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## Elections

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The biggest elections law story of the 2003 General Assembly involved the need to change a number of North Carolina elections procedures to comply with the new federal Help America Vote Act of 2002 (HAVA). The HAVA requirements set in motion most of the new legislation.

### **Help America Vote Act**

#### **North Carolina Requirements under the Federal Legislation**

In the wake of the difficulties attending the presidential election in Florida in 2000, Congress passed HAVA<sup>1</sup> with the goal of improving the administration of elections throughout the United States. In its substantive provisions, HAVA imposes on the states a number of new requirements with respect to federal elections:

- It establishes standards for voting machines. Each polling place must now have at least one direct-record electronic voting system or other voting system equipped for voters with disabilities.
- It establishes new standards for provisional voting in an attempt to limit the number of voters turned away from the polls because of questionable registration statuses.
- It establishes standards for the information that must be posted at the polls.
- It creates new requirements concerning voting after the polls normally would have closed in situations where court orders keep the polls open.
- It requires each state to maintain a single, uniform, centralized, computerized statewide voter registration list that includes a unique identifier for each voter.
- It requires that a voter must provide a driver's license number or the last four digits of his or her Social Security number when registering to vote (if the voter has neither, he or she must be provided with a special number for that purpose).
- It adds requirements for the identification documents a voter must provide when voting if he or she initially registered by mail.

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1. Pub. L. No. 107-252, 42 U.S. C. §§ 15301–15545.

Although the requirements literally apply only to federal elections, as a practical matter they will apply to all elections, since the state cannot realistically conduct federal elections by one set of rules and state and local elections by another.

In its financial assistance provisions, HAVA makes money available to the states for election administration improvements on a very favorable matching basis. North Carolina (and the other states) need only provide 5 percent of the amount that the federal government provides. As a “maintenance of effort” condition for receipt of the funds, North Carolina (as well as the other states) also must continue to appropriate money each year for HAVA-related activities at a level at least as high as that appropriated in 2002.

### **State Match for Federal Funds**

HAVA requires that each state receiving the matching federal funds establish a special account for that money. S.L. 2003-12 (H 549) does so, amending G.S. 147-69.2(a) (which lists funds maintained by the state treasurer) to create the Election Fund.

The Current Operations and Capital Improvements Appropriations Act of 2003 (the budget act), S.L. 2003-284 (H 397), appropriates to the State Board of Elections \$6,837,797 for fiscal 2003–2004 and \$4,915,939 for fiscal 2004–2005. In Section 25.1 the budget act transfers \$1,922,215 to the Election Fund to constitute the 5-percent match for federal funds over the biennium. Of that amount, approximately \$1.2 million is to be used in the first year of the biennium to match an expected \$22.6 million in federal funding. The remaining \$0.7 million is to be reserved to match an expected \$14 million in the second year of the biennium.

### **Statewide Voter List**

Traditionally in North Carolina each county board of elections has maintained the official voter registration list for that county, and together the county voter registration lists comprised the official lists of registered voters for the entire state. In the mid-1990s the General Assembly directed the State Board of Elections (SBE) to create a statewide system of computerized voter registration. Though the system has been developed and implemented in the intervening years, it has continued to serve primarily as a supplement to the county-based official lists. G.S. 163-82.11 has provided that “[e]ach county board of elections shall maintain its own computer file of registered voters,” and G.S. 163-82.10(a) has provided that “[t]he county board of elections shall maintain custody of the official registration records of all voters in the county.”

S.L. 2003-226 (H842) (the state HAVA compliance act) modifies several state statutes to accommodate the new HAVA legislation. In light of the HAVA requirement that each state maintain a single, uniform, centralized, computerized statewide voter registration list, the act amends G.S. 163-82.10 to provide, beginning January 1, 2004, that the statewide computerized list is to be “the official voter registration list for the conduct of all elections in the State.” The same provision is made in an amendment to G.S. 163-82.11. The requirement that each county maintain its own computerized file of registered voters is deleted. A new provision specifies that the completed and signed voter registration forms maintained by the counties are to be “backup to the official registration record of the voter” (that is, the statewide computerized file).

