DECLARATION OF HARRY A. VANSICKLE PURSUANT TO 28 U.S.C. § 1746

I, Harry A. VanSickle, hereby declare under penalty of perjury as follows:

1. I am the Commissioner of the Bureau of Commissions, Elections and Legislation (Bureau). The Bureau is a part of the Commonwealth of Pennsylvania’s Department of State (Department) – an administrative department of the Commonwealth’s Executive Branch.

2. As Commissioner of the Bureau, I serve at the pleasure of the Secretary of the Commonwealth (Secretary), who heads the Department; and with the assistance of personnel assigned to the Bureau and other officials and employees of the Department, I perform such powers and duties as the Secretary might delegate to the Bureau.

3. Subject to his supervision and authority or the supervision and authority of his deputies, the Secretary has assigned to the Bureau the following responsibilities relevant to the above-captioned action:

   • The general administration of the Commonwealth’s responsibilities under the Help America Vote Act of 2002 (HAVA).
• The administration of the responsibilities imposed by law upon the Secretary or the Department in the administration of elections in the Commonwealth of Pennsylvania, including elections for Federal office.


4. I make this declaration based on my personal knowledge and based on information provided to me in the ordinary course of the business of the Department by other officials, employees and agents of the Department.

THE HELP AMERICA VOTE ACT

5. Enacted in October 2002, HAVA imposes upon the States and their political subdivisions a variety of duties prescribed by Congress relevant to the conduct of elections for Federal office. As the chief State elections official of the Commonwealth, the Secretary has the principal responsibility to oversee the Commonwealth’s compliance with HAVA.

Section 102 – Federal Payments to be used Solely to Replace Lever Voting Machines and Punch Card Voting Systems

6. Section 102 of HAVA (42 U.S.C. § 15302) directed the Administrator of the General Service Administration (GSA) to establish a program under which GSA would make payments to the States to use in replacing any punch card voting systems or lever voting systems that were used in the State in the November 2000 General Election. Under the program, payments to the States were based on the number of voting precincts within the State that used a punch card voting system or a lever voting system in the November 2000 general election, such precincts being described by section 102 of HAVA as “qualifying precincts.” 42 U.S.C. § 15302(a)(1).
7. To receive a payment under the program established by GSA under section 102 of HAVA, the State was required to submit to GSA a notice certifying, *inter alia*, that the State would use the payment to replace punch card voting systems or lever voting systems used in the State no later than the deadline prescribed by section 102 of HAVA. See 42 U.S.C. § 15302(b).

8. The deadline prescribed by section 102 of HAVA to replace punch card voting systems and lever voting machines with voting systems that do not use punch cards or levers was the November 2004 general election. 42 U.S.C. § 15302(a)(3)(A). However, section 102 of HAVA permitted States to receive a one-time waiver of the deadline, “for good cause,” until the first election for Federal office held after January 1, 2006. 42 U.S.C. § 15302(a)(3)(B).

9. If a State receiving funds under the GSA program should fail to meet the applicable deadline, section 102(d) of HAVA (42 U.S.C. § 15302(d)) requires the State to pay to the U.S. Election Assistance Commission (EAC) – the agency that has inherited the program from the GSA under section 902(b)(4) of HAVA (42 U.S.C. § 15542(b)(4)) – an amount equal to the “noncompliant precinct percentage” of the funds provided to the State under the program.

10. Based on the formula prescribed by section 102(c) of HAVA (42 U.S.C. § 15302(c)), GSA paid to each State eligible for payments under section 102 the sum of $3,192.22 for each “qualifying precinct” located in the State.

11. Acting pursuant to section 102 of HAVA and the instructions provided by the GSA, the Commonwealth of Pennsylvania on or about April 29, 2003, submitted to the GSA a notice that included a certification that the Commonwealth would use the payment received under section 102 to replace punch card and lever voting systems in the Commonwealth’s “qualifying precincts” by the deadline prescribed by section 102(a)(3) of HAVA (42 U.S.C. § 15302(a)(3)). In its notice to GSA, the Commonwealth also agreed that if the Commonwealth
should fail to meet the deadline prescribed by section 102(a)(3) of HAVA, the Commonwealth would repay the amount required by section 102(d) of HAVA. A true and correct copy of the notice that the Commonwealth submitted to the GSA pursuant to section 102 of HAVA is attached hereto as **Exhibit A**.

12. Based on the notice submitted by the Commonwealth of Pennsylvania, the GSA paid to the Commonwealth the sum of $22,916,952.00.

