

New York State Citizens' Coalition on HAVA Implementation

Proposed Regulations for Statewide Database Coalition Comments

The introduction of a computerized, statewide voter registration system can be a milestone for New York State voters. In election after election, otherwise eligible voters have been turned away from the polls because of the failure of county boards of elections to timely process voter registration applications and produce accurate voter rolls for Election Day. Implementation of a new voter registration system that fully complies with state and federal law promises to correct for many of these perennial problems.

The draft New York State Database Regulations published by the New York State Board of Elections on June 21, 2006 are deficient in several important respects. First, they fail to: 1) recognize that exact matches of information in different databases is problematic; 2) incorporate the innovations adopted by New York State as regards use of various state databases for verifying voter eligibility and producing accurate voter rolls that fully accommodate the voting rights of homeless individuals, certain 17 year old citizens, and residents convicted of felony convictions, as provided for under state and federal law; and 3) reform unduly restrictive rules for processing voter registration forms that will result in the rejection of timely voter registration applications. The above-listed organizations respectfully submit these comments on the following areas of concern with draft New York State Database Regulations and request that they be amended as suggested herein.

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 coalition¹.

“Matching” standard to protect eligible registrants (Sections 6217.6(2), (3), (4))

The federal Help America Vote Act (HAVA) requires that applicants for voter registration list either a Department of Motor Vehicles (DMV) number or the last four digits of their Social Security number (SSN) on their registration forms, if they possess them. States must attempt to validate this unique identifying number for each registrant by comparing the information provided on registration forms with data in existing governmental databases. Congress allowed the states to decide what matching standards

¹ Specific endorsers of these comments include: Asian American Legal Defense and Education Fund, Brennan Center for Justice at NYU School of Law, Citizens Union, Common Cause/New York, Demos: A Network for Ideas and Action, New Immigrant Community Empowerment, National Nonpartisan Voter Education Campaign, National Voting Rights Institute, League of Women Voters of Westchester, New York Immigration Coalition, New York Public Interest Research Group, New York Statewide Senior Action Council, New Yorkers for Verified Voting, Professional Staff Congress/CUNY, Puerto Rican Legal Defense and Education Fund, American Association of Jews from the Former USSR, New York Chapter - NY Chapter, Women's City Club of New York.

to apply in attempting to validate the number.

The draft regulations do not specify a particular standard for comparing information. The most stringent standard – one that requires an exact match between information on voter registration forms and DMV records -- can easily disfranchise voters. Simple typos or data entry errors will cause a mismatch. In other cases, inconsistencies between data records will cause a match to fail even where there is no error. For example, a voter may register to vote with a new married name or new address, before she is obligated to inform DMV of the switch; such a record will not “match.” Mismatches may also occur in instances where a voter’s hyphenated last name, middle name, middle initial, or nickname appears in one database but not the other.

Exact-match standards have already been caused problems in New York. In 2004, staff at the New York City Board of Elections flagged new registrations as flawed when they found that information on new voter registration forms did not precisely match DMV records. A subsequent visual inspection revealed that 20% -- 1 in 5 -- of the new registrations were flagged as mismatches due solely to data entry mistakes. An additional 4 percent of the forms contained immaterial entry errors made by the registrants. Adoption of the exact-match standard could have jeopardized the voting rights of many eligible New York City residents.²

The draft regulations appear to allow the discretion to apply exact-match standards in verifying registrants’ identifying numbers – opening up the possibility that the problems that arose in New York City in 2004 might be replicated elsewhere in the state. The state board of elections should instead prevent counties from applying rigid verification standards that risk disfranchising eligible voters.³ It could do so by promulgating a statewide standard declaring that an individual’s identifying number is considered validated if a reasonable person would conclude that the individual on the form is substantially likely to be the same individual as an individual represented on another government database, such as the DMV or Social Security systems. In this way, the state would approach the forthcoming computerized, statewide voter registration system as an opportunity to ensure that no eligible voter is denied access to the ballot.