### **Electronic Applications for Voter Registration**

G.S. 163-82.3 specifies the forms that a voter must use to apply to register to vote, whether application is made by mail, at a state agency, or at the office of the county board of elections. G.S. 163-82.6 provides that the county board of elections office may receive the application forms by mail, by fax, or in person and requires that the forms “shall be valid only if signed by the applicant.” The state HAVA compliance act amends G.S. 163-82.6 and G.S. 163-82.10, beginning January 1, 2004, to permit the completed forms to be “either a paper hard copy or an electronic document” and to provide that “[a]n electronically captured image of the signature of the voter on

an electronic voter registration form offered by a State agency shall be considered a valid signature for all purposes.”

The new statutory provisions make the electronically captured images of voters’ signatures and the full or partial Social Security and driver’s license numbers that may be generated in the voter registration process confidential and not subject to the public records law (a corresponding amendment is made to the Public Records Law, G.S. Chapter 132). Disclosure of driver’s license numbers in violation of this provision does not give rise to civil cause of action unless the disclosure results from gross negligence, wanton conduct, or intentional wrongdoing.

### **Verification of Voter Identification**

HAVA requires that the single statewide computerized voter registration list contain a unique identifier for each voter and that voters provide a driver’s license number or the last four digits of their Social Security numbers when registering to vote (if the voter has neither, then he or she will be assigned a number for that purpose). To comply with HAVA, S.L. 2003-226 amends G.S. 163-82.4, effective January 1, 2004, adding the individual’s driver’s license number to the elements of information required on the voter registration application. It specifies that if the applicant does not have a driver’s license, he or she is to provide the last four digits of his or her Social Security number. If the applicant has neither a driver’s license nor a Social Security number—a situation presumably applicable to a very small set of individuals—the SBE will assign the applicant a “unique identifier number.” In addition, S.L. 2003-226 also amends G.S. 163-10A, requiring the SBE to create, for use in the new statewide system, a unique registration number for every voter. This registration number will not necessarily be numerically related to an individual’s driver’s license or Social Security number or the unique identifier number described above.

To verify information provided on the voter registration application, the HAVA compliance act adds new G.S. 163-82.19(b), directing the SBE and the Department of Transportation to develop and operate a system for matching information in the voter registration system with driver’s license information maintained by the Division of Motor Vehicles (DMV).

Finally, the state HAVA compliance act specifies that two additional questions be added to the voter registration application form, beginning January 1, 2004: (1) Is the applicant a United States citizen? (2) Will the applicant be eighteen years old by the time of the election?

### **Jury List Preparation**

In each county, a jury commission prepares a list of prospective jurors for that county from two sets of names. The first set is a list of the county’s registered voters and the second is a list of the county’s licensed drivers. The state HAVA compliance act amends G.S. 20-43.4, beginning January 1, 2004, to require that the Commissioner of Motor Vehicles compare new lists of licensed drivers to the county voter registration list maintained by the SBE, eliminating duplicates in the two lists. The comparison will also be used to identify the licensed (or formerly licensed) drivers who are also registered voters, the licensed (or formerly licensed) drivers who are not registered voters, and the registered voters who are not licensed (or formerly licensed) drivers. This information will be included in the final list the DMV sends to each county’s jury commission.

A separate bill, S.L. 2003-278 (H 1120), amends G.S. 163-82.10(d) to provide that addresses required to be kept confidential in accordance with the Address Confidentiality Program of G.S. Chapter 15C are not to be made available to jury commissions.

### **Posted Information at Polling Places**

The state HAVA compliance act creates G.S. 163-166.7 to meet HAVA’s standards for information that must now be posted at the polls. The new statute requires that in every federal or state election, each county board of elections must post at each polling place a sample ballot including:

- the date of the election and the hours for voting,
- instructions on how to vote using the voting machines in that polling place,
- instructions on how to cast provisional ballots,
- instructions to mail-in registrants and first-time voters on how to comply with requirements regarding voter identification (see “Proof of ID of Mail-In Registrants” below), and
- general information on voting rights, such as how to contact appropriate officials to complain of violations.

This new provision is effective for all elections occurring after January 1, 2004.