13. Following receipt of its payment under section 102 of HAVA, the Governor of the Commonwealth and Secretary Cortés received from the GSA a letter dated July 28, 2003, describing the payments made to the Commonwealth under sections 101 and 102 of HAVA and the terms and conditions under which the GSA made the payments to the Commonwealth. A true and correct copy of the GSA letter dated July 28, 2003, is attached hereto as **Exhibit B**.

14. From the nearly $23 million that the Commonwealth of Pennsylvania received from the GSA under section 102 of HAVA, the Commonwealth plans to pay to Allegheny County the sum of $4,178,615.98. The planned payment would be made in the form of a grant agreement between the Department of State and Allegheny County and would be made subject to certain terms and conditions, including full and timely compliance with the requirements of section 102 of HAVA.

15. Acting pursuant to section 102(a)(3)(B) of HAVA (42 U.S.C. § 15302(a)(3)(B)), the Commonwealth of Pennsylvania on or about December 15, 2003, timely certified to the GSA that the Commonwealth, “for good cause,” would not be able to meet the November 2004 deadline. By letter dated March 18, 2004, the GSA responded that the waiver authorized by section 102(a)(3)(B) had been approved and informed Secretary Cortés that the Commonwealth would be obliged to ensure that all of the punch card and lever voting systems in the qualifying
precincts within the Commonwealth would be replaced in time for the first election for Federal office held after January 1, 2006. A true and correct copy of the GSA letter dated March 18, 2004, is attached hereto as Exhibit C.

16. The first election for Federal office to be held in the Commonwealth of Pennsylvania in 2006 is the General Primary Election scheduled by statute to be held throughout the Commonwealth on May 16, 2006.

17. To comply with section 102 of HAVA, all lever voting machines and punch card voting systems must be replaced; and no voting system or device used in any precinct in the Commonwealth on May 16, 2006, may include a lever or punch card.

18. Under section 902(b)(4) of HAVA (42 U.S.C. § 15542(b)(4)), the EAC is the Federal agency currently responsible for administering and enforcing the provisions of section 102 of HAVA. By letter dated March 24, 2006, the Executive Director of the EAC, Thomas Wilkey, informed Secretary Cortes that he would be responsible to certify to the EAC that all punch card and lever voting machines in every qualifying precinct in the Commonwealth – 7,173 precincts in 37 counties (including Allegheny County) – have been replaced for the May 16 primary and that all funds received under section 102 of HAVA have been expended or legally obligated by that date. A true and correct copy of Mr. Wilkey’s letter dated March 24, 2006, is attached hereto as Exhibit D.

19. In his letter, Mr. Wilkey informed Secretary Cortés: “In order to avoid repayment of funds, Pennsylvania will be required to certify the total number of qualified precincts (those precincts which used punch card or lever machines to administer the regularly scheduled election for Federal office held in November of 2000) that have replaced all such machines in time for the first election for Federal office in 2006.” “This means,” Mr. Wilkey explained, “that there
may be no punch card or lever voting systems operating in the precinct.” Also, wrote Mr. Wilkey, “[t]he replacement machines must not use punch cards or levers, meet the requirements of HAVA section 301 (42 U.S.C. § 15481) and comply with all other relevant Federal statutory requirements (noted in 42 U.S.C. § 15545). Failure to demonstrate compliance will require repayment.” Exhibit 4 (underlining in original; bolded italics added).

20. In response to a letter dated March 23, 2006, to the EAC from several Pennsylvania counties seeking a waiver of the deadline set by section 102(a)(3)(B) of HAVA, Gavin S. Gilmour, Deputy General Counsel for the EAC, wrote a letter to Secretary Cortés dated March 31, 2006. A true and correct copy of Mr. Gilmour’s letter dated March 31, 2006, is attached hereto as Exhibit E. In his letter, Mr. Gilmour informed Secretary Cortés that the EAC has no authority to grant any additional waivers of the deadline prescribed by section 102(a)(3)(B) of HAVA. Mr. Gilmour also reiterated the message from Mr. Wilkey that “to the extent that any qualifying Pennsylvania precinct has failed to replace all of its punch card or lever voting machines, the Commonwealth will be obligated to return a portion of its Federal funds.” Exhibit 5 (emphasis added).

