

Comments

by the

Undersigned Voting Rights, Civil Rights, and Civic Organizations

on the

**U.S. Election Assistance Commission's
Draft Voluntary Guidance on Implementation of Voter Registration Lists**

May 25, 2005

On behalf of the undersigned voting rights, civil rights, and civic organizations, we respectfully submit these comments on the Election Assistance Commission's draft Voluntary Guidance on the Implementation of Voter Registration Lists required by Section 303(a) of the Help America Vote Act of 2002 (HAVA). We believe that the draft Guidance utterly fails to provide states with sufficient direction as to how they should comply with HAVA's mandate that states implement and use statewide voter registration databases in a manner that protects voters' rights. For the reasons set forth below as well as in the April 26, 2005 testimony of Wendy R. Weiser of the Brennan Center for Justice at NYU School of Law, the Guidance should be amended, at a minimum, to make clear that:

- States must establish uniform, nondiscriminatory, and transparent standards for matching voter registration information with information in other databases and ensure that the mere failure of election officials to find a match may not result in the disenfranchisement of any eligible voter.
- States must establish express safeguards to protect against erroneous purges, including uniform standards for removing voter records and procedures to ensure that, before any record is removed, the affected voter is notified and provided an opportunity to correct or confirm his or her record.
- States must establish effective security measures to prevent unauthorized access to and use of the database, including clear lines of authority for adding, deleting, and updating voter records, mechanisms to ensure that all database transactions are tracked and documented, and mechanisms and procedures to generate detailed reports of database transactions.
- States must take steps to enable all voter registration agencies – including motor vehicle, public assistance, and disability agencies – to be electronically integrated with the voter database, including for the purpose of adding, correcting, and updating voter registration information
- States must establish effective measures to preserve the privacy of confidential voter information and to prevent that information from being used for any unauthorized purpose.

To assist the Commission in amending its draft Guidance, the following comments track the format and language of the draft Guidance wherever possible. They also include specific language that we recommend that the Commission include in its final Guidance, as well as explanations as to how our proposals follow from the provisions of HAVA. In considering these comments, the Commission should keep in mind the priorities outlined in the bulleted points above. In addition, a priority best practice is a public access portal that enables voters to verify their registration status and records and to determine the location of their polling places. If the Commission has any further questions concerning these comments, please contact Wendy Weiser of the Brennan Center for Justice at (212) 998-6130 or wendy.weiser@nyu.edu or any of the undersigned organizations.

I. Database Coordination

A. Adding and Updating Voter Registration Information

Question 10 of the draft Guidance asks how the statewide voter registration database should be “coordinated with other agency databases.” In attempting to answer that question, the Guidance correctly states that “HAVA makes accurate voter registration lists a priority.” But that statement is too broad and vague to provide states with any direction. The Guidance must make clear that an “accurate” voter registration list is a *complete* list – that is, one that includes the name and registration information of every eligible and registered voter in the state – as well as a list that contains information that is *up-to-date*. This is compelled by HAVA’s requirements that states ensure that “the name of each registered voter *appears*” on the statewide voter registration list¹ and that “voter registration records ... are accurate and updated regularly.”²

In order to ensure that the voter list is complete, states must “coordinate the statewide the statewide voter registration list with other state agency databases,” as the Guidance correctly points out. The Guidance should make clear that completeness requires that the voter registration list be coordinated with *all* voter registration agencies, including motor vehicle, public assistance, and disability agencies. Failure to coordinate with any of these agencies could result in the loss of voter registration records – a result that HAVA’s statewide database requirement was intended to prevent. Any such coordination must, however, be accompanied by express privacy protections to ensure that coordination does not expand access to confidential voter information and is used only for the purposes of adding, updating, and verifying voter records.

In addition, the Guidance should specify that the transmission of voter registration records from any voter registration agency must, to the extent possible, be done electronically, since that will better prevent the loss of records and will reduce the risk of error. Electronic transmission will also better enable states to meet HAVA’s requirement that states enter new registration information into the statewide database on an expedited basis.³ Electronic

¹ 42 U.S.C. § 15483(a)(2)(B)(ii) (emphasis added).