### **Voting Systems, Overvotes, and Lever Machines**

HAVA creates new standards for voting systems (commonly referred to as “voting machines”). The state HAVA compliance act responds by amending G.S. 163-182.1, directing the SBE to develop, beginning January 1, 2004, new procedures for certain types of voting systems. Optical scan and direct record systems are to make special provision for overvotes. If a voter casts a ballot on which he or she has marked more names than the number of candidates to be elected (or more proposals than the number to be approved), the voting machine is to notify the voter of the overvote, inform the voter that if the overvote is not corrected no vote will be counted in that race, and provide the voter with an opportunity to correct the overvote.

In 2001 the General Assembly provided that no new punch-card voting machines could be put into use in North Carolina and that those counties then using punch-card systems must eliminate them by 2006. The state HAVA compliance act adds a similar provision to G.S. 163-165.4A with respect to lever machine voting systems.

Finally, S.L. 2003-226 amends G.S. 163-165.7 to make clear that in the process of approving or disapproving voting systems to be used in the state, the SBE may employ the guidelines and information supplied and the laboratories approved by the Election Assistance Commission, which was created by HAVA.

### **Expansion of Provisional Voting and Notice to Provisional Voter**

North Carolina has for a number of years permitted individuals to vote provisionally in certain circumstances in which they would otherwise be turned away from the polls without being allowed to vote at all. Such voters may cast a provisional ballot, one that is not counted until eligibility to vote has been established (establishment of eligibility typically being accomplished in the days after the election but before the canvass). Under administrative procedures adopted by the SBE (codified in the North Carolina Administrative Code but not in the General Statutes), voters have been able to cast provisional ballots in the following instances:

1. the person is already registered to vote in the county but moved from one precinct to another within the county more than thirty days earlier and reports to the new precinct to vote;
2. the person claims to have applied for voter registration (perhaps through the Division of Motor Vehicles or another state agency), but the person’s name cannot be found in the voter registration records;
3. the person was previously removed from the voter registration list but has in fact continuously remained eligible to vote; or
4. the person disputes the voting district to which he or she has been assigned.

HAVA establishes new requirements for provisional voting. In response the state HAVA compliance act has expanded the range of circumstances in which a voter may vote provisionally, beginning January 1, 2004. It adds new G.S. 163-166.11 providing that *any* person is eligible to cast a provisional ballot—even if he or she does not appear on the official list of registered voters—as long as the person executes a written affirmation asserting that he or she is a registered voter and eligible to vote. The new statute also provides that the provisional voter is entitled to know whether his or her vote is eventually counted, and, if not, the reason. A system to furnish

this information to provisional voters must be established by either the SBE or county boards of elections.

### **Voting after 7:30 When Polls Are Kept Open by Court Order**

Under North Carolina law, the polls close at 7:30 PM. Occasionally, because of irregularities or other circumstances, a court will order the polls to remain open for some time after 7:30. HAVA creates new standards for voting after the polls would normally have closed in situations where a court orders the polls to remain open. In response, the state HAVA compliance act amends G.S. 163-166.01 to provide, beginning January 1, 2004, that a voter who votes after 7:30 PM as a result of a court order or other lawful order, including an order of the county board of elections, may vote only by provisional ballot. These provisional ballots are to be handled and counted separately from other provisional ballots cast in that election. If the court order has not been reversed or stayed by the time of the canvass, the provisional ballots are to be counted.

### **Proof of ID of Mail-In Registrants**

North Carolina law does not require voters to produce identification at the polls when they present themselves to vote. HAVA, however, includes requirements for identification documents to be provided by voters who initially registered by mail. In response, the state HAVA compliance act adds new G.S. 163-166.12, applicable only to individuals who have registered to vote by mail on or after January 1, 2003, and who have not previously voted in North Carolina in an election that includes a race for federal office. Such individuals, in order to vote in person after January 1, 2004, must present to the precinct election officials one of the following:

1. a current and valid photo identification;
2. a current utility bill, showing name and address;
3. a bank statement, showing name and address;
4. a government check, showing name and address;
5. a paycheck, showing name and address; or
6. another government document showing name and address.

In order to vote by absentee mail-in ballot after January 1, 2004, such individuals must submit a copy of one of these documents with the mailed-in ballot. Elections board officials must note the type of identification submitted and then dispose of the mailed copy.

