

**Minutes of the Public Meeting**  
**United States Election Assistance Commission**

1225 New York Avenue, NW  
Suite 150  
Washington, DC 20005

The following are the Minutes of the Public Meeting of the United States Election Assistance Commission (“EAC”) held on September 6, 2007. The meeting convened at 10:00 a.m. EDT. The meeting was adjourned at 3:45 p.m. EDT.

**PUBLIC MEETING**

**Call to Order:**

Chairwoman Donetta Davidson called the meeting to order at 10:00 a.m.

**Pledge of Allegiance:**

Chairwoman Davidson led all present in the recitation of the Pledge of Allegiance.

**Roll Call**

EAC Commissioners

EAC General Counsel Julie Hodgkins called roll of the members of the Commission and found present: Chairwoman Donetta Davidson, Vice Chair Rosemary Rodriguez, Commissioner Caroline Hunter, and Commissioner Gracia Hillman. Four members were present for a quorum.

Senior Staff

Executive Director Thomas Wilkey and General Counsel Juliet Hodgkin’s

**Adoption of the Agenda**

Vice Chair Rodriguez moved to adopt the agenda. Commissioner Hillman seconded the motion. The motion carried unanimously.

**Welcoming remarks by Chairwoman Donetta Davidson.**

**Approval of the minutes from the previous meetings**

The Chair opened up the floor for any corrections to the June 14th and July 19<sup>th</sup> minutes. Commissioner Hillman motion called for a motion to approve the minutes. Vice Chair Rodriguez seconded. Motions passed unanimously.

## EAC Activities Report by the Executive Director (Thomas R. Wilkey)

### Voting System Certification Program

EAC has registered ten voting system manufacturers for its Testing and Certification Program. Seven voting systems have been submitted for testing. One system has been suspended and one system is pending. EAC issued two notices of noncompliance. AVS was notified of a discrepancy regarding a motherboard. EAC is awaiting their response. ES& S was notified of the requirements to report all manufacturing and assembly facilities. They complied with the request. Three notices of clarifications:

NOC 07-001-Timely submission of certification application

NOC 07-002-EAC certified labs doing work outside of voting system certification engagements.

NOC 07-003-State testing done in conjunction with federal testing.

All of the information is available at [www.eac.gov](http://www.eac.gov). Click on the Testing and Certification link.

### Voting System Testing Labs

EAC has certified three laboratories:

SysTest

iBeta Quality Assurance

InfoGard Laboratories

Visit [www.eac.gov](http://www.eac.gov) for more information about these labs.

### Voluntary Voting System

EAC received the draft from the Technical Guidelines Development Committee. Press release will be sent to everyone on our email list.

EAC will publish a public comment feature on [www.eac.gov](http://www.eac.gov) within the next two weeks. The public will have 120 days to comment. Additionally, it will be published in the Federal Register. After the public comment period ends, EAC will consider all comments, and then publish an EAC draft version. EAC plans to have several hearings about the VVSG and hopes to receive a wide range of input. At the end of the process, EAC will adopt a final version and distribute all of these details for moving forward when the TDGC version is posted.

### Election Management Guidelines

EAC has issued the first three chapters of its Election Management Guidelines. They are available at [www.eac.gov](http://www.eac.gov).

Certification

System security

Physical security

A new Quick Start Guide about voting system has also been issued and distributed to election officials throughout the country and also available at [www.eac.gov](http://www.eac.gov). and at the front desk.

#### Office of Inspector General

Responsible for reviewing audits of HAVA funding at the state level. IG continues to review circumstances surrounding EAC research projects, fraud, and voter intimidation. EAC is hopeful that the IG will distribute findings as soon as the review is completed.

#### Poll Worker Best Practices

EAC adopted two guidebooks to assist in addressing the challenges election officials face finding and keeping good poll workers. Both are available on our website and will be distributed to election officials throughout the country.

#### Effective Election Design

EAC adopted a set of best practices for effective election designs:

- Ballots (op-scan and touch screen)

- Voter information signs

EAC is working to have all of these materials posted on our website and burning more CD's for distribution to election officials. EAC will notify as soon as all of the info is available.

#### EAC Information Updates

EAC distributes a monthly electronic newsletter that provides updates on our activities, upcoming meetings, and other HAVA-related issues. The best way to receive the frequent updates is to sign up by calling 866-747-1741 or send an email to [HAVAinfo@eac.gov](mailto:HAVAinfo@eac.gov).

Chairwoman Davidson clarified that notices of noncompliance were sent to all election officials, posted on our website and send to the chief state election officials

Commissioner Hillman clarified that the notices of clarification are issued in response to a question raised by the lab, manufacturer or both. They are clarifications of what is in the manual which is on the EAC website under FAQs. Commissioner Hillman clarified that the Election Management Guideline, the new Quick Start Guide is a companion for the chapter on certification and updated from the previous version.

