February 8, 2005

The Honorable Ron O'Brien
Franklin County Prosecuting Attorney
Franklin County Courthouse
375 South High Street
Columbus, Ohio 43215

SYLLABUS: 2005-006

The Ohio Secretary of State is not empowered to require, by means of an administrative directive, that the board of elections of each county must, no later than February 9, 2005, select a precinct count optical scan (PCOS) voting system provided by a vendor certified by the Secretary of State or, if the board does not make this selection, the Secretary of State will designate one of those vendors to provide a PCOS voting system for use by the board.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

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OPINION NO. 2005-006

The Honorable Ron O'Brien
Franklin County Prosecuting Attorney
Franklin County Courthouse
375 South High Street
Columbus, Ohio 43215

Dear Prosecutor O'Brien:

We have received your request for an opinion concerning Directive 2005-01, issued by the Secretary of State on January 12, 2005. Directive 2005-01 relates to the voting methods used in Ohio counties and, in particular, refers to precinct count optical scan (PCOS) voting systems, direct recording electronic (DRE) voting systems,[1] and voter verified paper audit trails (VVPAT).[2] You have asked the following questions:

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[1] R.C. 3506.01(F) sets forth the following definition:

> (F) "Direct recording electronic voting machine" means a voting machine that records votes by means of a ballot display provided with mechanical or electro-optical components that can be actuated by the voter, that processes the data by means of a computer program, and that records voting data and ballot images in internal or external memory components. A "direct recording electronic voting machine" produces a tabulation of the voting data stored in a removable memory component and in printed copy.

[2] R.C. 3506.01(H) sets forth the following definition:

> (H) "Voter verified paper audit trail" means a physical paper printout on which the voter's ballot choices, as registered by a direct recording electronic voting machine, are recorded. The voter shall be permitted to visually or audibly inspect the contents of the physical paper printout. The physical paper printout shall be securely retained at the polling place until the close of the polls on the day of the election; the secretary of state shall adopt rules under Chapter 119. of

1. Does the Ohio Secretary of State have the statutory authority to issue Directive 2005-01 particularly with respect to designating a vendor for a county board of elections on or before February 11, 2005 if the local board has not selected one of the two eligible PCOS vendors by February 9, 2005?

2. May the Secretary of State require a board of elections to choose a PCOS voting device on or before February 9, 2005 that does not have a VVAT required by SHB262?

3. Since HAVA requires that the voting system be ADA accessible, may the Secretary of State designate a PCOS voting device be selected by a Board of Elections on or before February 9, 2005 that is not ADA accessible?

4. Since HAVA requires a review and implementation process in each state that includes public comment, signature of the Governor, submission to the U.S. Election Assistance Commission, reproduction in the Federal Register, and the Ohio plan that went through that process did not mandate PCOS statewide, does the Secretary of State have the authority to unilaterally amend that plan through issuance of Directive 2005-01 and require compliance by February 9, 2005?

For the reasons below, we conclude that the Ohio Secretary of State is not empowered to require, by means of an administrative directive, that the board of elections of each county must, no later than February 9, 2005, select a PCOS voting system provided by a vendor certified by the Secretary of State or, if the board does not make this selection, the Secretary of State will designate one of those vendors to provide a PCOS voting system for use by the board.

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the Revised Code specifying the manner of storing the physical paper printout at the polling place. After the physical paper printout is produced, but before the voter's ballot is recorded, the voter shall have an opportunity to accept or reject the contents of the printout as matching the voter's ballot choices. If a voter rejects the contents of the physical paper printout, the system that produces the voter verified paper audit trail shall invalidate the printout and permit the voter to recast the voter's ballot. On and after the first federal election that occurs after January 1, 2006, unless required sooner by the Help America Vote Act of 2002, any system that produces a voter verified paper audit trail shall be accessible to disabled voters, including visually impaired voters, in the same manner as the direct recording electronic voting machine that produces it.

Directive 2005-01

On January 12, 2005, Secretary of State J. Kenneth Blackwell issued to all county boards of election a document designated Directive 2005-01, entitled "Deployment of Voting Systems." Directive 2005-01 directs each county board of elections to select a PCOS voting system for use in its county. The selection must be made no later than February 9, 2005. If the board of elections does not make a timely selection, the Office of the Secretary of State will select a vendor using a random selection process and will notify the board of elections on February 11th of the vendor selected.