² *Id.* § 15483(a)(4).

³ *See* 42 U.S.C. §§ 15483(a)(1)(A) & (a)(4).

transmission of voter records can be facilitated by electronic links and interactive connections to the databases of those agencies.⁴

In order to ensure that the statewide voter registration list contains information that is current or up-to-date, as contemplated by the HAVA, the Guidance should specify that coordination with other agency databases must be used not only for the purpose of verifying voter information but also for the purpose of correcting, supplementing, and updating the information in voter registration forms and records. This will have the added benefits of reducing the risk of inconsistent records at different agencies and saving voters the burden of changing their records at all government agencies.

One important application of this principle that the Commission should note is that coordination with felony records must be used not only for the purpose of determining who is ineligible to vote but also for the purpose of determining whose eligibility has been restored under state law.⁵ Where state law provides that a person's eligibility is restored after completion of their incarceration, parole, or probation, the restoration of voting rights should be automatically reflected in the statewide voter registration list. Otherwise, states will not be able to meet HAVA's requirement that the name of each eligible voter appears on the list.

Accordingly, we recommend that the Commission adopt the following language in place of that in the first paragraph under question number 10 in the draft Guidance:

HAVA makes complete, accurate, and up-to-date voter registration lists a priority. States should coordinate the statewide voter registration list with other state agency databases – including the databases of motor vehicle, public assistance, disability, and other voter registration agencies – that may contain information relevant to the statewide voter registration list. Coordination must be used to enable states to meet HAVA's requirement that new voter registration information be entered in the statewide voter registration database on an expedited basis. To the maximum extent possible, states should supplement their current record transmission procedures with procedures to electronically transmit new and updated voter registration information from these other state agencies to the statewide voter registration list or election officials responsible for updating that list.

Coordination must also be used to facilitate efforts to correct, supplement, and update the information in voter registration records and forms. States should therefore establish procedures to ensure that, without violating a voter's privacy and with proper notice to the voter, election officials use information in other state agency databases to correct errors in voter registration records and to

⁴ The electronic transmission of registration records should nonetheless be accompanied by physical transmission of the application forms to appropriate election officials. The original applications should be maintained as a backup record of the registration of each voter.

⁵ For more detailed recommendations concerning the interaction between statewide voter registration databases and felony records, please refer to the comments submitted by Laleh Ispahani of the American Civil Liberties Union on May 25, 2005.

update voter registration information in a manner that ensures that all eligible and registered voters can successfully exercise their right to vote. Efforts to coordinate the statewide database with other state agency database must at all times be guided by HAVA's requirements that states ensure that the name of each eligible and registered voter appears on the statewide voter registration list and that states regularly update the information in the voter registration list.

Coordination must be subject to strong privacy protections to ensure that coordination does not increase access to confidential voter information. Coordination should be used only for the purposes of adding, correcting, updating, or verifying voter registration records.

In addition, we recommend that the Commission add the following sentence to the end of the second paragraph under question 10:

Coordination of the statewide database with felony records must also be used to ensure that the voter registration list accurately reflects the restoration of voting rights under state law of individuals who complete their incarceration, parole, or probation.

B. Verifying Voter Registration Information

The draft Guidance says, under question 10, that states should attempt to “match” information provided on voter registration applications with that in drivers’ license and social security databases “for the purpose of verifying the accuracy of the information” provided by new registrants. It says nothing about what criteria should be used to determine a match or what states must do if their verification process fails to produce a match. This is a major failing given the importance of the verification process and the potential for that process, if not properly implemented, to be used to disenfranchise eligible voters in violation of HAVA.

The Guidance correctly explains that if a state is able to validate a voter’s registration information through the matching process, that voter is “exempt[.]” from HAVA’s “identification requirement for first-time registrants by mail.” In other words, HAVA contemplates that the matching process will be used to protect new voters by relieving them of HAVA’s identification burdens. If a state is unable to match the information provided by a first-time voter who registers by mail, HAVA subjects that voter to identification requirements.⁶ If that voter is unable to meet those identification requirements, HAVA entitles the voter to cast a provisional ballot,⁷ which must be counted if the voter is “eligible under State law to vote.”⁸ HAVA visits no additional burdens or penalties on voters whose registration information the state is unable to match with existing state records. The Guidance should therefore make it absolutely clear that a state may not penalize a registrant whose information it is unable to verify through the matching process. Specifically, the Guidance should specify that a state may not reject a voter registration

⁶ 42 U.S.C. § 15483(a)(3).