Meeting turned over to Vice Chair-Rodriguez.

### **Consideration of EAC Advisory 07-003A regarding Maintenance of Effort**

(Maintenance of Effort is a means by which the federal government requires states to share in the expense of funding a particular endeavor. The Help America Vote Act requires that states maintain the effort or level of funding that each state expended in the fiscal year preceding November 2000. In May, the Commission adopted an advisory about Maintenance of Effort. Since that time, we've had additional questions, so today we are considering an amendment to our May advisory that will address these additional issues. And now we will hear from our General Counsel, Julie Hodgkins.)

Julie Hodgkins:

May meeting adopted several questions- Colorado and South Dakota phrased interpretations of the existing maintenance of effort advisory. An amended advisory was issued directly to answer their questions:

1. Whether or not the advisory of MOE requirement is applied retroactively?  
The question that was answered, what years does the MOE requirement apply to? It applies from the point at which a state receives HAVA funds. The state has to maintain the same level of effort they maintain in the fiscal year preceding the 2000 election. For example, if a state received HAVA funds on August 31<sup>st</sup> of 2004, they have to maintain their same level of effort for the fiscal year that encompasses that date, August 31, 2004 and for every year thereafter use HAVA funds.
2. Which fiscal year must the state use to demonstrate that it has met the MOE requirements?  
The Office of Inspector General was consulted to answer this question- different fiscal years are not important but essentially the state and county needs to provide documentation as to MOE in whichever fiscal year applies. Therefore, it is easier on the state or county to demonstrate that they met the maintenance of effort requirement.  
The original advisory the state or county did this in one of two ways; by demonstrating that they spent same amount of money that they spent in the fiscal year preceding the 2000 election. If they could not demonstrate that, the state could then go back and figure out what their base year maintenance of effort was and then demonstrate in each year that they have met at least that amount of spending.
3. Who is responsible for providing MOE?  
The state will be responsible for approval of MOE. However, this can be done by documentation provided by the county.

The recommendation to the Commission is that EAC adopt Advisory 07---3A as a replacement and update to previously adopt Advisory 07-003.

Commissioner Hillman:

Question 4:

Is it a direct quote out of HAVA under the proposed maintenance of efforts?

Julie Hodgkins:

Yes, if the state receives HAVA funds on August 31, 2004, then the state in its subdivisions would be responsible for maintaining this effort during the state or local fiscal year encompassing August 31, 2004. That level of effort encompassing 2004 is not less than the level of expenditures maintained by the state prior to November 2000. The state must demonstrate that they have expended the same amount of money. If they have not expended the same amount of money, then the auditors would issue a finding that they have failed to meet their maintenance of effort requirement, and they would have to reimburse their HAVA funds with that amount of money.

Chairwoman Davidson moved to adopt Advisory 07-003, amending the previous issued 07-003, and that this advisory is posted on our Web site, as submitted, to substitute the 07-003.

Commissioner seconded the motion. Unanimous adoption of advisory...

Briefing regarding Administrative Procedures

Testimonies:

Jeffrey Lubbers, American University, School of Law, Fellow in Law and Government:

Procedural laws-

HAVA established independent entity headed by four commissioners who are appointed by the President and confirmed by the Senate. EAC is an agency for the purpose of Title 5 of the U.S. Code, including the Administrative Procedure Act.

APA- enacted in 1946 and applies to all executive branches agencies. It contains default procedures applying to agency adjudication, rulemaking, as well as judicial review of agency actions. It does not specifically apply to EAC, although it does not specifically mandate implementing regulations.

EAC- has substantives responsibilities contained in HAVA and those transferred from the Federal Election Commission under the National Voter Registration Act of 1993, NVRA. The responsibilities include:

Awarding grants  
Conducting certification and decertification of voting systems hardware and software by accredited labs  
Conducting studies of election-related issues  
Adopting or modifying Voluntary Voting System Guidelines.

HAVA specifically precluded the Commission from issuing any rule or regulation or taking any other action, which impose any requirement on any state or unit of local government, except to the extent permitted by Section 9 (a) of NVRA, but it does not contain specific notice of comment procedural requirements for adopting or modifying Voluntary Voting System Guidelines.

The APA's procedural requirements for rulemaking in Section 553 of Title 5 apply only to the rules issued under NAVRA. Such rules are covered by the Paperwork Reduction Act which provides special procedures for OMB review of rules containing information on election requirements, the Regulatory Flexibility Act which provided for special consideration for rules affecting small businesses and small communities, and the Unfunded Mandate Reform Act which provided for special consultations with state, local, and tribal governments on rules affecting them.

