

Chairman Benjamin Hovland
Vice Chair Donald Palmer
Commissioner Thomas Hicks
Commissioner Christy McCormick
U.S. Election Assistance Commission

February 2, 2020

Dear Chair Hovland, Vice Chair Palmer, Commissioner Hicks and Commissioner McCormick,

By making dramatic last-minute changes to the draft Voluntary Voting System Guidelines 2.0, and posting them only one week before the public hearing at which the Election Assistance Commission (EAC) is scheduled to vote, the EAC is violating Section 222 of the Help America Vote Act (HAVA), 52 U.S.C. § 20962. As a result, the EAC is disregarding years' worth of carefully-developed advice so that it can rush adoption of severely weakened guidelines, not only violating HAVA but placing the security and reliability of America's elections at risk.

We urge the EAC to disregard the changes that were made outside of the HAVA prescribed process to the proposed Voluntary Voting System Guidelines 2.0 and Requirements, and instead vote on the Guidelines and Requirements that were developed and approved by the Technical Guidelines Development Committee, subject to three public hearings, and approved by the EAC's Board of Advisors and Standards Board.

I. Legal framework

The EAC is required by HAVA to promulgate voluntary voting system guidelines. Section 222 of HAVA prescribes a multi-step technical and public input process for adoption of these guidelines. These technical and public input processes are designed to ensure that the EAC acts with the best possible input from technical experts (both on and off its official boards) and the general public.

A. Technical input

First, the Technical Guidelines Development Committee provides recommendations to the EAC's Executive Director, which the Executive Director "shall take into consideration." 52 U.S.C. § 20962(b)(1); *see also id.* § 20961(b)(1).

Next, the Executive Director "shall submit the guidelines proposed to be adopted under this subpart (or any modifications to such guidelines) to the Board of Advisors." *Id.* § 20962(b)(2). In similar manner, the Executive Director "shall submit

the guidelines . . . to the Standards Board,” which itself undergoes a two-step review involving first its Executive Board, then the full Standards Board. *Id.* § 20962(b)(3). Both boards must submit comments and recommendations to the EAC. *Id.* § 20962(c).

Notably, even though both the Standards Board and the Board of Advisors are already represented on the Technical Guidelines Development Committee, *see id.* §§ 20961(c)(1)(A)(i)-(ii), Congress found it important to require the Executive Director to seek the feedback of the full boards—and to prohibit the EAC from voting to adopt final guidelines until it has given these boards 90 days to review and comment on the proposed guidelines and has “tak[en] into consideration” their comments and recommendations. *See id.* §§ 20962(d)(1)-(2).

B. Public input

In addition to the technical input process, HAVA also requires an opportunity for public notice and comment comparable to that applicable to other administrative rulemaking frameworks, such as the Administrative Procedure Act, 5 U.S.C. § 553. Under Section 222(a) of HAVA, the final adoption of guidelines or modified guidelines must include:

- (1) Publication of notice of the proposed guidelines in the Federal Register.
- (2) An opportunity for public comment on the proposed guidelines.
- (3) An opportunity for a public hearing on the record.
- (4) Publication of the final guidelines in the Federal Register.

52 U.S.C. §§ 20962(a)(1)-(4).

II. The VVSG Requirements have been legally recognized by the EAC as subject to the development framework outlined in HAVA.

When the EAC initiated the development of the VVSG 2.0, it expressed its intention to develop a high-level set of principles and guidelines which would serve as the VVSG. The EAC also described its intention to develop Requirements for the VVSG separate from the Guidelines, which would not be subject to the development process specified in HAVA.

At a September 2019 meeting of the Technical Guidelines Development Committee, Commissioner Hovland informed the Committee that the EAC had sought a legal opinion on its plan to separate the Requirements from the Guidelines. Commissioner Hovland explained that the EAC’s counsel determined that the

Requirements may be a separate document, but that the Requirements still must comply with the Help America Vote Act and its procedures.¹

Indeed, the EAC painstakingly followed the HAVA-prescribed procedures and processes for the development of the Requirements for years. The EAC itself defines the VVSG as a “set of specifications and requirements against which voting systems can be tested to determine if the systems meet required standards.”² By the EAC’s own reckoning, the document under consideration for the February 10 vote is subject to all the steps outlined in HAVA. However, as set forth in more detail below, the EAC’s recent actions plainly violate HAVA’s procedures.

III. The EAC’s failed process with VVSG 2.0

The EAC diligently followed HAVA’s direction for years, and then summarily disregarded HAVA’s clear procedural instructions for the VVSG 2.0 Requirements. The following recap of the VVSG 2.0 development process demonstrates how the EAC failed.

July 20-21, 2015 After being dormant for years, a re-constituted Technical Guidelines Development Committee (TGDC) meets to begin developing the next iteration of the VVSG, designated 2.0. The EAC outlined a plan to develop a high-level set of “principles and guidelines” that constitute the VVSG 2.0 and would go through the HAVA-mandated adoption process, and a set of VVSG 2.0 “requirements” that would go through a separate but non-statutory process that would mirror the HAVA process.

