DIRECTIVE CONCERNING THE CONDUCT OF ELECTRONIC VOTING SYSTEM EXAMINATIONS BY THE COMMONWEALTH OF PENNSYLVANIA ISSUED BY THE SECRETARY OF THE COMMONWEALTH

Pursuant to Section 1105-A of the Pennsylvania Election Code, at 25 P. S. §3031.5, and revised as required by Act 150 of 2002, the following Directive is issued by the Secretary of the Commonwealth for all electronic voting system examinations conducted in the Commonwealth of Pennsylvania.

1. Vendors interested in having an electronic voting system (system) examined in the Commonwealth of Pennsylvania must submit a written request to the Secretary of the Commonwealth. Each request shall be accompanied by an examination fee of $3,000.00, established by the Secretary and payable to the Commonwealth of Pennsylvania, for each system to be examined. Any stand-alone equipment, which can be sold separately, constitutes a system for the purposes of examination and requires a separate fee.

2. The Department will review a system(s) if the system(s) either:
   
   (a) Has been qualified by the independent testing authority (ITA) or authorities for compliance with the most recent Federal standards, known as the 2002 Federal Election Commission Voting Systems Performance and Test Standards as deemed adopted by the Election Assistance Commission under Section 222(e) of the Help America Vote Act of 2002, 42 U.S.C. § 15362(e) (If so, each request for a system examination by the Department shall also include a copy of the most recent ITA testing report(s) qualifying the system.);

   or

   (b) Has been submitted for examination by federally recognized ITA(s) using the most recent testing standards (the 2002 Standards) (If so, the vendor must submit a copy of its request for examination to the federally recognized ITA(s) for the most recent testing standards (the 2002 Standards)).

3. 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 the federal standards, the Secretary of the Commonwealth reserves the right to reexamine that system.

4. Upon application for an examination, the vendor must submit to the Secretary of the Commonwealth and his designated representative(s), i.e. 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, unless the system(s) is being examined pursuant to paragraph 2(b); (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. (A copy of the Outline of the Content and Format for a Representation Affidavit is enclosed as Attachment A.) The Commonwealth will retain the examination fee if any false statement is provided in the Representation Affidavit. The Secretary will schedule the examination upon receipt of the examination fee, the Representation Affidavit, and the ITA approvals or evidence indicating submission of the system(s) to recognized ITAs, pursuant to paragraph 2.

5. Upon receipt of the written request, the examination fee, and the documentation referred to in paragraphs 2 and 4 above, the Secretary will forward to the vendor the Guidelines and Instructions for the Representation Affidavit, a copy of Article XI-A of the Pennsylvania Election Code, 25 P.S. §3031.1 et seq., and other relevant information.

6. The Secretary will forward the ballot simulation to be used at the examination and any further instructions to the vendor no later than twenty (20) days prior to the scheduled examination.

7. Regularly scheduled examinations of systems will be conducted on the following days: the fourth Wednesday of January, June and September. The Secretary will schedule an exam if he receives the examination fee, the Representation Affidavit, and all system documentation referenced in paragraphs 2 and 4 above thirty (30) days before the exam. Examinations may also be scheduled at the discretion of the Secretary of the Commonwealth.

8. The examination fee will be returned to the vendor when a vendor cancels a scheduled examination more than 20 days prior to the scheduled examination. The examination fee will not be returned to the vendor when a vendor cancels an examination less than 20 days before the scheduled examination or if any false statement is provided in the Representation Affidavit or documentation, as specified in paragraphs 2 and 4 above.

9. The examination will be conducted in accordance with Article XI-A of the Pennsylvania Election Code. A demonstration may be videotaped at the sole discretion of the Secretary. 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. 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. The vendor must also 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. The Pennsylvania Standardized Test will be used to verify that the system complies with the criteria established in section 1107-B of the Pennsylvania Election Code, at 25 P.S. § 3031.7, including the “Pennsylvania method” at section 1107-B(3), at 25 P.S. § 3031.7(3). (See the Explanation of the Pennsylvania Method at Attachment B.) Based on prior experience, the Department strongly recommends that each vendor bring a skilled technician who can answer technical questions regarding that system.

10. The system under review must meet all of the criteria set forth in the Pennsylvania Election Code at the scheduled examination. If the Secretary does not approve the system, and another examination or demonstration of the same system is required, the Secretary of the Commonwealth shall determine the fee.
11. Either at the time of the examination or as soon thereafter as is practicable, the vendor, by its duly authorized officer, shall execute an indemnification and warranty in the form provided by the Secretary. See Attachment C. Thereafter, if the vendor’s system has been approved by the Secretary, the vendor or its successor shall re-execute the prescribed indemnification every three (3) years or within ninety (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.