⁷ *Id.* § 15483(a)(1)(B).

⁸ *Id.* § 15483(b)(4).

application solely because the state is unable to match the information in that application with another state record.

Indeed, the rejection of voter registration applications that do not produce a match with another state record would render meaningless HAVA's provision exempting new voters from identification requirements, since the identification requirements are triggered only when a state *cannot* match the voter's registration information with an existing state record. In addition, it would vitiate HAVA's provisional ballot protections for first-time voters who register by mail, since the refusal to register those voters would mean that the provisional ballots are void *ab initio*.

More importantly, a state that rejects voter registration applications simply because they are unable to verify the registration information in another state database would also be violating HAVA's mandates that it ensure that "the name of every eligible voter *appears*" on the voter registration list⁹ and adopt "safeguards to ensure that eligible voters are not removed in error" from the list.¹⁰ As explained at length in the April 26, 2005 testimony of Wendy R. Weiser, given the difficulties in reliably matching data in different databases, each of which records data in different ways and each of which is likely to contain errors, a rule rejecting voter registration applications whose information a state is unable to match would inevitably lead to the mass disenfranchisement of eligible voters. Because this result is both foreseeable and preventable, states are obligated under HAVA to adopt safeguards against such disenfranchisement. The only reliable safeguard is to prohibit election officials from rejecting voter registration applications solely because they are unable to produce a match.

In addition, to ensure that voters are not deprived of the benefits of the verification process and that the process actually improves the accuracy of voter registration lists, the Commission should make clear that states must develop uniform, non-discriminatory, and transparent matching protocols that maximize election officials' ability to verify voter registration information. If matching records are not found in driver's license or social security databases, election officials should attempt to match the registrant's information with other state agency databases with which the statewide voter list is coordinated. If election officials are still unable to find matching records, they must also be required to audit the voter registration record, including by reviewing the original paper voter registration application. These guidelines are essential to meeting HAVA's goal that the voter verification process be used to ensure the accuracy of the voter registration list.

Accordingly, we recommend that the Commission adopt the following language in place of the third paragraph under question 10 in the draft Guidance:

Moreover, Section 303(a) of HAVA requires States to attempt to match information received on voter registration forms against driver's license and social security databases for the purpose of ensuring and verifying the accuracy of the information in voter registration applications and records. States must establish uniform, non-discriminatory and transparent standards for matching

⁹ *Id.* § 15483(a)(2)(B)(ii) (emphasis added).

¹⁰ *Id.* § 15483(a)(4)(B)

voter registration information with information in other databases. Those standards should maximize election officials' ability to find matching records, taking into account the different ways in which different databases record data and the possibility for errors in the databases. Records should be determined to match if they contain substantially similar information such that a reasonable person would conclude that the records refer to the same individual. If election officials are unable to find a matching record for an applicant for voter registration in the driver's license or social security databases, they should search the databases of the other state agencies with which the voter registration list is coordinated. Election officials should also audit any records that fail to produce a match, including by reviewing the original paper voter registration application, to ensure that the voter registration information was correctly entered into the statewide list and to correct any non-material errors made by the registrant.

Although election officials may take further steps to verify the eligibility of applicants for voter registration, they may not reject a voter registration application simply because they are unable to match the information in that application with a record in an existing state database. The use of the matching process to reject voter registration applications that do not contain affirmative evidence of fraud would violate HAVA.

Under Section 303(b), validation of voter registration information through the matching process provides an exemption to the voter identification requirement for first-time registrants by mail. If a state is unable to validate the registration information of a first-time voter who registered by mail, the voter is entitled to vote a regular ballot if the voter meets the identification requirement and a provisional ballot if the voter does not meet the identification requirement.