Nonbinding guidelines:

EAC should transmit these Guidelines to Congress.

Under 2006 (c) of the E-government Act of 2002, requires an agency to accept rulemaking submissions by electronic means would apply to any rulemaking under HAVA.

EAC does appear to have any adjudicatory responsibilities.

However, the APA has such general requirements as the right to representation in Commission proceedings, statement of reasons for denial of applications or petitions, withdrawal, suspension, revocation of a license.

Freedom of Information Act or FOIA enacted in 1966 applies to all executive branch agencies. It requires all agencies to publish, index and make available for public inspection and copying items of information agencies in the Federal Registry. Additionally, each agency is required to publish in the Federal Registry a list of things: Description of its central and field organizations, the places at which the employees work and from whom, and the methods whereby the public may obtain information i.e. organizational information.

Rules of procedures and descriptions of forms available, instructions as to the scope and contents of all papers, reports or examinations.

Substantive rules of general applicability adopted and authorized by law, statements of general policy or interpretations of general applicability formulated and adopted by the agency.

As part of the Office of Federal Registry, EAC should seek its own part in the Code of Federal Regulations in Title 11 and seek permission to

publish its voluntary guidelines there along with and any other rules under NVRA.

FOIA also requires agency to make nonexempt records available, in accordance with public rules, stating the time, place, fees, if any, and procedures to follow.

In 1986- FOIA directed each agency to promulgate regulations in conforming to OMB guidelines, in terms of fees charged. The 1996 amendments to FOIA provided agencies may promulgate regulations pursuant to notice and public comment, providing for the arrogation of requests, and multi track processing of requests for records.

Additionally, each agency shall promulgated regulations pursuant to notice and comment for expedited processing of requests for records. Therefore EAC is obligated to publish its organization and functions, and also its procedures for disclosure of information.

The Government and Sunshine Act requires all agencies headed by two or more confirmed members to undertake its business in open session - closed meetings must be noticed within seven days as well as promulgate regulations to implement requirements of the act after giving the public at least 30 days to file written comments/

Privacy Act-system of records must publish in the Federal Register the name and location of the system the categories of individuals contained in the system, the routine use of the records, agency policies concerning the records, including storage, retrieval, access, retention, and disposal, the person including title and address, responsible for the system, method used to notify how to gain access to records about themselves, and the sources or records in the system. Exempt records must also be noticed.

Rules and training for persons who work with Privacy Act materials. EAC should establish a set of rules concerning the protection of individual records under the Privacy Act of 1974.

Info quality act-guidelines to regulate use and dissemination of information and develop an administrative mechanism for correction of information.

Make periodic reports to OMB (disseminate major studies of election administration issues.)

EAC should develop guidelines for implementing the IQA dispute resolutions mechanisms.

Government-wide statutes:

Fed advisory committee act- agencies meeting with outside groups to conform to procedures in the act (three advisory committees: EAC's Standards Board, Board of Advisors, and the Technical Guidelines Development Committee.

These boards will have to follow the Advisory Committee Act, General Services Administrations -Part 41 of CFR

Other Statutes:

Ethics in Government Act

Federal Tort Claim Act  
Govt Performance results Act (annual performance plans, strategic plans, performance reports)  
Regulations-testimony in legal proceedings  
Commissioner Hunter:  
Paperwork Reduction Act applies to rules issued under the NVRA?

Professor Jeffrey Lubbers: rulemaking as well as information to forms, surveys, information requests. But the catchall provision is that any independent regulatory agency has the power to override OMB disapproval by a majority vote. HAVA establishes the EAC as a clearing house of information.

Curtis Crider, Inspector General, U. S. Election Assistance Commission:  
Contracted with Clifton Gunderson- to perform audits of the states as well as EAC audits, grant audits, operational program economy, efficiency reviews.

Mia Leswing, Partner, Clifton Gunderson, LLP:  
Partner in charge-inventory of EAC to do a review of programs and activities to adverse impacts such as mismanagement, waste, and fraud (First year of the audit has been difficult and lengthy):

1. Information/Technology- readiness assessment of EAC compliance with Federal Information Security Management Act, FISMA.
2. Entity profile area-EAC has established its organizational structure-6 officers General Counsel, standards and certification director, research office of communication, and office of financial and administration, and programs and services office.

Status is ongoing -observations and conditions and some recommendations provided recently. And waiting on some comments. The review Methodology applied to our assessment includes reviewing the organizational chart:

EAC website, perform interviews, obtain documentations to corroborate or support, cycle memos to staff for comments, follow-up interviews, incorporate comments in the end. This allows us to identify areas where observations can provide recommendations to strengthen or help the operations or controls over the programs.