12. Each designated representative(s) of the Secretary will 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 shall describe whether the system examined can be safely used by voters at elections as provided in the Pennsylvania Election Code and whether it meets all of the requirements specified in the Election Code.

13. The Secretary will issue an official examination report after all of the reports of the designated representative(s) have been received. For those systems reviewed under Item 2(b), if the Secretary does not receive a copy of the ITA report(s) confirming compliance with the most recent standards by the date that the Secretary issues a report, any approval granted by the report will be deemed tentative and conditional until the Secretary receives a copy of the ITA report(s). Before a county can execute a purchase order or contract with the vendor, both the county and the Secretary must receive a copy of the ITA report(s) confirming compliance with the most recent standards. Before final certification by the Secretary of the Commonwealth, the vendor must provide the number assigned by the National Association of Election Directors (NASED), or its successor, for each voting system examined. The Secretary will forward to the vendor a copy of the official examination report as soon as it is issued.

14. The Secretary’s report will specify (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.

15. 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, the Secretary may, at any time and at his discretion, reexamine any system previously examined and approved by him.

16. Subject to the terms and conditions below, this Directive shall be binding upon any vendor and its respective 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. For the purposes of this Directive, the term “assign” shall include, but shall not be limited to, the sale, gift, assignment, pledge or other transfer of any ownership interest in the system approved by the Secretary.

   b. Any assignment shall 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
this Directive, as well as the requirements for systems contained in the Pennsylvania Election Code, and to assume the duties, obligations and responsibilities being assigned.

17. Failure by a vendor to adhere to any of the terms and conditions contained in this 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 this 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 this 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.

Attachments:

Attachment A: A copy of the Outline of the Content and Format for a Representation Affidavit, referenced in paragraph 4.
Attachment B: Explanation of the Pennsylvania Method, referenced in paragraph 9.
Attachment C: Indemnification and Warranty, referenced in paragraph 11.
PENNSYLVANIA DEPARTMENT OF STATE

ATTACHMENT A TO THE DIRECTIVE FOR ELECTRONIC VOTING SYSTEMS

OUTLINE OF THE CONTENT AND FORMAT FOR A REPRESENTATION AFFIDAVIT

Pursuant to the DIRECTIVE CONCERNING THE CONDUCT OF ELECTRONIC VOTING SYSTEM EXAMINATIONS BY THE COMMONWEALTH OF PENNSYLVANIA ISSUED BY THE SECRETARY OF THE COMMONWEALTH (Directive), a Representation Affidavit (Affidavit) must be submitted by all vendors that apply for an electronic voting system examination. The Affidavit must be submitted in the format outlined below containing all relevant information.

The Affidavit will become public record and will be available to the public upon request as well as to state, county and municipal officials.

After reviewing the Affidavit, an electronic voting system examination will be scheduled for the next regularly scheduled examination occurring more than 30 days after receiving the Affidavit.

State of __________________________
County of __________________________

________________________, __________________________, of __________________________
(Name of Affiant) (Title or Position) (Name of Corporation)

Corporation, having been duly sworn, deposes and states the following:

I. Vendor Identification:
   A. Full name of company
   B. Address of principal office
   C. Agent for this examination
   D. Telephone number of agent
   E. Date and state of incorporation
   F. Number of full time employees
   G. Annual gross sales
   H. Other product lines

II. Electronic Voting System Identification:
   A. List all components involved in recording and/or tabulating votes; and for each give:
      1. Function
      2. Unit cost
   B. If more than one configuration is possible, briefly describe the components and application of each

BCEL – January 31, 2005
C. Briefly describe any available discounts

D. Describe support policies for:
   1. Equipment installation
   2. Training and instructional materials for voters and election officials
   3. Providing supplies and associated equipment

III. Provide the following information for each vote recording or tabulating device:
A. Describe the general type (DRE, touch screen, optical scan, punch card, etc.)
B. Extent of use:
   1. First year in use
   2. States authorizing use
   3. Number of jurisdictions in use
C. Describe the physical characteristics of each vote recording/tabulating device(s):
   1. Construction materials
   2. Dimensions
   3. Storage requirements:
      a. Space
      b. Stacking capacity
      c. Temperature and humidity restrictions
   4. Operating requirements:
      a. Space
      b. Secrecy provisions
      c. Lighting
      d. Power requirements, tolerances
      e. Temperature and humidity restrictions
D. Ballot form and use (vote recording devices):
   1. Type (paper, card, DRE, etc.)
   2. Size:
      a. Minimum voting positions
      b. Maximum voting positions
      c. Provisions for oversize ballots
   3. Capacity:
      a. Voter speed
      b. Recommended ratio of devices per number of voters
   4. Method of voting:
      a. Description
      b. Write-in procedure
      c. Absentee ballot compatibility
      d. Spoiled ballot/voter correction provisions
      e. Overvote detection/warning
      f. No-vote capability
   5. Recount procedure/auditability
E. Processing characteristics (vote tabulating devices):
   1. Tabulating method (precinct, central, combined)
   2. Ballot security and control:
      a. Handling
b. Transportation