Requirements Payments, the State Plan and the Requirements of Title III of HAVA

21. Under section 251 of HAVA (42 U.S.C. § 15401), the EAC was required to make a “requirements payment” each year in which such funds were available to each State that meets the conditions prescribed by section 253 of HAVA (42 U.S.C. § 15403). A State must use its requirements payments to meet the requirements of Title III of HAVA (42 U.S.C. §§ 15481-85) and, after those requirements have been met, for other activities to improve the administration of elections for Federal office.
22. To be eligible to receive requirements payments under section 251 of HAVA, a State must meet the conditions specified by section 253 of HAVA. Under section 253(b) of HAVA (42 U.S.C. § 15403(b)), a State, *inter alia*, must file with the EAC a State plan covering the fiscal year that contains each of the elements specified by section 254 of HAVA (42 U.S.C. § 15404) and adopted in accordance with procedures prescribed by sections 255 and 256 of HAVA (42 U.S.C. §§ 15405 & 15406).

23. Among the elements of the State plan mandated by section 254 of HAVA are (a) a description of how the State will use the requirements payment to meet the requirements of Title III of HAVA; (b) how the State will distribute and monitor the distribution of the requirements payment to units of local government in the State for carrying out the requirements of Title III; (c) how the State will adopt voting system guidelines and processes to meet the requirements of section 301 of HAVA; and (d) how a payment received from the GSA under section 102 of HAVA to replace lever and punch card voting systems will affect the activities described in the State plan. 42 U.S.C. §§ 15404(a)(1), (2), (4) & (10).


25. Among the requirements for voting systems used in elections for Federal office are these:

- The voting system must produce a record with an audit capacity for the system. To satisfy the audit capacity requirement mandated by section 301(a)(2) of HAVA (42 U.S.C. § 15481(a)(2)), a voting system must produce a permanent paper record with a manual audit capacity for the system. 42 U.S.C. § 15481(a)(2)(B)(i). Also, the paper record so produced must be available as an official record for any recount conducted with respect to any election in which the system was used. 42 U.S.C. § 15481(a)(2)(B)(iii).
• Under section 301(a)(2) of HAVA (42 U.S.C. § 15481(a)(3)), the voting system must be accessible to individuals with disabilities. This means that the voting system must be “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” 42 U.S.C. § 15481(a)(3)(A). To satisfy this accessibility requirement, section 301(a)(3)(B) of HAVA (42 U.S.C. § 15481(a)(3)(B)) requires that there be at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.

• The voting system must provide alternative language accessibility consistent with the Voting Rights Act of 2003. 42 U.S.C. § 15481(a)(4).

• The error rate of the voting system in counting ballots must comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission in 2002. 42 U.S.C. § 15481(a)(5).

26. As the Commonwealth of Pennsylvania was developing its first State plan, the Department of State studied the requirements of section 301 of HAVA to determine whether lever voting machines – then in use by 24 Pennsylvania counties (including Allegheny County) – could meet the HAVA standards. Based on the Secretary’s and his advisors’ review of section 301(a) of HAVA, Secretary Cortés concluded that lever voting machines could not meet the mandated standards – particularly the requirements for a manual audit capacity and accessibility to individuals with disabilities.

27. Thus, on June 18, 2003, Secretary Cortés issued to the county boards of elections HAVA Bulletin # 1. A true and correct copy of Secretary Cortés’s memorandum to the county boards of elections dated June 18, 2003, and HAVA Bulletin # 1 are attached hereto as Exhibit F. In his memorandum accompanying HAVA Bulletin # 1, Secretary Cortés declared: “All counties using lever voting machines in the Commonwealth must replace them no later than January 1, 2006.”
28. Through each of the State plans filed with the EAC – in July 2003; August 2004; and September 2005 – and published in the *Federal Register* and posted on the Department’s web site, the Commonwealth informed the EAC and the public that all of the lever voting machines in the Commonwealth would be replaced in time for the first election for Federal office held in the Commonwealth after January 1, 2006.

29. During the Summer of 2005, certain county elections officials and others questioned the Department of State regarding the Secretary’s legal conclusion – announced in June 2003 – that lever voting machines are not legal under section 301 of HAVA. To assist the Secretary in responding to those queries, the Department on August 30, 2005, asked the EAC for advice. A true and correct copy of the letter from Al Masland, Chief Counsel of the Department of State, to the EAC is attached hereto as Exhibit G.

30. In response to the Masland letter and other inquiries, the EAC on September 8, 2005, issued EAC Advisory 2005-005—Lever Voting Machines and HAVA Section 301(a). A true and correct copy of EAC Advisory 2005-005 is attached hereto as Exhibit H.

