



U. S. Department of Justice

Office of Intergovernmental and Public Liaison

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May 22, 2003

Honorable M.J. "Mike" Foster
Office of the Governor
P.O. Box 84004
Baton Rouge, LA 70804-9004

Re: Letter of March 20, 2003, Help America Vote Act

Dear Governor Foster:

This responds to your letter of March 20 to Attorney General Ashcroft requesting a formal opinion from the Department of Justice ("the Department") on certain issues concerning the Help American Vote Act of 2002, 42 U.S.C. 15301 to 15545 ("HAVA"). The Attorney General has assigned the enforcement responsibilities of the Department under Section 401 of HAVA to the Civil Rights Division. Although it is through case-by-case litigation that the Department states its formal position with respect to statutes it enforces, the Department does on occasion offer its general views on the manner in which it intends to enforce a particular statute or set of laws in a specified area. Therefore, while we cannot issue a formal advisory opinion, we will attempt to answer the questions posed in your letter to the extent that we can based on our responsibilities to enforce the provisions of Title III of HAVA, which imposes uniform and nondiscriminatory election technology and administrations requirements on the 55 States and Territories.

Questions 1-3 and 9 of your letter regard the funding provided under Title I and Title II of HAVA and the matching funds required under Section 253. The Department has no role in distributing federal funds under HAVA or auditing compliance with funding requirements as set out in Section 902. Any questions regarding funding should be directed to the federal agencies with responsibility for those programs. For questions regarding Title I funding under HAVA and election reform reimbursements under Division J of the Consolidated Appropriations Resolution for 2003, you may contact Deborah Schilling (202/501-0719) at the U.S. General Services Administration (GSA). For questions regarding Title II funding under HAVA, you may contact Penelope Bonsall (800/424-9530) at the Office of Election Administration, which is presently located at the Federal Election Commission, but will move to the Election Assistance Commission ("EAC") when it is created. For questions regarding disability funding under Sections 261 and 291 of HAVA, you may contact Dr. Margaret Giannini (202/205-1016) at the Office on Disability for the U.S. Department of Health and Human Services.

Question 4 asks for the definition of a "federal election" under HAVA. Title III of HAVA applies only to elections for federal office. However, HAVA does not contain a definition of the term "election for federal office." Section 3 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1(1)&(2) ("NRVA"), defines "election" and "federal office" as those terms appear in the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1) & (3)). Other definitions or descriptions of the scope of elections for federal office appear in the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. 1973ff-1(a)(1) & 1973ff-6(3); the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. 1973ee-6(3); and the Civil Rights Act of 1960, 42 U.S.C. 1974.

Question 5 asks for advice on Louisiana's affidavit voting procedures and their relation to HAVA. We have not done a review of Louisiana's statute or its election procedures and cannot provide you with advice on whether your current statute meets the requirements of HAVA. In general, however, having a voter execute an affidavit as to his or her identity and then voting by regular ballot would not appear to meet the identification requirements of Section 303(b)(2)(A) of HAVA for first-time, mail-in registrants in federal elections. Covered registrants who do not fall in one of the exemptions provided and who do not present the required identification must vote by provisional ballot under Section 303(b)(2)(B) of HAVA. It should be noted that under Section 304, these requirements are "minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906."

Question 6 inquires about the driver's license/social security number requirement in HAVA and its application to an individual who has been issued such a number but refuses to provide it. Section 303(a)(5) provides a voter registration application for federal elections cannot be accepted or processed by a state unless it includes the applicant's driver license number (if the applicant has such number) or the last four digits of the applicant's social security number (if the applicant does not have a driver license number) and would clearly apply to an individual who has one of these numbers but refuses to provide it. If the applicant has neither such number, then the State must assign a unique identifying number. This requirement is effective as of January 1, 2004, or upon good cause extension from the EAC, as of January 1, 2006, and appears to apply to any registration application regardless of source. This requirement is optional only for those States permitted under Section 7 of the Privacy Act (5 U.S.C. 552a note) to ask, and which actually do ask, registrants for a complete social security number on registration applications.

Question 7 asks about a possible delay in the effective date of a registration to allow for verification of the information required by HAVA. Section 8(a)(1) of the NVRA requires that covered States "ensure that any eligible applicant is registered to vote in an election" if the "valid voter registration form of the applicant" is submitted, accepted, received or postmarked, as the case may be,

within 30 days before the federal election in question (or lesser period if allowed by state law). However, Section 303(b) of HAVA requires States to begin verifying certain information from mail-in registrants as of January 1, 2004, and Section 303(a)(5) requires States to begin verifying certain information from all registrants as of January 1, 2004, or with a good cause extension from the EAC, as of January 1, 2006. Therefore, an applicant's registration cannot become effective until the information has been verified. If verification cannot be completed between the close of registration and the election date it appears that the prudent course would be to allow such voters to cast a provisional ballot and to count that ballot only if the registration information is later verified.

Question 8 regards the confirmation mailings used by Louisiana for mail-in voter registrations. Again, the Department has not reviewed your specific statute and procedures on confirmation mailings. In general, however, it does not appear that HAVA has amended or superceded the relevant parts of NVRA regarding the sending of disposition notices. Section 8(a)(2) of NVRA requires State election officials to send such a notice to each applicant regarding the disposition of his or her application. If a notice of disposition is sent by non-forwardable mail and is returned undelivered, Section 6(d) of NVRA allows the local registrar to determine whether that person should remain on the voting rolls.

I trust this information is responsive to your inquiry.

Sincerely,



Lori Sharpe Day
Director and Advisor to the Attorney General