c. Storage

3. Tabulation speed/device capacity

4. Exception handling (misfeeds, mutilated ballots, etc.)

5. Write-in processing

6. Absentee ballot processing, if compatible ballot

7. Overvote/undervote detection and processing

8. Recount processing/Auditability

F. Set-up, maintenance and repair:

1. Recording devices and tabulating devices:
   a. Set-up times
   b. Training and level of expertise required

2. Preventive maintenance requirements:
   a. Performed by whom
   b. Training and level of expertise required

3. Corrective maintenance:
   a. Performed by whom
   b. Training and level of expertise required

G. Additional or optional equipment associated with this device:

1. Description

2. Cost

H. Data processing support required:

1. Equipment

2. Programming

3. Personnel

4. Supplies
CERTIFICATION

I, the undersigned, certify that I am an authorized representative of the below listed vendor and I have read and hereby agree to the terms and conditions contained in the Directive and this Representation Affidavit on behalf of the vendor. I further certify that the system referred to in this affidavit is being tested, or has been tested and deemed qualified by the independent testing authority or authorities for compliance with the most recent Federal standards, known as the 2002 Federal Election Commission Voting Systems Performance and Test Standards as adopted by the Election Assistance Commission in compliance with Section 222(e) of the Help America Vote Act, 42 U.S.C. § 15362(e). I understand that failure to abide by the terms and conditions of the Directive and this Representation Affidavit could result in the proposed voting system not being certified by the Secretary or revocation of an existing voting system certification.

______________________________
Signature                      Date

______________________________
Name (Printed)

______________________________
Vendor Name

______________________________
Vendor Address

On this, the ______ day of _______________, 20____, before me ___________________, the undersigned officer, personally appeared ___________________, who acknowledged himself/herself to be the ___________________ of ___________________, a corporation, and that he/she as such ___________________, being authorized to do so, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by himself/herself as ___________________. In witness whereunto, I hereunto set my hand and official seals.

______________________________
(TITLE OF OFFICER)

BCEL – January 31, 2005
AN EXPLANATION AND SELECTED EXAMPLES OF “THE PENNSYLVANIA METHOD”

The Pennsylvania requirements for electronic voting systems are found in the Pennsylvania Election Code at 25 P.S. § 3031.7. The third requirement, at § 3031.7(3), is unique to Pennsylvania, and is often referred to as “the Pennsylvania method.”

To change a vote for a straight political party ticket in an election where more than one candidate is elected, the Election Code, at § 3031.7(3), requires the voter to make one mark for a candidate in the other party for whom the voter would like to vote. In doing so, this action requires that the votes previously made by the voter for all candidates for that office be erased. Then the voter must be able to select candidates of either party for that office up to the number allowed or write in an individual’s name, as provided at 25 P.S. § 3031.7(5) & (6).

As an example, assume that there are 3 Democratic candidates (Jones, Smith and Roberts) and 3 Republican candidates (Perry, James and O’Donnell) for school director, where voters may select up to 3 candidates in a general election. The voter initially selects a straight party ticket for all Democratic candidates. In this school director race, however, the voter then desires to vote for Mr. Perry, a Republican. The Pennsylvania Election Code requires that the voter be required to make one mark to vote for Mr. Perry. When the voter makes his mark for Mr. Perry, all of the Democratic candidates for the office of school director are deselected at the same time. Once the Democratic candidates are deselected, the voter must be able to reenter or mark the ballot for not more than 2 additional candidates from either party or write in not more than two additional names.

For a different example, assume that there are 3 Democratic candidates (Jones, Smith and Roberts) and 3 Republican candidates (Perry, James and O’Donnell) for school director, where voters may select up to 3 candidates in a general election. The voter initially selects a straight party ticket for all Democratic candidates. In this school director race only, however, the voter desires to vote only for one Democratic candidate, Jones. The Pennsylvania Election Code requires that the voter be required to make one mark to vote for Mr. Jones. When the voter makes his mark for Mr. Jones, all of the other Democratic candidates for the office of school director are deselected at the same time. Once the other two Democratic candidates are deselected, the voter must be able to reenter or mark the ballot for not more than 2 additional candidates from either party or write in not more than two additional names.