31. In EAC Advisory 2005-005, the EAC generally agreed with Secretary Cortés’s opinion, stating that “lever voting systems have significant barriers which make compliance with Section 301(a) [of HAVA] difficult and unlikely.” The EAC specifically cited four requirements of section 301(a) that it believed lever voting machines likely could not meet – the audit capacity requirement; the error rate requirement; the alternative language accessibility requirement; and the requirement that voting systems be accessible to individuals with disabilities.

32. Were the Allegheny County Board of Elections to use its lever voting machines in the May 16, 2006 General Primary Election, it likely would be violating four requirements of
section 301(a) of HAVA, as outlined in EAC Advisory 2005-005; and the board most certainly would be violating the very explicit requirement of section 301(a)(3)(A) that voting systems be accessible to individuals who are blind or visually impaired.

The Title III Complaint Procedure

33. As a condition of receiving its requirements payments and as a general mandate under section 402 of HAVA (42 U.S.C. § 15512), a State must file with the EAC (or include in its State plan) a plan for the implementation of a uniform, nondiscriminatory administrative complaint procedure.


35. None of the plaintiffs have filed a Title III complaint with the Bureau to complain that the Department, the Allegheny County Board of Elections, or any other person or entity has violated any provision of Title III of HAVA, including section 301.

THE EXAMINATION AND CERTIFICATION PROCESS

HAVA Provisions

36. Under HAVA, the examination and certification of voting systems is principally the responsibility of the States. However, Congress charged the EAC with the responsibility to develop and adopt “voluntary voting system guidelines,” see 42 U.S.C. §§ 15322(1), 15361-62,
and to establish a program – again voluntary to the States – for the testing, certification, decertification and recertification of voting system hardware and software by accredited laboratories. See 42 U.S.C. § 15371.

37. Respecting the establishment of a program for the testing, certification, decertification and recertification of voting system hardware and software by accredited laboratories under section 231 of HAVA (42 U.S.C. § 15371), the EAC has only recently begun to develop that program. However, section 231(d) of HAVA (42 U.S.C. § 15371(d)) provides that “[u]ntil such time as the [EAC] provides for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories under [section 231], the accreditation of laboratories and the procedure for the testing, certification, decertification, and recertification of voting system hardware and software used as of the date of the enactment of [HAVA] shall remain in effect.”

38. On the date that HAVA was enacted in October 2002 and to the present, the National Association of State Election Directors (NASED) – a non-partisan trade association consisting of election directors from the 50 states, the territories and the District of Columbia – has overseen the qualification process for voting systems, working with independent testing authorities (ITA) accredited by NASED.

39. Respecting voluntary voting system guidelines, following the process mandated by sections 221 and 222 of HAVA (42 U.S.C. §§ 15361-62), the EAC on December 13, 2005, finally adopted its Voluntary Voting System Guidelines (VVSG). However, the 2005 VVSG explicitly do not take effect for 24 months – or until December 15, 2007.

40. In recognition that it would take a significant amount of time for the EAC to adopt and implement voluntary voting system guidelines in time for use by the States
complying with HAVA, Congress established in section 222(e) of HAVA (42 U.S.C. § 15362(e)) a “special rule”: “Notwithstanding any other provision of [§§ 221 and 222 of HAVA], the most recent set of voting system standards adopted by the Federal Election Commission [FEC] prior to the date of the enactment of [HAVA] shall be deemed to have been adopted by the [EAC] as of the date of the enactment of [HAVA] as the first set of voluntary voting system guidelines adopted under [§§ 221 and 222 of HAVA].”

41. The most recent voting system standards adopted by the FEC at the time of HAVA’s enactment were the 2002 Voting System Standards (VSS). See www.eac.gov/election_resources/vss.html. Under section 222(e) of HAVA, the VSS currently remain – and until December 15, 2007, will remain – the effective voluntary voting system guidelines of the EAC.

**Pennsylvania Law and Procedure**

42. Under section 1105-A(c) of the Pennsylvania Election Code (Election Code), 25 Pa. Stat. Ann. § 3031.5(a) (West Supp. 2005), no “electronic voting system” – whether a direct recording electronic device (DRE) or a paper ballot system that uses an electronic device to read or tabulate ballots – may be used in any election in the Commonwealth unless it has been examined and approved by the Secretary of the Commonwealth pursuant to sections 1105-A and 1107-A of the Election Code (25 Pa. Stat. Ann. §§ 3031.5 & 3031.7 (West 1994 & Supp. 2005)).