The State Board of Elections should amend 6217.6(2) to read:

In order to do so, the County Board shall utilize the information provided on the application and shall attempt to verify such information with the information provided by the New York State Department of Motor Vehicles, or the United State[s] Social Security Administration and any other lawfully available information source. The County Board shall do so by transmitting such information to NYSVoter. *An application shall be deemed verified for the purposes of this Section of these rules if a reasonable person would conclude that the individual represented on the application is substantially likely to be the same individual as an*

² Levitt, J., Weiser W., Munoz A., *Making the List*, Brennan Center for Justice, March 2006

³ Regrettably, the draft regulations improperly opt for a less-than-exact-match standard when it comes to *purging* from the rolls suspected duplicate registrations. See comments below on Section 6217.8 (2).

individual represented in the records of the New York State Department of Motor Vehicles, the United States Social Security Administration, or any other lawfully available information source. The County Board shall deem as verified for the purposes of this Section of these rules an application received from the Department of Motor Vehicles processed simultaneously and integrated with an application for a motor vehicle driver's license, a driver's license renewal or an identification card if such card is issued by the Department of Motor Vehicles in its normal course of business, pursuant to Section 5-212 of the Election Law.

Residential address requirement and homeless voters (Section 6217.4(2)(b))

The federal mail-in registration form, which states must accept under the terms of the National Voter Registration Act (NVRA),⁴ recognizes that some applicants may have no residential address. It therefore allows such persons to fill in a rudimentary map on their voter registration application with an X showing the place they can usually be found. Nearby crossroads and landmarks may be indicated instead of a residential address. This option can also serve the needs of certain rural residents.

Section 6217.4(2)(b) appears to conflict with the NVRA and prevent homeless individuals from registering to vote. The draft regulations provide that each NYSVoter record “must contain at least the following,” including “Residence Address including house number or apartment number, half code, street name and direction, city and five-digit Zip code and Zip code plus 4” (emphasis added). It does not offer an exception for persons who lack some or all of the attributes of a residential address, even though persons can fill out a valid federal mail-in form without such an address.

The address requirements set out in Section 6217.4(2)(b) would also appear to violate the constitutional rights of homeless voters, as established in *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984) (denying voter registration to homeless persons solely because they do not have a residential address violates the Fourteenth Amendment). State courts have interpreted N.Y. Elec. Law §5-104 to allow homeless persons to prove residence without having a fixed residential address. *Coalition for the Homeless v. Jensen*, 187 A.D.2d 582, 590 N.Y.S.2d 502 (2d Dep’t 1992).

We note that the Request for Proposals (RFP) for NYSVoter II, issued by the New York State Board of Elections (SBOE) on May 8, 2006, may anticipate accommodating registrants without fixed addresses. The RFP notes in Attachment A that the system will capture “Residence Address (standard and non-standard)” and “Mailing Address (if any) (standard and non-standard).” In Section 3.3.3.1 the RFP also notes specific non-standard address protocols, but only for New York City and Suffolk County. This may indicate that the voter registration system requirements will be more expansive than suggested by the language of the draft regulations. In any event, the latter’s strict requirements for

⁴ [42 U.S.C.A. § 1973gg\(4\)\(a\)\(1\)](#); [42 U.S.C.A. § 1973gg\(7\)\(a\)\(2\)](#). Note that the Help America Vote Act amended the NVRA, transferring responsibility of the federal form from the Federal Election Commission to the Election Assistance Commission (EAC). [See](#) 42 U.S.C. § 15532.

residential addresses must be amended to accommodate the registration of homeless but otherwise eligible state residents.

The State Board of Elections should amend 6217.4(2)(b) to read:

Residence Address including house number or apartment number, half code, street name and direction, city and five-digit Zip code and Zip code plus 4 – *or an indication of a non-standard Residence Address.*

Registration of 17 year olds (Section 6217.5(1)(a)(ii))

New York allows the registration of 17 year-old residents who will be 18 before December 31st. See N.Y. Elec. Law § 5-210(5)(g). It is true that a registrant who is not 18 by Election Day will not be able to vote in that election. See N.Y. Elec. Law § 5-102(1). But as long as she turns 18 by the end of the year, she should still be *registered*. One provision of the draft regulations indirectly acknowledges this right: in Section 6217.5 (4)(b)(v), the draft regulations make provisions for noting as incomplete a registration submitted by an applicant who has not indicated that she will be 18 years old by the *end of the year*.

