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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Michael L. Davis
Judge of Probate
Limestone County Courthouse
Post Office Box 1145
Athens, Alabama 35612

Electronic Voting – Voting Equipment – Rules
and Regulations

The federal Election Assistance Commission (“EAC”) serves as a successor entity to the Federal Election Commission (“FEC”) for purposes of promulgating voluntary standards or guidelines for the evaluation and testing of electronic voting equipment.

Section 17-7-23 of the Code of Alabama requires the Alabama Electronic Voting Committee (“AEVC”) to apply the voluntary voting system guidelines promulgated by the Election Assistance Commission for the evaluation and testing of electronic vote counting systems.

Any voting equipment or voting systems that have been previously approved by the AEVC can be used in federal, state, and local elections in the State of Alabama. The AEVC is not authorized to recertify or decertify voting equipment or voting systems that have been approved by the AEVC unless otherwise required by federal law. Once a system has been approved, only a change or an improvement to the system must be certified by the AEVC.

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Dear Judge Davis:

This opinion of the Attorney General is issued in response to your request.

QUESTION 1

Does the newly formed Election Assistance Commission, created by the Help America Vote Act of 2002 ("HAVA"), serve as a successor entity to the Federal Election Commission in promulgating voluntary standards and/or guidelines for the evaluation and testing of electronic voting equipment or voting systems as required by section 17-7-23 of the Code of Alabama?

FACTS AND ANALYSIS

The federal Election Assistance Commission was established pursuant to 42 U.S.C.A. § 15321, *et seq.* It was formerly a division within the Federal Election Commission but became a separate and distinct entity with the passage of 42 U.S.C.A. § 15321. Though the Federal Election Commission is still responsible for the administration and enforcement of the Federal Election Campaign Act, the EAC now has sole responsibility for carrying out the duties relating to testing, certification, decertification, and recertification of electronic voting system hardware and software. 42 U.S.C.A. § 15322 (2006). Pursuant to section 15371, the Election Assistance Commission is responsible for the drafting and adoption of the voluntary voting system guidelines. 42 U.S.C.A. §15371 (2006).

CONCLUSION

The Election Assistance Commission serves as a successor entity to the Federal Election Commission for purposes of promulgating voluntary standards or guidelines for the evaluation and testing of electronic voting equipment.

QUESTION 2

If the answer to Question 1 is in the affirmative, does section 17-7-23 of the Code require the Alabama Electronic Voting Committee to apply the voluntary voting systems guidelines/standards promulgated by the Election Assistance Commission for evaluation and testing of an electronic vote-counting system?

FACTS AND ANALYSIS

The Election Assistance Commission oversees the testing and certification of voting system hardware and software by accredited laboratories. 42 U.S.C.A. § 15371 (2006). Section 15371 allows states to provide for the testing, certification, decertification, or recertification of their voting system hardware and software by the laboratories accredited by the EAC. In accordance with this provision, Alabama law requires the proper examination and certification of electronic vote-counting systems for use in elections conducted in this state. ALA. CODE § 17-7-23 (2006).

The Alabama Electronic Voting Committee was created to administer the proper examination and certification of electronic vote-counting systems in Alabama. ALA. CODE § 17-7-22 (2006). Section 17-7-23 details the duties of the AEVC and states that voting equipment shall “meet[] . . . the performance and test standards for electronic voting systems issued by the Federal Election Commission.” ALA. CODE § 17-7-23(2) (2006). This section continues by requiring that “the [Alabama Electronic Voting] committee shall approve only those electronic vote counting systems that are certified by an authorized independent testing authority, or successor entity, as meeting the performance and test standards for electronic voting systems issued by the Federal Election Commission.” *Id.*

The State of Alabama incorporated and adopted the “performance and test standards for electronic voting systems issued by the Federal Election Commission” in section 17-7-23(2) of the Code of Alabama. *Id.* This Office has been informed that at the time the Legislature adopted FEC standards, the 1990 FEC voting system standards were in effect. In 2002, the FEC issued the 2002 voting system standards. In 2005, the EAC issued voluntary voting system guidelines.

It is also the understanding of this Office that, as new standards or guidelines are issued, the independent testing authorities quickly cease testing equipment to determine if the equipment complies with older standards. As a result, if Alabama were to adhere to one older set of standards, no new voting equipment could be certified for use in Alabama because a company offering voting equipment would not be able to locate a testing authority that would certify that the voting equipment offered by that company complies with that older set of standards.

Because part of the FEC became the EAC and the EAC issued new voluntary voting system guidelines in 2005, you ask whether section 17-7-23 of the Code requires the Alabama Electronic Voting Committee to apply the new voluntary voting system guidelines promulgated by the EAC. As stated under Question 1, the EAC is the successor entity to the FEC with respect to voting system guidelines. Accordingly, the AEVC must ensure that electronic vote-counting systems offered for sale in Alabama meet the performance and test standards for electronic voting systems issued by the EAC.

CONCLUSION

Section 17-7-23 requires the Alabama Electronic Voting Committee to apply the voluntary voting system guidelines promulgated by the Election Assistance Commission for the evaluation and testing of electronic vote-counting systems.

QUESTIONS 3 AND 4

What voting equipment and/or voting systems, if any, can be used in federal, state, and local elections in the 67 counties of the State of Alabama that do not meet the voluntary voting systems guidelines/standards promulgated by the Election Assistance Commission and incorporated by reference in section 17-7-23 of the Code?

If the answer to Question 3 grandfathers all previous certified equipment/systems by the AEVC (once certified - always certified), what is the clear and detailed manner of any and all legal responsibility of the AEVC in the process of certification, amendment of

certification, recertification and/or decertification of electronic-voting equipment/systems used or to be used in the State of Alabama, as set forth in both federal and state law, whether by statute, administrative rule, or incorporated by reference?

FACTS AND ANALYSIS

As stated above, the AEVC is responsible for ensuring that voting equipment meets the performance and test standards for electronic voting systems issued by the EAC (formerly issued by the FEC). ALA. CODE § 17-7-23(2) (2006). Section 17-7-23(5) further states as follows:

After an electronic vote counting system has been certified, any change or improvement in the system shall be certified by the committee prior to the adoption of such change or improvement by any county. The committee shall re-examine the electronic vote counting system to the extent necessary to determine that it, as changed or improved, is in compliance with the requirements of this article. If the system, as changed or improved, is not in compliance, the committee shall suspend all sales of the equipment or system in the state until such equipment or system complies with the requirements of this article.

ALA. CODE § 17-7-23(5) (2006). Based on the language in this section, after a vote-counting system has been certified by the AEVC, only a change or an improvement to a system must be certified by the AEVC. The change or improvement to the system must meet the current standards issued by the EAC. The AEVC is not required or authorized to recertify equipment in the future, nor is the AEVC required or authorized to decertify equipment, unless otherwise required by federal law. Accordingly, it is the opinion of this Office that any voting equipment or voting systems that have been previously approved by the AEVC can be used in federal, state, and local elections in the State of Alabama.

CONCLUSION

Any voting equipment or voting systems that have been previously approved by the AEVC can be used in federal, state, and local elections in the

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State of Alabama. The AEVC is not authorized to recertify or decertify voting equipment or voting systems that have been approved by the AEVC unless otherwise required by federal law. Once a system has been approved, only a change or an improvement to the system must be certified by the AEVC.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Noel S. Barnes of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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