If an individual subject to these requirements attempts to vote in person without the proper identification, he or she may vote a provisional ballot. If the individual attempts to vote by absentee mail-in ballot without the proper identification, elections board officials are to treat the mailed-in ballot as a provisional ballot.

These requirements do not apply to the following: (1) an individual who submits one of the acceptable identification documents when registering by mail; (2) an individual who submits a driver's license number or the last four digits of his or her Social Security number when registering by mail and an election official matches the number submitted to an existing state identification record bearing the same number, name, and date of birth; (3) an individual voting absentee under the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act, or other federal law.

### **HAVA Complaint Procedures**

The state HAVA compliance act creates new G.S. 163-91 directing the SBE to establish a complaint procedure, as required by HAVA, for the resolution of complaints alleging HAVA violations.

### **The SBE and Federal Write-In Absentee Ballots**

The state HAVA compliance act amends G.S. 163-256 to specify that, as pertains to all elections and processes related to the use of federal write-in absentee ballots, the SBE is to be the single office responsible for providing information concerning voter registration and absentee voting procedures to be used by absent overseas and uniformed services voters.

The act also amends G.S. 163-245, effective January 1, 2004, to provide that an otherwise valid voter registration or absentee ballot application submitted by an absent uniformed services voter during a year is not to be refused or prohibited on the grounds that it was submitted before the first date that the county board of elections otherwise accepts such applications. If such an application is rejected, the county board of elections must notify the voter of the reason for the rejection.

Finally, the act amends G.S. 163-247(3) to provide that an absentee ballot request from an absentee uniformed services voter is to be considered an application for absentee ballots for all elections held through the next two regularly scheduled general elections for federal offices.

## **Non-HAVA Changes Related to Elections Administration**

### **Campaigning at Polling Places**

G.S. 163-166.4 prohibits campaign activities—distribution of literature, placement of signs, solicitation of votes, and so forth—in the voting place or within a buffer zone around the polling place. The statute provides that the buffer zone for each polling place is to be determined by county boards of elections. A buffer zone must be set at a fifty-foot width from the door of the polling place, where practical, but in any event must be at least twenty-five feet wide. The statute has further provided that, “where practical,” the county board of elections is to establish an area outside the buffer zone where individuals can participate in campaign activities.

County boards of elections are responsible for securing appropriate sites for polling places in all of the precincts within the county. Frequently these sites are government-owned buildings, and establishing both the buffer zone and the area outside it permissible for campaign activities is usually a practical matter. Sometimes, however, the polling sites are privately owned buildings, such as churches, and the owners may impose as a condition of the site’s use severe restrictions or even complete bans on campaign activities. S.L. 2003-365 (H 819) amends G.S. 163-166.4 to limit the circumstances in which county boards are able to set up polling places with such restrictions on campaign activities. First, it adds to the statute a direct requirement that county boards establish areas for campaign activities outside the buffer zones, removing the “where practical” provision. Second, it allows an exception to this requirement only upon a grant of special permission by the executive director of the SBE. With this permission a county board may enter into an agreement with property owners that includes this type of restriction. In order to grant such permission, the executive director must determine that

- no other suitable voting place is available in the precinct,
- the county board will require the precinct chief judge to monitor the grounds ensuring that the restrictions on campaign activity are applied equally to all candidates and parties, and
- the distribution of voting places subject to the restrictions does not disproportionately favor any party, candidate, or racial or ethnic group.

### **Precinct Officials’ Pay**

G.S. 163-46 requires that county boards of elections pay precinct chief judges, judges, and assistants at least the state minimum wage (currently \$5.15 per hour) for their services and specifies that the county commissioners may provide funds with which the county elections board may pay these precinct officials additional amounts. S.L. 2003-278 adds a provision to the statute

specifying that if a precinct official is being paid an hourly wage or daily fee on an election day and the official performs additional election duties away from the assigned precinct voting place, he or she is not entitled to any additional moneys for those duties, except for reimbursable expenses.

