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4 U.S. ELECTION ASSISTANCE COMMISSION

5 PUBLIC MEETING

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7 1225 NEW YORK AVENUE, N.W.

8 WASHINGTON, D.C. 20005

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10 Taken on the date of:

11 THURSDAY, SEPTEMBER 6, 2007

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21 Start time: 10:00 o'clock, a.m.

22 Taken by: Jackie Smith, a court reporter

1 U.S. ELECTION ASSISTANCE COMMISSION:

- 2 Donetta Davidson, Chairman
- 3 Rosemary Rodriguez, Vice-Chair
- 4 Gracia Hillman, Commissioner
- 5 Caroline Hunter, Commissioner
- 6 Juliet Thompson-Hodgkins, General
- 7 Counsel
- 8 Thomas Wilkey, Executive Director
- 9

10 SPEAKERS:

- 11 Jeffrey Lubbers, American University
- 12 Curtis Crider, EAC
- 13 Mia Leswing, Clifton Gunderson, LLP
- 14 Edgardo Cortes, EAC
- 15 Jim Dickson
- 16 Myrna Perez
- 17 Scott Novakowski
- 18 Nancy Tate
- 19 David Becker

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1 P-R-O-C-E-E-D-I-N-G-S

2 CHAIR DAVIDSON: If everybody

3 would turn their cell phones on silent,

4 that's what we're doing up here, and then

5 we will start. Nice to have reminders.

6 Welcome, everybody. I'd like to

7 call the meeting to order. And as I said,

8 if you put your cell phones on silent, we

9 would appreciate it. If everybody would

10 please stand for the "Pledge of

11 Allegiance."

12 (Pledge of Allegiance.)

13 CHAIR DAVIDSON: Thank you.

14 Julie Hodgkins, our counsel, would you

15 please call the roll.

16 MS. HODGKINS: Thank you, Madam

17 Chair. Please respond by saying "present"

18 or "here" after I call your name.

19 Donetta Davidson, Chair?

20 CHAIR DAVIDSON: Here.

21 MS. HODGKINS: Rosemary

22 Rodriguez, Vice-Chair?

1 VICE-CHAIR RODRIGUEZ: Here.

2 MS. HODGKINS: Caroline Hunter,

3 Commissioner?

4 COMMISSIONER HUNTER: Here.

5 MS. HODGKINS: Gracia Hillman,

6 Commissioner?

7 COMMISSIONER HILLMAN: Here.

8 MS. HODGKINS: Madam Chair,

9 there are four members present and a

10 quorum.

11 CHAIR DAVIDSON: Thank you.

12 If everybody would turn to the

13 agenda, please, and review it, and if I

14 could get a motion.

15 VICE-CHAIR RODRIGUEZ: I move to

16 accept approval of today's agenda.

17 CHAIR DAVIDSON: Second.

18 COMMISSIONER HILLMAN: Second.

19 CHAIR DAVIDSON: All those in

20 favor say, I. Thank you.

21 Today, I'd like to thank

22 everybody for being with us, and as you

1 can see, we have a very full agenda. Most
2 of it is discussion that will focus on
3 internal procedures and administrative
4 procedures. We feel that it is very
5 important for the public to know how the
6 EAC conducts business, not only internal
7 business, but also external issues,
8 especially those that impact all voters
9 today, discussion about the National Voter
10 Registration Act.

11 As always, testimony and other
12 relative documents from today's meeting
13 will be available on our Web site at
14 "www.eac.gov." We've got a lot of work to
15 do, so we'll go ahead and get started.

16 Under old business, we have minutes
17 from the June 14th meeting. If I could
18 have approval or corrections made by the
19 board.

20 COMMISSIONER HILLMAN: Move

21 approval of the June 14, 2007 minutes.

22 VICE-CHAIR RODRIGUEZ: Second.

1 CHAIR DAVIDSON: All those in
2 favor, say I. Opposed? Motion carried.

3 And then the same, I have
4 minutes from the July 19, 2007 public
5 meeting. And if I could have a motion on
6 approving or any corrections that need to
7 be made to be done at this time.

8 COMMISSIONER HILLMAN: Move
9 approval.

10 CHAIR DAVIDSON: Second?

11 VICE-CHAIR RODRIGUEZ: Second.

12 CHAIR DAVIDSON: All those in
13 favor, say I. Thank you.

14 Moving forward, I have a report
15 from the Executive Director, Tom Wilkey.
16 Can I have you do that now, Tom.

17 MR. WILKEY: Thank you, Madam
18 Chair. I also want to thank everybody for
19 being with us today. We have a full day
20 planned, so I will be as brief as

21 possible.

22 Under our voting system

1 certification program, we have been very
2 busy with this program over the past few
3 weeks. We have ten voting system
4 manufacturers who have registered with EAC
5 for certification. Seven voting systems
6 have been submitted for testing. We have
7 some suspended testing on one system, and
8 one system is pending. We have issued two
9 notices of non-compliance. We notified
10 ABS of a discrepancy regarding a mother
11 board, and we're awaiting their response,
12 We notified ES&S of requirements
13 to report all manufacturing and assembly
14 facilities. ES&S has complied with our
15 request.
16 We have issued three notices of
17 clarification which we call NOCs, and we
18 encourage election equipment manufacturers
19 and the public to take note of these. The
20 three are: Timely submission of

21 certification applications, EAC certified

22 labs doing work outside of voting system

1 certificate engagements, and state testing

2 done in conjunction with federal testing.