Nov. 18, 2015 National Institute of Standards and Technology (NIST) and EAC launch public working groups for the development of the VVSG. Public working groups were initiated to allow for public input *during* the development of the VVSG, on the front end, rather than develop VVSG and have to address a large volume of public comments after the draft is completed. Groups include cybersecurity, accessibility, pre-election testing and post-election auditing. Members of the public, academia and the vendors participate.

¹ See EAC, Transcript, “United States Election Assistance Commission, Technical Guidelines Development Committee Meeting” (Sept. 19-20, 2019), at 41-43 (statement of Commissioner Hovland), *available at* <https://www.eac.gov/sites/default/files/2020-01/EAC09192019VerbatimTGDC%20%282%29.pdf>.

² See EAC, “Voluntary Voting System Guidelines,” *available at* <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>.

Feb. 9, 2016	TGDC meeting on creation of new VVSG Principles and Guidelines.
July 2016	VVSG cybersecurity public working group kick-off meeting led by NIST. Groups meet semi-weekly, weekly and eventually bi-weekly over the next three years. Other groups begin meeting as well.
Feb. 28, 2017	Public comment period on high level Principles and Guidelines begins.
June 7, 2017	Public comment period on high level Principles and Guidelines closes.
Sept. 11-12, 2017	TGDC adopts high level VVSG 2.0 Principles and Guidelines, a five-page document of fundamental voting system principles.
Apr. 22-24, 2018	Standards Board and Board of Advisors meet and approve high level Principles and Guidelines.
Sept. 19-20, 2019	The EAC notified the TGDC that it received a legal opinion stating that the EAC could not move forward with the bifurcated proposed structure of Principles and Guidelines and Requirements. The EAC stated that, while the documents could be separate, both must go through the HAVA process, including a 90-day public comment period, a public hearing, and adoption by the commissioners. ³
Dec. 18, 2019	TGDC call to address accessibility and security issues including wireless provision in requirements.
Feb. 7, 2020	Finalized VVSG with requirements is passed unanimously by the TGDC.
Mar. 24, 2020	VVSG 2.0 Principles and Guidelines and Requirements submitted for public comment.
Mar. 27, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.
May 6, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.

³ See *supra* note 1.

May 20, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.
June 16, 2020	Board of Advisors annual meeting; approves proposed VVSG 2.0 with Requirements.
June 22, 2020	Public comment period closes.
July 21, 2020	Standards Board meeting voted to approve draft VVSG 2.0 with Requirements. At this meeting EAC and NIST acknowledge that the EAC staff is meeting weekly with vendors to discuss changes to the VVSG 2.0 Requirements. ⁴
Jan. 26, 2021	EAC notices in the Federal Register a vote on the VVSG 2.0 Principles and Guidelines and Requirements for February 10, 2021 (16 days later). <i>See</i> 86 Fed. Reg. 7077. <i>The notice does not include a link to the draft on which the EAC will vote.</i>
Feb. 1, 2021	The EAC publishes the proposed VVSG 2.0 Principles and Guidelines and Requirements on its website. It contains substantial deletions and revisions, including a significant revision to permit wireless networking hardware and significantly weaken a provision for end-to-end verifiable systems which could be used to permit direct recording electronic equipment and/or internet voting.

IV. Conclusion

As the timeline above indicates, the process was functioning properly from 2015 well into the summer of 2020. The TGDC, the Board of Advisors, the Standards Board, and the general public all had substantial opportunities to provide feedback and comment on the proposed VVSG 2.0 Requirements, including through multiple public comment periods and public hearings. The Board of Advisors and the Standards Board approved the proposal.

Yet the EAC conducted a parallel, nonpublic process in which it apparently met in secret with vendors to discuss wholesale revisions to the guidelines that the EAC's own TGDC, Standards Board, and Board of Advisors had already approved. In the end, the EAC released a substantially weakened proposal, which differs in hundreds of material points from the painstakingly prepared draft approved by the EAC's own boards after extensive public feedback, just nine days before the EAC is

⁴ On August 3, 2020, Free Speech For People (FSFP) submitted a Freedom of Information Act request (#20-00039) seeking EAC communications with vendors regarding VVSG 2.0. After multiple agency delays, on January 19, 2021, FSFP filed an administrative appeal of the EAC's constructive denial of the FOIA request.

scheduled to take a final vote. This revised proposal will draw widespread condemnation from election and computer security experts and Congress, which the EAC attempted to avoid.

The EAC's attempted end-run around the Help America Vote Act and avoidance of public scrutiny endanger the security of America's elections and violate federal law. We urge the EAC to vote on February 10, 2021 only on the VVSG 2.0 Requirements that were properly and legally developed.

Sincerely,

Ron Fein
Legal Director

Susan Greenhalgh
Senior Policy Advisor

cc: Chair and Members, U.S. Senate Committee on Rules and Administration
Chair and Members, U.S. House Committee on House Administration