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To: 'votingsystemguidelines@eac.gov'; 'ddavidson@eac.gov'
Subject: Voter Action Comments Regarding Proposed Pilot Program Certification Testing Requirements & Manual
Date: 04/26/2010 05:39 PM
Attachments: 2010-04-26 Final Voter Action Letter to EAC.pdf

Dear Commission:

Attached please find a letter and exhibits submitted on behalf of Voter Action. This letter (and its related exhibits) were already hand delivered to the Election Assistance Commission earlier today.

Electronic copies of the exhibits referenced in the attached letter will be sent in subsequent emails.

If you have any questions please do not hesitate to contact me.

Thank you,

Cory Way



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April 26, 2010

VIA HAND DELIVERY & E-MAIL
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U.S. Election Assistance Commission
c/o Donetta Davidson, Chair
1201 New York Avenue, NW, Suite 300
Washington, D.C. 20005

Re: Proposed Pilot Program Voting System Testing and Certification Requirements and Manual [61 Fed. Reg. 16088-90 (Mar. 31, 2010) and 75 Fed. Reg. 21285 (Apr. 23, 2010) (Requirements) and 61 Fed. Reg. 18189 (Apr. 9, 2010) (Manual)]

Dear Commissioners:

Voter Action¹ respectfully requests the U.S. Election Assistance Commission (EAC or Commission) to withdraw its proposed requirements and manual for the federal certification of voting systems for use in pilot programs during real elections by uniformed and overseas citizens to vote. The proposed pilot program certification testing requirements and manual do not comply with federal law and, if adopted, would illegally impair the fundamental voting rights of uniformed, overseas and other voters to vote and have their votes counted as cast.²

¹ Voter Action is a national non-profit organization that seeks to ensure election integrity in the United States. Voter Action aims to protect an open and transparent election process, one in which our elections at the federal, state, and local level are accessible and verifiable. Voter Action supports the basic civil and political rights of all voters to cast their ballots in an independent manner and to have their votes accurately recorded and counted.

² See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

In particular, the processes employed by the Commission in pursuing the proposed pilot program voting system certification testing requirements (and the related implementation manual) violate the Help America Vote Act (HAVA), the Federal Advisory Committee Act (FACA), the Administrative Procedure Act (APA) and the federal laws governing uniformed and overseas citizen absentee voting, and may also violate other statutes. The EAC processes constitute violations because, *inter alia*, the Commission: (1) established an advisory committee other than the one established by HAVA to develop these voting system certification testing requirements and manual; (2) utilized the advice of this non-statutory advisory committee in ways that conflict with HAVA, FACA and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voters Empowerment Act (“MOVE Act”); and (3) failed to provide for public notice and comment as required by HAVA and the APA.

This letter provides background to, and highlights concerns associated with, the proposed pilot program voting system certification testing requirements and manual before addressing legal issues presented by the procedures by which the EAC came to propose these requirements and related manual.

Section I provides factual background and outlines Voter Action’s concerns with respect to the EAC’s proposals and procedures. Section IA explains that the U.S. Department of Defense (DOD)—the designated federal agency to carry out pilot programs to test the feasibility of voting systems for UOCAVA voters—is not doing UOCAVA pilot programs in 2010 or until the Technical Guidelines Development Committee (TGDC) has made its recommendations to the EAC regarding Internet and other forms of remote voting systems. Section IB shows that HAVA requires the EAC to consider the recommendations of the TGDC with respect to any voting system guideline or modification thereof. The conflict between the TGDC voting system guidelines (and manual) and the EAC proposed requirements (and manual) is laid out in Section IC, as is the dearth of new provisions in the proposed requirements directed to the features of remote voting systems to be deployed in real elections in pilot programs involving overseas and uniformed voters. Section ID addresses the serious security threats to election integrity posed by Internet-based and other remote voting systems. Section IE addresses concerns about Scytl, a foreign-based and presumably foreign-owned Internet-based voting system company that was involved in the development of the proposed requirements and manual.

Section II explains why the EAC has violated HAVA, FACA and UOCAVA in creating and using the advice of an advisory group other than the TGDC, which included Scytl and another Internet-based voting system company run by former EAC Chair Paul DeGregorio.

Finally, in Section III, we explain why the EAC has violated HAVA and the APA with respect to public participation in this rulemaking process.

I. Introductory Background and Overview of Concerns Regarding the EAC’s Proposals and Procedures.

A. The DOD is Not Piloting Remote Voting Systems in 2010, Nor Has the TGDC Proposed Guidelines for Remote Voting Systems.

The 2010 election will determine control of the U.S. Senate and House of Representatives. For the 2010 election, the DOD has no plans to introduce Internet or other experimental telecommunications pilot programs for absentee voting for the approximately six million uniformed or overseas citizens eligible under UOCAVA.³ In fact, the DOD has stated that the development and execution of a pilot program could take five years.⁴ This five year time frame would not begin until after the EAC adopts remote voting system guidelines developed by the TGDC, an entity statutorily created under HAVA. Section 222(b)(1) of that Act provides that “[i]n developing the voluntary system guidelines and modifications of such guidelines under this section, the Executive Director of the Commission shall take into consideration the recommendations provided by the Technical Guidelines Development Committee under section 221 of this title.”⁵ On December 9, 2009, the EAC specifically tasked the TGDC to develop UOCAVA pilot program certification requirements.⁶

Yet on March 31, 2010—without the advice of the TGDC and eight months before the 2010 general election—the EAC proposed certification testing requirements for voting systems to be used in pilot programs for UOCAVA voters. Ten days later the EAC proposed a manual for use by voting system manufacturers to test “experimental” voting systems for EAC certification for use in pilot programs (including any offered by states under which uniformed and overseas citizens would vote absentee using Internet and telecommunications networks and

³ See 42 U.S.C. § 1973ff *et seq.*; U.S. Department of Defense, *Expanding the Use of Electronic Voting Technology for UOCAVA Citizens—As Required by Section 596 of the National Defense Authorization Act for Fiscal Year 2007* (May 2007) [Ex. A].

⁴ U.S. Government Accountability Office, *Elections: Action Plans Needed to Fully Address Challenges in Electronic Absentee Voting Initiatives for Military and Overseas Citizens*, GAO Report 07-774 (June 2007), at 28 (GAO Report 07-774) [Ex. B] (“Moreover, DOD officials told us that even if the [Election Assistance] Commission had developed Internet voting guidelines at the time of our review, DOD would not have been able to develop a secure, Internet-based electronic demonstration project in time for the 2008 presidential election. DOD said that—depending on the Internet voting guidelines provided by the Commission—the final system design, full development, testing and development phases would take an estimated 24 to 60 months. Furthermore, deployment of any system requires participation of the military services, which have many additional, competing priorities that may cause delays in deployment. Given that less than 17 months remain before the November 2008 election, FVAP officials said there is insufficient time to advertise and launch the Internet-based electronic demonstration project.”). Past pilot programs by the DOD were rushed and resulted in poor results. GAO Report, at 4; *see also id.* at 28 (“The Commission and state and local election officials noted that the aggressive schedules for these latest electronic initiatives did not allow sufficient time”).