3 These are all issues that have been

4 brought to the attention of the director

5 of certification. And to be as

6 transparent as possible, rather than

7 simply answering them over the telephone,

8 we answer them in writing, and make sure,

9 for everyone to see, so that they can be

10 of benefit to others who have questions

11 relative to our certification manual.

12 We will post more notices of

13 clarification in the next few days, so

14 please make sure you check our Web site,

15 again, you will hear me say it frequently,

16 "eac.gov."

17 Under voting system labs, EAC

18 has three certified laboratories; SysTest,

19 IBeta Quality, and Infoguard. We're

20 awaiting disposition of several more, at

21 least one that may be imminent in the next

22 few weeks from NAVLAP, at the National

1 Institute of Standards and Technology.

2 And you can keep up to date on that

3 information at "eac.gov."

4 Under the Voluntary Voting

5 System Guidelines, we received the draft

6 version of the TGDC, who has worked

7 diligently over the past year or two on

8 this next iteration. It will be posted

9 today, may be up there at this point

10 within the next couple of hours, and we

11 will send out a press release to have one

12 on our e-mail list.

13 Within the next ten weeks, we

14 will launch a public comment feature on

15 "eac.gov", and the public will have 120

16 days to comment. We will be publishing it

17 also in the Federal Register. After the

18 public comment period ends, EAC will

19 consider all comments, then publish the

20 EAC draft version. And all comments will

21 be available on our Web site, and you will

22 see every single comment that has been

1 made relative to this document.

2 We plan to have several hearings
3 on the VVSG, and hope to receive a very
4 wide range of input. At the end of the
5 process, we'll adopt a final version. We
6 will distribute all these details for
7 moving forward when we post the TGDC
8 version, and the Commission has taken a
9 very aggressive approach to how it will
10 adopt this very comprehensive document.

11 And I hope that all of you who are
12 interested in this will check out the
13 details at "eac.gov."

14 Under election management
15 guidelines, EAC has issued a first three
16 chapters of its Election Manual
17 Guidelines, available also on our Web
18 site. They are certification, system
19 security, and fiscal security. As I have
20 indicated in the past, we will also have

21 additional chapters as we move forward.

22 We have issued a new Quick Chart Guide

1 about voting system certification and we
2 will distribute it to election officials
3 through the country, also available on our
4 Web site, and we also have copies out at
5 the front desk.

6 Our Office of Inspector General,
7 who is responsible for reviewing audits of
8 HAVA funding at the state level -- we also
9 encourage you to look at the information
10 about these audits. The IG continues to
11 review circumstances surrounding EAC
12 research projects, fraud, and voter
13 intimidation. And we are hopeful the IG
14 will distribute findings as soon as review
15 is completed.

16 Under our poll worker best
17 practices, EAC has adopted two guidelines
18 to help address the challenges election
19 officials face, finding and keeping good
20 poll workers. Both are available on our

21 Web site, and we'll be distributing them

22 soon to election officials throughout the

1 country. We have a sign-up sheet out
2 front. If you need copies, we'll be glad
3 to get them to you.

4 This is a very comprehensive
5 guide of particular interest to me, and I
6 am very proud of the work that went into
7 this, the successful practices for poll
8 worker recruitment, and guidelines for
9 college poll workers.

10 Under effective election
11 designs, many of you were here for this
12 presentation at a past public meeting.
13 The Commission has donated a set of best
14 practices to have effective election
15 designs, and ballots, and voter
16 information. We're working to get it up
17 on our Web site. This was a comprehensive
18 process because of the magnitude of the
19 graphics in that report, and we're running
20 more CGs. We will post information on the

21 results. We'll have all of this posted on

22 our Web site.

1 As always, EAC distributes a
2 monthly electronic newsletter that
3 provides updates on our activities,
4 upcoming meetings, and other HAVA-related
5 issues. The best way to receive the
6 frequent updates to our voting program is
7 to sign up by calling us at 866-747-1471,
8 or letting us know at "havainfo@eac.gov",
9 if you wish to be included in receiving
10 this information, as well as all of the
11 information that we distribute.

12 Madam Chair, that is my report
13 for this meeting.

14 CHAIR DAVIDSON: Thank you.

15 I have one question or a
16 statement, and I'd like for you to correct
17 me if I'm wrong.

18 At the time that we had the
19 notices of noncompliance, that was also
20 sent out to all election officials

21 throughout the nation; isn't that correct,

22 at the same time it was put up on our Web?

1 MR. WILKEY: We normally notify
2 chief state election officials because
3 they are responsible for certification
4 issues, as well as posting it on our Web
5 site.

6 CHAIR DAVIDSON: Okay. I just
7 wanted to make sure of that.

8 Other questions for Mr. Wilkey?

9 COMMISSIONER HILLMAN: I do.

10 CHAIR DAVIDSON: Commissioner
11 Hillman.

12 COMMISSIONER HILLMAN: Just for
13 clarification, when you talked about the
14 notices of clarification, do I understand
15 that those are issued in response to a
16 question raised by the labs, or the
17 manufacturers, or both?

18 MR. WILKEY: They could be both.
19 They could be both, and they are merely
20 clarification of what is in our manual.

21 But similar to what we do on our HAVA

22 questions where we put it up on FAQs on

1 our Web site, we wanted to take the same
2 approach, particularly since other people
3 may ask the same question. So we're
4 taking great care to do it in writing, and
5 making sure that it's up on our Web site
6 for everybody to see.

7 COMMISSIONER HILLMAN: And then
8 under the election management guidelines,
9 the new Quick Start Guide about voting
10 system certification, is that a Quick
11 Start Guide that is a companion for the
12 chapter on certification?

