

Overview: NH's Non-Compliance with HAVA, **Section 301** (a) (1) (A) (iii) requiring election-day voters using optical scans to be notified of over votes and have a chance to correct/request replacement ballot. Codification of the federal requirement is in keeping with NH's commitment and law to "enfranchise as many citizens as possible and to count their votes whenever possible. RSA 659:64" (2016 EPM, p. 41).

Problems:

1. Required compliance by Jan. 1, 2006 (no waiver allowed) ¹
2. Has been known since 2000 Presidential election that over votes are usually mistakes, often not the voter's fault and most likely to affect low income, less educated voters who are **inclined to vote Democratic**.² At least four known possibilities for election fraud with over voted ballots using the AccuVote system.
3. Enforcement provisions of HAVA law through administrative complaint procedure, §15512 (NH AG's office/Ballot Law Commission) or USD0J, §15511, not real options. AG's opinion in November 2019 and Bud Fitch's in Jan. 22, 2018 claimed printing directions on ballots fulfilled requirement for "**a paper ballot system**." ³ Documentation available.
4. \$5 million initial funding (\$20 million authorized, with 5% state matching funds required) was dependent on state plan for continuing compliance sent to EAC Sept. 30, 2003 ⁴ published in Federal Register March 24, 2004. Includes election-day over vote notification requirement for optical scans, Section 301.

May 14, 2003 - Secretary of State received and deposited \$5 million in HAVA Title I funds. ⁵

5. In testimony opposing HB 1486, Deputy SoS Scanlan told the House ELC on Jan.23, 2018 NH was in compliance with law, backed up by Bud Fitch's memo of Jan. 22, 2018. ⁶ Memo available.

Background: Gardner appointed 19-person HAVA committee in Feb. 2003, chaired by David Scanlan and including Gardner, Anthony Stevens from SoS and Bud Fitch from AG's office. ⁷ Legislature passed HB 577 and HB 627 in 2003 to bring NH into compliance with HAVA requirements. NO MENTION of over vote notification in legislative history of two bills. (Non-germane amendment to HB 627 exempted ballots from RSA 91-A.) NO MENTION of over vote notification requirement in March 2006 Ballot Law Commission hearing to certify updated software. Transcript available.

Possible Remedies:

- 1, 2. At least two people meet with Gardner. He agrees to direct vendor to program fall elections to reject election-day over voted ballots and to direct local officials to

review rejected absentee ballots to determine voter intent if possible. Agrees to work with legislator to codify this HAVA requirement into law in next legislative session.

3. NH AG publicly and in writing acknowledges error in not addressing issue when first notified in Sept. 2017 and error in his Nov. 2019 opinion addressed to Deborah Sumner, with copy sent to Bill Gardner. Claimed no appeal to Ballot Law Commission was allowed. Documentation available.

4. Since 5% of state matching funds (nearly \$790,000) depended on NH compliance, what state agency should investigate what LOOKS like fraud? ⁸

5. Scanlan and Fitch publicly and in writing acknowledge their 2018 error re: HB 1486 to House and Senate Election Law Committees, bill's sponsor, Rep. Douglas Ley, and Deborah Sumner, who brought this to the legislative committee's attention. (Both Scanlan and Fitch said NH was in compliance by printing directions on ballot.)

NOTES:

¹ <https://www.doj.nh.gov/election-law/documents/title-iii-hava.pdf>

(See Sec. 301. "(d) Effective Date--Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.")

See p. 11 and Appendix A (A63-A65) of "State of New Hampshire 2005 State Plan Draft "The State will require optical scanning systems to reject ballots with over-votes." PDF copy available

² *2004 Election Day Survey Report*, Election Data Services, Inc., Sept. 27, 2005

<https://www.eac.gov/research-and-data/2004-election-administration-voting-survey>

"Jurisdictions with the lowest income and education levels tended to report the highest percentage of overvotes and undervotes. The percentages tended to drop to a lower level at the second-to-third lowest income and education categories." P. 142

Reported error rate of central count in Florida, November 2000, 5 times precinct level because "in-precinct tallying systems allowed the voter to feed his ballot into the machine and immediately be notified if he had overvoted an office.....this allowed a voter to correct his ballot and resubmit it." Chapter 10, first page

Michael C. Herron and Jasjeet S. Sekhon, "Overvoting and Representation: An examination of overvoted presidential ballots in Broward and Miami-Dade counties," Sept. 28, 2001.

<http://sekhon.berkeley.edu/elections/election2000/HerronSekhon.pdf>

"First, we show that ballots with overvotes on non-presidential races were more likely to contain presidential overvotes compared to ballots with no overvotes elsewhere. Second, we show that ballots with presidential overvotes appear to have been cast by Democratically-inclined individuals..."

“Overall, the evidence we present implies that a disproportionate fraction of the presidential overvotes cast in Broward and Miami-Dade Counties in the 2000 election were produced by Democrats and this diminished the vote total of Al Gore.” From Abstract

³ 2004 Election Survey Report, p. 265, pdf defines paper ballot voting system as “A system of recording votes on paper ballot cards that are counted and tabulated manually” and optical scan as “A system of recording votes by marks in voting response fields on ballot cards that are read by an optical scanner or similar sensor.”

⁴ NH 2003 plan of Sept. 30, 2003 published in Federal Register of March 24, 2004(pp. 14736-14771)

<https://www.govinfo.gov/content/pkg/FR-2004-03-24/pdf/04-5839.pdf>

“Establish voting system standards consistent with HAVA, Section 301” p.14755-56. See also “Plan Management” p. 14756 “The Secretary of State will manage the implementation of the NH State plan...”

See “Final Report: Administration of Payments Received Under the Help America Vote Act by the New Hampshire Secretary of State,” US Election Assistance Commission Office of the Inspector General, May 1, 2003 through September 30, 2015, Attachment B-OMB Circulars, pp. 4-5

https://www.eac.gov/sites/default/files/eac_assets/1/6/NH_Final_Performance_Audit_Report.pdf

To receive funding (§15403), “The request must provide certification that the State will use funds in accordance with current law and guidelines stated in Section 301....submit certification that its current voting machines are consistent with the guidelines stated in Section 301....”

⁵ ibid. See Timeline, p. 2 of 13

⁶ Leg. History of HB 1486, 2018.

http://gencourt.state.nh.us/SofS_Archives/2018/house/HB1486H.pdf

⁷ “State of New Hampshire, 2005 State Plan Draft, “ June 24, 2005. “The optical scanners will be set to reject [over voted] ballots, affording voters the opportunity to correct over votes.” P. 12. Also, Appendix A-63-65. Committee members named, p. 61. PDF copy available.

⁸ ibid, p. 29

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July 30, 2020