Julie Hodgkins, General Counsel, U. S. Election Assistance:  
Public notice and comment:  
Required procedures and policies that are internal to the EAC or that does not require a full rule-making type activity:  
APA-Section 553-Statutory authority-NVRA Title 5-requirements for Standard- Arbitrary and capricious act  
Public comment for a different reason:

FOIA-Regulations we issue- how the public request information, how much money we charge them.

Government and Sunshine Act-establishment of procedures for meetings through regulation.

Public meeting is any gathering of a quorum and deliberations, video conference, and telephonic. Alternative voting procedures-tally voting. Paperwork reduction act-seek input from public as to the collection of information under the NVRA such as information on a bi-annual basis, research projects, conferences and workshops held.

Regulations that require Public notice:

Statements of policies i.e. internal policy (contracting policy-bidder process, procedures, policy, publish manual i.e. laboratory accreditation and certification.

Privacy act requires public notice but not comment-personal id info, telephone, personnel records, address.

Internal policies-personnel policy, apply for leave, work from home, hours of operations. That doesn't impact the public.

EAC currently complied with many of these different acts:

In spirit-notice this meeting-Sunshine Act, Freedom of Info Act- provided thousands of pages of documents to Congress, but EAC has not published the regulations required under these acts.

First step establish a code of federal elections: (publish in the Federal Registry-cost generated and permanent CFR cite.)CFR cites save money.

A letter was sent to the Office of Federal regulations requesting the establishment of a cite for EAC.

Second step, contract with an outside provider to assist us in developing administrative regulations:

Under FOIA, Govt Sunshine Act, Privacy Act, 2 (e) regulations (how a 3<sup>rd</sup> party or non-Government agency request that an employee testify on their behalf in litigation.

Once we receive a report from the Inspector General and from Clifton Gunderson we will utilize these recommendations and complete a comprehensive list of internal and external program directives to establish the needed Administrative Regulation which impact our program and are unique to the agency.

Commissioner Hillman:

1. Mr. Lubbers-any law that assigns responsibility of how a new agency gets the information as to what its responsibilities are-

Professor Jeffrey Lubbers: "No"

Commissioner Hillman:

Is there any exception or different perspective as to the information which was provided from the other panelist?

Professor Jeffrey Lubbers:

“Julie Hodgkins comments are good as to these requirements and are well informed and perceptive.

Grey areas-EAC has to work through a certain scope of its responsibility to implement something?

Primarily rule making and adjudication is covered by the APA however, since EAC does not have adjudication, decertification proceedings are a type of adjudication.

EAC is not specifically requirements mandated by the APA...only rulemaking is the NVRA.

Under the Congressional review Act, EAC’s voluntary

Voting System Guidelines must be submitted to submit to Congress before they can take effect?

“We had full compliance.”

Professor Jeffrey Lubbers:

“There are some specific requirements to send it over to the Government Accountability Office.”

Specific Requirements such as withdrawal/suspension, revocation, or annulment of a license and decertification of a voting system?

“Section 5588 (c) as to license revocation....before an agency revokes a license, should give a license holder a chance to come into compliance unless extreme public interest such as decertification.

Mr. Crider:

IG-return on investment for our auditing?

“(5 to 1 return) 2.4 million in exceptions in the work done and 500K in audits cost.”

Julie Hodgkins:

Because of the voluntary nature of the program, the certification that EAC issues is not license.

Mr. Crider:

Further explorations for EAC?

EAC has other statues to comply with, policies, operating procedures in place...good intuition.

Professor Jeffrey Lubbers:

As an independent agency, the OMB executive orders do not apply to the agency: two aspects of executive orders on rulemaking-participate in semi-annual agenda of regulations-of all pending rules and participate in the annual regulatory plan which are published in the registry i.e. are we agency within the act. FEC could make a case to Congress to be exempt.

Chairwoman Davidson: EAC's specific process for decertification in the Manual and rights?

Julie Hodgkins:

Certification issued is not a license b/c it's a voluntary program and states can adopt but not mandated by law.

Licensing provision does not comply b/c it's voluntary however we have taken some measures as to the process to retain license status and was open to public comment and documented from vendors and laboratories. Rules under NVRA are treated as laws if they are properly adopted through the notice and comment period and not entered into arbitrarily or capricious. Chevron-Regulations properly adopted are given great deference as long as they are not arbitrary and capricious. But court could review as to the constitutionality. There are a variety of means to establish- non-in person meeting and notify the public: establish a regulatory process and provide access to the public like you would any other meeting.

Commissioner Hunter:

No federal agency can regulate over the extent to which congress gives the authority to do so. If the Courts were to see that we extended our reach of authority they could determine that it is arbitrary and capricious.