⁵ 42 U.S.C. §§ 15361 and 15362. Section 221 of HAVA provides that “[a]t the time the Commission adopts any voluntary voting system guidelines pursuant to section 222 of this title [42 U.S.C. § 15362], the Development Committee shall cause to have published in the Federal Register the recommendations it provided under this section to the Executive Director of the Commission concerning the guideline adopted.” 42 U.S.C. § 15361(f).

⁶ EAC, *Proposed Uniformed and Overseas Citizens Absentee Voting Act Pilot Program Testing Requirements* (Mar. 24, 2010), at 8 (EAC Proposed Requirements), available at http://www.eac.gov/News/program-areas/voting-systems/docs/requirements-03-24-10-uocava-pilot-program/attachment_download/file.

connections).⁷ The Commission published *Federal Register* notices allowing the public a mere 15 days in which to comment on each proposal.⁸ Voter Action requested a substantially longer period in which to comment,⁹ after which the EAC added another 15 days for comments on the proposed certification testing requirements.¹⁰ The EAC has maintained a 15 day only comment period, however, for the related certification testing manual.¹¹ According to the EAC, “the reason for the shortened public comment period is to allow for the UOCAVA pilot [voting] systems to be submitted under the program in time to allow them to be used in the 2010 general election *should a manufacturer desire to do so* [emphasis added]. In addition, because much of the manual is taken from already approved EAC manuals there is very little new material to review for comment.”¹²

B. HAVA Requires the TGDC to Assist the EAC in the Development of Voting System Guidelines.

Congress established the EAC to ensure that voting and election administration systems “afford each registered and eligible voter an equal opportunity to vote and have that vote counted.”¹³ The Commission’s key duties are to “provide for the testing, certification, decertification and recertification of voting system hardware and software by accredited laboratories” pursuant to voting system guidelines established by the Commission and in accordance with HAVA. 42 U.S.C. §§ 15361, 15371. HAVA requires the EAC to consider TGDC recommendations in developing voting system guidelines, publish the proposed guidelines for public comment, hold public hearings about the proposed guidelines, and review the proposed guidelines with the EAC’s Board of Advisors and Standards Board and consider their comments.¹⁴

In 2005, the TGDC produced Voluntary Voting System Guidelines (VVSG), which were adopted by the EAC in 2006. The Commission published a *Federal Register* notice of a 90-day period during which the public could comment on the proposed guidelines.¹⁵ The Commission

⁷ While the proposed requirements focus on UOCAVA voters, the manual does not state that it is so limited. The notice provided by the EAC is patently inadequate to inform voters that the manual is for any type of pilot program, rather than only for UOCAVA pilot programs.

⁸ U.S. Election Assistance Commission (EAC), “Request for Substantive Comments on the EAC’s Proposed Requirements for the Testing of Pilot Voting Systems To Serve UOCAVA Voters,” 75 Fed. Reg. 16088-90 (Mar. 31, 2010) (Pilot Program Comment Notice) [Ex. C]; EAC, “Request for Substantive Comments on the EAC’s Procedural Manual for the Election Assistance Commission’s Pilot Voting System Testing and Certification Program Manual,” 75 Fed. Reg. 18189 (Apr. 9, 2010) (Program Manual Comment Notice) [Ex. D].

⁹ Eleanor Smith, Zuckerman Spaeder LLP, Letter to EAC (Apr. 15, 2010) [Ex. E].

¹⁰ EAC, “Request for Substantive Comments on the EAC’s Proposed Requirements for the Testing of Pilot Voting Systems To Serve UOCAVA Voters; Correction,” 75 Fed. Reg. 21285 (Apr. 23, 2010) [Ex. F].

¹¹ See Brian Hancock, EAC Testing and Certification Program Director, Memorandum to EAC Executive Director Tom Wilkey, “Waiver Request: Submission of Voting Systems Pilot Program Testing and Certification Manual for 15 day Public Comment Period (April 2, 2010) (Waiver Request) [Ex. G] (showing the hand-written grant by EAC Executive Director Thomas Wilkey of the waiver request to reduce the public comment period from 30 to 15 days).

¹² Waiver Request (emphasis added).

¹³ 42 U.S.C. § 15381(a)(3).

¹⁴ 42 U.S.C. § 15362.

¹⁵ EAC, “Proposed Guidance on Voluntary Voting System Guidelines,” 70 Fed. Reg. 37378 (June 29, 2005) [Ex. H].

received 6,576 comments. The Commission held three public hearings, one each in New York City, Pasadena, and Denver. The EAC's Standards Board and Board of Advisors held a two-day meeting to formulate recommendations. The EAC posted comments on its website. On April 12, 2006, the Commission published the final 2005 VVSG in the *Federal Register* and delayed the effective date until December 13, 2007. By then the TGDC had provided the Commission with recommendations for the next generation of voting system guidelines, which have since received public comment during a 120-day comment period for which the EAC provided public notice. After these comments are fully considered, a revised set of guidelines will be noticed by the EAC for public comment during a second 120-day period. In addition, the Commission is holding public hearings and receiving input both from the EAC Standards Board (which consists of 110 election officials from state and local governments) and the EAC Board of Advisors (which consists of 37 public and private community representatives).¹⁶

C. The Proposed Pilot Program Voting System Guidelines Conflict with the VVSG, Do Not Address the Special Security Risks Posed by Internet and Remote Electronic Voting Systems, and Are Unduly Influenced by the Voting Systems Industry.

The proposed pilot program certification testing requirements appear to have been developed at the behest of—and for the benefit of—Internet voting systems companies that desire the imprimatur of federal government certification for products marketed to states. Indeed, these proposals were developed by a special advisory group, the UOCAVA Working Group, created by the EAC that included representatives from two Internet voting system companies: Everyone Counts (run by Paul DeGregorio, a former EAC Chair) and Scyt1 (a foreign-based company, presumably foreign-owned, and historically financed—at least in part—by a foreign government).

Other key stakeholders, including the National Institute of Standards and Technology (NIST), the head of which chairs the TGDC, were effectively excluded from membership in the UOCAVA Working Group. This exclusion is especially striking because the Commission has declared “its long held belief that National Institute of Standards and Technology (NIST), because of its internationally recognized technical expertise in developing standards, is *essential* to the development of guidelines for UOCAVA voters.”¹⁷

Internet voting suffers from serious security and reliability vulnerabilities.¹⁸ The EAC's proposals do not address these critical vulnerabilities, which are discussed further in the next section of this letter.

¹⁶ See generally EAC, “EAC Seeks Public Comment on TGDC’s Recommended Voluntary Voting System Guidelines—Online Tool Now Available,” Press Release (Oct. 31, 2007) [Ex. I]; 42 U.S.C. § 15343.

¹⁷ Thomas R. Wilkey, EAC Executive Director, Letter to Derek B. Stewart, GAO Defense Capabilities and Management Director (May 25, 2007) (emphasis added) [Ex. J]; EAC, Meeting Webcast (Apr. 8, 2010) (EAC Meeting Webcast), available at <http://www.eac.gov/News/meetings/04-08-10-public-meeting>.

