

**Analysis of Section 4, "Voter Verified Ballots" of S. 17,
The Voting Opportunity and Technology Enhancement Rights Act of 2005**

GENERAL COMMENTS REGARDING S. 17

There are a number of very good provisions in this bill, but several of the sections have problems of one sort or another. Section 4, which pertains to voter-verified ballots, is seriously deficient in terms of establishing any well defined mechanism for voter verification.

SECTION 4: VOTER VERIFIED BALLOTS

Despite its title, this section does little to establish any meaningful requirement for voter verified ballots while at the same time potentially interfering with the rights of States to establish requirements for voter-verified paper ballots.

Unlike all of the other legislation that has been introduced in both the Senate and House (both in this session of Congress as well as the last session) to address the question of voter-verified ballots, this section of S. 17 leaves the ambiguous language of HAVA's manual audit capacity requirement (§301(a)(2)) unchanged. While it calls upon the Election Assistance Commission (EAC) to establish uniform and nondiscriminatory standards for meeting that ambiguous audit requirement [see page 10, lines 4 through 10], it sets no new deadline by which those standards must be established.

Instead of addressing the known deficiencies in the existing language of HAVA §301(a), it tacks on a new paragraph (7) ("Voter Verified Ballots") at the end of that subsection. There, it establishes a requirement, effective January 1, 2009, that voting systems must provide voters with "an independent means of voter verification ... which allows each voter to verify the ballot before it is cast and counted". It further requires the voting system to provide voters a choice of 4 different verification options: a paper record, audio record, pictorial record, or electronic/accessible record.

Unfortunately, this new paragraph (7) is incredibly deficient in establishing any meaningful requirement for a voter-verified ballot, because:

1. This new paragraph (7) does not itself explicitly define what it means for a voter to "verify the ballot before it is cast and counted" [page 8, lines 15 and 16].

Unlike other pending VVPB legislation (e.g., Senator Ensign's Voting Integrity and Verification Act of 2005), it does not require that the voter be able to verify "the accuracy of their ballot". This new paragraph (7) makes specific reference [see page 8 lines 9 through 10] **only** to clause (i) of HAVA §301(a)(1)(A):

*"(7) VOTER VERIFIED BALLOTS. - In order to meet the requirements of paragraph (1)(A)(i),
..."*

The existing language for clause (i) of HAVA §301(a)(1)(A) specifies only that a voting system shall:

“(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;”

That language does not explicitly provide that such verification (by the voter of “the votes selected by the voter on the ballot”) represents the voter's intent. For example, miscalibrated touch screen voting machines sometimes register "voter selections" other than what the voter intended.

While clause (ii) of HAVA §301(a)(1)(A) requires that the voting system shall also:

“(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted...”,

it should be noted that **clause (ii) is not referenced by the new paragraph (7)** . Neither does this bill make any conforming amendment to clause (ii) so as to ensure that it makes reference to the new paragraph (7).

2. It fails to make any explicit provision for the voter to be able correct any error that the voter discovers on any such a voter verified ballot record.

While the existing language of HAVA §301(a)(1)(A)(ii) makes provision for the voter to:

“...change the ballot or correct any error before the ballot is cast and counted...”,

that clause makes no reference to this new paragraph (7) nor to the voter verified ballot records that are newly-defined in this paragraph, nor does this bill provide any conforming amendment to clause (ii) to add any such references. As noted above, neither does the new paragraph (7) make reference to clause (ii) of paragraph (1)(A).

Rather, §301(a)(1)(A)(ii) refers only to the "ballot", which, in the context of a DRE voting machine, has been and would continue to be construed as referring to that DRE's ephemeral summary screen that displays the “votes selected by the voter”.

Accordingly, if the voting system produces a voter verified ballot record (either paper, audio, pictorial, or electronic, as defined in paragraph (7)(B)) and that ballot record is incorrect, the voter is afforded the opportunity to verify that that record is wrong, but neither paragraph (7) nor paragraph (1)(A)(ii) defines any mechanism by which the voter is provided an opportunity to change that ballot record before the ballot is cast and counted.

