

Statement of

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Before the

United States Election Assistance Commission

On “Administrative Procedure Requirements Applicable to the  
EAC”

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Madam Chair and Commissioners

Good Morning. I am pleased to be invited this morning to discuss the spectrum of administrative procedure requirements applicable to the U.S. Election Assistance Commission (EAC).

My perspective is based on a long involvement in administrative law issues. Before joining the faculty of Washington College of Law in 1996, I served as a lawyer for 20 years in a small federal agency, the Administrative Conference of the United States (ACUS), which conducted many studies of administrative procedure problems across the government and advised agencies (especially new agencies like the EAC) about government procedural statutes.

I thought that in my brief time with you this morning I would summarize the procedural laws that I believe apply to the EAC.

First, as you know, the Help America Vote Act of 2002 (HAVA) established the EAC as an “independent entity,” headed by four Commissioners appointed by the President and confirmed by the Senate. This makes the EAC an “agency” for the purpose of Title 5 of the United States Code, see 5 U.S.C. §§ 105, 551(1), including the Administrative Procedure Act and other statutes that adopt this definition. I would suggest,

then, that the following statutes apply. Some of them also mandate that covered agencies publish implementing regulations.

1. The Administrative Procedure Act (APA). This Act, enacted in 1946, applies to all executive branch agencies, and contains default procedures applying to agency adjudication and rulemaking, as well as judicial review of agency actions. It applies to the EAC, though it does not specifically mandate implementing regulations.

The EAC's substantive responsibilities are contained in HAVA and those transferred from the Federal Election Commission under the National Voter Registration Act of 1993 (NVRA). The responsibilities under HAVA appear primarily to be awarding grants; conducting certification and decertification of voting system hardware and software by accredited laboratories; conducting studies of election-related issues; and adopting or modifying voluntary voting system guidelines. HAVA specifically precludes the Commission from issuing any rule or regulation or taking any other action "which imposes any requirement on any State or unit of local government, except to the extent permitted" by section 9(a) of NVRA. [§ 209, 42 U.S.C. § 15329], but it does contain specific notice-and-comment procedural requirements for adopting or modifying voluntary voting system guidelines [§ 222 of HAVA, 42 U.S.C. § 15362].

Thus the APA’s procedural requirements concerning rulemaking [5 U.S.C § 553] would only apply to any rules issued under NVRA. Any such rules might also be covered by the Paperwork Reduction Act [44 U.S.C §§ 3501-3520] (providing special procedures for OMB review of rules concerning information collection requirements), the Regulatory Flexibility Act [5 U.S.C. §§ 601-612] (providing for special consideration for rules affecting small businesses and communities), and the Unfunded Mandates Reform Act [2 U.S.C. §§ 1501-1571] (providing for special consultations with state, local, and tribal governments on rules affecting them).

In addition, under the “Congressional Review Act” [5 U.S.C. § 801], agency rules (including non-binding rules such as the EAC’s voluntary voting system guidelines) must be submitted to Congress before they can “take effect.”<sup>1</sup>

Finally, Section 206(c) of the E-Government Act of 2002 [Pub. L. No. 107-347], requiring agencies to accept rulemaking submissions by electronic means to the extent practicable, would apply—at least to any rulemaking under NVRA.

The EAC does not appear to have any adjudicative responsibilities that would be covered by the APA’s adjudication provisions. However, it

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<sup>1</sup> Although with respect to non-binding guidelines, it is admittedly unclear what “take effect” means.

should be noted that the APA does have some other requirements that might come into play, including:

- Right to representation when appearing in Commission proceedings [5 U.S.C. § 555(b)];
- Requirement of statement of reasons for denials of applications or petitions [5 U.S.C. § 555(e)];
- Special requirements concerning the withdrawal, suspension, revocation, or annulment of a license [5 U.S.C. § 558(c)].

2. The Freedom of Information Act (FOIA). This Act, originally enacted in 1966, also applies to all executive branch agencies. It requires all agencies (1) to publish certain items of information in the *Federal Register*, (2) to index and make available for public inspection and copying certain other items of information, and (3) to make certain agency records available to any members of the public upon request for such records.

More specifically, each agency is required [5 U.S.C. §552(a)(1)] “in accordance with published rules” to publish in the Federal Register:

- Descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
- Statements of the general course and method by which its functions are determined and assigned, including the nature and requirements of all formal and informal procedures available;
- Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

- Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;<sup>2</sup> and
- Each amendment, revision, or repeal of the foregoing.<sup>3</sup>

Also, FOIA requires agencies to make their non-exempt records available to requestors who have reasonably described them and requested them “in accordance with published rules stating the time, place, fees (if any), and procedures to be followed” [5 U.S.C. § 552(a)(3)(A)(ii)].

The 1986 amendments to FOIA also directed the Office of Management and Budget to develop fee guidelines for all agencies, and each federal agency was directed to promulgate regulations conforming to those guidelines [§ 552(a)(4)(A)(i)]. OMB published its guidelines on March 27, 1987. See [http://www.whitehouse.gov/omb/inforeg/foia\\_fee\\_schedule\\_1987.pdf](http://www.whitehouse.gov/omb/inforeg/foia_fee_schedule_1987.pdf).