¹⁸ See, e.g., Professor Andrew Appel, Introductory Presentation, Internet Voting Debate, Fourth Annual UOCAVA Summit, Munich, Germany (Mar. 19, 2010), available at <http://www.youtube.com/watch?v=aZsR9soT3SU> (Part 1);

Through these proposals, the Commission encourages voting system manufacturers to essentially self-test “innovative” and “experimental” voting systems for certification by the Commission.¹⁹ For-profit manufacturers—rather than testing laboratories accredited under HAVA—are permitted to perform much of the certification testing. The proposed requirements authorize the voting system manufacturers to deviate from the requirements in testing for certification and to make changes to their voting systems *after* certification and *without notifying the EAC*.²⁰ The manufacturers could simply use tests performed in development of the voting system—rather than having to demonstrate that the voting systems could perform to the certification requirements once they are submitted for certification. The Commission’s role would be reduced to simply reviewing paperwork that manufacturers elect to submit for certification along with the manufacturer’s declaration that its voting system “conforms” to the certification requirements. Auditing is *post*-election and again depends upon the information provided by the manufacturer to the EAC.²¹ The Commission has declared that it will expedite certification decisions regarding test plans and test reports within five and ten business days, respectively, upon receipt of the manufacturer’s paperwork.²² There are no procedures for enforcement of the certification standards by the Commission or for EAC *de*-certification in the event of certification violations.²³

The proposed pilot certification testing requirements and manual are touted as providing expedited voting system certification at reduced costs to the voting systems manufacturers. But that is true only if they somehow replace the VVSG that set forth voting system certification testing requirements, and were at least developed under HAVA’s regulatory scheme to protect election integrity.

D. Internet and Other Remote Electronic Voting Systems Expose Elections to Unacceptable Threat of Compromise.

Today’s computer-based technology vulnerabilities allow just one person to engage in election fixing in a myriad of ways, including changing one vote to many votes (in one or many contests), and potentially across physical, geographical and other boundaries, quickly and without detection.²⁴ While insider fraud is recognized as a greater threat than external hackers,²⁵

<http://www.youtube.com/watch?v=SRqRMKCC0Ak&feature=channel> (Part 2); and

<http://www.youtube.com/watch?v=JbC5GjHoG6E&feature=channel> (Part 3).

¹⁹ EAC, Voting System Pilot Program Testing & Certification Manual (Apr. 9, 2010) (EAC Pilot Program Manual), at 1; EAC Meeting Webcast.

²⁰ EAC Proposed Requirements, Pilot Program Manual and EAC Meeting Webcast.

²¹ EAC Pilot Program Manual, at 2; EAC Meeting Webcast.

²² Brian Hancock, EAC Director of Voting System Certification, Remarks at EAC Meeting Webcast, *supra* (at approximately the 1:08 minute mark of the meeting).

²³ See, e.g., EAC Meeting Webcast.

²⁴ See, e.g., GAO Report, at 25-31; Richard Thornburgh, Richard Celeste et al., The National Academies, Letter Report on Electronic Voting to the National Science Foundation (July 20, 2006) [Ex. K]; Richard Celeste, Dick Thornburgh and Herbert Lin (eds), The National Academies, *Asking the Right Questions About Electronic Voting* (2005), available at http://www.nap.edu/catalog.php?record_id=11449. See also Greg Gordon, “Most Electronic Voting Isn’t Secure, CIA Expert Says,” McClatchy Newspapers (Mar. 24, 2009), available at <http://www.mcclatchydc.com/2009/03/24/64711/most-electronic-voting-isnt-secure.html> [Ex. L].

external hackers now have demonstrated that they can actually become insiders with access to the most secret system operations.²⁶

Insider fraud and other security risks from *non*-Internet based electronic voting have yet to be adequately addressed by the current federal testing and certification regime. Evolving technology and threats make it difficult for standards to keep up.²⁷ The vulnerabilities of these voting systems are documented in seminal reports of independent state investigations of electronic voting systems integrity, including the Ohio Secretary of State's "Project EVEREST" report²⁸ and the California Secretary of State's "Top-to-Bottom" review.²⁹ Some of these vulnerabilities have been demonstrated by voting system experts on video and are available on the Internet.³⁰

Internet voting is insecure, unreliable, and undermines the secrecy of the ballot. Internet voting security concerns in 2004 led the Pentagon to cancel Internet voting for as many as 100,000 military and overseas voters from seven states.³¹ Respected computer security experts across the country agree that the security problems associated with Internet voting would be exponentially greater than the current problems associated with electronic voting machines.³² As Ellen Theisen of the non-partisan group VotersUnite summarized in testimony last year:

²⁵ Concerns about insider fraud are shared by major independent authorities who have considered election security, including the National Election Commission, the General Accounting Office, the National Academy of Science's Committee on a Framework for Understanding Electronic Voting, and ACCURATE (ACCURATE is a multi-institution, inter-disciplinary, academic research project funded by the National Science Foundation's "CyberTrust Program"). President Jimmy Carter and James A. Baker II warned in their *Report of the Commission on Federal Election Reform* that:

The greater threat to most systems comes not from external hackers, but from insiders who have direct access to the machines. Software can be modified maliciously before being installed into individual voting machines. There is no reason to trust insiders in the election industry any more than in other industries, such as gambling, where sophisticated insider fraud has occurred despite extraordinary measures to prevent it?"

Jimmy Carter & James A. Baker, III, *Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform* (Sept. 2005), at 28 [Ex. M].

²⁶ Ellen Nakashim, "Google Hackers Duped Company Personnel to Penetrate Networks—Cyber Attacks Growing More Sophisticated, Experts Say," *Washington Post* (Apr. 21, 2010), at A15 [Ex. N].

²⁷ GAO Report, at 8 (noting the 2005 "guidelines do not comprehensively address telecommunications and networking services or their related security weaknesses, such as those related to the Internet.").

²⁸ Secretary of State, State of Ohio, *Project Everest: Evaluation and Validation of Election Related Equipment, Standards and Testing—Report of Findings* (Dec. 14, 2007) [Ex. O], available at <http://www.sos.state.oh.us/sos/upload/everest/00-SecretarysEVERESTExecutiveReport.pdf>.

²⁹ Secretary of State, State of California, "Top-to-Bottom Review" (2007) [Ex. P], available at http://www.sos.ca.gov/elections/elections_vsr.htm.

³⁰ See, e.g., Professor Andrew Appel, Princeton University Report on Sequoia (Mar. 19, 2010) (demonstrating the ease of hacking into the Sequoia voting system), available at <http://www.youtube.com/watch?v=wzZR5XZ5Cz4> (Part I); <http://www.youtube.com/watch?v=aF3aRTXis2k&feature=related> (Part II); and <http://www.youtube.com/watch?v=Auv77eqyu1s&feature=related> (Part III).

³¹ See Associated Press, "Pentagon Cancels Internet Voting Test, Too Many Concerns About Ballot Security, Officials Say," (May 17, 2004) [Ex. Q].