43. Under section 1105-A of the Election Code, before the Secretary of the Commonwealth may examine an electronic voting system that has not already been examined and approved by him, a person or corporation owning, manufacturing or selling (or a person or entity interested in the manufacture or sale of) the electronic voting system must request the Secretary of the Commonwealth to examine the system.
44. Section 1105-A(a) of the Election Code also provides, as a condition of the Secretary's examination of a voting system, that the system have been "examined and approved by a federally recognized independent testing authority" and meet "any voting system performance and test standards established by the Federal Government." 25 Pa. Stat. Ann. § 3031.5(a).

45. The Secretary may not approve an electronic voting system unless he determines that the system meets the 17 numbered requirements of section 1107-A of the Election Code (25 Pa. Stat. Ann. § 3031.7 (West 1994)) and, "in his opinion, the system ... can be safely used by voters at elections as provided in [the Election Code]." 25 Pa. Stat. Ann. § 3031.5(b).

46. A county board of elections using an electronic voting system approved by the Secretary must "comply with the requirements for the use of the electronic voting system as set forth in the report [issued] by the Secretary of the Commonwealth" in approving the system. 25 Pa. Stat. Ann. § 3031.5(b).

47. The Secretary has issued a directive concerning the conduct of electronic voting system examinations. A true and correct copy of the Secretary's Directive is attached hereto as Exhibit J.

48. Under the Directive, vendors interested in having an electronic voting system examined must submit a written request to the Secretary. Each request must be accompanied by an examination fee of $3,000 for each system to be examined.

49. Under the Directive, the Department will review a system if the system either:

(a) Has been qualified by an independent testing authority (ITA), recognized or accredited as provided by section 231(d) of HAVA (42 U.S.C. § 15371(d)), for compliance with the most recent Federal standards – currently the 2002 Federal Election
Commission Voting Systems Performance and Test Standards that were deemed by section 222(e) of HAVA (42 U.S.C. § 15362(e)) to have been adopted by the EAC as its first set of voluntary voting system guidelines (42 U.S.C. §§ 15361-62) – in which case each request for a system examination by the Department must include a copy of the most recent ITA testing report qualifying the system; or

(b) Has been submitted for examination by an ITA (recognized or accredited under section 231(d) of HAVA), using the most recent testing standards (the 2002 VSS), in which case the vendor must submit with its application a copy of its request for examination by the ITA.

50. In the event that a system that has been previously approved by an ITA is later found by the ITA or its successor not to be in compliance with Federal standards, the Secretary of the Commonwealth reserves the right to reexamine that system.

51. Upon application for an examination, the vendor must submit to the Secretary of the Commonwealth or his designated representatives, including the examiner or examiners, a detailed Representation Affidavit, including (a) a list of all components (including hardware and software, as well as the software version and number, if any); (b) the number assigned by the National Association of State Election Directors (NASED), or its successor, and a copy of the most recent ITA testing report(s) qualifying the system or a copy of the vendor’s request for examination by an ITA; (c) a statement that the system is available in sufficient quantity to meet the needs of voters in the various counties in the Commonwealth; and (d) complete documentation for each system to be examined, including source codes, operating manuals, training manuals, setup manuals, repair manuals, procedures manuals and programming instructions.
52. The Department will schedule the examination upon receipt of the examination fee, the Representation Affidavit, and the ITA approvals or evidence indicating submission of the system to recognized ITAs.

53. Upon receipt of the written request, the examination fee, and the documentation referred to in the preceding paragraphs, the Department will forward to the vendor a copy of Article XI-A of the Election Code and other relevant information.

54. The Department will forward the ballot simulation to be used at the examination and any further instructions to the vendor no later than 20 days prior to the scheduled examination.

55. Regularly scheduled examinations of systems are conducted on the following days: the fourth Wednesday of January, June and September. The Department schedules an exam if it receives the examination fee, the Representation Affidavit, and all system documentation referenced in the preceding paragraphs 30 days before the exam. Examinations may also be scheduled at the discretion of the Secretary of the Commonwealth.


57. Where applicable, the examination also includes the standards set forth in section 301 of HAVA. For example, a blind employee of the Department votes on the system using its audio component to test compliance with section 301(a)(3)(A) of HAVA.

58. All examinations are videotaped, and the videotape becomes the official record of the exam.
59. Any feature that the vendor wants to have approved for use in the Commonwealth must be presented for examination. If a component is not presented for examination, the Secretary may approve or disapprove such component at his discretion.