One section of the draft regulations, however, is inconsistent with the state law. Section 6217.5 (1)(a)(ii) lists “Eighteen years of age or older on election day” among the qualifications for voter registration. The draft regulations must be amended.

The NYSVoter II RFP replicates the errors in the draft regulations. Section F.2.1.8.1 of Appendix A, (“Business, Technical, Implementation and Support Requirements”), states: “NYSVoter II shall verify whether the registrant will be at least 18 by any upcoming election. If so, NYSVoter II will flag registration as pending until that election.” This is inconsistent with the provision of New York law acknowledging that 17-year-olds may submit valid registrations if they will be 18 by December 31 of the calendar year, even if they will not be 18 by Election Day, and therefore will not be eligible to vote at that particular election.

Finally, Section 3.3.3.1 of the RFP for NYS Voter II acknowledges that counties have adopted different approaches to minors’ submission of voter registration forms. However, the RFP also states that Monroe County rejects such forms, and appears to be directing bidders to incorporate this county violation of law into their proposed system. State law mandates to accept and process these forms must be incorporated into the regulations.

The State Board of Elections should amend Section 6217.5(1)(a)(ii) to read:

Eighteen years of age or older *by December 31 of the year of registration*;
and

In addition, the State Board of Elections should amend the RFP accordingly.

Felon voting rights (Section 6217.5(1)(b)(ii), 6217.10(4)(b))

New York allows convicted felons who have been released from incarceration and finished their parole to register and vote - N.Y. Elec. L. § 5-106(2). Regrettably, many election officials are ignorant of the law and are prone to misinterpret the state felon disenfranchisement statute. The draft regulations would likely perpetuate such errors. Among disqualifications from voter registration, it lists: “Sentenced to prison based on a felony conviction.” See Section 6217.5 (1)(b)(ii). This provision fails to clearly establish the right of felons who have finished their incarceration/parole to register to vote.

The draft regulations are deficient in another regard. They fail to capture information on the restoration of felons’ rights to vote. Inclusion of such data could serve to prevent some election officials from continuing to deny the vote to eligible individuals with past criminal convictions. The current practice of county boards of elections in New York State regarding the registration records of a person with a felony conviction is as follows: Once a county board receives notice of a conviction, an individual’s registration record is coded to reflect her disqualification from voting. That code often remains on a registrant’s record after her period of ineligibility has lapsed, becoming in effect a “Scarlet Letter” that serves to deny eligible voters their fundamental right to vote.

In two surveys of New York county boards of elections, Demos, the Brennan Center for Justice at the NYU School of Law, the Community Service Society, and the Legal Action Center found that local elections officials were requiring that persons whose registration records had been coded for felony conviction produce documentary evidence of restored voting rights, in contravention of state law.⁵ The New York State Board of Elections’ efforts to correct these unlawful county practices have been insufficient and ineffective.

The draft database regulations and the Request for Proposal will serve to codify and integrate into NYS Voter current flawed practices for coding registrants with convictions. Section 6217.10 (4)(b) of the draft regulations anticipates that NYS Voter will receive from the Office of Court Administration (OCA) notice of and a code denoting a person’s conviction of a felony offense and sentencing to a term of imprisonment. The appropriate county board of elections is thereafter notified “for follow-up and determination.” The draft regulations make no provision for capturing or transmitting to county boards notice of the *restoration* of voting rights for a person with a conviction.