### **Student Election Assistants**

S.L. 2003-278 adds new G.S. 163-42.1 providing that for elections after January 1, 2004, students are eligible to be appointed as student election assistants to work at voting places. These students must

- be at least seventeen years old at the time of the primary or election,
- be United States citizens,
- be county residents,
- be enrolled in a secondary school (or home school),
- have exemplary academic records as determined by the school,
- be recommended by the school's principal or director, and
- have parental consent.

No more than two student assistants may be assigned to one voting place. Each student assistant works under the direct supervision of the election judges and receives the same training and compensation as other assistants.

### **Absentee Votes**

G.S. 163-132.5G requires that county boards of elections maintain their voting data by precinct so that votes cast by precinct residents by absentee ballot, both mail-in and one-stop, are reported on the precinct returns. The statute also provides that the SBE rules enforcing this requirement are to call for compliance with it by 2006. Further, the statute requires that these rules may allow for exceptions in circumstances where the expense of compliance would create a financial hardship for a particular county. S.L. 2003-183 (H 869) amends G.S. 163-132.5G to move the compulsory compliance date to 2004 for counties the SBE determines are capable of complying by that year.

### **Candidates' Names on Ballots**

G.S. 163-165.5 establishes requirements for the content of election ballots, including how candidates' names should appear as regards the use of titles, nicknames, and so forth. S.L. 2003-209 (H 201) adds a provision to the statute directing the SBE to establish a review procedure that local boards of elections must follow to ensure that names appear on the ballots in accordance with the statutory requirements.

### **Township ABC Elections**

G.S. 18B-600 specifies the types of elections that may be held with respect to local options for the sale of alcoholic beverages—malt beverage sales, unfortified wine sales, sales of liquor through Alcoholic Beverage Control stores, and retail sales of mixed beverages. In general, the statute provides that these elections are to be on a countywide or citywide basis. In some instances, however, the statute allows for alcoholic beverage elections in jurisdictions other than counties or cities, such as townships with certain specified characteristics. S.L. 2003-218 (S 19) amends the provision concerning township elections to permit elections in townships located within a county where the population of all cities in the county that have previously approved the sale of any kind of alcoholic beverages comprises more than 20 percent of the total county population. In any such township election, the area within any incorporated municipality is to be excluded, and no permits may be issued in the excluded area.

### **Campaign Contributions by Federal PACs**

G.S. 163-278.7A authorizes federal political committees to make contributions to North Carolina state candidates or political committees, provided that the federal committees comply with SBE reporting requirements. S.L. 2003-274 (H 787) amends the statute to specify that these requirements may not be more stringent than those required of North Carolina state political committees, unless the federal committee makes an election contribution to a state candidate or committee in excess of \$4,000.

### **Campaign Reporting in Municipal Referenda**

The campaign finance restrictions and reporting requirements applicable to state and local races in North Carolina are generally applicable to referenda and to the committees established in favor of or in opposition to a referendum question. The definition of *referendum* in G.S. 163-278.6(18a) broadly includes within its scope—and therefore within the restrictions and reporting requirements—“any type of municipal, county, or special district referendum.” S.L. 2003-278 amends the statute to specify that the definition includes any initiative or referendum authorized by a city’s charter or local act but does not include recall elections. (Currently, recall elections are available in fifteen municipalities and one school administrative unit.)

### **Nomination of Presidential Candidates**

Candidates for North Carolina’s presidential preference primary can get on the primary ballot in one of two ways. First, under G.S. 163-213.4, the SBE meets and nominates all individuals who have become eligible to receive payments from the federal Presidential Primary Matching Payment Account. The statute has provided that this meeting was to be held on the first Tuesday in February before the primary. Second, under G.S. 163-213.5, a candidate can present a petition to the SBE accompanied by a certain number of qualifying signatures by 5:00 PM on the day of the SBE nominating meeting. S.L. 2003-278 changes these two statutory dates. The nominating meeting is moved to the first Tuesday in March, and the deadline for the submission of petitions is moved to 5:00 PM on the Monday prior to the nominating meeting.

## **Non-HAVA Changes Related to Election Procedures**

### **Signing the Poll Book**

The state HAVA compliance act amends G.S. 163-166.7 to require, beginning January 1, 2004, that before voting, a voter must sign the poll book (or other voting record or voter authorization document being used at that polling place). If the voter is unable to sign, a precinct official is to enter the person’s name.