13 MR. WILKEY: Yes.

14 COMMISSIONER HILLMAN: And is it
15 an update of a Quick Start that we already
16 put out or is it a new Quick Start?

17 MR. WILKEY: There is a new
18 Quick Start. We had done an earlier
19 version before we adopted our
20 certification, so this is an update to it.

21 CHAIR DAVIDSON: Any other

22 questions? Okay.

1 I anticipate that I am going to
2 have to leave early today, so I am going
3 to turn the meeting over to our
4 Vice-Chair, Commissioner Rodriguez, to
5 conduct the rest of the meeting and this
6 afternoon's meeting also. I hope I can be
7 here as much as possible, but I just
8 wanted to make sure that the meeting was
9 conducted properly.

10 So, Commissioner Rodriguez,
11 thank you, very much, for being willing to
12 do this.

13 VICE-CHAIR RODRIGUEZ: Thank
14 you, Madam Chair. I'm going to ask,
15 because we're all in varying degrees of
16 health right now, if anybody needs to take
17 a break, if they will just let me know.
18 Thank you.

19 Under new business, the first
20 item is consideration of EAC advisory

21 07-003A regarding maintenance of effort.

22 Maintenance of effort is a means by which

1 the Federal Government requires states to
2 share any expense of funding in an
3 endeavor.

4 The Help America Vote Act
5 requires the states maintain the effort or
6 level of funding that each state expended
7 in the fiscal year preceding November,
8 2000. Back in May, EAC adopted an
9 advisory about maintenance of effort. And
10 since that time, we have had additional
11 questions. So today, we're considering an
12 amendment to our May advisory that will
13 address the additional issues, and we'll
14 hear from general counsel, Julie Hodgkins.

15 MS. HODGKINS: Thank you, Madam
16 Vice-Chair. I appreciate the opportunity
17 to bring this to you.

18 Since the May meeting when you
19 adopted this advisory on maintenance of
20 effort, we have received several

21 questions, primarily from states of

22 Colorado and South Dakota, concerning what

1 I will call an interpretation of the
2 existing maintenance of effort advisory.
3 Some of those questions, I believe, were
4 probably answered in the original
5 advisory, but rather than try to go
6 through an interpretation, we felt like it
7 was just better to recommend that we issue
8 an amended advisory to directly answer
9 their questions.

10 Essentially, the questions were
11 three. First of all, the question that
12 was asked was whether or not we would
13 apply this advisory for maintenance of
14 effort requirement retroactively. I don't
15 know that that's exactly the right
16 question, so I think that the appropriate
17 question there is, what years does the
18 maintenance of effort requirement apply
19 to. So that's the question that we have
20 answered.

21 And, essentially, you covered

22 that in your opening there, and that is,

1 from the point at which a state receives
2 HAVA funds, they have to maintain the same
3 level of effort they maintain in the
4 fiscal year preceding the 2000 election.

5 So in the for instance, if a
6 state received HAVA funds on August 31st
7 of 2004, they would have to maintain their
8 same level of effort for the fiscal year
9 that encompasses that date, August 31,
10 2004. We based that on the state's fiscal
11 year. And for every year thereafter they
12 have and use HAVA, the second question
13 that was asked was which fiscal year must
14 the state use to demonstrate that it has
15 met the maintenance of effort
16 requirements. This came up because
17 several states have counties that have
18 different fiscal years than the state
19 does.

20 Well, that seems like a terrible

21 accounting nightmare for them. You can

22 understand how it's difficult to determine

1 which one they should rely upon. In
2 proposing this answer to you, I consulted
3 with our Office of Inspector General
4 primarily responsible for auditing those
5 funds and determining whether or not
6 maintenance of effort has been made, and
7 asked them whether or not it really
8 mattered to them whether or not there were
9 different fiscal years. And, essentially,
10 I was told that would be fine but,
11 essentially, that the state and county
12 needed to provide documentation of having
13 met the maintenance of effort in whichever
14 fiscal year applies to them. That makes
15 it a little bit easier on the state or
16 county to be able to demonstrate that them
17 met that maintenance of effort
18 requirement.

19 You may recall from the original
20 advisory that the state or county did

21 could that in one of two ways; number one,

22 by demonstrating that they sent at least

1 the same amount of money that they spent
2 in the fiscal year preceding the 2000
3 election. And if they can't demonstrate
4 that, they can go back and figure out what
5 their base year maintenance of effort was,
6 and then demonstrate in each year that
7 they have met at least that amount of
8 spending.

9 So there is sort of an easy way
10 out and a more difficult procedure. If
11 they can't produce the easy plan, the last
12 question that was asked was who is,
13 essentially, responsible for providing
14 maintenance of effort. Our grants are
15 issued to the states. So, primarily, the
16 state will be responsible for approval of
17 maintenance of effort. However, they can
18 do that by having the county provide
19 documentation showing that they have made
20 that maintenance of effort.

21 So we'll be looking initially to

22 the state, but if they want to prove up

1 that by having the county submit
2 documentation, that's fine by us. So that
3 covers the questions that were asked.

4 What I would recommend to the
5 Commission is we adopt Advisory 07-003A as
6 a replacement and update to previously
7 adopted Advisory 07-003.

8 VICE-CHAIR RODRIGUEZ: Thank
9 you.

10 Ms. Hodgkins, are there any
11 questions on this issue? Are we prepared
12 to vote on it?

13 COMMISSIONER HILLMAN: Well, I
14 know we have discussed this before, and
15 maybe this is just -- the thing I think
16 that didn't stick in my head, okay,
17 looking at Question No. 5 under the
18 proposed maintenance of effort. I take it
19 No. 7 is a direct quote out of HAVA.