Directive 2005-01 states that the selection and use of PCOS voting systems is required in order to comply with requirements of the Help America Vote Act of 2002 (HAVA)[3] and Sub. H.B. 262, 125th Gen. A. (2004) (eff. May 7, 2004). Directive 2005-01 contains the following explanation:

> The standards under development for VVPAT equipment as required per Substitute House Bill 262, the 2004 increase in Ohio voter registrations and the increase in time required to use VVPAT machines all mitigate against this technology as a viable option for the state of Ohio. The existing Federal funding and supplemental funding from the General Assembly under SHB 262 will not be sufficient to cover the purchase of direct recording electronic (DRE) voting systems with a voter verified paper audit trail (VVPAT). I reached this conclusion following extensive research by the SOS staff.
>
> A logical analysis of the requirements of both HAVA and SHB 262 in combination with the HAVA deadline slightly more than one year away, lead inexorably to the following conclusion. In order for the state of Ohio to be in compliance with both federal and state law within existing funding, Precinct Count Optical Scan (PCOS) voting systems are the only viable option. PCOS voting systems already approved by the Controlling Board as a part of existing contracts meet all federal and state requirements. Further, they can be purchased and deployed with currently available funds.

Your questions concern the authority of the Secretary of State to issue this directive. You have informed us that the Franklin County Board of Elections has used electronic voting machine devices for over a decade and is satisfied with their operation. The Board understands

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[3] The Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, enacted Chapter 146, "Election Administration Improvement," which appears at 42 U.S.C.A. §§ 15301 to 15545 (2004 Pamphlet).

the need to comply with federal and state law, but does not desire to revert to a paper based voting device and questions the authority of the Secretary of State to mandate that result.

Help America Vote Act of 2002

The Help America Vote Act of 2002 was enacted to provide uniform standards for voting processes in elections for federal office, and to provide the states with financial assistance to secure voting systems that ensure the integrity and efficiency of the voting process. *See* note 3, *supra*. HAVA provides for payments to the states to carry out various educational, administrative, and operational activities relating to elections. Among the permitted expenditures are expenditures for "[i]mproving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes." 42 U.S.C.A. § 15301(b)(1)(F). Although some of HAVA's provisions took effect earlier, the date for compliance with its voting system standards in elections for federal office is January 1, 2006. 42 U.S.C.A. §15481(d).

Pursuant to HAVA, the State of Ohio, through the Secretary of State, submitted to the federal government a State Plan providing for the implementation of HAVA in Ohio. *See* 69 Fed. Reg. 14879 (Mar. 24, 2004). The State Plan sets forth a program for meeting the voting system standards of HAVA. It calls for a transition from punch card voting to a more modern mode of voting, provides for the use of electronic voting equipment in some counties, and speaks of flexibility in the choice of vendors and voting systems. 69 Fed. Reg. 14885, 14889 to 14902 (Mar. 24, 2004). The State Plan recognizes the authority given to county boards of election to select and implement voting systems in their counties. 69 Fed. Reg. 14886, 14891, 14901, 14902. The State Plan states, in part:

> The Help America Vote Act requires "uniform and nondiscriminatory election technology" that meets specific voting system standards. Ohio has opted for a program that specifically addresses the requirements of the Act, but *provides counties with some degree of flexibility in choice of vendor and how they implement and develop voting systems to meet the particular needs of their region.*
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> . . . .
>
> Additionally, the Secretary of State will ask the state's Board of Voting Machine Examiners to review the recommendations of the committee to *ensure the vendors and systems meet not only the requirements of the Act, but are reasonable based on their knowledge of Ohio counties and their voting needs. . . .*
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> . . . .
>
> *Providing counties with the ability to choose among a list of qualified vendors preserves the involvement of the counties in the vendor process* while maximizing the buying power of the state under a state term contract procedure. The Secretary of State will serve as the primary contractor for voting devices in the State of Ohio, *embracing the concept that the ultimate beneficiaries of the contract are the counties.*

> Ultimately, the responsibility for ensuring compliance with the Help America Vote Act of 2002 falls to the chief elections official in the state. But the *Secretary of State recognizes the execution of the Act will take place at the county level.*

69 Fed. Reg. 14891 (Mar. 24, 2004) (emphasis added).

As Ohio's chief election official, the Secretary of State is the person "responsible for coordination of the State's responsibilities" under HAVA. 42 U.S.C.A. §15403(e); *see* R.C. 3501.04. The Secretary of State thus has an obligation to promote and implement the program set forth in the State Plan. However, HAVA does not bestow upon the Secretary of State any authority in addition to that given to the Secretary of State under state law. Thus, the Secretary of State may implement HAVA only with the powers granted under Ohio law.

