issue, please feel free to do so.

As you know, because of the concerns regarding lever and punchcard voting systems, Congress created a program in Section 102 of HAVA, 42 U.S.C. 15302, under which states could seek specific funding for replacement of such voting systems. Connecticut did not participate in this program. However, Connecticut did receive a total of some \$33,076,849 in federal funds under HAVA, to be used in achieving compliance with the requirements of the statute in

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elections for federal office, including compliance with the voting system standards of Section 301. We understand that Connecticut has been considering for some time use of such funding to replace all lever voting machines in the State with newer technology that does satisfy the error rate and manual audit requirements of HAVA, and, indeed, is actively taking steps to that end. Under the circumstances, an agreement assuring the prompt scheduling of steps to obtain such devices appears the most fruitful course to compliance.

In our capacity as the enforcement authority for Title III of HAVA, the Department has been monitoring the progress of the states in carrying out HAVA's mandates. In so doing, we have sought to work cooperatively with states as they seek to comply with HAVA. As we have indicated to you, we are prepared to work cooperatively with Connecticut on achieving full compliance with HAVA. However, immediate steps must be taken by the state to implement a plan to bring the state into compliance at the earliest possible time.

We look forward to further discussion with you concerning these issues. If you have any additional questions or concerns, please do not hesitate to contact us.

Sincerely,


John Turner
Chief
Voting Section