³² See, e.g., Verified Voting, "Computer Technologists' Statement on Internet Voting," (Sept. 11, 2008) [Ex. R], available at <http://www.verifiedvoting.org/article.php?id=5867>.

- **In 2004, a panel of experts commissioned by the U.S. Department of Defense** concluded that it was not possible to ensure the privacy, security, or accuracy of votes cast over the Internet with its current architecture. They said the attempt to provide secure, all-electronic Internet voting was “an essentially impossible task.”³³
- **In 2007, the U.S. Government Accountability Office (GAO)** found that email and Internet voting is “most vulnerable to privacy and security compromises than conventional methods now in use” and that “available safeguards may not adequately reduce the risks of compromise.”
- **In 2008, the National Institute of Standards and Technology (NIST)** found that the “[t]echnology that is widely deployed today is not able to mitigate many of the threats to casting ballots via the web.”
- **In 2008, thirty leading computer science experts and professors at major universities** signed a statement asserting that until “serious, potentially insurmountable technical challenges” are overcome, permitting the Internet to be used for public elections “is an extraordinary and unnecessary risk to democracy.”³⁴

These concerns are not academic. In March 2010, Internet hackers attacked the computerized system used to transmit votes in the Colombian election.³⁵

More generally, Internet-based computer hacking and cyber warfare are now commonly understood national security threats. Recent reports revealed penetrations of the DOD and Federal Aviation Administration computer systems, as well as Google security, such that Google’s security source codes could have been compromised,³⁶ possibly by the Chinese

³³ With respect to the SERVE Internet Voting Program, the Congressional Research Service has observed: The FVAP administered an experimental Internet voting program, the Secure Electronic Registration and Voting Experiment (SERVE), for military and overseas citizens in the November 2000 election. Those eligible to cast ballots via the Internet were voters whose legal residence was in one of fourteen participating counties in Florida, South Carolina, Texas, and Utah. The pilot project was limited to a total of 350 voters, of whom 84 cast absentee ballots over the Internet. The FVAP issued a June 2001 report evaluating the program. An expanded version was in place in seven states for the 2004 elections, but it was cancelled after a report reviewing the program raised Internet security concerns. Among other conclusions, the report noted that because fundamental vulnerabilities exist with Internet voting, a successful cyber attack on the SERVE program could undermine the November election.

Kevin J. Coleman, “The Uniformed and Overseas Citizens Absentee Voting Act: Overview and Issues,” Congressional Research Service, CRS Report for Congress, No. RS20764 (Nov. 4, 2009) [Ex. S].

³⁴ Ellen Theisen, Testimony Before the U.S. House of Representatives on House Bill 1624 (Feb. 6, 2009) [Ex. T], available at <http://www.votersunite.org/Info/WATestimonyET.pdf>.

³⁵ Agence France Presse, “Hackers Attacked Colombian Vote Count,” (Mar. 17, 2010) [Ex. U].

³⁶ See, e.g., Julian Barnes, “Pentagon Computer Networks Attacked, the Cyber Strike on Key Sites is Thought to be from Inside Russia,” *LA Times* (Nov. 28, 2008) [Ex. V]; Siobhan Gorman, “FBI Suspects Terrorists Are Exploring Cyber Attacks,” *Wall Street Journal* (Nov. 18, 2009) [Ex. W]; John Markoff, “Hackers Said to Breach Google Password System,” *New York Times* (Apr. 20, 2010) [Ex. X].

government.³⁷ And official reports document a growing threat and incidence of cyber warfare.³⁸ Now Congress is considering the nomination of the first head of the new U.S. military cyber command.³⁹ A fundamental way to undermine the national security of our democracy would be to put into elected office persons who are not the choice of U.S. voters.

E. The Involvement of Scytl Raises National Security Concerns.

Foreign governments may also seek to undermine the national security interests of the United States, either directly or through other organizations. Not long ago the Committee on Foreign Investment in the United States investigated Venezuelan-based Smartmatic to determine whether the Venezuelan government owned or controlled Sequoia Voting Systems. Smartmatic is reported to have divested itself of Sequoia Voting Systems after this investigation was underway.⁴⁰

Now Scytl, which has been associated with the Spanish government, is represented on the UOCAVA Working Group. Scytl was apparently founded in 2001 as a spin-off from a research group at the Universitat Autònoma de Barcelona and was (and may still be) partially funded by the Spanish government's Ministry of Science and Technology. Scytl's headquarters is in Barcelona (Spain) although Scytl also has offices in Washington, D.C., Singapore, Bratislava (Slovak Republic) and Athens (Greece).⁴¹ Voter Action has not been able to determine the identity of Scytl's ultimate owner(s) and controller(s) from publicly available information.

³⁷ Shane Harris, "China's Cyber-Militia—Chinese Hackers Pose a Clear and Present Danger to U.S. Government and Private-Sector Computer Networks and May Be Responsible for Two Major U.S. Power Blackouts," *National Journal* (May 31, 2008) [Ex. Y], Jason Fritz, "How China Will Use Cyber Warfare to Leapfrog in Military Competitiveness," 8 *Culture Mandala* 28 (2008) [Ex. Z].

³⁸ Hilton Collins, "2010 Cyber-Threat Forecast Sees Hacks Growing in Sophistication and Reach," *Government Technology* (Dec. 31, 2009) [Ex. AA]; GAO, *Information Security: Concerted Response Needed to Resolve Persistent Weaknesses*, GAO Report 10-536T (Mar. 24, 2010) [Ex. BB]; GAO, *Information Security: Cyber Threats and Vulnerabilities Place Federal Systems at Risk*, GAO Report 09-661T (May 5, 2009) [Ex. CC]; GAO, *Cybersecurity: Progress Made but Challenges Remain in Defining and Coordinating the Comprehensive National Initiative*, GAO Report 10-338 (Mar. 5, 2010) [Ex. DD]; Dan Elliott, "USAF Adds Cyber Training for Recruits and Officers," Associated Press (April 12, 2010) (reporting that the Air Force will train all new recruits in the basics of cyberwarfare and add more advanced schooling for others to help combat the growing threat of attacks on U.S. computer networks.) [Ex. EE].

³⁹ Lolita C. Baldor, "Senate Stalls Cyber Commander to Probe Digital War," Associated Press (Apr. 12, 2010) [Ex. FF].

⁴⁰ See Bob Davis, "Smartmatic to Shed U.S. Unit, End Probe Into Venezuelan Links," *Wall Street Journal* (Dec. 22, 2006), at A6 [Ex. GG]; Sequoia Voting Systems, "U.S. Voting Technology Leader Sequoia Voting System Announces New Corporation Ownership," Press Release (Nov. 8, 2007) [Ex. HH]. See also Richard Brand & Alfonso Chardy, "Venezuela Owns Stake in Ballots," *The Miami Herald* (May 28, 2004), at 1 [Ex. II] (reporting investment in Smartmatic associated with Venezuelan government and use of Smartmatic voting systems in controversial 2004 recall election won by Venezuelan President Hugo Chavez).

⁴¹ See generally Scytl company website, available at http://www.scytl.com/subcategoria_ing_8_16.htm.