60. The vendor must present the system to the Secretary and his designated representative(s) in a condition that enables them to manipulate and examine the system, including election definition and ballot setup, if appropriate.

61. The vendor also must provide to the Secretary and his designated representative(s) the ability to program and set up an election of their own design should it be deemed necessary.

62. A procedure designated as the Pennsylvania Standardized Test is used to verify that the system complies with the criteria established in section 1107-A of the Election Code (25 Pa. Stat. Ann. § 3031.7), including the “Pennsylvania method” prescribed by section 1107-A(3) (25 Pa. Stat. Ann. § 3031.7(3)).

63. Included in the examination is a test to determine if the system provides a “permanent physical record of each vote cast,” as required by the definition of “electronic voting system” found in section 1101-A of the Election Code (25 Pa. Stat. Ann. § 3031.1 (West 1994)). This Pennsylvania requirement for a “permanent physical record of each vote cast” is consistent with the requirement of section 301(a)(2)(B)(i) of HAVA (42 U.S.C. § 15481(a)(2)(B)(i)), which requires that “[t]he voting system shall produce a permanent paper record with a manual audit capacity for such system.”

64. The system under review must meet all of the criteria set forth in the Election Code during the scheduled examination.
65. Either at the time of the examination or as soon thereafter as is practicable, the vendor, by its duly authorized officer, must execute an indemnification and warranty in the form provided by the Secretary. Thereafter, if the vendor's system has been approved by the Secretary, the vendor or its successor must re-execute the prescribed indemnification every three years or within 90 days of (a) any change in ownership of the vendor, the vendor's assets, or the structure of the vendor's organization; (b) the filing for bankruptcy protection by the vendor; or (c) an assignment for the benefit of the vendor's creditors.

66. Each designated representative or consultant of the Secretary must submit a written report to the Secretary no later than 45 days after the date of the examination, unless otherwise directed by the Secretary. The report describes whether the system examined can be safely used by voters at elections as provided in the Election Code and whether it meets all of the requirements specified in the Election Code.

67. As required by section 1105-A(b) of the Election Code (25 Pa. Stat. Ann. § 3031.5(b)), the Secretary issues an official examination report after all of the reports of the designated representatives or consultants have been received.

68. Though the Secretary's Directive provides for a conditional approval for those systems reviewed that have not yet been approved by a recognized ITA, if the Secretary does not receive a copy of the ITA letter confirming compliance with the current voting system standards by the date that the Secretary is ready to issue a report certifying the system, the Secretary will wait until he receives a copy of the ITA report approving the system before he will certify that system. The Department sends to the vendor a copy of the official examination report as soon as it is issued.
69. No county board of elections or its agent may execute a purchase order or contract with a vendor until the Secretary has approved the system under section 1105-A of the Election Code.

70. As required by section 1105-A(b) of the Election Code (25 Pa. Stat. Ann. § 3031.5(a)), the Secretary's report specifies (a) the capacity of the components of the system; (b) the number of voters who may reasonably be accommodated by the voting devices and automatic tabulating equipment that comprise the system; and (c) the number of clerks and machine inspectors required, if any, based on the number of registered electors in any election district in which the system is to be used.

71. As required by section 1105-A(d) of the Election Code (25 Pa. Stat. Ann. § 3031.5(d)), any change that affects the accuracy, efficiency or capacity of an approved system must be presented to the Secretary. At his discretion, the Secretary may request a demonstration or an examination of the system with any changes. In addition, under section 1105-A(a) of the Election Code (25 Pa. Stat. Ann. § 3031.5(a)), the Secretary may, at any time and at his discretion, reexamine any system previously examined and approved by him.

72. The Secretary's Directive is binding upon any vendor and its successors and assigns.

   a. The vendor may not assign, in whole or in part, its rights, duties, obligations, or responsibilities with respect to development, service and maintenance of a system approved by the Secretary without written notification to the Secretary.

   b. Any assignment must be evidenced by a written agreement executed between the vendor and its assignee, in which the assignee agrees to be legally bound by all of the terms and conditions of the Secretary's Directive, as well as the requirements for
systems contained in the Election Code, and to assume the duties, obligations and responsibilities being assigned.