Finally, the 1996 amendments to FOIA provided that, in terms of deadlines for handling requests, each agency “may promulgate regulations, pursuant to notice and receipt of public comment,” providing for the aggregation of certain requests and for multi-track processing of requests for records. In addition each agency “shall promulgate regulations, pursuant to

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<sup>2</sup> The Director of the Office of the Federal Register administers the *Federal Register*, and the *Code of Federal Regulations*, see 1 C.F.R. pts 5, 8. I think it would be useful for the EAC to seek its own part in Title 11 of the *Code of Federal Regulations* and to seek permission to publish its voluntary guidelines there, along with any rules issued under NVRA.

<sup>3</sup> In addition, each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding. [5 U.S.C. § 552(a)(5)].

notice and receipt of public comment,” providing for expedited processing of certain requests for records. [§§ 552(a)(6)(B)(iv), (a)(6)(D)(i), (a)(6)(E)(i)].

Therefore, the EAC is obliged to publish its “Organization and Functions,” and also its procedures for disclosure of records under the Freedom of Information Act

3. Government in the Sunshine Act. This Act, enacted in 1976, requires all agencies headed by two or more presidentially appointed, Senate-confirmed members to undertake its business in open sessions, unless the business falls into one of nine exemptions. 5 U.S.C. § 552b. In addition such meetings (and also closed meetings) must be noticed in the *Federal Register* within 7 days of the meeting. The EAC obviously is covered by the Sunshine Act, and I noticed that today’s meeting was properly noticed in the *Federal Register*.

However the Act also requires each covered agency to “promulgate regulations to implement the requirements” of the Act after giving the public at least 30 days to file written comments. I believe the EAC has yet to comply with this requirement.

4. Privacy Act. This Act, enacted in 1974 focuses on “systems of records” established, maintained, or controlled by an agency. A “system of records”

is a group of any records where individual names or other individual identifiers can be used to retrieve the information (5 U.S.C. §552a(a)(5)).

For each system of records an agency maintains, it 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; the method used to notify individuals how to gain access to records about themselves; and the sources or records in the system. Any new use of the system must be noticed for comment 30 days prior to implementing the new use. Exempt systems must also be noticed. ((See, e.g., §552a(b)(3), (e)(4) and (e)(11)).
- Maintain records in the system accurately, completely, and timely to ensure fairness to the individuals (§552a(e)(5));
- Establish rules and training for persons designing, developing, operating, or maintaining the system to ensure compliance with the Act and the agency’s implementing policies (§552a(e)(9));
- Establish safeguards for the protection of records (§552a(e)(10));
- Inform government contractors of their duties under the Act (§552a(m)).

Thus, the EAC should develop and publish a set of rules concerning the “protection of privacy and access to individual records under the Privacy Act of 1974.”<sup>4</sup>

Information Quality Act (IQA). This law [44 U.S.C. §3516 note; enacted December 21, 2000 by Pub. L. No. 106-554 §515, 114 Stat. 2763, 2763A-

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<sup>4</sup> The E-Government Act also requires agencies to conduct special privacy impact assessments before “developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form.” See Section 208(b)(1)(a)(i).



153], requires agencies to (1) issue guidelines (following OMB guidance) to regulate their use and dissemination of information; (2) develop administrative mechanisms so that affected parties may seek correction of information that does not comply with information quality guidelines and; (3) make periodic reports to OMB. OMB published its guidelines on February 22, 2002 (67 Fed. Reg. 8452).

Given the EAC's responsibility to undertake and disseminate major studies of election administration issues, the EAC should develop its guidelines for implementing the IQA.

Application of other statutes and need for other regulations.

The foregoing list of statutes is intended to list the most pressing ones. Of course, other government-wide statutes apply to the EAC.

The Federal Advisory Committee Act [5 U.S.C. App. II], which regulates agencies' meetings with outside advisory groups, applies to the three advisory committees established by HAVA (the Election Assistance Commission Standards Board, the Election Assistance Commission Board of Advisors, and the Technical Guidelines Development Committee). Thus, these boards will have to follow the Act and the General Services Administration's Federal Advisory Committee Management Regulations, 41 C.F.R. part 102-3.

Other statutes worth noting include the Ethics in Government Act, Federal Tort Claims Act, and the Government Performance Results Act [Pub. L. No. 103-62]. The latter requires agencies to develop strategic plans describing their overall goals and objectives, annual performance plans containing quantifiable measures, and performance reports describing their success in meeting those standards and measures.

In addition the Commission may wish to consider developing regulations concerning “Testimony by Commission Employees in Legal Proceedings,” and “Production of Commission Records in Legal Proceedings.”

I would be pleased to try to answer your questions today and to assist the Commission in any way I can in the future.<sup>5</sup>

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<sup>5</sup> I note that the ABA Section of Administrative Law and Regulatory Practice has published three books that may be useful to you in this area: *Federal Administrative Procedure Sourcebook* (3d ed. 2000), *Interpretive Guide to the Government in the Sunshine Act*, (2d. ed. 2005), and *A Guide to Federal Agency Rulemaking* (4th ed. 2006). I have had some role in all three. See <http://www.abanet.org/abastore/index.cfm?section=Main&fm=Product.Search&type=c&eid=AL>.