In 2008, the Florida Department of State commissioned a review of Scytl's remote voting software (Pnyx.core ODBP 1.0) and concluded, in part, that:

- The system is vulnerable to attack from insiders.⁴²
- In a worst case scenario, the software could lead to (1) voters being unable to cast votes; (2) an election that does not accurately reflect the will of the voters; and (3) possible disclosure of confidential information, such as the votes cast by individual voters.⁴³
- The system may be subject to attacks that could compromise the integrity of the votes cast.⁴⁴

II. The EAC Failed to Comply with HAVA, UOCAVA and FACA in Establishing the "UOCAVA Working Group" and Utilizing Its Advice.

Congress enacted FACA to protect against undue influence by special interest groups over government decision-making and duplication of effort by advisory committees. *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 451 (1989); 5 U.S.C. App. II et seq. FACA defines an advisory committee as:

any committee, board, commission, council, conference, panel, task force, or other similar groups, or any subcommittee or other subgroup thereof . . . , which is (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the federal government.

5 U.S.C. App. II § 3(2).

FACA requires that a group established or utilized by federal agencies to obtain advice or recommendations must (1) be chartered before it takes action, (2) provide appropriate notice of meetings in advance, (3) permit public participation, (4) provide access to records and transcripts, and (5) provide a fair balance of views represented.⁴⁵ An agency creating an advisory committee must take measures to avoid undue influence by a special interest over the advisory committee's activities.⁴⁶

⁴² Michael Clarkson et al., *Software Review and Security Analysis of Scytl Remote Voting Software* (Sept. 19, 2008) (Scytl Report), at 34-36, available at <http://www.eecs.berkeley.edu/~daw/papers/scytl-odbp.pdf>.

⁴³ Scytl Report, at 4.

⁴⁴ Scytl Report, at 63.

⁴⁵ 5 U.S.C. App. II, §§ 9(c), 10(a)(2), 10(a)(1), 10(b), and 5(b).

⁴⁶ 5 U.S.C. § 5(3).

The EAC is familiar with the requirements of FACA. The TGDC is a federal advisory committee required by HAVA⁴⁷ and was chartered by the EAC most recently in August 2008.⁴⁸ The TGDC's statutory objective and duty is to assist the EAC with the development of voluntary voting system guidelines.⁴⁹ The TGDC chair is the Director of the National Institute of Standards and Technology. The TGDC must include representatives from the EAC Standards Board, Access Board and Board of Advisors, as well as representatives of the American National Standards Institute, the Institute of Electrical and Electronics Engineers and the National Association of State Election Directors. Moreover, "[u]nder the Help America Vote Act, the National Institute of Standards and Technology will provide technical assistance to the Commission."⁵⁰

At its first meeting on July 9, 2004, the TGDC announced the FACA ground rules, including the following ethics requirements:

- Members who serve in an individual, expert capacity are Special Government Employees (SGEs) under 18 U.S.C. § 208, and are subject to Federal conflict of interest statutes and rules. As such, they are prohibited from participating in particular matters that may have a direct and predictable effect on their financial interests or on those of a spouse, minor child, or general partner.
- SGEs also may not be Registered Agents under the Foreign Agents Registration Act, 22 U.S.C. § 611 et seq. The responsibility for determining whether any particular member is required to register as a foreign agent under this statute lies with the individual and not the Commission.
- Members who serve in a representative capacity are not subject to the conflict of interest statutes, but must still adhere to rules designed to prevent using a public position for private gain, including abuse of Government affiliation, resources, and information.
- Advice on standards of conduct matters for both SGEs and representatives will be provided by the EAC.⁵¹

In addition, the deliberative process of the TGDC is to be open to the public, as required by FACA:

- The Committee shall not act in the absence of a quorum (defined as a simple majority of the members of the Committee not having a conflict of interest in the matter being

⁴⁷ 42 U.S.C. § 15361; EAC Technical Guidelines Development Committee, "The Technical Guidelines Development Committee," Memorandum (July 9, 2004) (TGDC FACA Memorandum" [Ex. JJ].

⁴⁸ EAC Technical Guidelines Development Committee, "Charter of the U.S. Election Assistance Commission Technical Guidelines Development Committee" (Aug. 12, 2008) [Ex. KK].

⁴⁹ "The Committee's advisory duties are determined by statute which provides that the general purpose of the Committee is to assist the Executive Director of the Election Assistance Commission in the development of voluntary voting system guidelines." TGDC FACA Memorandum.

⁵⁰ TGDC FACA Memorandum.

⁵¹ TGDC FACA Memorandum.

considered by the Committee, except that, if the number of members on the Committee is even, half will suffice).

- All Committee meetings must be called by a Federal officer or employee (usually the Designated Federal Officer), announced to the public in advance, and be open to the public. While limited exceptions to the open meeting requirement exist, they must be based on applicable law. Closed meetings must be approved in advance by the Election Assistance Commission.
- Meetings should allow a reasonable opportunity for public comments. The public may also file written statements with the Committee at any time.
- All materials made available to the Committee, prepared for the Committee, or prepared by members of the Committee, as well as minutes and transcripts of meetings, will be available to the public in a reading room format. . . .⁵²

Through providing public notice, open meetings and access to its working documents, the TGDC has developed voting system guidelines used by the EAC to certify voting systems for use in federal elections.⁵³ The Committee's recommendations were the basis for the 2005 VVSG.⁵⁴ The Committee has since recommended changes to these standards and the Commission has proposed new VVSG for public comment.⁵⁵

In December 2009, the EAC "directed" the TGDC to develop best practices and standards for electronic voting system pilot programs for uniformed and overseas citizen absentee voting.⁵⁶ The EAC directive stems from federal law regarding the development of pilot programs by the DOD for absentee voting by uniformed and overseas citizens.⁵⁷ As explained by the EAC:

[T]he Military and Overseas Voters Empowerment Act contains a provision allowing the Secretary of Defense to establish one or more pilot programs to test the feasibility of new election technology for UOCAVA voters. This provision requires the EAC and NIST to provide best practices or standards to support these pilot programs 'in accordance with electronic absentee voting guidelines established under' the earlier FY2005 NDAA [Defense Authorization Act for

⁵² TGDC FACA Memorandum; *see also* EAC, "TGDC Meeting Announcements," available at <http://www.eac.gov/about/committees/tgdc/meeting-announcements/>.

⁵³ *See* TGDC, "TGDC Meetings and Output," available at <http://vote.nist.gov/PublicHearingsandMeetings.html>.

⁵⁴ EAC, *Voluntary Voting System Guidelines Version I—Initial Report*, at 1 (May 9, 2005) (VVSG), reprinted at <http://vote.nist.gov/VVSGVol1&2.pdf>.

⁵⁵ *See, e.g.*, EAC, "Proposed Guidance on Voluntary Voting System Guidelines," 72 Fed. Reg. 62639-2640 (Nov. 6, 2007) [Ex. LL].

⁵⁶ EAC Proposed Requirements, at 8. The MOVE Act is Subtitle H of Title V of the 2010 National Defense Authorization Act, P.L. 111-84, 12 Stat. 2334 (Oct. 29, 2009).