20 MS. HODGKINS: It is.

21 COMMISSIONER HILLMAN: So it

22 talks about not less than the left of such

1 expenditures maintained by the state for
2 the fiscal year ending prior to November.
3 I got that. Then it says, if the state
4 receives HAVA funds on August 31, 2004,
5 then the state in its subdivisions would
6 be responsible for maintaining this effort
7 during the state or local fiscal year
8 encompassing August 31, 2004. That level
9 of effort encompassing 2004 is not less
10 than the level of expenditures maintained
11 by the state prior to November 2000.

12 MS. HODGKINS: Exactly.

13 COMMISSIONER HILLMAN: And if it
14 was by any chance --

15 MS. HODGKINS: They must
16 demonstrate that they have expended the
17 same amount of money. If they have not
18 expended that same amount of money, then
19 our auditors would issue a finding that
20 they have failed to meet their maintenance

21 of effort requirement, and they would have

22 to reimburse their HAVA funds with that

1 amount of money.

2 VICE-CHAIR RODRIGUEZ: Thank

3 you. Are there any further questions?

4 Are we prepared to vote?

5 CHAIR DAVIDSON: I move that the

6 EAC adopts Advisory 07-003, amending the

7 previous issued 07-003, and that this

8 advisory be posted on our Web site, as

9 submitted, to substitute the 07-003.

10 COMMISSIONER HUNTER: Second.

11 VICE-CHAIR RODRIGUEZ: Its been

12 moved and seconded to adopt the advisory

13 as discussed. Are there any questions?

14 All those in favor? Any opposed? Okay.

15 We have adopted, and we will post the

16 advisory.

17 We're now going to go into the

18 administrative procedures briefing on the

19 agenda in morning. As all of you know,

20 the EAC is a young agency, and in some

21 cases, we try to go beyond what's

22 required, but we have some catching up to

1 do in other areas to be sure that we have
2 in place all of the appropriate
3 administrative procedures. Congress is
4 also very interested in our progress in
5 this area. And to ensure maximum
6 productivity and transparency, the EAC has
7 made the adoption of these procedures a
8 top priority.

9 I am going to ask the panel to
10 come forward, please; Professor Lubbers,
11 Curtis Crider, the Inspector General for
12 the EAC, Mia Leswing, and Ms. Hodgkins
13 will also participate. I will introduce
14 Professor Lubbers, and then ask Curtis to
15 introduce Ms. Leswing.

16 Jeffrey Lubbers is a Fellow in
17 Law and Government, American University
18 College of Law. He teaches courses in
19 administrative law, environmental, federal
20 institutions, and ADR, which is

21 alternative dispute resolution; am I

22 correct?

1 MR. LUBBERS: Yes.

2 VICE-CHAIR RODRIGUEZ: He's also
3 taught at the Miami University School of
4 Law, Georgetown University Law Center,
5 Melbourne University, Macomb University
6 Law School. He was a Colonel and JD from
7 Chicago Law School, and is a member of the
8 Bar of the State of Maryland and District
9 of Columbia.

10 Prior to joining American
11 University, he served in various positions
12 with the Administrative Conference of the
13 United States, the United States
14 Government's advisory agency on procedure
15 improvements in federal programs until its
16 closure by the 104th Congress in 1995.

17 I encourage you to Google
18 Professor Lubbers. He's got a very
19 impressive background, and we welcome you
20 this morning.

21 MR. LUBBERS: Thank you, very

22 much. I am pleased to be here this

1 morning to discuss the spectrum of
2 administrative procedure requirements
3 applicable to the U.S. Elections
4 Assistance Commission, and I won't go over
5 my background since you did in such nice
6 detail. Thank you, very much.

7 As you probably know, the
8 administrative conference did not turn out
9 to be a permanent agency after all. We
10 were defunded in 1959, but Congress has
11 recently re-authorized the administrative
12 conference, although it has not provided
13 any funds for it. So the law is still on
14 the books, but it hasn't been recreated as
15 of yet. It's too bad, because I think it
16 could be helpful to the EAC.

17 I would summarize some of the
18 procedural laws that apply to the EAC.
19 First, as you well know, HAVA established
20 EAC as an independent entity headed by you

21 four Commissioners who are appointed by

22 the President and confirmed by the Senate.

1 This makes the EAC an agency for the
2 purpose of Title 5 of the United States
3 Code, including the Administrative
4 Procedure Act and other statutes that
5 adopt this definition.

6 So I would suggest that the
7 following statutes that I will discuss
8 next apply. Some of them also mandate
9 that covered agencies publish implementing
10 regulations. So, first, the
11 Administrative Procedure Act or APA. This
12 act was enacted in 1946 and applies to all
13 executive branch agencies. It contains
14 default procedures applying to agency
15 adjudication, rulemaking, as well as
16 judicial review of agency actions. It
17 does apply to EAC, although it does not
18 specifically mandate implementing
19 regulations.

20 Now, again, as you know, the

21 EAC's substantive responsibilities are

22 contained in HAVA, and those transferred

1 from the Federal Election Commission under
2 the National Voter Registration Act of
3 1993, NVRA. The responsibilities under
4 HAVA primarily awarding grants, conducting
5 certification and decertification of
6 voting systems hardware and software by
7 accredited labs, conducting studies of
8 election-related issues, and adopting or
9 modifying Voluntary Voting System
10 Guidelines.

