

March 19, 2003

TO: New York State Task Force on HAVA Implementation

FR: New York State Citizens' Coalition on HAVA Implementation

RE: Voter Identification Requirements (§ 303)

This memorandum provides background information and specific commentary on the implementation of HAVA's voter identification requirements in Section 303 of the law. This memorandum is intended to identify key considerations and concerns that should be kept in mind as the Task Force proceeds.

The New York State Citizens' Coalition on HAVA Implementation is an *ad hoc* coalition of civic, labor and civil rights organizations. This memorandum represents the collaborative efforts and opinions of this coalition. In addition to this memorandum, we will attempt to provide supplemental research and guidance on each of the topics being considered by the Task Force. If there are specific areas in which members of the Task Force would appreciate additional research or assistance, please let us know. Additional questions or clarification may be obtained from Jeremy Creelan, The Brennan Center for Justice at NYU School of Law, at (212) 992-8642 or jeremy.creelan@nyu.edu.

1. HAVA's Voter Identification Requirements

a. Identification Requirements for All Voters When Registering to Vote (§ 303(a)(5))

(i) Summary of Requirements

Beginning January 1, 2004 unless New York seeks a waiver until January, 2006, New York must request of new registrants: 1) the applicant's driver's license number or, if the registrant does not have a current and valid driver's license, 2) the last four digits of the applicant's Social Security number. § 303(a)(5)(i). For voters who do not have either of the above numbers, the state must assign a unique number to identify the voter for registration purposes. In other words, the registrant's failure to provide this identification information does not void the voter's effort to register but requires the state election officials to assign a unique identifying number that will be used in the statewide voter registration database.¹

¹ Senator Dodd, the chief Senate sponsor of HAVA, made clear the states' responsibility to implement HAVA in a manner that preserves voters' access to registration, and indicated the drafters were careful to ensure such flexibility:

[N]othing in this section [i.e., § 303(a)(5)(A)] prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section 303(a)(5)(A)(iii) specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. . . . Moreover, nothing in this section prohibits a State from registering an applicant once the verification process takes places, notwithstanding the fact that the applicant provided

The “chief State election official” and the Commissioner of the Department of Motor Vehicles (“DMV”) must enter into an agreement to match information in their databases in order "to verify the accuracy of the information provided on applications for voter registration." § 303(a)(5)(B). In addition, the DMV Commissioner must enter into an agreement with the U.S. Social Security Commissioner "for the purpose of verifying applicable information." The terms "match" and "verify" are not defined, and thus it is up to New York State to define how extensive the state’s use of databases will be to assist voters by identifying them in this manner.

(ii) Specific Concerns and Recommendations

These voter identification provisions have the potential to disenfranchise eligible voters if not implemented properly and with a sensitivity to this concern. The concerns are twofold: First, driver’s license and Social Security data are vulnerable to errors either in transmission by the voter’s inclusion in the databases and by election officials. This may produce difficulties in matching database records and thus leave many new voters unregistered. Second, state election officers may leave too much discretion to county and local election officers who either misinterpret the law’s requirements or do not have sufficient access to state databases to ensure that voter information is properly matched and voters registered. Accordingly, several key steps should be taken to ensure that HAVA expands rather than contracts new voters’ access to registration:

- ***Ensure State Responsibility for Registration Information Verification.*** The responsibility and authority for accepting and verifying voter registrations lies with the state, not with county or local officials acting on their own. *See* § 303(a)(5)(B). States must ensure that systems are in place for the uniform and nondiscriminatory application of these procedures. In addition, it is the “chief State election official” who administers the registration list. Accordingly, it is critical that the Task Force and future legislation establish in plain terms that the New York State Board of Elections and DMV will ensure that voter registration applications are not rejected for failure to provide driver’s license or Social Security numbers, and that a unique identifying number is assigned to those applicants who do not provide such information. Failure to do so will allow county and local election officials to reject registration applications because of incomplete or inaccurate information.
- ***Ensure That Registrant’s Failure to Provide Driver’s License or Social Security Number Does Not Prevent Voter Registration or Produce Disparate Treatment.*** As noted already, if a new voter does not provide his driver’s license or Social Security number on his registration application, the state must allow him to register to vote by instead assigning a unique identifying number to his record. The Task Force and the Legislature should ensure that state and county election officers do not reject registration applications for failure to provide this information. Under most circumstances, such a

inaccurate or incomplete information at the time of registration . . . or that the matching process did not verify the information.

rejection would be a violation of HAVA. In addition, the Task Force and the Legislature should expressly establish that such applicants should not be flagged or otherwise be subjected to differential treatment or discrimination by election officials.

- ***Integrate Maximum Number of State Databases with Voter Registration List.*** As Assemblywoman Destito properly requested in an early Task Force meeting, the Task Force should ensure that the Board of Elections takes advantage of all accessible databases to identify and match voter registration information. For example, if a registrant provides a partial driver's license number or simply a name and date of birth, state officials should use DMV and other databases to correct or provide the driver's license number so that the application can be accepted, processed and verified. Although certain databases may be confidential, the Task Force and the Legislature should explore ways to use state law and private agreements between state and federal agencies to make such databases available for this limited purpose. The more databases that are integrated into the voter registration process, the less burdensome the identification requirements need be on voters and election officers.
- ***Aggressively Match Database Information To Make Identification Requirements Less Burdensome for First-Time Voters.*** As discussed in more detail below, HAVA exempts first-time voters who register by mail from the identification provisions contained in Section 303(b) if a state or local election officer successfully matches his driver's license number or last four digits of his Social Security number with "an existing State identification record bearing the same number, name and date of birth as provided in such registration." § 303(b)(3)(B). This means that the Task Force can significantly reduce potential burdens on new voters when they first appear at the polls by ensuring that all existing state databases are aggressively tapped and integrated into the voter registration matching and verification process.
- ***Require Notice to Voters Concerning Registration Application.*** Under the National Voter Registration Act of 1993, each applicant must be given notice of the disposition of his application. Under HAVA, when information cannot be verified through DMV or other records, the state should require election officials to notify voters in sufficient time for them to correct the problem before the next election. The state should also require state and county election officials to assist and facilitate the process of making such corrections.

