

1 New York State Board of Elections Plan for HAVA Compliance  
2 January 4, 2008  
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4 Pursuant to the December 20, 2007 direction of the Court, upon the  
5 Record, the Defendant State Board of Elections (NYSBOE) offers the following  
6 as its Plan of Compliance with the Court's June 2, 2006 Remedial Order:

7 A. Ballot Marking Device:

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

- 12 • Attached as Exhibit "C", is a time line which identifies the tasks required to  
13 achieve interim HAVA compliance in 2008, via the deployment and  
14 implementation of at least one ballot marking device in each polling  
15 location in the State of New York. Defendants NYSBOE, Kosinski and  
16 Zalen are committed to this facet of the proposed Plan of Compliance  
17 which they believe would address the minimum level of compliance which  
18 the Court will accept, as indicated upon the Record on December 20,  
19 2007.
- 20 • NYSBOE has completed initial tasks related to the re-bidding of contracts  
21 for accessible ballot marking devices in order to allow the State to have in  
22 place no later than February 29, 2008 a mechanism for increasing the  
23 number of such devices from which county boards may make their  
24 selections.

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

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14    B. Testing, Certification and Selection of Voting Systems:

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

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

1 anticipates the start of testing on or about January 10<sup>th</sup> as vendors deliver  
2 their submission to SysTest, Inc.

- 3 • In order to comply with the Court's December 20, 2007 direction, the  
4 testing to be undertaken in 2008 may not be full New York Compliance  
5 Testing resulting in full certification at this time but rather testing to ensure  
6 that the Ballot Market Devices meet the statutory requirements set forth in  
7 42 USC 15481(a). As testing may not be sufficient to ensure compliance  
8 with all New York statutory and regulatory requirements, NYSBOE will,  
9 pursuant to New York Election Law 7-201(4) authorize the use, in 2008, of  
10 ballot marking devices not formally certified by it upon an experimental  
11 basis to insure that it is logistically possible to have a ballot marking  
12 device at every polling place in accordance with the Court's December 20,  
13 2007 Directive and 42 USC 15481(a)(3)(B).
- 14 • The time required to complete testing to enable NYSBOE to formally  
15 certify such ballot marking devices pursuant to New York Election Law 7-  
16 201(1) as compliant with New York's requirements 9 NYCRR Part 6209  
17 which include New York Election Law Section 7-202 and the 2005  
18 Voluntary Voting System Guidelines adopted by the US Election  
19 Assistance Commission, is dependent upon each submitted system's  
20 readiness to comply with same. NYSBOE estimates the time required to  
21 test to the standards identified herein is approximately nine (9) months. It  
22 is respectfully pointed out to the Department of Justice that no voting  
23 system has as yet been certified by the US Election Assistance  
24 Commission as being in compliance with the 2005 Voluntary Voting

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

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

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

8 C. Full HAVA Compliance for 2009:

- 9 • To implement lever machine replacement, NYSBOE has completed tasks  
10 related to the re-bidding of contracts for complete voting systems,  
11 including the publication of a Notice to Bid (appearing in the New York  
12 State Contract Reporter on September 24, 2007), the drafting, adoption  
13 and distribution of voting system requirements identified as 9 NYCRR Part  
14 6209, and is drafting, in conjunction with the Office of General Services,  
15 contracts with those bidders which have responded to the Notice to Bid to  
16 date.
- 17 • Attached as Exhibit "E", is a time line which identifies the tasks required to  
18 implement lever machine replacement and move the State to HAVA  
19 compliance. Voting system certification includes testing, an independent  
20 review of the testing, the creation and review of corresponding reports,  
21 review of the voting devices by the Citizens Election Modernization  
22 Advisory Committee, and final consideration by the State Board  
23 Commissioners.

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

19 D. Conclusion:

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

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<sup>2</sup> Election Law Section 7-203 (3).