Authority of Secretary of State with regard to county boards of elections

In order to answer your questions, it is helpful to review the authority of the Secretary of State with regard to the operations of county boards of elections. The Secretary of State is the chief election officer of Ohio, with various powers and duties relating to the registration of voters and the conduct of elections. *See* Ohio Const. art. III, § 1; R.C. 3501.04; R.C. 3501.05. The Secretary of State is empowered to appoint members of boards of elections and is responsible for providing them with advice and assistance, as provided by law. R.C. 3501.05(A); *see, e.g.,* R.C. 3501.05(B) (advise board members as to the proper methods of conducting elections); R.C. 3501.05(D) (furnish board members with indexed copies of the election laws); R.C. 3501.05(I) (certify to the boards of elections the forms of ballots and names of candidates for state offices and the form and wording of state referendum questions and issues); R.C. 3501.05(J) (give final approval to ballot language for local questions or issues). R.C. 3501.05(M) (compel the observance by election officers of the requirements of the election laws); R.C. 3506.15 (provide boards of elections with "rules, instructions, directives, and advisories regarding the examination, testing, and use of the voting machine and tabulating equipment, the assignment of duties of booth officials, the procedure for casting a vote on the machine, and how the vote shall be tallied and reported to the board, and with other rules, instructions, directives, and advisories the secretary of state finds necessary to ensure the adequate care and custody of voting equipment, and the accurate registering, counting, and canvassing of the votes").

A board of elections is created in each county. The board consists of four qualified electors of the county, appointed by the Secretary of State, as the Secretary's representatives, to serve for a four-year term. R.C. 3501.06. The board of elections is responsible for providing places for voter registration and places for holding primaries and elections. The board of elections must also provide equipment and supplies for the elections process. *See, e.g.,* R.C. 3501.11(B), (C), (F), (H), (I); R.C. 3506.15 (boards of elections are "charged with the responsibility of providing for the adequate instruction of voters and election officials in the proper use of the voting machine and marking devices").

By statute, the authority to determine the type of voting equipment used in a county is made on the county level, as follows:

> Voting machines, marking devices, and automatic tabulating equipment may be adopted for use in elections in any county in the following manner:
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> (A) By the board of elections;
>
> (B) By the board of county commissioners of such county on the recommendation of the board of elections;
>
> (C) By the affirmative vote of a majority of the electors of such county voting upon the question of the adoption of such equipment in such county.

R.C. 3506.02. The question of adopting the use of voting equipment may be presented to the voters upon petition, and the question of issuing bonds to provide for the purchase of voting equipment may also be presented to the voters. *Id.*; *see also* R.C. 3506.03 (methods of acquiring voting equipment, including purchase or lease).

In selecting voting equipment, the boards of elections are limited to systems that are certified by the Secretary of State. *See* R.C. 3506.05(B) ("[n]o voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes shall be purchased, leased, put in use, or continued to be used … unless it, a manual of procedures governing its use, and training materials, service, and other support arrangements have been certified by the secretary of state"). The Secretary of State appoints the Board of Voting Machine Examiners to examine and approve equipment. *Id.* A vendor who desires to have equipment certified submits that equipment and pays a fee. R.C. 3506.05(C). The Board of Voting Machine Examiners examines the equipment and submits a report to the Secretary of State. R.C. 3506.05(D). "If the board finds that the equipment meets the criteria set forth in sections 3506.06, 3506.07 and 3506.10[4] of the Revised Code, can be used safely and can be depended upon to record and count accurately and continuously the votes of electors, and has the capacity to be warranted, maintained, and serviced, it shall approve the equipment and recommend that the secretary of state certify the equipment. The secretary of state shall notify all boards of elections of any such certification." R.C. 3506.05(D) (footnote added); *see also* R.C. 3506.05(F) and (G) (procedure by which certification of voting equipment may be withdrawn); R.C. 3506.05(H)(1) ("[t]he secretary of state, in consultation with the board of voting machine examiners, shall establish, by rule, guidelines for the approval, certification, and

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[4] R.C. 3506.06, R.C. 3506.07, and R.C. 3506.10 set forth requirements that a voting machine must meet in order to be approved by the Board of Voting Machine Examiners or certified by the Secretary of State. The requirements include such matters as voting in absolute secrecy, voting upon only those matters upon which the elector is entitled to vote, and changing a vote before it is registered.

continued certification of the voting machines, marking devices, and tabulating equipment to be used under Title XXXV of the Revised Code").