⁵⁷ 42 U.S.C. § 1973ff-7(e)(1). Section 1973ff-7(e)(1) provides that "The Election Assistance Commission and the National Institute of Standards and Technology shall provide the Presidential designee [DOD] with best practices or standards in accordance with electronic absentee voting guidelines established under [the FY 2005 NDAA]".

fiscal year 2005.] In December 2009, the EAC directed the TGDC to begin this work as a top research priority. The EAC expects this work to result in the comprehensive set of remote electronic voting system guidelines as mandated by the FY2005 NDAA.

EAC, Proposed Uniformed and Overseas Citizens Absentee Voting Act Pilot Program Testing Requirements (March 24, 2010), at 8 (EAC Proposed Requirements). In UOCAVA, Congress provided that “the design and conduct of a pilot program . . . shall not conflict with or substitute for existing laws, regulations, or procedures with respect to the participation of absent uniformed services voters and military voters in elections for Federal Office.”⁵⁸ Meanwhile:

[I]n July 2009, the EAC convened a UOCAVA Working Group to consider how to adapt the EAC’s Testing and Certification Program to accommodate UOCAVA pilot systems. It was concluded that two products were needed: a modified set of system testing requirements; and a revised testing and certification process. It was determined that the working group would assist the EAC in drafting the testing requirements and the EAC staff would adapt the certification process to accommodate the UOCAVA pilot program Since many different types of remote voting systems could be submitted to the EAC certification program, the EAC Working Group defined generic system requirements to provide for system design flexibility.”

EAC Proposed Requirements, at 7.

On April 9, 2010, the EAC revealed that the UOCAVA working group includes representatives of two privately-held Internet voting system companies, Everyone Counts (run by former EAC Chairman Paul DeGregorio) and Scytl (a company partially funded by the Spanish government). Excluded from this working group are representatives from the EAC Standards Board and Access Board, American National Standards Institute, and the Institute of Electrical and Electronics Engineers.⁵⁹ According to testimony at UOCAVA’s April meeting, the main goals of the Working Group appear to have been to shorten the time frame for voting system certification from eight months to less than six weeks, and to reduce the certification costs to voting system companies from \$800,000 to less than \$500,000.⁶⁰

The EAC usurped from the TGCD its statutorily mandated task to develop the voting system certification requirements and manual to be used in pilot programs and gifted that essential task to the UOCAVA Working Group. In doing so, the EAC has eliminated the essential checks and balances established by Congress in HAVA, particularly with respect to advice to the EAC in developing voting system guidelines. In addition, the EAC has excluded the DOD from DOD’s statutorily authorized role in UOCAVA pilot programs. The EAC is

⁵⁸ 42 U.S.C § 1973ff-7(2)(B).

⁵⁹ EAC Meeting Webcast.

⁶⁰ EAC Meeting Webcast.

therefore in violation of substantive federal law as it relates to the development of voting system standards for uniformed and overseas citizen absentee voting.⁶¹

The EAC has failed to comply with FACA in the process of developing these unauthorized voting system certification requirements and manual. The EAC established the UOCAVA Working Group to obtain advice from the working group as to the development of pilot program voting system certification testing requirements and manual. The EAC utilized the advice of the working group in proposing these requirements and manual. In light of the facts discussed above, the UOCAVA Working Group is an advisory committee subject to FACA. Yet the EAC failed to charter the UOCAVA Working Group as an advisory committee. In violation of FACA, it also failed to provide adequate notice in advance of each UOCAVA Working Group meeting, open each meeting to the public, and permit the public to participate, as required by FACA. Furthermore in switching to advice from the UOCAVA Working Group, the EAC removed the independent technical expertise required for and found in the TGDC and replaced it with representatives of special interests, namely the Internet voting system industry. For this reason, the UOCAVA Working Group is not fairly balanced in terms of views represented. The UOCAVA Working Group is also unfairly balanced in terms of views represented because voters are stakeholders and they are not represented on the UOCAVA Working Group.

Moreover, no ethical safeguards applicable to the TGDC and its non-governmental members were apparently applied to this working group. And, it appears that the UOCAVA Working Group was victim to undue influence from special interests, namely the Internet voting system companies.⁶² The proposed requirements do not address the new and challenging security risks posed by the use of Internet and other remote electronic voting systems. Rather, these proposed requirements do no more than “adapt” existing voting systems certification testing guidelines.⁶³ Worse still, the EAC took the advice of the working group and proposed relaxed certification testing requirements that depend entirely upon trust that the voting system manufacturers are conforming to testing and certification requirements. These weak

⁶¹ The APA provides for judicial review of agency action that is arbitrary and capricious or otherwise violates constitutional or statutory law. *See* 5 U.S.C. § 706.

⁶² EAC employees are subject to executive branch conflicts of interest and other ethics rules. *See* 11 C.F.R. § 9411.1. The EAC proposed working group policy noticed in the Federal Register on January 9, 2009, does not extend these protections to working group participants. *See* 74 Fed. Reg. 896. This proposed working group policy directs the EAC Executive Director to develop procedures regarding the use, make-up, administration and product of working groups, and directs that EAC working groups “must include a fairly balanced membership. Members of the working group should represent a cross-section of the election or other communities that are directly affected by the topic and academics and/or technical experts who are uniquely qualified as appropriate to the nature and functions of the working group.” *Id.* The proposed policy further provides that “any working group established by the EAC must be provided a clear focus in the form of a written agenda or group mandate. . . and the EAC shall capture the opinions . . . expressed by the working group and make that information available to the Commissioners [and] the public.” *Id.*

⁶³ EAC Proposed Requirements at 7, available at http://www.eac.gov/News/program-areas/voting-systems/docs/requirements-03-24-10-uocava-pilot-program/attachment_download/file (proposed requirements “adapt the EAC’s Testing and Certification Program to accommodate UOCAVA pilot systems;” UOCAVA Working Group would recommend “a *modified* set of system testing requirements” for a “*revised* testing and certification process.”); *see also* Waiver Request, *supra* (explaining that much of the manual is taken from already approved EAC manuals and there is very little new material).

requirements, which are inconstant to VVSG, clearly benefit Everyone Counts and Scytl, both privately-held, for-profit Internet voting system companies.⁶⁴ Indeed, the only purpose served by these requirements is to provide voting system manufacturers with a federal seal of approval for remote voting systems to be sold to states *before* the TGDC develops the remote voting system guidelines sought by Congress.⁶⁵

For each of these separate and independent reasons, the working group is an advisory committee that is subject to FACA and is not in compliance with HAVA and UOCAVA. Because the EAC did not comply with HAVA, UOCAVA and FACA in the establishment or utilization of the working group, its advice cannot be relied upon by the EAC. *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1516-1517 (D.D.C. 1983); *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994). Accordingly, the proposed requirements and manual should be withdrawn from consideration.

III. HAVA and the APA Require Notice and Comment Rulemaking for the Proposed Pilot Program Voting System Certification Testing Requirements and Manual.