As to EACs decertification program, point to something that is not considered adjudication:

Professor Jeffrey Lubbers:

Type of due process that should be given to a party deprived by decertification - Executive Office of United Trustee through DOJ's bankruptcy section - procedures from allowing the agency to challenge the removal of their accreditation which is voluntary.

Commissioner Hunter:

Under VVSG- the National Institute of Standards and technology there is a innovations class-EAC will review and determine whether a new voting system could fall under the innovation class and be certified in sort of a separate track. As to...report by Gunder- will there be a comprehensive list of internal procedures that we need to do?

"The process cycle manual is a documentation of how each program operates: What kind of procedure do they perform, what kind of documentation do they need to maintain, memo and how do they record it, how do they disburse those appropriation, collect data from those grants or money they receive, and whatever the details of the financial record that needs to be presented, received, dispersed; basically (life of that process) quality control....minimum policies and procedures.

Julie Hodgkins:  
EAC would take the recommendations and assess those recommendations with the appropriate staff.

Ms. Leswing:  
Gunder-Agency needs a risk assessment-goals and prioritize which is the foundation to set up policies and procedures.

Executive Director Wilkins:  
The Commission made a decision to meet fully its statutory obligations under HAVA.

Julie Hodgkins:  
EAC comply with the transparency portion of the acts as it relates to the public. And complying with the Paperwork Reduction Act.

Vice Chair Rodriguez:  
Announced a lunch break and shortly reconvened.

### **Lunch Break – Noon – 1:00 PM**

Briefing on National Voter Registration Act (NVRA) (Prior to the passage of the Help America Vote Act, the Federal Election Commission administered the National Voter Registration Act or the NVRA. HAVA transferred FEC's authority to the EAC, but did not transfer FEC's regulations regarding the NVRA. Today we're going to hear recommendations from our staff regarding how to move forward with our role in administering the NVRA.)

Julie Hodgkins, General Counsel, U. S. Election Assistance Commission:  
NVRA ENACTED BEFORE EAC. Regulatory authority section is Article 1, Section 4 Of the U.S. constitution, and Article 2, Section 1 known as the time, manner, and place clause. It allows Congress to regulate the time, manner, and place of holding elections for senators and representatives , and by interpretation, Article 2, Section 1, extends the same authority top elections for the President of the United states. The authority of the NVRA has been litigated a number of times and its constitutionality upheld such as Acorn versus Edgar and Voting Rights Coalition versus Wilson. The regulatory authority that is given to EAC is found in Section 9 of the NVRA. And it states, in consultation with the chief election officers of the states, "-shall prescribe such regulations as are necessary to carry out Paragraph 2 and 3.  
Paragraph 2 states shall develop a mail voter registration application form for elections for federal office  
Paragraph 3 states that not later than June 30<sup>th</sup> of each odd numbered year, shall submit to the Congress a report assessing the impact of this act on the administration of elections for federal office during the proceeding two-year

period, including recommendations for improvements in the federal and state procedures forms and other matters affected by this act.

Section 9 is not the only section. Section 6A requires this form to be used by each covered states. Never been litigation or case regulated scope of the agency. Statements to consider-EAC regulatory authority:

Statute is ambiguous

1. Section 9 House Report-promulgate appropriate regulations necessary to carry out the entire act NVRA./form, list maintenances, send notices from one jurisdiction to another, broader category,
2. Senate Report-limited the regulatory to carry out its regulatory authority
3. Conference Report

EAC authority issue regulations to design mail application forms, used by all states in reporting to Congress.

FEC-46 covered jurisdictions -No uniformity as to the states.

Requirements-i.e. US Citizens, felony, 18 years of age.

FEC-exercised some discretion and created a single form. Set forth a list of common items on the form and provided a catchall-covered by an attestation clause. What does that mean? EAC not promulgated. HAVA-did not makes FECs regulation defacto ours. HAVA transferred Voting systems standards VSS -Transferred responsibilities of the EAC which then put together the Voluntary voting System Guidelines. EAC made some responses through letter to Arizona or Florida relating to changes in state specific instructions-Constitutional authority was cited and how that impacts our regulatory authority.

EAC authority under NVRA-

EAC has the ability to regulations necessary to promulgate a form and that we have some discretion and what is acceptable to a form. What is necessary to promulgate the form is a commission decision as far as beyond what FEC had to consider i.e. Identification, citizenship, voter registration groups, what regulations should or should not apply, restrictions that should or should not apply to them in registering people.

EAC may take a broad approach to regulate under NVRA. However it's a policy decision but if it's a more limited decision then it's a policy decision for EAC. Since, we have not promulgated our own rules than we are handicapped.

Easiest and simple Approach-

Transfer from the FEC the regulations that it promulgated, and transferring to a Section code of regulations that would be assigned to EAC by entering into a joint rule-making process.