In 2004, the General Assembly enacted Sub. H.B. 262, 125th Gen. A. (2004) (eff. May 7, 2004), which, among other things, added to the Revised Code provisions governing DRE voting machines and VVPAT, and requiring that DRE machines meet certain requirements for certification. *See* R.C. 3506.01(F) and (H); R.C. 3506.05(H)(3); R.C. 3506.10(P); notes 1 and 2, *supra*. R.C. 3506.10(P) now states: "On and after the first federal election that occurs after January 1, 2006, unless required sooner by the Help America Vote Act of 2002, if the voting machine is a direct recording electronic voting machine, it shall include a voter verified paper audit trail.[5]

Sub. H.B. 262 also includes uncodified Section 3, which sets forth a procedure for integrating the VVPAT requirement with the State Plan prepared under HAVA. Section 3, in division (E)(1)(a), requires the Secretary of State to adopt a schedule for certifying DRE systems with VVPAT for use in Ohio, and calls for "the certification, acquisition, and implementation of direct recording electronic voting machines with a voter verified paper audit trail not later than the first federal election that occurs after January 1, 2006," unless required sooner by HAVA. The Secretary of State has, thus, been directed by the General Assembly to take appropriate action to enable Ohio voters to use DRE voting systems with VVPAT. The responsibility for selecting and acquiring the equipment rests with the county, and the Secretary of State is not authorized to purchase voting equipment "except when acting as an agent on behalf of the board of county commissioners of a county." Sub. H.B. 262, 125th Gen. A. (2004) (eff. May 7, 2004) (sec. 3, uncodified, div. (F)(2)(a)).

The DRE system with VVPAT is designed to comply with standards for voting systems established by HAVA. Among the standards established by HAVA are the requirements that the voter must be able to verify the votes selected before the ballot is cast and counted, and the voter must have an opportunity to change the ballot or correct any error before the ballot is cast and

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[5] Although Sub. H.B. 262, 125th Gen. A. (2004) (eff. May 7, 2004), makes provision for a voting system based on the DRE voting machine with VVPAT, it does not require that any or all counties use this voting system. Section 3 (uncodified) of Sub. H.B. 262 establishes a procedure for the certification and purchase of DRE systems, but states expressly, in division (F), that the process shall not authorize the Secretary of State to "[r]equire a county board of elections to select or use any direct recording electronic voting machine except as otherwise required by federal law." HAVA permits the use of a variety of voting systems, including DRE systems, provided that they meet applicable requirements. *See* 42 U.S.C.A. § 15481(a)(1)(A) (systems used in federal elections may include lever voting system, optical scanning voting system, or direct recording electronic system); 42 U.S.C.A. § 15481(c) (state may use the same system it used in the federal elections in November 2000, so long as the system meets or is modified to meet requirements); *cf.* 42 U.S.C.A. § 15302 (replacement of punch card or lever voting machines).

counted. 42 U.S.C.A. § 15481(a)(1)(A). VVPAT is designed to satisfy these requirements for a DRE voting system. With regard to a system using paper ballots, the viewing of the ballot provides the opportunity for verification, and change or correction may be achieved through the issuance of a replacement ballot, if necessary. *Id.*; *see also* 42 U.S.C.A. § 15481(c)(2) (for purposes of permitting a voter to verify the votes selected on the ballot before the ballot is cast and counted, "the term 'verify' may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements"); R.C. 3506.10(E) (to be approved and certified, a voting machine must permit the elector to change the elector's vote up to the time the elector starts to register the elector's vote).[6]

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[6] 42 U.S.C.A. § 15481(a) states, in part:

(a) Requirements

Each voting system used in an election for Federal office shall meet the following requirements:

(1) In general

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall –

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office –

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by –

Federal law also requires that, in order to be approved and certified, a voting system must have an audit capacity that meets the following requirements:

> (2) Audit Capacity
>
> (A) In general
>
> The voting system shall produce a record with an audit capacity for such system.
>
> (B) Manual audit capacity
>
> (i) the voting system shall produce a permanent paper record with a manual audit capacity for such system.
>
> (ii) the voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.
>
> (iii) the paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

42 U.S.C.A. § 15481(a)(2). Thus, to satisfy HAVA, a voting system must produce a permanent paper record with a manual audit capacity, and the paper record must be available as an official record for purposes of any recount. For a DRE voting system, VVPAT constitutes the permanent paper record that is available for recount. *See* R.C. 3506.18(A) ("[f]or any recount of an election in which ballots are cast using a direct recording electronic voting machine with a verified paper audit trail, the voter verified paper audit trail shall serve as the official ballot to be recounted"). For a system that uses paper ballots, including a PCOS, the ballots themselves serve this purpose.

