

EXHIBIT G



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August 30, 2005

The Honorable Ray Martinez
Commissioner
United States Election Assistance Commission
1225 New York Avenue N.W., Suite – 1100
Washington, D.C. 20005

**Re: Request for EAC Opinion/Advice as to the Legality
of Lever Voting Machines under Section 301 of HAVA**

Dear Commissioner Martinez:

On behalf of Secretary of the Commonwealth Pedro A. Cortés, the Commonwealth of Pennsylvania formally requests an opinion or advice from the Election Assistance Commission (EAC) as to whether lever voting machines may be used in elections for Federal office consistent with section 301 of the Help America Vote Act of 2002 (HAVA) after this year.

Since the enactment of HAVA in 2002, the Pennsylvania Department of State has consistently interpreted section 301 of HAVA to prohibit the use of lever voting machines in Federal elections held on and after January 1, 2006.

On June 18, 2003, the then-Commissioner of the Department's Bureau of Commissions, Elections and Legislation sent written correspondence to each of Pennsylvania's 67 county boards of elections regarding this issue. The interpretation of HAVA expressed in this memorandum was based on analysis and advice proffered by the Department of State's Office of Chief Counsel. In her memorandum, the Commissioner stated:

Section 301(a)(2) of HAVA requires each voting system to “produce a permanent paper record with manual audit capacity...” [See 42 U.S.C. § 15481(a)(2)]. This record must be “available as an official record for any recount conducted with respect to any election in which the system is

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used.” Because lever voting machines do not provide a “manual audit capacity,” this office has concluded that **HAVA requires the replacement of lever voting machines.**

Later in 2003, the Department of State conducted public meetings and held public hearings throughout the Commonwealth on the implementation of HAVA. After consideration of all public comments and consultation with the Commonwealth’s State Plan Advisory Board, Secretary Cortés, on July 31, 2003, submitted the Commonwealth’s State Plan to the Federal Election Commission for delivery to the EAC upon its formation. The EAC, in turn, published the Commonwealth’s State Plan in the *Federal Register*, inviting additional public comment.

On page 12 of its State Plan, the Commonwealth stated: “Because HAVA requires that all voting systems have a manual audit capacity, the 24 counties now using lever machines must replace them.” In short, it has been our contention that “manual audit capacity” necessitates the ability to retain and recreate a record of each individual ballot that was cast in the event a recount is required. The Department of State received no comment from any person or entity (including the EAC) contesting, or even questioning, the Commonwealth's explicit legal conclusion about the illegality of lever voting machines under section 301 of HAVA.

Under HAVA, the Commonwealth was required to update its State Plan for 2004. Again, the Department conducted public meetings, invited public comment and consulted with the State Plan Advisory Board. The State Plan that the Commonwealth submitted to the EAC for 2004 included the identical statement that the Commonwealth made in 2003 respecting the illegality of lever voting machines under section 301 of HAVA. Again, the Department of State received no comment from any person or entity contesting or questioning the Commonwealth's explicit legal conclusion that lever voting machines are illegal under HAVA. Both versions of the State Plan are available on our website, www.dos.state.pa.us.

Because lever voting machines clearly are legal under the Pennsylvania Election Code, the decision of the Secretary of the Commonwealth to mandate the replacement of all lever voting machines in use in 24 of Pennsylvania's counties (including many of its most populous ones) is based entirely on the Department of State's interpretation of section 301 of HAVA -- as expressed in its State Plan in 2003 and 2004 (and incorporated into its 2005 version of the State Plan, which was recently completed) and frequent correspondence to Pennsylvania's county governments.

In fact, Pennsylvania's long-established plan to distribute and spend Title II requirements payments, along with its section 102 grants, is also based on its understanding that section 301 of HAVA requires the replacement of lever voting machines. The State Plan did not contemplate any county retaining its lever machines since the Department of State regards them as illegal under section 301 of HAVA and had always believed that the EAC agreed with that interpretation of HAVA.

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We believe that most States that were using mechanical lever voting machines in 2002 have decided to replace those machines. In fact, we have discovered that the state plans of several other States (including New Jersey, New York and Texas) published by the EAC in the *Federal Register* in March 2004 expressed an understanding of section 301 of HAVA similar to Pennsylvania's interpretation of HAVA: that mechanical lever voting machines may not be used in elections for Federal office after 2005.