11 HAVA specifically precludes the
12 Commission from issuing any rule or
13 regulation or taking any other action,
14 quote, "which imposes any requirement on
15 any state or unit of local government,
16 except to the extent permitted by Section
17 9(a) of NVRA, but it does contain specific
18 notice and comment procedural requirements
19 for adopting or modifying Voluntary Voting
20 System Guidelines, as we were discussing

21 this morning." Thus, the APA's procedure

22 requirements concerning rulemaking in

1 Section 553 of Title 5 would apply only to
2 those rules issued under NVRA. Any such
3 rules might be covered by the Paperwork
4 Reduction Act, which provides special
5 procedures for OMB review of rules
6 containing information on election
7 requirements, the Regulatory Flexibility
8 Act, which provides for special
9 consideration for rules affecting small
10 businesses and small communities, and the
11 Unfunded Mandates Reform Act, which
12 provides for special consultations with
13 state, local, and tribal governments on
14 rules affecting them.

15 In addition, under the
16 Congressional Review Act, agency rules,
17 including non-binding rules such as the
18 EAC's Voluntary Voting System Guidelines,
19 must be submitted to Congress before they
20 can quote, "take effect."

21 Now, with respect to your

22 non-binding guidelines, it is a little

1 hard to understand what that might mean,
2 but I still think that you are supposed to
3 transmit these guidelines to Congress.

4 Finally, under 206(c) of the
5 E-Government Act of 2002, requiring an
6 agency to accept rulemaking submissions by
7 electronic means, to the extent
8 practicable, that would apply to any
9 rulemaking under HAVA, but it sounds like
10 you are already complying with this act
11 with respect to voluntary guidelines.

12 The EAC does not appear to have
13 any adjudicative responsibilities.
14 However, it should be noted that the APA
15 does have some other general requirements
16 that might come into play, including the
17 right to representation when appearing in
18 Commission proceedings, requirement of
19 statements of reasons for denial of
20 applications or petitions, special

21 requirements concerning the withdrawal,

22 suspension, revocation of a license, which

1 might actually apply to your defense.

2 Freedom of Information Act or
3 FOIA. This act, originally enacted in
4 1966, applies to all executive branch
5 agencies. It requires all agencies, one,
6 to publish certain items of information in
7 the Federal Register. Two, to index and
8 make available for public inspection and
9 copying certain other items of
10 information, and three, to make certain
11 agency records available to any member
12 members of the public upon request for
13 such records.

14 More specifically, each agency
15 is required, in accordance with published
16 rules, to publish in the Federal Register
17 a list of things which I will just
18 summarize briefly: Description of its
19 central and field organizations, and the
20 places at which the employees work and

21 from whom, and the methods whereby the

22 public may obtain information. So,

1 basically, your organizational
2 information. Rules of procedure and
3 descriptions of forms available, and
4 instructions as to the scope and contents
5 of all papers, reports, or examinations.
6 And a large category that affects other
7 agencies more than yours, substantive
8 rules of general applicability adopted as
9 authorized by law, and statements of
10 general policy or interpretations of
11 general applicability formulated and
12 adopted by the agency.

13 Now, here, I would say as a
14 footnote that, as you know, that there is
15 the Office of Federal Register whose
16 director administers the Federal Register
17 and the Code of Federal Regulations. I
18 think it would be useful for the EAC to
19 seek its own part in the CFR, probably in
20 Title 11, and to seek permission to

21 publish its voluntary guidelines there,

22 along with any rules under NVRA.

1 I mentioned when I was at the
2 Administrative Conference, we published
3 our advisory guidelines in the CFR. FOIA
4 also requires some other rulemaking. It
5 requires agencies to make your non-exempt
6 records available to requesters who have
7 described them reasonably and requested
8 them in accordance with published rules,
9 stating the time, place, fees, if any, and
10 procedures to be followed.

11 In addition, there is some
12 amendment to FOIA which have also required
13 or at least authorized some rulemaking.
14 In 1986, FOIA directed each agency to
15 promulgate regulations in conforming to
16 OMB guidelines, in terms of fees charged.
17 OMB did publish its guidelines in 1987.
18 The 1996 amendments to FOIA provided
19 agencies may promulgate regulations
20 pursuant to notice and public comment,

21 providing for the aggregation of certain

22 requests, and if you got a lot of requests

1 or FOIA, and for multi track processing of
2 requests for records. That's
3 discretionary. You may promulgate those
4 regulations.

5 In addition, each agency shall
6 promulgate regulations pursuant to notice
7 and comment for expedited processing of
8 requests for records. Therefore, I
9 believe EAC is obligated to publish its
10 organization and functions, and also its
11 procedures for disclosure of information.

12 Third, the Government and
13 Sunshine Act, an act enact in 1976,
14 requires all agencies headed by two or
15 more presidentially appointed,
16 Senate-confirmed members to undertake its
17 business in open session, unless the
18 business falls into one of nine
19 exemptions. In addition, such meetings --
20 and also closed meetings must be noticed

21 in the Federal Register within seven days

22 of the meeting. So the EAC, obviously, is

1 covered by the Sunshine Act, and I notice
2 that today's meeting was properly noticed
3 in the Federal Register. It appears that
4 you are following the Sunshine Act.

5 However, the act also requires
6 each covered agency to promulgate
7 regulations to implement requirements of
8 the act after giving the public at least
9 30 days to file written comments. I
10 believe EAC has yet to comply with this
11 requirement.