Accordingly, the VVPAT that must accompany a DRE, as required by Sub. H.B. 262, is intended to satisfy both the verification requirements and the paper audit trail requirements established by HAVA. *See* R.C. 3506.05(H)(3)(a); R.C. 3506.18(A); *cf.* R.C. 3506.05(H)(3)(b) (the Secretary of State may, by rule, waive the requirement that the VVPAT shall be capable of being optically scanned for the purpose of a recount and shall be readable in a manner that makes

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> (i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and
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> (ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).
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> (C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

the voter's ballot choices obvious to the voter without the use of computer or electronic codes, if the Secretary of State determines that this requirement is cost prohibitive).

Authority for issuance of Directive 2005-01

Your first question is whether the Ohio Secretary of State has statutory authority to issue Directive 2005-01, particularly with respect to designating a vendor for a county board of elections if the county board of elections does not select one of the two eligible PCOS vendors by February 9, 2005. No statute gives the Secretary of State this authority.

As discussed above, both the county boards of elections and the Secretary of State have powers and duties relating to the voting process. However, the decision as to which type of voting method is to be used in a particular county is delegated to the county board of elections, acting independently or with its board of county commissioners, or to the voters of the county. R.C. 3506.02. The Secretary of State is not given authority to make this decision for the county.

The county boards of election are bodies separate from the Secretary of State, with their own statutory powers and duties, including responsibilities that require the exercise of discretion. *See* 2003 Op. Att'y Gen. No. 2003-036 at 2-298 (where board of elections is statutorily authorized to perform an act and is given no clear direction on how to perform it, the board has discretion to perform it in any reasonable manner that is consistent with statute); 2002 Op. Att'y Gen. No. 2002-025 at 2-169 (certain matters "are left to the discretion of the board of elections"). The Secretary of State is not empowered to make decisions on behalf of boards of elections in matters in which the responsibility for exercising discretion and making decisions is bestowed by statute upon the boards of elections. *See generally State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 7, 591 N.E.2d 1186 (1992) ("[a]s the General Assembly has … specifically placed the duty to ascertain whether initiative petitions are properly verified on the boards of elections, we cannot find that the Secretary of State has a clear legal duty to perform it himself"); 2004 Op. Att'y Gen. No. 2004-023 at 2-195; 2002 Op. Att'y Gen. No. 2002-025 at 2-169.

The Secretary of State does have authority to advise the boards of elections as to the proper methods of conducting elections. R.C. 3501.05(B). Further, R.C. 3501.05(M) expressly authorizes the Secretary of State to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws." R.C. 3501.05(M) is a general directive that is meant to make clear that Ohio's election officers must be mindful of the numerous requirements imposed in Title 35, and that the Secretary of State ultimately is responsible for ensuring that those officers observe and implement such requirements. R.C. 3501.05(M) in no way means, however, that the Secretary of State may exercise discretion conferred upon those officers by specific provisions of R.C. Title 35 when he has not otherwise been granted that discretion himself. And that is the case with respect to the voting machine provisions of R.C. 3506.02. This statute makes it the responsibility of officials at the county level to exercise a reasonable discretion and select voting equipment and machines appropriately suited to the needs of the county electorate. R.C. 3506.02 speaks to a specific aspect of the voting process and directly confers authority and responsibility upon county officials. The general directive in R.C.

3501.05(M) cannot reasonably be interpreted to mean that the Secretary of State may override a county's exercise of that authority and discretion, at least with respect to its selection of a voting system that has already received the Secretary of State's certification.