We have discovered only one state plan published by the EAC in March 2004 that expressed doubts about the illegality of lever voting machines under section 301 of HAVA. Connecticut wrote in its state plan that it saw two schools of thought as to the meaning of HAVA's audit capacity requirement: one that lever voting machines could not meet (*i.e.*, requiring the creation of a permanent paper record of each ballot cast on the machine); and another that lever machines could be equipped to meet (*i.e.*, requiring only the creation of a permanent paper record of the total ballots cast on the machine and the number of votes cast for each candidate for Federal office). Pennsylvania does not believe that the second interpretation of HAVA is reasonable under the text and purpose of HAVA's manual audit capacity requirement.

Recently, Hans A. von Spakovsky, an attorney with the Department of Justice's Civil Rights Division, proffered his personal opinion in a primer on HAVA that includes a statement that neither punch cards nor lever machines are prohibited by HAVA. However, Mr. von Spakovsky did not analyze in his primer the question of whether, and if so how, lever voting machines might satisfy the manual audit capacity requirement of section 301 of HAVA.

Following receipt of a copy of Mr. von Spakovsky's primer at a conference of Secretaries of State, the Department sought comment from other States and the EAC. Though the States that have responded substantively have expressed agreement with Pennsylvania's view, the EAC has not responded formally. Informally, staff of the EAC has advised that the issue is under study by the EAC's General Counsel, Juliet Thompson.

This summer, the Department of State began to hear for the first time reports that opponents of electronic voting systems and advocates of lever voting machines are urging at least one Pennsylvania county to reject its allocation of section 102 funds and retain its lever voting machines (supplemented by one voting machine per precinct to accommodate voters with disabilities who cannot use lever voting machines without assistance). They argue that lever voting machines are legal for use in Federal elections under section 301 of HAVA.

In recent weeks, these advocates' lobbying has generated newspaper reports in Pennsylvania that include conflicting opinions about the legality of lever voting systems under HAVA and reports that New York (contrary to its State Plan published in March 2004) and Connecticut plan to retain their lever voting systems in whole or in part. In fact, just this weekend, a Pennsylvania newspaper reported that a spokesperson for the

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EAC told the reporter that HAVA does not prohibit the use of lever voting machines. Though we understand that the reporter misunderstood the EAC spokesperson (who was addressing section 102 of HAVA, and not section 301), the article has contributed to the confusion and conflict that has been growing in recent weeks in at least one populous Pennsylvania county – Bucks County.

Because of the very recent – and, in our view, quite late – public debate in Pennsylvania about the legality of lever voting machines under section 301 of HAVA, and considering the serious consequences of this new issue for Pennsylvania's more than two-year-old plan to comply with HAVA, the Department of State has determined that it must seek clear and immediate direction from the EAC.

As we have described, based on a plain reading of section 301(a)(2) of HAVA, the Department has determined that lever voting machines do not satisfy the audit capacity requirement – the requirement of HAVA that Pennsylvania in 2003 cited in its State Plan as requiring the replacement of lever voting machines. The Department remains convinced that lever voting machines – at least those in use in the Commonwealth of Pennsylvania – do not satisfy this HAVA requirement.

In addition, the fact that lever machines are not – and cannot be made – accessible to voters with vision and other disabilities further argues against their continued use. Because HAVA next year will require every polling place to have at least one fully accessible machine as part of its voting system for elections for Federal office, a county that decided to keep its lever voting machines would need to purchase one new system for each polling place. Moreover, a county retaining its lever voting systems would be required to meet the accessibility requirement without the assistance of the section 102 grants earmarked by Congress for use in replacing lever voting machines. We do not believe that Congress intended to allow States and their political subdivisions such an inefficient and expensive option.

Although the proper resolution of this issue appears clear to the Commonwealth of Pennsylvania – as it did in 2003 when Pennsylvania developed, adopted and submitted its State Plan to the EAC and in 2004 when Pennsylvania submitted to the EAC its 2004 update to the State Plan – we look forward to your analysis of this important issue to help resolve this contentious debate as the HAVA deadlines for procuring and deploying new voting systems loom.

Sincerely yours,

Albert H. Masland
Chief Counsel

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cc: The Honorable Gracia Hillman, EAC Chair
The Honorable Paul DeGregorio, EAC Vice-Chair
The Honorable Donetta Davidson, EAC Commissioner
Juliet Thompson, EAC General Counsel

The Honorable Pedro Cortés, Secretary of the Commonwealth
The Honorable Barbara Adams, General Counsel