### **Time Between Election and Canvass**

On election night the votes are counted at the precinct (in the manner appropriate to the type of voting machines used) and the precinct officials report the results to the county board of elections. Some time after that, the county board of elections conducts the *canvass*, the final review for determining that the votes have been counted and tabulated correctly. With the results of the canvass in hand, the county board then prepares “abstracts” of the results in triplicate, sends one copy to the SBE, sends another to the clerk of superior court, and retains the third.

G.S. 163-182.5 has required county boards to conduct the canvass on the third day after the election (usually Friday after the Tuesday election). S.L. 2003-278 amends the statute to require the boards to conduct the canvass on the seventh day after the election. The same change is made

in G.S. 163-291(5) for partisan municipal elections and in G.S. 163-293(c) and G.S. 163-294(b) for nonpartisan municipal elections.

G.S. 163-300 has required county boards of elections to send abstracts of the municipal election results to the SBE by the fifth day after the election. S.L. 2003-278 moves this deadline to the ninth day.

These changes are effective for elections occurring after January 1, 2004.

### **Timing of Demand for Mandatory Recount**

G.S. 163-182.7(b) permits a candidate who loses by 1 percent or less to demand a recount. The demand for a recount must be made by noon on the fourth day after the canvass. In coordination with the change of the canvass date, S.L. 2003-278 moves the deadline for demanding a mandatory recount to 5:00 PM on the first day after the canvass.

Federal, statewide, and certain other races are canvassed by the SBE rather than by county boards of elections. G.S. 163-182.7(c) permits any candidate losing by 1 percent or less to demand that the SBE conduct a recount. The statute has set the deadline for this recount demand to be the second Wednesday after the election. S.L. 2003-278 changes this deadline to the second Thursday after the election.

These changes are effective for elections occurring after January 1, 2004.

### **Timing of Demand for Second Primary**

G.S. 163-111 permits a second-place candidate in a party primary election to demand a second primary if the leading candidate does not receive 40 percent of the vote. The statute has required that the demand be presented by noon on the seventh day following the primary. S.L. 2003-278 changes this deadline to noon on the ninth day.

G.S. 163-291(5) has provided that in partisan municipal elections the demand for a second primary must be presented by noon on the Monday following the canvass of the first primary. S.L. 2003-278 changes this deadline to noon on Thursday.

These changes are effective for elections occurring after January 1, 2004.

### **Timing of Certificate of Election**

G.S. 163-182.15 has required the county board of elections and the SBE to issue certificates of nomination or election five days after completing their canvasses (unless there is an election protest pending). Effective for elections occurring after January 1, 2004, S.L. 2003-278 provides that boards of election and the SBE will have six days to issue the certificates.

### **Authority of SBE to Order a New Election**

G.S. 163-182.13 outlines the circumstances in which the SBE, with the concurrence of four of its members, may order a new election. These circumstances include “irregularities or improprieties occur[ring] to such an extent that, *although it is not possible to determine whether those irregularities or improprieties affected the outcome of the election*, they taint the results of the entire election and cast doubt on its fairness.” S.L. 2003-278 deletes the italicized portion of this provision. The effect of this deletion is that the SBE will be able to order a new election if the irregularities or improprieties cast doubt as to the results of the entire election or its fairness, even if the SBE is certain the irregularities or improprieties would not have affected the election’s outcome.

### **Power of Court to Stay Certification of Election**

Following an election a candidate may pursue a protest, first to the county board and then by appeal to the SBE. G.S. 163-182.14 has provided that after the SBE has made its decision and is

prepared to issue a certificate of election to the opponent, the candidate may petition the court for an order staying the issuance of the certification. Before the court can issue the stay, however, the statute has specified that (1) the candidate must provide evidence that he or she is likely to prevail in the protest, (2) the candidate must provide evidence that the results of the election would be changed in his or her favor as the result of the protest or appeal, and (3) minor irregularities having no effect on the election results are not sufficient for the court to issue a stay. S.L. 2003-278 deletes the second and third of these provisions.

*Robert P. Joyce*