New York State Board of Elections Plan for HAVA Compliance
January 4, 2008

Pursuant to the December 20, 2007 direction of the Court, upon the Record, the Defendant State Board of Elections (NYSBOE) offers the following as its Plan of Compliance with the Court's June 2, 2006 Remedial Order:

A. Ballot Marking Device:

Since the submission of the two separate Plans of Compliance by NYSBOE and the Defendants' submission in Opposition to the Department of Justice's Motion to Enforce the June 2, 2006 Remedial Order, NYSBOE respectfully advises the Court and the Department of Justice that:

- Attached as Exhibit "C", is a time line which identifies the tasks required to achieve interim HAVA compliance in 2008, via the deployment and implementation of at least one ballot marking device in each polling location in the State of New York. Defendants NYSBOE, Kosinski and Zalen are committed to this facet of the proposed Plan of Compliance which they believe would address the minimum level of compliance which the Court will accept, as indicated upon the Record on December 20, 2007.
- NYSBOE has completed initial tasks related to the re-bidding of contracts for accessible ballot marking devices in order to allow the State to have in place no later than February 29, 2008 a mechanism for increasing the number of such devices from which county boards may make their selections.

- To date the New York State Office of General Services (OGS) has received submissions from the following vendors for both Lot 1 (full voting systems) and Lot 2 (ballot marking devices) machines: Premier, ES&S, Avante, IBS and Sequoia.
- NYSBOE and OGS have completed initial contract negotiations with Premier, Avante and ES&S and negotiations with Sequoia are being scheduled as set forth in Exhibit C attached hereto.
- Although much has been already accomplished to implement this Plan Of Compliance, in many respects NYSBOE is at the mercy of the production schedule of the vendors who have responded to the Notice to Bid and their ability to produce a sufficient number of ballot marking devices in time for the implementation of this Plan.

B. Testing, Certification and Selection of Voting Systems:

Moving forward, NYSBOE respectfully advises the Department of Justice that:

- NYSBOE has completed the tasks related to re-bidding to secure the services of an Independent Testing Authority (ITA), for the purposes of conducting certification testing for all voting systems being proposed for sale in New York. A complete contract award has been made as of December 11, 2007 to SysTest, Inc. of Colorado which is currently working up testing protocols.
- NYSBOE is proceeding with voting system testing forthwith, by reason of completion of a contract award to the successful ITA, and currently

anticipates the start of testing on or about January 10th as vendors deliver their submission to SysTest, Inc.

- In order to comply with the Court's December 20, 2007 direction, the testing to be undertaken in 2008 may not be full New York Compliance Testing resulting in full certification at this time but rather testing to ensure that the Ballot Market Devices meet the statutory requirements set forth in 42 USC 15481(a). As testing may not be sufficient to ensure compliance with all New York statutory and regulatory requirements, NYSBOE will, pursuant to New York Election Law 7-201(4) authorize the use, in 2008, of ballot marking devices not formally certified by it upon an experimental basis to insure that it is logistically possible to have a ballot marking device at every polling place in accordance with the Court's December 20, 2007 Directive and 42 USC 15481(a)(3)(B).
- The time required to complete testing to enable NYSBOE to formally certify such ballot marking devices pursuant to New York Election Law 7-201(1) as compliant with New York's requirements 9 NYCRR Part 6209 which include New York Election Law Section 7-202 and the 2005 Voluntary Voting System Guidelines adopted by the US Election Assistance Commission, is dependent upon each submitted system's readiness to comply with same. NYSBOE estimates the time required to test to the standards identified herein is approximately nine (9) months. It is respectfully pointed out to the Department of Justice that no voting system has as yet been certified by the US Election Assistance Commission as being in compliance with the 2005 Voluntary Voting

System Guidelines adopted by the US Election Assistance Commission, let alone the additional statutory requirements imposed by the New York State Legislature in Election Law Title II, Sections 7-200ff. It is for that reason that NYSBOE will authorize the counties to use machines pursuant to New York Election Law 7-201(4) in 2008.