II. Preventing Erroneous Purges

The draft Guidance does not at all address HAVA's requirements that states establish "safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters"¹¹ and ensure that "only voters who are *not* registered or who are *not* eligible to vote are removed" from the statewide voter registration list.¹² These provisions are essential cornerstones of HAVA's statewide database requirement and must not be ignored in the Guidance. We strongly urge the Commission to include in its final Guidance guidelines on how states can fulfill their obligation under HAVA to protect against erroneous purges. These guidelines must take into account the real danger that list maintenance procedures may erroneously disenfranchise eligible voters in violation of the above-cited provisions of HAVA, because there is currently no reliable method of generating accurate lists of ineligible voters or of duplicate records. They must also ensure that citizens are not unfairly or mistakenly deprived of their right to vote without due process of law.

¹¹ *Id.*

¹² *Id.* § 15483(a)(2)(B)(ii).

Accordingly, we recommend that the Commission add the following section to its final Guidance:

How should states safeguard against the erroneous removal of eligible voters from the statewide voter registration list?

Although HAVA contemplates that states will take steps to remove duplicate records and the records of ineligible voters from its statewide voter registration list, it also requires that states do so in a way that ensures that only voters who are not registered or who are not eligible are removed from the statewide list. HAVA further requires that states establish safeguards to ensure that eligible voters are not removed in error from the database. HAVA also requires that the removal of any name from the statewide list be done in accordance with the protections of the National Voter Registration Act.

At a minimum, these requirements mean that states must establish uniform, non-discriminatory, and transparent standards for determining when a voter registration record is a duplicate or belongs to an ineligible voter and therefore is subject to removal from the voter list. States should also establish procedures to double-check and correct voter registration records before concluding that a record potentially is a duplicate or belongs to an ineligible voter. Before removing any name from the statewide voter registration list, states must notify the voter and provide him or her with an opportunity to correct or explain his or her record. Organized computer list maintenance activities and purges must be completed no later than ninety days before a primary or general election, except with respect to individuals who request removal, who die during that period, or who become ineligible during that period due to criminal conviction. In addition, states must implement security measures to protect against unauthorized database transactions, including transactions that result in removing the names of eligible voters from the voter registration list.

III. Ensuring List Security and Voter Privacy

The draft Guidance does not explain HAVA's requirement that states implement "adequate technological security measures to prevent the unauthorized access to the computerized list."¹³ We strongly urge the Commission to provide guidance as to what constitutes "adequate" security measures and what constitutes "unauthorized access" to the list.

The requirement that states prevent "unauthorized access" to the voter list clearly contemplates that states will establish authorization protocols concerning who may view voter registration records and perform specified list transactions. It is important that those protocols be uniform and transparent. To comply with other provisions of HAVA, they must also ensure the privacy of voters' confidential information and prevent unauthorized transactions that result in the removal of voter registration records.

¹³ *Id.* § 15483(a)(3).

At a minimum, “adequate” security measures must include the standard security measures used in the information management industry. Those measures must ensure that adequate records are kept of all database transactions, especially transactions to remove names from the voter list. Not only is this embedded in the concept of “adequate” security measures, but it is also an essential safeguard against erroneous purges, also required by HAVA. “Adequate technological security measures” also means that statewide databases must be constructed with technological safeguards, such as password protections, to prevent unauthorized use of the database, unauthorized database transactions, and users from viewing confidential voter information that is not necessary to their authorized tasks.

Accordingly, we recommend that the Commission add the following section to its final Guidance:

What are adequate technological security measures to prevent the unauthorized access to the computerized list?

HAVA requires that states establish adequate technological security measures to prevent the unauthorized access to the computerized voter registration list. The requirement that the database protect against unauthorized access to the voter list means that only authorized persons should be able to view the information in the computerized list. It also means that the database must protect against unauthorized transactions, including transactions that result in the removal of voter records. To implement this requirement, states must establish clear and transparent authorization protocols concerning who may view voter registration records and perform specified list transactions. The database must incorporate technological security measures so as to ensure that only authorized persons may access the list and perform specified transactions. They must protect (such as by masking) confidential information about voters, including voters’ social security or driver’s license numbers and where the voter submitted his or her registration form. They must also protect against erroneous purges of eligible voters.