The UOCAVA certification testing requirements and manual proposed by the EAC are subject to the notice and comment requirements of HAVA, 42 U.S.C. § 15321 *et seq.*, and the APA, 5 U.S.C. § 551 *et seq.* The Commission has failed to meet these requirements, as explained below.

A. HAVA Explicitly Requires Public Comment and Participation.

The proposed certification testing requirements and manual would be modifications of voting system guidelines, and are thus subject to HAVA's provisions for notice and comment, public hearing and other public scrutiny of proposed voting system guidelines.⁶⁶ The process by which the Commission must adopt voting system guidelines is set forth in Section 222 of HAVA, which provides the "[g]eneral requirement for notice and comment" that;

... adoption of the voluntary voting system guidelines (*or modification of such a guideline*) shall be carried out by the Commission in a manner that provides for each of the following:

- (1) Publication of notice of the proposed guidelines in the Federal Register.
- (2) An opportunity for public comment on the proposed guidelines.
- (3) An opportunity for a public hearing on the record.

⁶⁴ EAC Meeting Webcast.

⁶⁵ Waiver Request (the EAC has proposed the pilot program certification testing manual so that UOCAVA pilot voting systems can be EAC certified "in time to allow them to be used in the 2010 general election *should a manufacturer desire to do so*") (emphasis added).

⁶⁶ 42 U.S.C. § 15362.

(4) Publication of the final guidelines in the Federal Register.

42 U.S.C. § 15362(a) (emphasis added). This section of HAVA further provides that the Executive Director of the Commission shall submit guidelines and “*any modifications to such guidelines*” to the Executive Board of the Standards Board, “which shall review the guidelines (*or modifications*) and forward its recommendations to the Standards Board. 42 U.S.C. §§ 15362(b)(2) and (3) (emphasis added).

Both the Board of Advisors and the Standards Board are statutorily required to submit comments and recommendations regarding the guidelines (*or modifications*) to the Commission. 42 U.S.C. § 15362(c) (emphasis added). In adopting guidelines or modifications thereof, the Commission must take into account the comments and recommendations of these boards and the Technical Guidelines Development Committee. 42 U.S.C. §§ 15362 (b)(1) and (d)(1). In addition, the Commission may not vote on the final adoption of a guideline or modification thereof “until the expiration of the 90-day period which begins on the date the Executive Director of the Commission submits the proposed guidelines (*or modifications*) to the Board of Advisors and the Standards Board” as required by this section of HAVA. 42 U.S.C. § 15362(d)(2) (emphasis added).

Here, the proposed certification testing requirements and manual exempt voting systems for use in pilot programs from the already adopted VVSG.⁶⁷ The proposed testing requirements would be used instead of the National Certification Testing Guidelines of the 2005 VVSG.⁶⁸ Thus, the testing requirements would be modifications to the VVSG subject to the statutory procedures outlined above.⁶⁹ For this reason alone, the proposed pilot program voting system testing and certification requirements if adopted by the Commission would be *ultra vires*.

B. The Commission Has Not Complied with the Notice and Comment Requirements of the APA.

Adopting the testing requirements and manual would also violate the notice and comment procedures of the APA. These requirements ensure that the public is aware of and has a meaningful opportunity to be heard with respect to a proposed agency rule. A “rule” is broadly defined by the APA to include “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. § 551(4). A “rule making” means agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5).

The APA sets forth the statutory requirements for notice and comment rulemaking. These requirements include that “[g]eneral notice of proposed rulemaking shall be published in the Federal Register,” which notice shall include “(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is

⁶⁷ See VVSG, *supra*.

⁶⁸ See generally Pilot Program Comment Notice, *supra* [Ex. C], Program Manual Comment Notice, *supra* [Ex. D]; EAC, *Voting System Pilot Testing & Certification Manual* (n.d.) (EAC Proposed Manual).

⁶⁹ See also *supra* note 63.

proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁷⁰ Once proper notice is given, “the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, view, or arguments”⁷¹ Public comments are then to be taken into account by the agency in its consideration of the final rule, including whether the rule is appropriate.⁷²

Notice and comment under the APA is required for any rules that “grant rights, impose obligations, or produce other significant effects on private interests.” *National Ass’n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1285 (D.C. Cir. 2005) (internal citation and quotations omitted) (nationwide discharge permits issued by Army Corps of Engineers under Clean Water Act were legislative rules subject to APA procedures); *see also Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 123 (D.D.C. 2008) (rule promulgated by the Department of Housing and Urban Development regarding housing projects’ eligibility for restructuring of mortgage debt subject to notice-and-comment procedures). Similarly, the Court of Appeals for the Federal Circuit held that a “Dear Manufacturer” letter setting forth rebate requirements for drug companies participating in a government health plan was subject to notice and comment procedures, because it “change[d] existing law and affect[ed] individual obligations.” *Coalition for Common Sense in Government Procurement v. Sec. of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006).

Rules that repeal existing rules must also abide by APA notice and comment rulemaking requirements. *Paralyzed Veterans of America v. West*, 138 F.3d 1434, 1435 (Fed. Cir. 1998). The proposed testing requirements and manual easily meet the definition of a rule subject to notice and comment under the APA since they seek to repeal the certification testing requirements of the VVSG with respect to voting systems to be used in pilot programs for uniformed and overseas citizens voting absentee. As explained below, the Commission’s statements to the contrary in the *Federal Register* for both the testing requirements and manual are incorrect.⁷³

Only “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” are exempted from APA rulemaking notice and comment requirements.⁷⁴ As exceptions to a general rule, these exceptions to APA notice and comment requirements for rulemaking must be construed narrowly.⁷⁵

⁷⁰ 5 U.S.C. § 553(b).

⁷¹ 5 U.S.C. § 553 (c).

⁷² 5 U.S.C. § 553(c); *Louisiana Federal Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003).

⁷³ *See* Pilot Program Comment Notice, *supra* [Ex. C], Program Manual Comment Notice, *supra* [Ex. D].

⁷⁴ 5 U.S.C. § 553(b)(3)(A). The agency may also avoid the notice and comment procedures if it finds—and states in the public record—“good cause” that notice and public procedure is “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). The Commission has published no such “good cause” here, and none exists. *See discussion infra*.

⁷⁵ *Steinhorst Assocs. v. Preston*, 572 F. Supp.2d 112, 119 (D.D.C. 2008).

1. The Proposed Voting System Certification Testing Requirements and Manual Are Not Interpretive Rules.

In *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 112 (D.C. Cir. 1993), the D.C. Circuit listed four factors that determine whether an agency rule is “legislative” or interpretive for the purposes of the notice and comment provisions of the APA: (1) whether, in the absence of the rule, there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If any one of these factors is met, the rule is legislative and not interpretive.⁷⁶

The proposed certification testing requirements and manual clearly meet the first, third and fourth requirements. Section 1.2 of the manual states that under HAVA the Commission “has the sole authority to grant certification or withdraw certification at the Federal level, including the authority to grant, maintain, extend, suspend, and withdraw the right to retain or use any certificates, marks or other indicators of certification.”⁷⁷ HAVA itself does not set forth the requirements for certification, but delegates to the Commission the authority to “provide for the testing, certification, decertification and recertification of voting system hardware and software by accredited laboratories.”⁷⁸ In the absence of the certification testing requirements and manual, the Commission could not “confer [the] benefit” of certification or “ensure the performance of” the system requirements. Accordingly, the first *American Mining Congress* factor is met.