- In order to provide for this experimental authorization, Defendants are interpreting New York Election Law 7-208 as not requiring the escrowing of the source codes for nonproprietary commercial off the shelf software for ballot marking devices but to require the escrowing of the Vendors' proprietary source codes for such ballot marking devices.
- On January 23, 2008 the Commissioners of NYSBOE shall determine which ballot marking device systems shall be offered to the counties for their selection, subject to the approval of the contracts for their purchase by the Office of State Comptroller and the Attorney General.
- Immediately following voting system authorization pursuant to New York Election Law 7-201(4), the County Board selection processes will be completed. The ultimate selection of a replacement voting system rests with the commissioners in each County Board, and in the City of New York, with the City Board of Elections. In view of the Court's December 20, 2007 directive, County Boards must complete their selection/purchase process by February 8, 2008 and upon their failure to do so NYSBOE shall select and order for them.

- For the purposes of this solicitation, the pricing information may be disclosed to the counties upon the approval of the contract(s) by the New York State Office of General Services.
- In order to affect a substantial time savings, acceptance testing will be undertaken by NYSBOE at a central location rather than by the various County and New York City Boards of Election as was originally proposed by the Compliance Plans previously submitted.

C. Full HAVA Compliance for 2009:

- To implement lever machine replacement, NYSBOE has completed tasks related to the re-bidding of contracts for complete voting systems, including the publication of a Notice to Bid (appearing in the New York State Contract Reporter on September 24, 2007), the drafting, adoption and distribution of voting system requirements identified as 9 NYCRR Part 6209, and is drafting, in conjunction with the Office of General Services, contracts with those bidders which have responded to the Notice to Bid to date.
- Attached as Exhibit "E", is a time line which identifies the tasks required to implement lever machine replacement and move the State to HAVA compliance. Voting system certification includes testing, an independent review of the testing, the creation and review of corresponding reports, review of the voting devices by the Citizens Election Modernization Advisory Committee, and final consideration by the State Board Commissioners.

- In the event that a county does not make a selection in the time frame established by NYSBOE, NYSBOE is statutorily authorized to determine the type and number of systems to be purchased and implemented in such county and shall order such voting systems for such county.[2]
- NYSBOE staff is crafting a program for the training of personnel on and the deployment of an acceptance testing program for new voting systems and ballot marking devices, as required by Election Law Section 7-206. These tasks are represented in the time line.
- On September 20, 2007, the Commissioners of NYSBOE approved proposed regulations related to the use of new voting systems. The proposed regulations have been published and the 45-day Public Comment Period will expire on January 22, 2008 after which the proposed regulation may be formally adopted by NYSBOE.
- NYSBOE staff continues to draft and distribute for comment, procedures related to the ownership and use of new voting systems. These initiatives are represented in the time line.
- It is anticipated that these voting systems will be ready for implementation statewide in time for the Fall 2009 elections.

D. Conclusion:

- NYSBOE appreciates that this proposed implementation plan is extensively aggressive in order to comply with the Court's directive that, at a minimum, there shall be one ballot marking device at every polling place in time for the September, 2008 Primary. Although much has been

[2] Election Law Section 7-203 (3).

already accomplished to implement this Plan of Compliance, in many respects NYSBOE is at the mercy of the production schedule of the vendors who have responded to the Notice to Bid and their ability to produce a sufficient number of machines in time for the implementation of this Plan. The concept of authorization for use in 2008 on an experimental basis pursuant to New York Election Law 7-201(4) is critical to the implementation of this Plan but the Defendants are not abandoning the State of New York's statutory and regulatory scheme designed to protect the integrity of voting in New York by offering anything other than authorization for use on an experimental basis pursuant to New York Election Law 7-201(4).

- SBOE will achieve full HAVA compliance in time for the September, 2009 Primary Election.

January 4, 2008

Respectfully submitted,

NEW YORK STATE BOARD OF ELECTIONS

By: s/
Todd D. Valentine (507572)
Special Counsel
Attorney for the New York State Board
of Elections and the Defendants
Kosinski and Zalen

By: s/
Paul M. Collins (191384)
Special Deputy Litigation Counsel
Attorney for the New York State Board
of Elections and the Defendants
Kosinski and Zalen