FEC adopted rules with comments which were subject to the APA.

Exceptions to the APA to forego notice and comment:

1. Regulations are contrary to public policy, impracticable, and unnecessary.

2. 5 USC (b) (3) (b)-forego 30 day requirement for good cause and coordinate with the FEC; agreement with FEC notice the public that the regulations have been moved from one place to the other.

Transferring the regulations is not the end of the game. FEC is not consistent with HAVA. EAC would have to make the regulations HAVA compliant. I.e. requirement of checkboxes for citizenship, age, etc. Develop policy to inform states of request, implementations for state-specific instructions and conformance with our governing statute.

Edgardo Cortes, Election Research Specialist, U. S. Election Assistance Commission:

Timeline and resources for long term approach to redoing the NVRA regulation-Resources- FEC had 4 staff and 2 attys on the regulatory part took 18 months. EAC has no full time staff. NVRA is handled by his division. EAC estimates 18-28 months to work toward the process:

Steps:

Determine the scope of the regulation-what the regulatory authority is.

Develop CFR site plan (1-2 months making the decision and develop the structure.)

Issue advance notice of proposed rule making

Research and information gathering phase (collect data from states, hold 6 to 8 regional hearings and working groups- 7 months-gather additional comments, system to manage comments and sort comments.)

Gather info/concerns and have the commission –re access what issues should be addressed.

Draft proposed legislation

Consult with chief state election officials

EAC deals with FEC (paper work reduction act) FEC is exempt from PRA.

Which adds 3-5months?

Once the regulations are drafted:

Publish in the Federal Registry-90 days public comment period.

Review of the comments

Publish final rules

Provide guidance to the states how to implement

Timeline depends on resources and staff and type of approach EAC takes.

Questions:

Commissioner Hillman:

Summarize power under NVRA/HAVA-floor and the ceiling?

Julie Hodgkins:

Can't exceed its authority.

Authority by the NVRA adopts a national voter registration form.

Key phrase-regulations necessary-not ambiguous-determination for the agency to make (Policy decision to be determined by its commission.) Must create a single form for the United States. Recognize all US jurisdiction must use and accept the form (consider what is acceptable items on the form).

The law-what must be on the form-?

Must include Sec 9B enumerated items: statement of eligibility; citizenship and attestation, signature of perjury

May not include a requirement for notarization.

Must include in print statement that this applicant declines to register to vote

Statement that if an applicant does not register to vote

Sect 9(b) 1: May require such identification info as signature, data related to previous registration to access the eligibility of the election process.

“Cant have more items that are on the form than is required”

Essentially EAC adopt the process stated by Mr. Cortes. (create a regulatory floor or a base line) and then any revising would start from there.

What is the process and length of time for EAC to do this in whole if FEC agreed: less than 30 days?”

Commissioner Hillman:

Does EAC have discretion as to what the notice would be and what the public could comment on?

Julie. Hodgkins:

“Our notice as to what your intent is would dictate what the comment would be on. “

When was that done; when did the FEC do the public comment and when were they commented on? “Publication of their final notice was in 1994.”

Any public comment objections rose about the now existing regulations? “FEC would have that information.”

Chairwoman Davidson:

Making the regulations HAVA compliant would EAC have to go through a long period of time? It's a substantive change and need a notice/comment period.

Mr. Cortes:

Timeline not as lengthy and would include a total rewrite. The process of changing the regulations to incorporate the HAVA mandates would be a shorter process including the 30 day public notice and comment period. In transferring the current regulations over, we have to have some regulations in place before the changes.

Commissioner Hunter:

The two letter letters sent by EAC (Florida and Arizona) represent policy decision?

“The one to Arizona.” Staffs understandings were that those types' pf questions with regard to changing state- specific instructions went to the staff for decision.

A Commissioner raise the issue to a was proposed a-vote that failed but created a policy statement by the Commission to uphold the initial letter that ED sent. EAC's regulatory authority we very limited. The FEC exercised it in a way that was intended by Congress and intended by the actual law and requirements of the NVRA to create a federal form.

The federal form has to be available---states could have their own forms. If EAC goes too far then we go beyond impermissibly eroding the constitutional right of the states to set that eligibility requirement states authority. However, there are problems when people can not access the state form. The language states only that regulation as are necessary to develop the form. And just because the political landscape has changed over the past ten years, should the agency become more expansive in its realm of setting federal forms. Should EAC become more expansive?

Julie Hodgkins:

NVRA limits EAC ability to regulate- Constitutionality of the act is very broad. It is the statutory authority that is more limited. It's the commission to fill the gap and what is necessary in order to implement the NVRA.

Commissioner Hunter:

Agrees that the constitutionality of the NVRA has been upheld, it was upheld only to the extent that it didn't impermissibly interfere with the state's ability and right to set its own eligibility standards.