Once a voter has voted a straight party and voted for a candidate of the same or another party in the same office using the “Pennsylvania Method,” as explained above, the
requirements of the Pennsylvania Election Code at § 3031.7(3) no longer apply. For example, the next time that the voter votes for another candidate in the same office after voting a straight party and then voting for a candidate of the same or another party, then he must deselect a candidate in that office before voting another time for another candidate for that same office.

NOTE: This document is intended to assist vendors in preparation for an examination of an electronic voting system. However, it is not meant to be an exhaustive analysis of all of the possibilities that § 3031.7(3) of the Pennsylvania Election Code may present.
For valuable consideration, the receipt of which is hereby acknowledged, and intending to be legally bound hereby, the undersigned, (Corporate Name), a corporation of (State), having a mailing address of (Address), "(Corporate Name)", for itself and its agents, successors and assigns, states the following with respect to election-related products manufactured and/or sold by (Corporate Name) that have been certified according to statute by the Secretary of the Commonwealth of Pennsylvania ("The Products"): 

I. INDEMNIFICATION

A. (Corporate Name) hereby indemnifies and agrees to hold harmless the Commonwealth of Pennsylvania and any election jurisdiction therein (collectively referred to as "Pennsylvania") from and against any and all claims of third parties arising out of or in connection with the use by Pennsylvania of The Products and based upon allegations that any of The Products infringe one or more patents or copyrights owned by, or under which rights are held by, such third parties, provided Pennsylvania notifies (Corporate Name) in writing of any such claims within sixty (60) days after receipt thereof by Pennsylvania; (Corporate Name) will respond to Pennsylvania within thirty (30) days after receipt of such notification. All fees, costs and damages related to such third party claims and defense or settlement thereof, including, without limitation, attorney fees, court costs, expenses and damages resulting from any injunction prohibiting Pennsylvania's use of The Products, shall be borne by (Corporate Name), provided, however, that (Corporate Name) shall have the right to select its own counsel for defense of any such claim.

II. WARRANTIES

(Corporate Name) hereby warrants and represents as follows:

A. That The Products conform to all applicable requirements of 25 P.S. §3031.7.

B. That neither The Products nor any separable component thereof will be sold or otherwise transferred to Pennsylvania by (Corporate Name) unless such Product or component has been duly certified by Pennsylvania for election use.

C. That it has the right to manufacture and/or sell The Products free of any known patent or copyright claim of any third party.

D. That it will notify the Secretary of the Commonwealth of Pennsylvania and any existing or prospective purchasing jurisdictions within said Commonwealth of any claim or pending legal action relating to The Products, including but not limited to claims or actions arising under the United States Intellectual Property Laws; that such notification will be made within ten days of the earlier of 1) the receipt of the claim.
by (Corporate Name), 2) filing of the action against (Corporate Name), or 3) the time of the examination; in any such case (Corporate Name) agrees to give such security, including but not limited to suitable bond, as shall be deemed appropriate by the Secretary of the Commonwealth under the circumstances.

III. RELIANCE BY PENNSYLVANIA

(Corporate Name) acknowledges that Pennsylvania is relying on the foregoing indemnification and warranties as a condition of certification of The Products for use in Pennsylvania, and that failure of (Corporate Name) to abide by the terms herein may result in decertification of The Products.

IV. PENNSYLVANIA LAW TO APPLY

(Corporate Name) agrees that this indemnification shall be interpreted and enforceable under and in accordance with the laws of Pennsylvania or the United States of America, as applicable, and that (Corporate Name) will accept jurisdiction of the federal and state courts of Pennsylvania for the purposes of resolving any disputes hereunder.

IN WITNESS WHEREOF, ________________, by its duly authorized officer, has executed this Indemnification on the date set forth below.

(Corporate Name)

By: ________________________________
    (Name and Title)                       (Date)

Attest: ______________________________
       (Name and Title)

STATE OF
)
  ) ss:
COUNTY OF
)

On this, the ______ day of _________________, 20____, before me, the undersigned officer, a Notary Public in and for said State and County, personally appeared ______________________, who acknowledged himself to be the ____________________ of (Corporate Name), and that ______ he/she, as such __________________________ being authorized to do so, executed the foregoing Indemnification for the purposes therein contained by signing the name of said Corporation by himself as ________________________________.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____________________________  My Commission Expires: _______________________
Notary Public

BCEL – January 14, 2004