The Secretary of State is responsible for certifying voting systems and making certain that they comply with applicable requirements. The statutory scheme requires, however, that voting systems that are submitted must be approved if they meet the statutory standards. Neither the Board of Voting Machine Examiners nor the Secretary of State is given discretion to arbitrarily reject all but one kind of equipment. Even as the Secretary of State is not empowered to exercise on behalf of the boards of county commissioners the discretion that is given to them to determine which voting system they will choose, the Secretary of State is not empowered to unreasonably limit the choices they have by certifying only a single kind of system. As noted above, the Secretary of State has been directed by the General Assembly to take appropriate action to enable Ohio voters to use DRE systems with VVPAT. An attempt by the Secretary of State to require all county boards of elections to use PCOS systems is inconsistent with this legislative directive.

Boards of election were established on a county basis so that they could tailor their decisions and actions to the needs of individual counties. *See State ex rel. City of North Olmsted v. Cuyahoga County Bd. of Elections*, 93 Ohio St. 3d 529, 533, 757 N.E.2d 314 (2001) (boards of elections are the local authorities that are best equipped to gauge compliance with election laws). The Secretary of State acknowledged this factor in the State Plan outlining the program for Ohio's compliance with HAVA, as quoted above. It is appropriate to consider this factor in the instant case, and to respect the authority of each county board of elections to make the decisions deemed best for its county.[7]

The Secretary of State asserts in Directive 2005-01 that the mandates it sets forth are necessary in order to achieve timely compliance with HAVA. Although the Secretary of State is responsible for coordinating Ohio's responsibilities under HAVA, *see* 42 U.S.C.A. § 15403(e), no provision of law grants the Secretary of State authority to make decisions on behalf of boards of elections. The fact of a looming federal deadline does not give the Secretary of State increased authority under state law.

One major reason given by the Secretary of State for directing the selection of a PCOS voting system by each board of elections is that this system is the only one that can be provided

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[7] It is clear that each board of elections is limited to the selection of voting systems that have been certified by the Secretary of State. If the only systems so certified are PCOS systems, then a board that needs to replace its existing system is limited to a PCOS system. It appears, however, that the Board of Voting Machine Examiners is required to approve, and the Secretary of State is required to certify, any voting equipment submitted for certification that satisfies the requirements set forth in R.C. 3506.05(D). Hence, it seems likely that more than one type of system will achieve certification.

throughout the state with the funds currently available. Directive 2005-01 states that the existing federal funding and supplemental funding from the General Assembly under Sub. H.B. 262 "will not be sufficient to cover" the purchase of DRE voting systems with VVPAT. It is not clear if this is the case and, in any event, the Secretary of State is not given authority to make a decision regarding the voting systems used in each of the eighty-eight counties on the basis of his financial predictions.

The Secretary of State is not given independent authority to determine how to expend moneys designated for voting systems. R.C. 3506.17 states expressly that "[a]ll moneys received pursuant to the Help America Vote Act of 2002 *that are not approved for release by the controlling board* as of the first federal election that occurs after January 1, 2006, shall be deposited in the state treasury to the credit of the [county electronic voting machine maintenance] fund." R.C. 3506.17 (emphasis added). This provision indicates both that the Controlling Board, as an arm of the General Assembly, has authority over the final appropriation of money for the purchase of new election equipment, and that the General Assembly anticipated that counties would be using electronic voting machines for which maintenance would be necessary. Thus, even apart from the fact that the Secretary of State is not empowered to direct the boards of elections to mandate PCOS voting systems throughout the state, the purchase of voting systems requires the prior approval of the General Assembly, by way of the Controlling Board.

The provisions of HAVA support this conclusion. HAVA moneys are paid to the state, and their expenditure is made by the state for the purposes of the state, not by the chief elections officer. For example, 42 U.S.C.A. § 15301(a) declares that the Administrator of General Services shall make a payment "to each State," and division (b)(1) of that section notes that "[a] State shall use the funds" for various purposes. Similarly, in establishing the program for the replacement of punch card or lever voting machines, 42 U.S.C.A. § 15302(a) consistently refers to the payment of funds to, and their use by, "a State" or "each State." *See also* 42 U.S.C.A. § 15401(a) and (b)(1) ("[t]he Commission shall make a requirements payment each year … to each State" meeting certain conditions and "a State receiving a requirements payment shall use the payment only to meet" certain requirements); 42 U.S.C.A. § 15403(a) ("[a] State is eligible to receive a requirements payment for a fiscal year" under certain conditions).