This fatal omission is repeated in the database RFP. As referenced in Appendix A (“Business, Technical, Implementation and Support Requirements”), NYS Voter will: receive felon notices from OCA, send such notices to county boards of elections for voter status determinations, “track and flag potential felons,” and allow NYSBOE to monitor resolution of such voters with convictions. See F.3.2.2, F.3.2.4. Nowhere in the RFP does

⁵ Two phone surveys of New York’s 62 county boards of elections were conducted in 2003 and 2005. The first survey found that more than half of the local boards were illegally requesting written documentation of restored voting rights from persons with felony convictions. The 2005 survey found that almost one-third of the county boards continued to illegally request such documentation. See “Boards of Elections Continue Illegally To Disfranchise Voters with Felony Convictions” (2006) by the Brennan Center for Justice at NYU School of Law and Demos: A Network for Ideas & Action, available at <http://www.demos.org/pubs/NYSurveyReport031506.pdf>.

the NYSBOE require that the database receive or transmit to county boards notice of the restoration of an individual's voting rights. The state's voter registration records will therefore be inaccurate as to persons whose rights have been restored, contrary to the requirement of HAVA Section 303(a)(4) that "The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly[.]"

First, OCA should include in the notice sent to NYS Voter an indication of the date that an individual's sentence will be complete; at the very least, beyond such a date, the individual will again be eligible to vote. It has also been suggested that the New York State Division of Parole and the New York State Department of Correctional Services each transmit to the state board of elections notice of restored voting rights due to an individual's discharge from parole or completion of her maximum prison sentence. Such notice should contain those persons' names, dates of birth, last known addresses, with counties of residence, and/or driver's license numbers and last four digits of Social Security numbers. See attached June 13, 2003 letter to New York State Board of Elections. The draft database regulations and RFP should be so amended.

The State Board of Elections should amend Section 6217.5(1)(b)(ii) to read:

Sentenced to prison based upon a felony conviction, *without restoration of voting rights*;

The State Board of Elections should amend Section 6217.10(4)(b) to read:

NYSVoter shall receive notices of felons sentenced to a term of imprisonment and of persons adjudicated mentally incompetent including the voter's last name, first name, middle name, gender, date of birth, street address, city, state, zip code, county, and a code indicating whether the person is a convicted felon sentenced to a term of imprisonment or a person adjudicated mentally incompetent from the New York State Office of Court Administration or any court having jurisdiction over such matters; *in the event of an individual convicted of a felony and sentenced to a disqualifying term of imprisonment, such notice shall also contain an indication of the date that the sentence is complete and the individual's voting rights are to be restored. NYSVoter shall also receive notices of discharge from parole and/or completion of sentence, containing the same information, from the New York State Division of Parole and/or the New York State Department of Correctional Services.* Notifications shall be sent to the appropriate county for follow-up and determination.

In addition, the State Board of Elections should amend the RFP accordingly.

Voter registration form - check-off boxes (Section 6217.5(4)(b)(iv), (v))

The draft regulations propose to impermissibly classify as incomplete a voter registration form which does not contain a mark in the checkbox affirming that the applicant is a citizen of the United States. See Section 6217.5 (4)(b)(iv). Affirmation of citizenship is

provided for elsewhere in the form. Every applicant for voter registration must, by signature or mark, swear or affirm that s/he is a citizen of the United States. N.Y. Elec. Law § 5-210(5)(k)(xi). The form also warns the applicant that untruthfully signing the form can subject the voter to incarceration for up to four years and/or a fine of up to \$5,000. *Id.* Though the check-off box is required by HAVA, failure to mark it should not render the form incomplete if the subsequent written attestation is completed.

Similarly, these draft regulations demand that an applicant supply both her date of birth and a mark in the checkbox affirming that she will be 18 years old by the end of the year. See Section 6217.5(4)(b)(iii), (v). As long as the applicant provides her date of birth, failure to mark the checkbox is wholly unnecessary.