b. Identification for First-Time Voters Who Register By Mail (§ 303(b))

(i) Summary of Requirements

A voter who has registered to vote *by mail* after January 1, 2003 *and* has not voted previously in a federal election in the state, shall be permitted to vote in person after presenting one of the following items to election officers at the polling place: current and valid photo identification, utility bill, bank statement, government check, pay check, or government document that shows the voter's name and address. If a first-time voter casts his vote by mail, he must submit a copy of one of these documents with his mail-in ballot. § 303(b).

These requirements shall not apply in the case of a person:

- (a) who is entitled to vote otherwise than in person under federal law; or
- (b) who registers to vote by mail and submits as part of such registration either a driver's license number or the last four digits of a Social Security Number and whose information the board of elections or other election officer matches with an existing identification record in a state database or file; or
- (c) who registers to vote by mail and submits as part of such registration either current and valid photo identification, utility bill, bank statement, government check, pay check, or government document that shows the voter's name and address.

In addition, in the case of a voter who desires to vote but does not meet these identification requirements, he or she may cast a ballot in person or by mail, and the ballot shall be counted as a provisional ballot.

(ii) Specific Concerns and Recommendations

These identification requirements for first-time voters who register by mail need not be onerous if implemented properly, but could seriously and inequitably deprive eligible voters of their right to vote if New York State implements them without adequate sensitivity and safeguards. The following steps should be taken by the Task Force and the Legislature to ensure that New York does not harm voters:

- ***Adopt Clear, Inclusive List of Acceptable Forms of Identification.*** The Task Force and the Legislature should establish a clear, inclusive list of acceptable forms of identification. Specifically, the Task Force should make clear that current and "valid photo identification" shall include any form of identification containing a photograph of the voter, including non-driver's identification, valid student identification cards, and credit or automated teller cards. A "current utility bill, bank statement, government check, pay check, or other government document" shall include, but not be limited to: voter registration cards, Electronic Benefit (EBT) cards, public housing lease and rent statements and agreements, including rent statement agreements provided pursuant to subsidized housing programs, public housing identification cards, Social Security Administration check statements, student identification cards or tuition statements or bills from public colleges and universities, insurance cards issued pursuant to government administered or subsidized health insurance programs, copies of correspondence from a federal, state or local government, bills from a federal, state, or local government, tuition bills and statements from public colleges and universities, a sample ballot pamphlet for the election sent by state or local election officials, discharge certificates, pardons, or other official documents issued to the voter in connection with the resolution of a criminal case, indictment, sentence or other matter, in accordance with state law, senior citizen discount cards issued by public transportation authorities or providers, or identification cards issued by government homeless shelters and other temporary or transitional housing facilities.

- ***Train Poll Workers and Educate Voters Concerning Identification Requirements.*** With adequate poll-worker training and voter education – including education for voters who may not be proficient in English – the law’s identification requirements need not be onerous. But without adequate investments in such work, the outcome of these new requirements could be devastating. The Task Force should outline a specific program of poll worker training and voter education on these requirements, and establish a specific procedure to ensure that adequate state and federal monies are devoted to this area. The training should include clear instructions and documentation for poll workers concerning the alternative forms of identification that may be accepted from new voters. Poll sites should have the identification requirements clearly posted for voters to see. In addition, this training and education must not be left to county and local officials, but instead must be overseen and enforced by state officials.
- ***Implement Statewide Voter Registration Database as Soon as Possible.*** The statewide voter registration database will ensure that voters who have moved between jurisdictions in the state and reregistered by mail will not be subjected to unnecessary identification requirements. This will also reduce the burden on poll workers and other election officials. Accordingly, the Task Force should ensure that New York implements this database as soon as possible and does not seek any waiver from the federal government.
- ***Aggressively Match Database Information To Make Identification Requirements Less Burdensome for First-Time Voters.*** HAVA exempts first-time voters who register by mail from the identification provisions contained in Section 303(b) if a state or local election officer successfully matches his driver’s license number or last four digits of his Social Security number with “an existing State identification record bearing the same number, name and date of birth as provided in such registration.” § 303(b)(3)(B). This means that the Task Force can significantly reduce potential burdens on new voters by ensuring that all existing state databases are aggressively tapped and integrated into the voter registration matching and verification process.
- ***Require County Boards of Elections To Provide Postage-Paid Mailers.*** County boards of elections should be required to send to each affected first-time voter who registers by mail a postage-paid mailer in which the voter may send a copy of his qualifying identification to election officers in advance of election day. This or a similar pre-election procedure would greatly reduce the potential confusion and threats to voters’ rights at the polls on election day.
- ***Ensure Proper Definition of “By Mail.”*** This provisions identification requirements only apply to first-time voters who register *by mail*. Accordingly, the Task Force should firmly establish that only those voters who send in their registration applications shall be subject to these requirements. Voter registration drives that collect registration applications from new voters in person and then deliver these applications to election officials by mail or by hand should not be subject to these requirements under HAVA. This is true even if mail-in registration forms are used for these registration drives.