The provisions of HAVA thus speak consistently of payments to the state, to be expended in accordance with state law. Under Ohio law, the General Assembly, as the legislative branch, appropriates funds to the executive officers. The executive officers may allocate the funds in accordance with the discretion they have been given. *State ex rel. AFSCME v. Taft*, 156 Ohio App. 3d 37, 2004-Ohio-493, 804 N.E.2d 88, ¶ 34 (Allen County). There is no separate grant of authority from the General Assembly to the Ohio Secretary of State to permit the Secretary of State to mandate the use of certain equipment to comply with HAVA and then use HAVA funds for that purchase, thereby circumventing the participation of the General Assembly.

Further, as noted above, county boards of elections, working with their boards of county commissioners, are given authority to make decisions about voting systems for their counties, and also about financial aspects of providing those systems. It is clear that various costs are involved in the selection and operation of different types of voting systems. Some systems have high initial costs for equipment but low costs for maintenance and operation. Other systems that might initially cost less may require substantial outlays for operations. For example, electronic systems generally come with an enclosure for voting, whereas the implementation of a PCOS system might require the purchase of voting booths. Further, the operation of a PCOS system requires the printing of paper ballots, with attendant issues of how many to have available at each polling site and the different ballots required in overlapping political districts. Some of the costs, such as printing ballots, are borne by local jurisdictions in some elections. *See* 2004 Op. Att'y Gen. No. 2004-008. It is appropriate for a local body to make the decisions that impact upon the local community with respect to the various costs related to the selection and operation of voting equipment.

The uncodified provisions of Sub. H.B. 262 providing for the certification, acquisition, and implementation of DRE systems with VVPAT recognize that boards of county commissioners have pending contracts for the purchase of various types of voting systems, including DRE systems. Section 3 (uncodified) of Sub. H.B. 262 provides a timetable and procedure for dealing with those contracts and achieving compliance with the new statutory standards for DRE systems. Section 3 recognizes that it may be appropriate for a county to acquire a DRE system and then upgrade, retrofit, or otherwise equip the machines with VVPAT. In addition, the provisions of Section 3 indicate that it is not the intent of the General Assembly that funds available for voting systems be used solely to purchase PCOS systems, but that they may be expended also for DRE systems or for upgrading or retrofitting purposes. Further, in division (C), Section 3 expresses the General Assembly's clear intent to provide funds for DRE systems with VVPAT, as follows: "It is the intent of the General Assembly that the state of Ohio pay, with funds made available pursuant to the Help America Vote Act of 2002 or through an appropriation of state capital funds, for any additional costs a county incurs after the initial purchase of direct recording electronic voting machines, to upgrade, retrofit, or otherwise equip those voting machines with a voter verified paper audit trail" if the county acquired the voting machines in any of several ways. *See also* Sub. H.B. 262, 125th Gen. A. (2004) (May 7, 2004) (sec. 3, uncodified, div. (H)) ("[i]t is the intent of the General Assembly that the state of Ohio pay, with funds made available pursuant to the Help America Vote Act of 2002 or through an appropriation of state capital funds, the full cost of acquiring all voting machines, marking devices, or automatic tabulating equipment under this section"). It is appropriate for the board of elections, with knowledge of its community and its resources, to make determinations that will affect both the current and the future costs of elections within the county.

For these reasons, we conclude that the Ohio Secretary of State is not empowered to require, by means of an administrative directive, that the board of elections of each county must, no later than February 9, 2005, select a PCOS voting system provided by a vendor certified by

the Secretary of State or, if the board does not make this selection, the Secretary of State will designate one of those vendors to provide a PCOS voting system for use by the board.

Choice of PCOS without VVPAT

Your second question is whether the Secretary of State may require a board of elections to choose a PCOS voting device that does not have a VVPAT required by Sub. H.B. 262. As discussed above, the Secretary of State is not empowered to require a board of elections to select a PCOS vendor by February 9, 2005, or have a vendor selected on its behalf. Thus, the answer to the first question answers the second question as well.

The issue of a VVPAT, however, is worthy of comment. As discussed above, a VVPAT is a physical paper printout on which the voter's ballot choices are recorded. Under the definition set forth in R.C. 3506.01(H), *see* note 2, *supra*, a VVPAT accompanies a direct recording electronic voting machine in order to provide the voter with a means of visually or audibly inspecting a printout of the ballot choices recorded on the DRE. R.C. 3506.01(H). The VVPAT also serves as the paper record that is available for purposes of any recount. *See* R.C. 3506.18(A). In a PCOS system, the voter marks an optical scan ballot. The ballot is a physical representation of the voter's ballot choices, and the voter thus views the ballot choices in this manner. *See* 42 U.S.C.A. § 15481(a)(1)(A). The PCOS ballot also constitutes the permanent paper record that is available as an official record for purposes of any recount, as required by 42 U.S.C.A. § 15481(a)(2). Hence, in an optical scan system, the optical scan ballot serves the purposes of a voter verified paper audit trail.