New York's rejection of voter registration applications for such non-material omissions in the registration form would violate federal law. Under 42 U.S.C. § 1971(a)(2)(B) (enacted as part of the Civil Rights Act of 1964), it is illegal for an election official to deny "the right of any individual to vote in an election because of an error or omission on any error or paper relating to an application, registration, or other act requisite to voting, if such error is not material to determining whether such individual is qualified under state law to vote in such election." When a voter swears, under penalty of criminal perjury, that he or she is a U.S. citizen, or provides a birthdate showing that she is over 18, it is immaterial that the voter may have left unchecked a duplicative box that asks precisely the same question. Thus, if a county auditor denies the right to vote in a federal election to a registrant in these circumstances, he or she will be violating federal law and will be subject to suit by the Attorney General or by a private citizen. By virtue of promulgating regulations that direct county auditors to take such a step, the State Board of Elections is leaving itself open to similar liability.

Furthermore, the refusal to register a voter for federal elections based on such an immaterial omission also would violate the fundamental right to vote under the Fourteenth Amendment. "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663. 665 (1966). Indeed, private plaintiffs have already filed a federal-court lawsuit over Florida's policy of rejecting forms solely because of the failure to check the citizenship box, and the lawsuit remains pending. *Diaz v. Hood*, No. 04-22572-CIV (S.D. Fla.)

The State Board of Elections should amend the regulations to delete Section 6217.5(4)(b)(iv) and (v).

Updating voter records from existing databases (Sections 6217.5(4)(b)(x), 6217.10(7)) This section should be expanded to mandate the automatic correction and completion of voter applicant information from existing state databases if the applicant's identity is clear. So, if the voter has supplied information allowing the state or county to determine her driver's license or Social Security number, without supplying the number itself – for example, if the voter's name, address and birth date match an existing state database such

as those maintained by the DMV, Department of Social Services or State University of New York -- the system should automatically supply the appropriate identifying number, and the voter should be notified accordingly. Similarly, for registered voters already on the system, if relevant information on other existing state databases is changed, the voter should be sent a notice asking whether registration records should reflect the new information as well.

The State Board of Elections should amend Section 6217.5(4)(b)(x) to read:

If any of the required information is missing on the voter registration application, the county board shall take immediate steps to obtain complete information. *If the missing information is information indicated in items vi-viii above, such steps shall include submitting the voter's name, address, and birth date for comparison against information maintained by the New York State Department of Motor Vehicles, the United States Social Security Administration, or any other lawfully available information source to determine whether the voter's appropriate identifying number can be located; if so, such number shall be deemed to have been provided with the application, and the voter shall be notified accordingly.* If the missing information is necessary to establish the applicant's eligibility to register [(i.e. name, date of birth, residence address, citizenship and signature[,]) the form shall be incomplete. In any such case the county board shall notify the applicant of the reasons that the registration application is incomplete and the period of time in which the application information must be provided in order to be eligible to vote in the next election. When the missing information is necessary to verify the applicant's identity (i.e., the New York driver's license number, non-driver's identification number, digits of the social security number, or indication that the applicant has not been issued such a number) and all required eligibility information is complete, the application shall be processed, the applicant registered, and a notice of approval which includes an indication that the county board has not been able to verify the identity of the applicant and a request for more information so that such verification may be completed shall be sent to the registrant pursuant to statute and these regulations.

The State Board of Elections should add Section 6217.10(7)(a):

NYSVoter may receive data from other reliable state information systems regarding potential changes to the information of registered voters, such as name or address changes. Notification shall be sent to the appropriate county for follow-up and determination.

Right to cast affidavit ballot (Section 6217.6(7), (9))

New York law provides a fail-safe voting provision in instances where county boards of elections are unable to validate the identifying numbers of newly registered voters. Such

voters may show identification at the polls and cast regular ballots, or vote by affidavit ballot if they are unable to present such ID.

The notice provisions of the draft regulations do not adequately represent these safeguards. Sections 6217.6 (7) provides that voters whose application information could not be validated will be notified that they may be asked to show ID at the polls in order to cast a ballot on a voting machine. It makes no reference to the right to cast an affidavit ballot if the voter can not show identification. The second voter notice provision included in Section 6217.6 (9) repeats the same. In both instances the draft regulations should clearly reference the right to cast an affidavit ballot.