Thus while clause (ii) of paragraph (1)(A) provides the voter the opportunity to change the “ballot” (i.e., the summary screen on the DRE voting machine's display), it does not define a similar opportunity for the voter to change or correct the “voter-verified” ballot record that is defined by the new paragraph 7. Neither does the language of paragraph 7 define any such mechanism by which the voter can change or correct that record.

3. This new paragraph (7) makes no specification that the voter verified ballot record needs to be permanent.

For example, it does not require that the audio or pictorial records be maintained after voters have cast their ballots, nor does it provide any specification of what those records are or how they would be produced. Is a pictorial record a photo of the selected candidate? If so, what would be the pictorial record for a ballot measure?

4. It fails to specify that the voter verified ballot record becomes a permanent record only after the voter has certified that such a record accurately reflects the voter's intent.

5. It fails to specify that the voter verified ballot record (whatever its format) needs to be preserved by the election officials in any way.

6. It fails to specify that the voter-verified ballot record is itself an official record of the voter's vote, rather than merely a vehicle for assuring the voter that any non-voter-verified electronic record (maintained invisibly inside a DRE voting machine) has been correctly recorded.

7. It fails to establish that in any discrepancy between a non-voter-verified (and invisible) electronic ballot record and a voter-verified ballot record, that the voter-verified ballot record shall be the true and correct record of the votes cast.

8. It fails to establish that the voter-verified ballot records shall be the official records used for purposes of any recount or audit.

In addition, by imposing a requirement that any voting system (not just those systems deployed to meet the accessibility requirements of paragraph 3) must provide all voters a choice of the 4 different methods of verification, it would effectively prevent after January 1, 2009 any further deployment of optically scanned ballot systems (including precinct-count optical scanners and associated ballot marking devices), since those systems do not provide these 4 choices. This would further narrow the range of existing HAVA-compliant voting technologies from which States could choose to meet their voting needs, and, over time, would force States to ultimately deploy such DRE voting machines at each and every voting station of every precinct.

Further, requiring each and every voting system to provide these 4 different methods of verifying a voter-verified ballot record will, over time, impose significant new expenses on States and jurisdictions.

In addition, if the voter-verified ballot records are to be used to conduct any type of meaningful audit or recount, elections officials will be forced to deal with four different flavors of such voter-verified ballot records, thereby greatly increasing the cost, complexity, and likelihood for error in any such recount or audit.

With regard to the January 1, 2009 date specified in this new paragraph (7), not only do these vague and ill-defined requirements not become effective until that date, but any voting systems purchased before that date "in order to meet the requirements of paragraph (3)(B)" are permanently exempted from meeting the "voter-verified ballot" requirements of this paragraph (see page 9, lines 14 through 17):

"(7)(D) The requirements of this paragraph shall not apply to any voting system purchased before January 1, 2009, in order to meet the requirements of paragraph (3)(B)."

The referenced paragraph (3)(B) of HAVA §301(a) reads:

"(B) satisfy the requirement of subparagraph (A) [the requirement that voting systems be accessible to individuals with disabilities] through the use of at least 1 direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place."

Note that paragraph (3)(B) says jurisdictions must deploy "at least 1" such system to meet its requirement but does not preclude them from deploying more than one. As a result, a jurisdiction might argue that all of the new voting systems it deployed were done so as to comply with HAVA's §301(a)(3)(B) requirement.

Taken together, this essentially means that any voting systems purchased prior to January 1, 2009 will be exempt from the "voter verified ballot" requirements of this new paragraph (7), which means that hardly any machines will be required to comply with these requirements.

Given the significant amount of new HAVA funding (\$2 billion) proposed for FY 2006 in Sec. 16 of this bill (see page 25, line 7), most jurisdictions will have installed their new voting systems well before January 1, 2009, and will thus be exempt from even the vague and ill-defined "voter verified ballot" requirements of the new paragraph (7).

In any case, by creating such a late deadline, this paragraph fails to put in place ANY voter verified ballot requirement in time for the next Presidential election in 2008.

In summary, the "voter-verified ballot" requirements established in Section 4 of this bill do little to provide any meaningful voter-verified ballot requirement on any reasonable time scale. Longer term, they will impose complex, ill-defined, and costly mandates on the States, potentially interfering with State-level voter verified paper ballot bills that have already been passed into law by a number of States, and further restricting the range of HAVA-compliant choices from which States can choose to meet their voting system needs.

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