Access for the disabled

Your third questions asks whether the Secretary of State may require a board of elections to choose a PCOS voting device that is not ADA accessible, in light of the fact that HAVA requires that the voting system be ADA accessible. Again, the conclusion that the Secretary of State is not empowered to require a board of elections to select a PCOS voting system answers this question.

It may be noted, with regard to the accessibility issue, that R.C. 3506.19 states:

> On and after the first federal election that occurs after January 1, 2006, unless required sooner by the Help America Vote Act of 2002, each polling location shall have available for use at all elections at least one direct recording electronic voting machine that is accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters.

In order for the boards of elections to comply with this provision (enacted by Sub. H.B. 262), it will be necessary for the Secretary of State to certify at least one DRE voting system as an

acceptable voting system. *See also* R.C. 3501.05(V) (Americans with Disabilities Act coordinator within the Office of the Secretary of State). Pursuant to statute, the DRE system must be accompanied by a VVPAT. Once that system is approved, no provision of law prevents a county board of elections from selecting that voting method pursuant to R.C. 3506.02.[8]

State Plan under HAVA

Your fourth question asks whether the Secretary of State is authorized, by the issuance of Directive 2005-01, to unilaterally amend the State Plan that was prepared under HAVA, submitted to the United States Election Assistance Commission, and published in the Federal Register. As discussed above, the Secretary of State lacks authority to issue the mandate set forth in Directive 2005-01, so that directive is not binding on the county boards of elections. As your question suggests, however, in addition to extending beyond the scope of the Secretary of State's statutory authority, Directive 2005-1 is inconsistent with the State Plan submitted by the State of Ohio under HAVA. The Secretary of State is designated as the person responsible for coordinating Ohio's responsibilities under HAVA. Having signed the State Plan, the Secretary of State is clearly knowledgeable of its contents and expected to take actions to promote its program. It is evident that the Secretary of State is not empowered to take actions that are inconsistent with the State Plan.

As discussed above, the State Plan was prepared in accordance with federal law to set forth Ohio's program for achieving compliance with HAVA. 42 U.S.C.A. § 15404. The Secretary of State, as chief election official, was responsible for developing it, through a committee including local elections officials, and following public notice and an opportunity for public comment. 42 U.S.C.A. §§ 15405 to 15406. In order for Ohio to receive funds under HAVA, the chief executive officer of Ohio – that is, the Governor – or a designee, in consultation and coordination with the Secretary of State, must certify each year that the State of Ohio is in compliance with federal law and with its State Plan. 42 U.S.C.A §15403(a).

When it enacted Sub. H.B. 262, the General Assembly instructed the Secretary of State to amend the State Plan so that it would conform with the newly-enacted provisions governing DRE voting systems with VVPAT. Sub. H.B. 262, 125th Gen. A. (2004 (eff. May 7, 2004) (section 4, uncodified). The Secretary of State is authorized and mandated to amend the State Plan in response to this directive from the General Assembly. He has no similar authority to submit amendments on his own initiative, or to vary substantially from the procedure established in the State Plan, which acknowledges the importance of having county boards of elections make significant decisions regarding voting methods used in their counties. *See* 42 U.S.C.A. § 15404(a)(11) (a state may not make any material change in the administration of the State Plan

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[8] A county must, of course, comply with applicable provisions in making the selection and make appropriate financial arrangements, which may involve moneys from federal, state, or local sources.

unless the change is developed and published in the Federal Register and made subject to public notice and comment in the same manner as the State Plan).

The State Plan adopted under HAVA sets forth the procedure by which Ohio will achieve compliance with HAVA. It is imperative for the Secretary of State to comply with the State Plan, rather than to take actions that are inconsistent with its provisions.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that the Ohio Secretary of State is not empowered to require, by means of an administrative directive, that the board of elections of each county must, no later than February 9, 2005, select a precinct count optical scan (PCOS) voting system provided by a vendor certified by the Secretary of State or, if the board does not make this selection, the Secretary of State will designate one of those vendors to provide a PCOS voting system for use by the board.

Respectfully,

JIM PETRO
Attorney General