73. Failure by a vendor to adhere to any of the terms and conditions contained in the Directive may result in delay or termination of the certification process if the Secretary has not yet approved the system of the vendor. Failure by a vendor or its assignee to adhere to any of the terms and conditions contained in the Directive may result in the revocation of the certification of the system if the Secretary has already approved the system of the vendor. If the Secretary revokes the certification of the system when a vendor or its assignee fails to adhere to any of the terms and conditions contained in the Directive and the vendor or its assignee has sold the system to a county within the Commonwealth of Pennsylvania or to the Commonwealth of Pennsylvania, then the vendor or its assignee must reapply for certification with the Secretary.


75. On March 9, 2006, ES&S submitted a request to demonstrate upgrades it had made to the iVotronic. The initial request and the October 27, 2005, request were accompanied by an examination fee of $3,000 for each system to be examined pursuant to ES&S’s application of December 9, 2004.
76. The Department decided to review the iVotronic and the 650 after all of the above-described requests had been made because both systems had been qualified by an independent testing authority (ITA) or were being tested by an ITA at the time of application.

77. The ITAs tested each of these systems for compliance with the most recent Federal standards, known as the 2002 Federal Election Commission Voting Systems Performance and Test Standards, which were deemed by section 222(e) of HAVA (42 U.S.C. § 15362(e)) to have been adopted by the EAC as its first set of voluntary voting system guidelines.

78. Upon application for an examination, ES&S submitted to the Department and Dr. Michael Shamos, the Secretary's designated representative, i.e., examiner, a detailed Representation Affidavit, including (a) a list of all components (including hardware and software, as well as the software version and number, if any); (b) the number assigned by the National Association of State Election Directors (NASED), and a copy of the most recent ITA testing report(s) qualifying the system or a copy of the vendor's request for examination by an ITA; (c) a statement that the system is available in sufficient quantity to meet the needs of voters in the various counties in the Commonwealth; and (d) complete documentation for each system to be examined, operating manuals, training manuals, setup manuals, repair manuals, procedures manuals and programming instructions.

79. The Department scheduled an examination on February 17 and 18, 2005, for the 650 and iVotronic with Unity software version 2.5, but ES&S later withdrew its request for certification when it appeared for a subsequent examination on November 16 and 17, 2005, for an upgraded version of the iVotronic.

80. From April 13, 2005, through October 26, 2005, ES&S refused to submit the source codes to the Department's examiner. However, on October 27, 2005, ES&S submitted
the source code to the Department with an application for examination of the 650 and iVotronic with upgraded Unity software version 3.0, along with a check for $3,000 for each system.

81. On November 16 and 17, 2005, the Department conducted the examination on the 650 and iVotronic in accordance with Article XI-A of the Election Code. The examination also included consideration of certain standards set forth in section 301 of HAVA (42 U.S.C. § 15481). Specifically, Jim Criss, a blind employee of the Department, voted on the iVotronic using its audio component to test compliance with section 301(a)(3)(A) of HAVA (42 U.S.C. § 15481(a)(3)(A)) as it applies to voters who are visually impaired.

82. The Department recorded the examinations on DVD, and those recordings are the official record of the exams.

83. The vendor presented the systems to the examiner in a condition that enabled him to manipulate and examine the systems, including election definition and ballot setup. The vendor also provided to the Secretary’s representatives the ability to program and set up an election of their own design.

84. The Department used the Pennsylvania Standardized Test to verify that the systems comply with the criteria established in section 1107-A of the Election Code (25 Pa. Stat. Ann. § 3031.7), including the “Pennsylvania method” described at section 1107-A(3) of the Election Code (25 Pa. Stat. Ann. § 3031.7(3)).

85. Included in the examinations was a test to determine if the system provides a “permanent physical record of each vote cast,” as required by the definition of “electronic voting system” provided in section 1101-A of the Election Code (25 Pa. Stat. Ann. § 3031.1). This Pennsylvania requirement for a “permanent physical record of each vote cast” is consistent with the requirement of section 301(a)(2)(B)(i) of HAVA (42 U.S.C. § 15481(a)(2)(B)(i)), which
requires that “[t]he voting system shall produce a permanent paper record with a manual audit capacity for such system.”

86. The 650 and iVotronic systems met all of the criteria set forth in the Election Code at the scheduled examination on November 16 and 17, 2005.

87. Dr. Shamos, the Department’s examiner, submitted a written report to the Secretary on December 12, 2005. The report stated that the systems examined could be safely used by voters at elections as provided in the Election Code and that the systems meet all of the requirements specified in the Election Code.