12 Fourth, Privacy Act. This act
13 enact in 1974 focuses on systems of
14 records established or maintained by the
15 agency. A system of records is a group of
16 any records where individual names or
17 other individual identifiers can be used
18 to retrieve the information. For each
19 systems of record an agency maintains, it
20 must publish in the Federal Register the

21 name and location of the system, the

22 categories of individuals contained in the

1 system, the routine use of the records,
2 agency policies concerning the records,
3 including storage, retrieval, access,
4 retention and disposal, the person,
5 including title and address, responsible
6 for the system, the method used to notify
7 individuals how to gain access to records
8 about themselves, and the sources or
9 records in the system. Any new use of the
10 system must be noticed for comment 30 days
11 prior to implementing the new use. Exempt
12 systems must also be noticed. It also
13 must establish rules and training for
14 persons who work with Privacy Act
15 materials.

16 So the EAC should develop and
17 publish a set of rules concerning the
18 protection of privacy and access to
19 individual records under the Privacy Act
20 of 1974.

21 Fifth, the Information Quality

22 Act. This is a little known act that was

1 added to a big appropriations bill kind of
2 secretly in 2000. And it requires
3 agencies to issue guidelines following OMB
4 general guidelines to regulate their use
5 and dissemination of information, and also
6 to develop an administrative mechanism so
7 that affected parties may seek correction
8 of information that does not comply with
9 information quality guidelines.

10 You also have to make periodic
11 reports to OMB. OMB published guidelines
12 on this in 2002, and I think this could
13 come into play with respect to your
14 responsibility to undertake and
15 disseminate major studies of election
16 administration issues.

17 So EAC should develop its
18 guidelines for implementing the IQA and
19 develop some dispute resolution mechanism
20 in case somebody complains about some

21 information that you are disseminating.

22 So I think those are the

1 statutes that are most pressing for you to
2 consider. Of course, there are some other
3 Government-wide statutes that apply to the
4 EAC, including the Federal Advisory
5 Committee Act, which requires agencies
6 meeting with outside groups to conform to
7 procedures in the act. And it applies to
8 the three advisory committees that are
9 established by HAVA; the Election
10 Assistance Commission's Standards Board,
11 the Election Assistance Commission's Board
12 of Advisors, and the Technical Guidelines
13 Development Committee.

14 So these boards are going to
15 have to follow the Advisory Committee Act,
16 and also the General Services
17 Administrations government-wide
18 regulations that are in Part 41 of the
19 CFR.

20 Now, other statutes worth noting

21 include the Ethics in Government Act, the

22 Federal Tort Claim Act, in case somebody

1 might find it would be hard to see how
2 they could sue you under the Tort Claims
3 Act, but it's possible, I suppose. And
4 then the Government Performance Results
5 Act, which requires agencies to develop
6 strategic plans, annual performance plans,
7 and performance reports as to how the
8 agencies are meeting the plans.

9 In addition, you might consider
10 the need at some time down the line to
11 develop regulations concerning testimony
12 by Commission employees in legal
13 proceedings and production of Commission
14 records in legal proceedings. Some
15 agencies have felt the need for these kind
16 of regulations where their employees are
17 called to testify in private tort
18 litigation. And if you thought that might
19 be a problem, you might want to establish
20 some rules to sort of regulate how that

21 might work out.

22 So I would be pleased to answer

1 any questions you might have, assist the
2 Commission in any way that I can in the
3 future. I would also be happy to discuss
4 the possibility of having a training
5 session, maybe one-day or half-day
6 training at American University Law School
7 for the Commission and staff.

8 VICE-CHAIR RODRIGUEZ: Thank
9 you, very much. I think we will proceed
10 with presentations, unless you want to ask
11 questions. Why don't we allow some
12 questions now then.

13 COMMISSIONER HUNTER: Thank you.
14 Professor Lubbers, thank you for coming
15 today. We know you quite literally wrote
16 the book on this area, and we appreciate
17 your willingness to come talk to us.

18 My question, my first question
19 is regarding the Paperwork Reduction Act.
20 And I know that you note that it may only

21 apply to the rules issued under NVRA. I

22 think that's what you said.

1 MR. LUBBERS: That's what I
2 said, in terms of rulemaking. I would
3 just clarify that. When it comes to
4 Paperwork Reduction Act applicability to
5 rulemaking, I think it applies to those
6 rules that have to be done under the APA,
7 which would be the NVRA rules, but as a
8 broader matter would apply to forms,
9 surveys, information requests, that the
10 Commission undertakes totally apart from
11 rulemaking.

12 COMMISSIONER HUNTER: Well,
13 that's too bad.

14 MR. LUBBERS: There is something
15 interesting in the Paperwork Reduction
16 Act. There is a list of independent
17 regulatory agencies in the Paperwork
18 Reduction Act. That is the only place in
19 the U.S. Code that actually defines the
20 term independent regulatory agency. And

21 the reason for that is that it has a

22 provision in it that applies, such an

1 agency to override an OMB disapproval of
2 an agency information collection request
3 by a majority vote.

4 Most commissions are odd
5 numbered commissions. So the FCC, for
6 example, has five members. It could
7 overturn it by a three, two vote. Here, I
8 guess, it would require a three, one or
9 two, one vote maybe. There is a list of
10 agencies in there. Of course, EAC is not
11 on the list because it didn't exist at the
12 time of the Paperwork Reduction Act, but
13 there is a catchall provision that says
14 any agency that is similar to this list.
15 So I would suspect that the EAC would have
16 that power to override an OMB disapproval
17 by a majority vote.

18 COMMISSIONER HUNTER: Just so I
19 understand, the purpose of that act
20 doesn't and the title of it doesn't seem

21 to go to the purpose of it. I imagine the

22 purpose is to make sure that the Federal

1 Government sort of knows what the federal
2 agencies are doing with respect to
3 collecting information, making sure that
4 it's a proper collection, and that type of
5 thing.