Adequate security measures include, at a minimum, a requirement that states keep electronic records of all database transactions, including transactions to remove names from the voter list. These records should indicate the date and time of each transaction, the identities of the persons who removed or modified records and who authorized the transaction, and the reason any record was removed or modified. In addition, election officials should periodically generate reports of transactions to remove or modify records and should audit those reports for errors or unauthorized transactions.

IV. Entering Voter Registration Information

In response to question 11, the draft Guidance correctly states that, as expressly required by HAVA, “all voter registration information obtained by any local election official must be electronically entered into the statewide voter registration list on an expedited basis at the time the information is provided to the local election official.” However, the Guidance says nothing

about how quickly states must process voter registration information before they reach local election officials. It is important that the amended Guidance correct that deficiency since a significant portion of voter registration applications in every state are submitted to other government officials before they reach local election officials.

HAVA provides that “the chief State election official shall provide such support as may be required” to ensure that voter registration information is input by local election officials on an expedited basis.¹⁴ Appropriate support includes procedures to ensure that voter registration records reach local election officials in a timely manner. Such procedures are also essential to ensure that the voter registration list is as complete, accurate, and up-to-date as possible.

Accordingly, we recommend that the Commission add the following sentence at the end of its response to question 11:

The chief State election official shall establish procedures to ensure that applications for voter registration submitted to any authorized state official or agency are processed on an expedited basis, including procedures to ensure that voter registration information is transmitted to the appropriate local election officials on an expedited basis.

V. Recommended Additional Database Features

In addition to adopting the recommendations outlined above, which we believe are required by HAVA, we also recommend that the Commission amend its Guidance to include best practices concerning statewide voter registration databases. A section discussing best practices would be very valuable at this time, when states are making decisions as to how they will construct their databases, since it may be very difficult or impossible to modify many features of a voter registration database after it is built.

Accordingly, we recommend that the Commission include the following new section in its final Guidance:

What best practices should states consider adopting in connection with the voter registration database?

Whether or not a specific measure is required by HAVA, states should make every effort to implement and use statewide voter registration databases in a manner that best protects voters’ rights, ensures a complete and accurate voter registration list, and assists election officials in effectively managing elections. Toward those ends, the Commission recommends that all states consider adopting the best practices being used in connection with statewide voter registration databases.

States should consider providing a public access portal, perhaps through an internet-based copy of the voter registration database that it is also accessible by

¹⁴ *Id.* § 15483(a)(1)(A)(vii).

telephone, to enable voters to verify their own registration status and records. This should also be accompanied by electronic polling-place finders to enable voters to determine the location of their polling places. These public access portals should have strong security measures to prevent persons other than the voter from viewing the confidential information in his or her voter record. This practice would assist states in ensuring the accuracy of their voter registration records while enabling voters to protect their own rights.

A well-constructed database should also be used to assist states in virtually all aspects of election administration, including managing and keeping track of absentee and provisional ballots, printing ballots, assigning precincts, and tracking poll workers. A database capable of these election management functions can promote better run elections and save states substantial costs over time.

In addition, states should consider providing polling-place access to the voter registration database on Election Day. Polling place access to a searchable voter registration database will reduce the number of eligible and registered voters whose names cannot be found on the list and will therefore prevent disenfranchisement of eligible voters and make it easier for election officials to administer elections.

Respectfully submitted,

Association of Community Organizations for Reform Now (ACORN)

Appleseed

Brennan Center for Justice at NYU School of Law

Common Cause

Demos

Lawyers Committee for Civil Rights Under Law

Mexican American Legal Defense and Education Fund (MALDEF)

National Association for the Advancement of Colored People (NAACP)

National Association of Protection and Advocacy Systems (NAPAS)

National Voting Rights Institute (NVRI)

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New York Public Interest Research Group (NYPIRG)

People For the American Way (PFAW)

Project Vote

Rock the Vote