The State Board of Elections should amend Section 6217.6(7) to read:

The request for more information shall inform the voter that: “THE FAILURE TO CONTACT THE BOARD OF ELECTIONS AND CORRECT ANY INACCURACIES IN THE APPLICATION OR PROVIDE REQUESTED ADDITIONAL INFORMATION MAY RESULT IN A REQUEST FOR IDENTIFICATION AT THE POLLS IN ORDER TO CAST A VOTE ON A VOTING MACHINE. *FAILURE TO PROVIDE PROPERLY REQUESTED IDENTIFICATION AT THE POLLS WILL NOT AFFECT YOUR RIGHT TO CAST A PAPER AFFIDAVIT BALLOT.*” If such notice is returned undelivered without a new address, the board shall forthwith send such applicant a confirmation notice pursuant to the provisions of section 5-712 of the Election Law and place such applicant in inactive status.

The State Board of Elections should amend Section 6217.6(9) to read:

If the board of elections has been unable to verify the identity of the applicant within forty-five days of the application, the board shall mail a second request for more information to the applicant. This notice shall inform the voter that: “THE FAILURE TO CONTACT THE BOARD OF ELECTIONS AND CORRECT ANY INACCURACIES IN THE APPLICATION OR PROVIDE REQUESTED ADDITIONAL INFORMATION MAY RESULT IN A REQUEST FOR IDENTIFICATION AT THE POLLS IN ORDER TO CAST A VOTE ON A VOTING MACHINE. *FAILURE TO PROVIDE PROPERLY REQUESTED IDENTIFICATION AT THE POLLS WILL NOT AFFECT YOUR RIGHT TO CAST A PAPER AFFIDAVIT BALLOT.*”

Strict standard for purging potential duplicate registrations (Section 6217.8(2))

The State Board of Elections should approach its draft regulations as opportunities to facilitate voting by every eligible state resident. For putting citizens on the rolls, this requires a more flexible approach, able to capture common mistakes like typographical errors and name changes, because the damage is severe (and unable to be remedied) when an eligible voter is wrongly denied registration. The principle is precisely inverted for purges. Here, if one person is falsely thought to be another, a flexible standard could

lead to eligible individuals being mistakenly classified as inactive, and excluded from the pollbooks. The Board should therefore adopt a more stringent, exact-match standard in the instance of identifying a possible duplicate registration. The risk of removing the name of an eligible voter from the rolls merits a more cautious approach.

The State Board of Elections should amend Section 6217.8(2) to read:

NYSVoter shall identify possible duplicate voter registrations based on:

- (i) *an exact match of an applicant's first three letters of the first name and the first five letters of the last name[;] date of birth[; and] the unique identification number, or the New York State Department of Motor Vehicle driver license or non-driver number or last 4 digits of the voter's Social Security number; or*
- (ii) *if the unique identification number, New York State Department of Motor Vehicle driver license or non-driver number, or last 4 digits of the voter's Social Security number is unavailable, an exact match of an applicant's name, including first name, middle name, last name, and suffix; and date of birth.*

Speedy processing of voter registration applications (Section 6217.5(2))

Within the last month before the registration deadline, County Boards should be responsible for the initial processing and registering of voters within 14 days of the receipt of their voter registration applications. The 21 days allowed in Section 6217.5 (2) virtually ensures that poll site books will not include names of registrants who submit forms within final week of registration, dramatically increasing the likelihood of delays and confusion at the polls and increased numbers of voters forced to utilize affidavit ballots.

The State Board of Elections should amend Section 6217.5(2) to read:

When a voter registration application is received, the County Board is responsible for processing each application and determining whether the application is complete and whether the applicant meets constitutional and statutory requirements. All voter registration applications shall be date and time stamped to establish eligibility and to establish the time lapse of no more than 21 days maximum – *and for applications received by the County Board less than fifty-five days before an election, to establish the time lapse of no more than 14 days maximum* -- for a completely processed voter registration. Procedures for opening mail, time stamping documents or pre-screening, to the extent that they are not prescribed by these regulations, are left to the county boards to establish.