6 MR LUBBERS: And that it does
7 not burden the public with unnecessary
8 collection requirements. So in that sense,
9 it is a paperwork reduction.

10 COMMISSIONER HUNTER: Yes. You
11 may have noticed HAVA establishes the EAC
12 as a clearinghouse of information, so many
13 people out there have said to us, well,
14 there is not a lot of information with
15 respect to state laws on the EAC Web site.
16 And many members of the public and members
17 of the press hope that the EAC may be able
18 to serve that role, to help people
19 understand what the varying state laws
20 are.

21 The problem is that's become

22 incredibly difficult because of the

1 Paperwork Reduction Act. Every time we

2 want to do a survey, it becomes

3 problematic with respect to paperwork.

4 One other thing we are told is we may do

5 the collection of information ourselves,

6 do it ourselves, for example, actually

7 looking up the statutes and posting it.

8 MR. LUBBERS: That's fine. That

9 wouldn't come under the reduction act.

10 COMMISSIONER HUNT: Okay. Thank

11 you.

12 COMMISSIONER HILLMAN: I think I

13 have questions for Professor Lubbers but,

14 quite frankly, I'd like to hear from the

15 other two panelists before I know what

16 questions I'm going to ask him.

17 CHAIR DAVIDSON: I would like to

18 say I really appreciate you being here,

19 and I may have questions in a little bit.

20 I think it's the very same thing we're

21 hearing from our counsel, but having it

22 down on paper definitely helps us. So I

1 appreciate your willingness.

2 MR. LUBBERS: I would say that
3 you are not alone, in terms of being a new
4 agency that has to deal with this complete
5 era of Government-wide statutes. If you
6 have any follow-up questions after the
7 hearing, I would be happy to answer them.

8 CHAIR DAVIDSON: We appreciate
9 your offer.

10 VICE-CHAIR RODRIGUEZ: And the
11 fact that your agency was eliminated by
12 Congress was not lost.

13 Mr. Crider.

14 MR. CRIDER: Good morning. I
15 appreciate the opportunity to talk.
16 Clifton Gunderson is the firm that we
17 hired last year to help us do audit work.
18 We're now in our first option with Clifton
19 Gunderson, and what we're using them for
20 is to perform audits of the states as well

21 as perform audits here in the EAC. As

22 part of our contract, they also do the

1 grant audits, also operational program
2 economy, efficiency reviews, any other
3 type of reviews we need done at the
4 request of the OIG.

5 Clifton Gunderson is the 13th
6 largest CPA and consulting firm in the
7 country, with offices in 17 states and
8 Washington, D.C. They have more than
9 1,900 employees, and some of the services
10 they provide are performance audits,
11 financial audits, attestation engagements,
12 internal control reviews, compliance
13 audits, economy efficiency reviews, and a
14 myriad of other services.

15 They have quite a bit of
16 experience in the Federal Government.
17 Some clients include the Department of
18 Agriculture, Department of Homeland
19 Security, Department of Justice, National
20 Science Foundation, Government

21 Accountability Office, Department of the

22 Treasury. They also do work in state

1 government offices too, Illinois Office of
2 the Auditor General, Colorado Office of
3 the State Auditor.

4 Ms. Mia Leswing, who will be
5 doing a presentation shortly, is a partner
6 working from Clifton Gunderson. She has
7 over 22 years in auditing, is a certified
8 public accountant, certified government
9 financial manager, systems manager. She
10 has experience in Federal and State
11 Government. We're very fortunate to have
12 her on our team.

13 Currently, in terms of systems
14 for the OIGs, they are doing quite a bit
15 of work in the states for us. As you
16 know, we're going out auditing HAVA funds.
17 And currently, they have completed, so
18 far, Virginia, Indiana, Kentucky, and
19 Wyoming.

20 In terms of success of their

21 audit, we have identified a number of

22 issues. What we are getting for our

1 return on investment right now, it's about
2 five to one. For every dollar we spend,
3 we're recouping five dollars for the
4 program. We feel like we have a fairly
5 successful program.

6 Audits of Rhode Island and
7 Missouri is ongoing. We will also be
8 doing some in-house work, but it will be
9 very limited due to the lack of resources.

10 In terms of the Commission
11 itself, at the request of the OIG, in
12 February of this year, we requested
13 Clifton Gunderson to do a review of the
14 EAC, in terms of what programs EAC has,
15 programs and activities to adverse impacts
16 such as mismanagement, waste, and fraud.
17 Ms. Leswing will be talking about that,
18 what they are doing in that area, very
19 shortly.

20 One of the concerns raised to

21 us, and I appreciate that, and we agree

22 that it has taken us too long to get this

1 project completed and we hope that will
2 not happen in the future, but some things
3 that occurred is the EAC made some
4 organizational changes in the summer. We
5 have had to go back in and update some of
6 the work we had already done previously to
7 make sure we had the most current
8 information.

9 And also, this is the first year
10 of the audit. Any time you do the first
11 year of anything, it's difficult. There
12 is a learning curve involved, and we had a
13 number of things going back and forth,
14 which is normal in this type of process,
15 to update things, make sure we get things
16 right, because it's very important that we
17 make sure that it's right.