Because the Commission specifically refers to the authority granted it by HAVA to certify and decertify voting systems, the third requirement is also met. And, as previously discussed, the pilot program certification requirements would in effect repeal the VVSG for voting systems used in pilot programs. For each of these separate and independent reasons the proposed rules are not interpretive.

2. The Proposed Voting System Certification Testing Requirements and Manual Are Not Policy Statements.

The proposed certification testing requirements and related manual set forth mandatory procedures for the certification process, so they are not mere statements of policy. “The primary distinction between a substantive rule ... and a general statement of policy ... turns on whether an agency intends to bind itself to a particular legal position.” *Syncor International Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). The use of “mandatory, definitive language is a powerful, even potentially dispositive factor” in determining if a rule is substantive as opposed to

⁷⁶ *Steinhorst Assocs.*, 572 F. Supp.2d at 119. In later cases, the D.C. Circuit has indicated that publication of a rule in the Code of Federal Regulations represents only a “snippet of evidence of agency intent.” *Id.* at 124 (quoting *Health Ins. Ass’n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994)).

⁷⁷ EAC Proposed Manual, *supra*.

⁷⁸ EAC Proposed Manual, *supra*, at § 231(a)(1).

a mere policy statement. *Wilderness Society v. Norton*, No. Civ. A. 03-64 RMC, 2005 WL 3294006, at *11 (D.D.C. Jan. 10, 2005) (internal citation omitted).

The proposed certification testing requirements and manual provide for an appeals procedure if certification is denied (*see* Manual § 5), clearly indicating that the Commission intends to be bound by its pilot program certification rules. These proposed rules also employ mandatory language. *See, e.g.*, Testing Requirements § 1.3.1 (“This document defines requirements for conformance of remote electronic voting systems ... that manufacturers ... *shall* meet”) (emphasis added). The proposed testing requirements and manual are therefore substantive rules not policy statements.

3. The Proposed Voting System Certification Testing Requirements and Manual Are not Procedural Rules.

Nor are the proposed certification testing requirements and manual mere procedural rules, because they “encode substantive value judgments” concerning the requirements for electronic absentee voting. In *National Association of Waterfront Employers v. Chao*, 587 F. Supp. 2d 90, 101 (D.D.C. 2008), the court held that an Administrative Law Judge’s adoption of an “anonymous claimant rule” in cases involving claims under the Longshore and Harbor Workers’ Compensation Act and Black Lung Benefits Act was substantive, not procedural. The court reasoned that by instituting the rule, “the Chief ALJ made a value judgment – he determined that in all claims for benefits under the Longshore Act and the Black Lung Act, the claimant’s privacy interest trumped the right to public access to administrative decisions and orders posted on the Internet.”

The testing requirements and manual set forth numerous value judgments concerning the requirements for an electronic absentee ballot system and for ensuring that approved systems meet these requirements. *See, e.g.*, Testing Requirements §§ 2.1 (“Accuracy”); 3 (“Usability”); 5 (“Security”); Manual § 6 (“Monitoring and Reporting”). These value judgments in turn implicate voters’ constitutional rights. *See Zessar v. Helander*, No. 05 C 1917 2006 WL 642646, *5 (N.D. Ill. Mar. 13, 2006) (“The right to vote by absentee ballot is not, in and of itself, a fundamental right. But once the State permits voters to vote absentee, it must afford appropriate due process protections...”); *see also Raetzl v. Parks / Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

Accordingly, the notice and comment requirements of the APA apply to the proposed voting system certification testing requirements and manual. Under the APA, the 15 day periods offered by the Commission to comment on these proposals—one 15 day period for the manual and two consecutive 15 day periods for the requirements—are each unreasonably short.

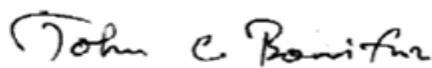
The appropriateness and adequacy of the 15 day period of public comment should be considered in light of the public comment periods provided by the Commission in the past for the adoption and modification of voting system guidelines. As previously discussed, in originally adopting the voting system guidelines, the Commission published notice in the *Federal Register* of a 90-day comment period. For the first proposed modifications to the voting system

guidelines since their adoption by the Commission, the Commission has committed to two separate public comment periods of 120-days. In this context, it is unreasonable for the Commission to provide public comment periods of only 15 days for the proposed testing requirements and manual.⁷⁹

Executive Order 12866⁸⁰ recognizes that, under ordinary circumstances, *at least* a 60-day comment period is appropriate. Given the importance of establishing and maintaining federal minimum standards for voting systems to be used in federal elections, the period of time for the public to comment traditionally has been considerably longer. Moreover, these proposals simultaneously seek to eliminate requirements in the VVSG and to employ these weakened guidelines to “experimental” voting systems under circumstances in which the security risks to election integrity are greatest. They also are directed at U.S. citizens who are the least likely to obtain prompt notice of the opportunity to comment—those citizens living abroad and in the uniformed service, including those serving our country half-way around the world in war zones.

For all of these and other reasons, the Commission should withdraw the proposed pilot program voting system certification testing requirements and manual from consideration. Voter Action appreciates the Commission’s consideration of these objections.

Sincerely,



John C. Bonifaz,
Legal Director, Voter Action

Enclosures

⁷⁹ On April 23, 2010, the Commission published in the Federal Register notice that it had erroneously published notice of the period to comment on the pilot program certification testing requirements as 15 days since the Commission had itself voted for a 30-day period. *See* 75 Fed. Reg. 21285 (Apr. 23, 2010). *See also* “Tally Vote Matter” sheets of EAC Commissioners (and EAC Chair Donetta Davison’s certification regarding same) approving March 30, 2010 6:00 pm deadline for 30-day public comment period for pilot program certification testing requirements [Ex. MM]. This is not harmless error as a second very short comment period precludes as did the first very short comment period actionable notice to would be commenters, denies thorough comments and puts those who submitted comments in haste to meet the 15 day deadline in the position of revealing their deliberative process should they now submit revised comments. For the proposed manual, the Executive Director of the Commission issued a waiver from the Commission’s own 30-day notice requirement for public comment. The waiver states that “the reason for the shortened public comment period is to allow for the UOCAVA pilot [voting] systems to be submitted under the [EAC pilot certification] program in time to allow them to be [EAC certified and] used in the 2010 general election *should a manufacturer desire to do so*. In addition, because much of the manual is taken from already approved EAC manuals there is very little new material to review for comment.” Waiver Request, *supra* (emphasis added). Ignoring the effect of omissions from rules establishing minimum voting system standards and trying to convenience voting machine manufacturers are not a valid reasons to abridge public comment under the APA or otherwise.

⁸⁰ Executive Order 12866 § 6(a) (Sept. 30, 1993); 58 Fed. Reg. 51735.

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