88. On December 8, 2005, the Department received a letter dated December 6, 2005 from SysTest (an ITA), notifying ES&S of the successful testing of the iVotronic version 9.1.3.0. A true and correct copy of the letter from SysTest is attached hereto as Exhibit K.

89. On December 22, 2005, the Secretary issued an official examination report certifying the iVotronic systems based on the recommendation of the examiner. A true and correct copy of the report is attached hereto as Exhibit L. The Department on December 22, 2005, sent a copy of the official examination report to ES&S.

90. On January 6, 2006, the Secretary issued an official examination report certifying the 650 system based on the recommendation of the examiner. A true and correct copy of the report is attached hereto as Exhibit M.

91. On March 9, 2006, ES&S submitted to the Department a request to demonstrate upgrades that it had made to the iVotronic. On February 10, 2006, SysTest (an ITA) had sent a letter to ES&S verifying its successful completion of qualification testing of the upgrades, iVotronic, version 9.1.4.1, and Unity software, version 3.0.1.0.
92. On March 28, 2006, the Department and Dr. Shamos conducted a demonstration of these upgrades; and the Department issued an amended certification report on April 7, 2006, for the iVotronic version 9.1.4.1 and Unity software version 3.0.1.0. A true and correct copy of the report dated April 7, 2006, is attached hereto as Exhibit N.

93. As required by the Secretary's certification of the iVotronic, ES&S has adopted (in consultation with the Department) a checklist “detailing the selectability of each option when setting up the election.” This checklist must be delivered to each county board of elections with the delivery of the iVotronic system. A true and correct copy of the checklist is attached hereto as Exhibit O. Also, as required by the Secretary's certification, I understand that ES&S is complying with the condition requiring disabling of the continuous roll VVPAT prior to delivering the iVotronic to county boards of elections and the condition that requires ES&S to instruct counties to change the font size for write-in votes when setting up an election.

USE OF THE iVOTRONIC AND THE M650 THROUGHOUT THE COMMONWEALTH

94. Allegheny County is not the only county board of elections that has decided to use the ES&S iVotronic and M650 in the May 16, 2006 General Primary Election.

95. As reflected in the attached map of the Commonwealth, the boards of elections of 35 counties throughout the Commonwealth have selected one or both of the ES&S systems that Allegheny County is planning to use.

96. Like Allegheny County, the boards of elections of four other counties have decided to use both the iVotronic system and the M650 systems together. They are the boards of elections of Chester, Clearfield, Jefferson and Luzerne Counties.
97. The boards of elections of 10 other counties have decided to use the iVotronic voting system in conjunction with a different ES&S optical scan ballot system, the Model 100. Those counties include Adams, Centre, Franklin, Fulton, Huntingdon, Indiana, Juniata, Mifflin, Montour and Snyder.

98. The boards of elections of 20 counties have decided to use only the iVotronic system. Those counties include: Beaver, Butler, Cambria, Cameron, Clinton, Columbia, Crawford, Cumberland, Elk, Erie, Forest, Greene, Lawrence, Lebanon, McKean, Mercer, Perry, Venango, Westmoreland and Wyoming.

99. A true and correct copy of the Electronic Voting Systems Map of PA Counties dated April 18, 2006, is attached hereto as Exhibit P.

100. Any court order that would effectively decertify or appears to decertify or enjoin the use of the iVotronic or M650 would dramatically affect the ability of the boards of elections in over half of the counties of the Commonwealth to conduct the May 16, 2006 General Primary Election.

PREPARATION OF COUNTIES FOR THE MAY 16, 2006 GENERAL PRIMARY

101. Because the upcoming May 16, 2006 General Primary Election is the first election in Pennsylvania subject to voting system requirements of section 301 of HAVA and the requirement of section 102 of HAVA to replace punch card voting systems and lever voting machines with a voting system that does not use punch cards or levers, most counties throughout the Commonwealth are preparing to use a new voting system for the first time.

102. Butler County, for example, will be using ES&S iVotronic voting systems for the first time. It is my understanding that the machines are being delivered to Butler County in the
second half of April, that the training of their elections staff will begin in the second half of April, and that training for poll workers begins on May 1. Other Pennsylvania counties are in various stages of preparation for the May 16, 2006 General Primary Election.

103. The Board of Elections of Allegheny County by no means is alone in the stage of its preparation for the May 16 primary. Many counties are similarly situated.

I declare under penalty of perjury under that the foregoing is true and correct.

Executed on:

4-23-06

[Signature]

Harry A. VanSickle