Commissioner Hillman:

What would you consider overly expansive?

Commissioner Hunter:

I think that pretty much anything that goes beyond just creating the federal form and affixing state instructions to that is outside of the scope.

Mr. Cortes:

FEC took a limited approach-made policy decision to exclude certain information because they were not necessary to determine eligibility of the applicant such as gender. Such definitive statements that they felt were necessary to properly administer elections or to access the eligibility of the applicant.

Commissioner Hillman:

Can the EAC adopt in whole the FEC regs and make them HAVA compliant...after the fact, or along the way?

Julie Hodgkins:

Best scenario is to have whatever it is HAVA compliant. It would be essentially relocation.

The vice chair asked whether a break was need, announced a 10 minute recess, and they shortly reconvened.

- Public Comment on National Voter Registration Act (NVRA) regulatory activity (4 minutes per speaker – up to 15 speakers):

1. Jim Dixon-AAPD:

Part of the disability civil rights team that worked on the Help America Vote Act.

Congress' intent was that Department of Motor Vehicle that social service agencies function as efficiently as the DMV to offering and collecting, and forwarding voter registration forms to the boards of election. Congress recognizes people w/disabilities have no reason to go to the DMV: data from NYC represents that there is a discrepancy people who have driver license or non-driver id. ...huge disparity. poor people who have the DMV card and the rest of the states. Congress fears that Agency implementation is sloppy and minimal. Currently there is a larger disparity than 1993. EAC should issue best practices to the states. As a country, lack of participation in our electoral process: rejected registration applications, database design problems, or problems with usability. Lower voter registration among poor /disable people is at a time this nation is looked on poorly by the rest of the world. It needs to be repaired; look to the recommendations the Brennan center made. EAC can solve this lack of participation and implement the will of Congress.

2. Myrna Perez-Brennan Center:

Reforms promoted to effectuate policies reflected in the NVRA  
Federal forms:

Measures should be taken to improve NVRA compliance

Best practices should be shared. Things that EAC should do:  
Encourage states to share information as to training...made available to all states.

Collect and distribute information as to why VRA are rejected.

Utilize survey to reflect issues of today i.e. usability

Issue state report cards as to how states are doing.

Changes to the Federal form presumptively require formal rulemaking but it is not essential for every change. Exceptions to notice and comment and swallow the rules:

Categories which if pre-identified, may be addresses outside the rule-making process such as spelling errors.....mailing address....info easily verified...not mislead the public.

Certain categories require notice and comment:

Change the form, changes to substantive information.

3. Scott Network :  
DEMOS  
EAC should use its authority under the NVRA to enhance compliance.  
Background on NVRA.  
Recommendations:  
Data collection and the EAC's biennial report to Congress:  
Encourage public comments, annual reports including notice and a comment period.  
EAC clearly has regulatory authority: reporting-collect comprehensive information. EAC not fulfilling its duty.  
Use regulatory-include a list of states that do not comply or failed to provide data at all and send to DOJ.  
Improve compliance –provide info to the states and a set of best practices.  
NVRA is one of the most important to mandate the government in the democratic process.

4. Nancy Tate-League of Women Voters:

- Voter Registration process needs improvement:  
Carefully and comprehensive at the steps to take to improve implementation of NVRA.  
Voting systems-public needs participation and legitimacy.  
HAVA and NVRA grant the commission with authority to improve voter registration system: under HAVA, the Commission acts only with the approval of 3 members  
The Commission has a formal regulatory authority under the NVRA to develop mail voter registration form.  
League urges the Commission to develop internal procedures ...public comment at appropriate steps and clear directive with the APA and other agencies.  
NVRA has not fulfilled its promises because of the way it is being implemented around the country....better voter registration opportunities and registration rules are properly maintained by addressing certain issues:
1. improvement management of the statewide voter registration databases...integrate with other agencies, guard against purging
  2. Several states have imposed severe restrictions on 3<sup>rd</sup> party voting i.e. severe restrictions placed on the league in FLA. In 2004 the league was key to ensuring 15 per cent of minority voters.
  3. NVRA is not being implemented in social service agencies.

Lastly, the league urges EAC to develop public procedure and to ensure clear and consistent administration of responsibilities.

5. David Becker-DOJ civil rights attorney and People for the American Way:

Before altering or adopting regulations regarding NVRA:

Scope of authority-NVRA is the constitutional exercise of Congresses authority...that authority to regulate is limited....primarily to the creation of national mail voter registration form.

Expressed language of the statute...Article 1 section 4-Congress has consistently been broad....i.e. "UNACAVA....if a state decided it wanted to, for residency purposes, no longer allow a citizen who was living overseas to vote by mail, that state does not have the power."

NVRA is ambiguous however, there is no authority for states to choose to reject that form or condition its acceptance or any additional qualification. It would probably be outside the authority granted under NVRA to regulate if states were permitted to at condition its acceptance on qualifications that aren't actually included in the form itself.

Arizona letter was a policy decision whereby litigation is ongoing, final judgments has not been issued, and appeals are not exhausted.

Generally if an agency were to adopt a position where it reversed its position based on a preliminary ruling would not do justice to the agency's credibility. Stakeholders have a right to expect some level of consistency from an agency and know that the legal analysis that occurred has been thoughtful and reasoned. "Transparent policy is the best policy...specifically done right but not necessarily fast."

Questions

Commissioner Hillman:

Whether a fundamental difference could be seen if EAC were to describe its process as the existing NVRA regulations being transferred to EAC, for EAC to begin its longer process, or if EAC were to adopt the existing regulations, whether EAC can, in fact, make changes to regulations that has not adopted? And I don't know whether there is a nuance there that the groups would be concerned about.

Mr. Becker:

Additionally, if the EAC, whether through adoption or transfer, were to take the existing NVRA regulations in whole and only change the name of agency and address that it would be appropriated in the

Commissioner Hillman:

CFR without public notice would this give you heartburn?

Mr. Becker:

Transfer every time of the regulations pose less of a concern and would require a lower level of scrutiny than adopting wholly new regulations. But for reasons of transparency and credibility, to go through a robust public comment period....issues with its developments...not as prominent as in 1994. Choose an

intermediate level of scrutiny for public comment. Almost 5 yrs of Ear's existence without the regulations applying to this agency....then its better to get this right...a substantial amt of time to get it right.

Commissioner Hillman:  
Distinction between adoption and transfer?

Mr. Perez:  
I'd probably want to do some additional research on that from an administrative perspective.  
What the issue is and not what the issue is and not see how interpreting labeling one way versus another changes the situation because it's not a matter of label. It's a matter of substance. Let the public comment....Transfer or adopt...need more time to research the issue.

Mr. Becker:  
Requested more time to do some additional research.

Vice Chair Rodriguez then read the proposed motion that was considered but not yet on the table followed by further discussion?

Ms. Tate:  
Public comment is a valuable opportunity to see what the public thinks about ....the policies...things that will influence your decision.

Chair Davidson:  
Clarification as to the transfer, changing the address and the agency name would be OK.

Mr. Tate:  
If you determine that all you are changing is something as simple as the name, and you decide that's not the best use of your time, then I guess that would be your decision. But you would need some amount of explanation in a more transparent way for the public.

Commissioner Hunter:  
What have you learned from what other agencies have done?

Julie Hodgkins:  
Noted two similar instances of the Homeland Security Act in the transfer from the Department of Treasury to the Department of Justice or from the Immigration and Naturalization Service to Homeland Security.  
Continued discussion about the development of those regulations followed.

Commissioner Hunter moved that EAC find that the transfer of FEC to the EAC section of the CFR does not require notice and comment or posting for 30 days,

that this action is unnecessary since these regulation respect adopted by the EAC through a notice and comment procedure and would run contrary to the public interest, and that additional public notice and public comment would unreasonably delay the ability of the EAC to consider changes to the national voter registration form needed for the upcoming elections.

Chairwoman Davidson seconded the motion.

There was then some discussion on how to proceed in the comment period to move forward.

Vice Chair Rodriguez then open the floor for discussion.

Vice Chair Rodriguez then offered the vote on the motion on the floor to suspend or to find that the Commission not requires notice and comment on the posting for the transfer of action.

The motion failed with a two-two vote.

Vice Chair Rodriguez then opened the floor for the next motion.

Discussion was held as to the language of the motion with friendly amendments. The final motion read with amendments as followed:

Move that the EAC direct its staff to work with the FEC to enter into a joint rulemaking to transfer the FEC regulations on the National Voter Registration Act to the EAC, and that the EAC staff be directed to take whatever steps are necessary to establish a CFR cite for the EAC to obtain concurrence of the FEC, and to post notice for a 30-day public comment procedure regarding the transfer of these regulations to EAC.

Chairwoman Davidson seconded for discussion issues.

Vice Chair Rodriguez reread the motion and a vote was taken.

The motion passed unanimously.

Hunter-I  
Rodriguez-I  
Hillmans-I  
Davidson-I  
4 votes

Commissioner Hunter:

Requested to enter a statement into the record but not read it.

Commissioner Hillman asked what the close time for people who may have wanted to submit written comments but were not planning to be here to speak:

Julie Hodgkins:

We closed that at 5:00 yesterday.

**The meeting was adjourned at 3:45 p.m.**