18 We appreciate all the work and
19 help from the EAC staff, in terms of
20 working with Clifton Gunderson to make

21 sure we get it right. Sometimes we have

22 had to go back in and revise documents

1 substantially, based on comments we have
2 received back, and we appreciate that.
3 Like I said, it's very, very important
4 that the information be correct. But also
5 what happens, we roll it up and provide a
6 new report. We have preliminary
7 information to the executive director.
8 Unfortunately, it was just recently, so he
9 has not had an opportunity to go through
10 it.

11 MS. LESWING: Thank you,
12 Mr. Crider. Good morning, Madam Chair,
13 Vice-Chair.

14 I am in charge of the EAC
15 reviews and audit. Mr. Crider has already
16 provided some background information, and
17 so I will go straight to some of the
18 slides that I have provided that discuss
19 the inventory and assessment of the EAC
20 operations and programs.

21 The scope of our assessment at

22 the EAC agency here at headquarters was

1 broken down into two related but distinct
2 areas. First, is the information
3 technology area. This is the readiness
4 assessment of EAC's compliance with the
5 Federal Information Security Management
6 Act, which we call FISMA.

7 The second area that we assess
8 at EAC is the entity profile area. And in
9 the entity profile area, we look at EAC
10 based on how EAC has established its
11 organizational structure. And we went
12 into and we documented EAC's processes
13 related to its six officers and directors;
14 and they are the office of the general
15 counsel, the standards and certification
16 director, the research office of
17 communication, the office of financial and
18 administration, and lastly, the programs
19 and services office. That's the scope of
20 the review that actually is ongoing here

21 at EAC.

22 The review methodology that we

1 applied to our assessment includes
2 reviewing the organizational chart, as we
3 mentioned, and that's how we decide our
4 process, based on the office.

5 As outlined in your
6 organizational structure, we visited the
7 EAC Web site. We performed interviews
8 with appropriate EAC staff. We obtained
9 documentation to corroborate or support
10 the documentation that we have gathered
11 during the interview process. We
12 documented the interview and what we
13 called the process cycle memos. We
14 provided cycle memos to appropriate EAC
15 staff for comments. If necessary, we
16 actually come back for follow-up
17 interviews to clarify some of the comments
18 that were provided.

19 In the end, we incorporate the
20 comments that we believe should be added

21 to the process cycle memo. This process

22 cycle memo gives us an understanding of

1 how each of the offices operate and allows
2 us to identify areas where we think we
3 have some observations that we can provide
4 recommendations to strengthen or help the
5 operations or the controls over the
6 programs that the offices has.

7 The status of our work right
8 now, in terms of the information
9 technology area, we have issued our report
10 to the EAC management. And the report has
11 provided recommendations that will assist
12 EAC in its readiness when there is a
13 full-blown audit that's done, in
14 accordance with FISMA. EAC is subject to
15 the FISMA, which is the Federal
16 Information Security Management Act.

17 On the entity profile side, we
18 have provided preliminary observations and
19 conditions that we have identified in each
20 of the offices, and provided some

21 recommendations that we believe will

22 strengthen or enhance whatever controls

1 they have. And this was provided
2 recently, and unfortunately, we are
3 waiting for the EAC to provide some
4 comments on it.

5 That's the status of where we
6 are at this point, in terms of the work
7 that we're doing here at the EAC. I will
8 be happy to answer any question.

9 VICE-CHAIR RODRIGUEZ: Thank
10 you, Ms. Leswing. Thank you, Mr. Crider.

11 Are there questions for any
12 member of the panel before Ms. Hodgkins
13 presents? Then we're ready for Ms.
14 Hodgkins.

15 MS. HODGKINS: Thank you, Madam
16 Vice-Chair. Professor Lubbers today
17 explained the framework of the
18 administrative, so I will try to not
19 repeat too much of what he said but maybe
20 talk about it from a little bit different

21 perspective, and also broaden out the

22 discussion also to procedures and policies

1 that are internal to the EAC or that do
2 not require a full rule-making type
3 activity.

4 So in my presentation, what I'm
5 going to do is break this down, if you
6 will, by what is required; those
7 regulations that require public comment,
8 those regulations or policies that require
9 publication, and those that are internal
10 and do not need to be published.

11 The first thing that, frankly,
12 Professor Lubbers covered very well is the
13 requirements of the Administrative
14 Procedures Act. Section 553 of HAVA 5 of
15 the United States Code sets forth the
16 requirements for rulemaking. There are
17 some exceptions that are established there
18 but, essentially, where we're given
19 statutory authority to publish rules, and
20 in our case, that is only one situation

21 that is under the National Voter

22 Registration Act. We're to follow the

1 provisions of Title 5, Section 553, which
2 require notice and the opportunity for the
3 public to comment on what it is that --
4 the rules that we intend to put in place.
5 These rules do have the effect of law when
6 they have been properly adopted or are
7 given deference by the Courts under a
8 standard which is known as arbitrary and
9 capricious.

10 So if the agency has not acted
11 in an arbitrary or capricious manner in
12 issuing the standard, or the rule rather,
13 then the Court is going to give that
14 deference, is going to uphold that rule.

15 And so since our rule-making
16 authority is rather limited, I will kind
17 of move on now to the things that require
18 public comment, but because of a different
19 reason, they are required to have public
20 comment because of the fact that some

21 other statute requires them to be

22 commented on publicly.

1 Professor Lubbers mentioned
2 regulations under the Freedom Of
3 Information Act. That is a separate act,
4 although it is often times referred to
5 under the rubric of the Administrative
6 Procedures Act. So that gets a little
7 confusing from time to time, in terms of
8 what's what.

9 The regulations that we issue
10 under that act usually are regarding how
11 the public requests information from us.
12 How much money we will charge them in
13 order to obtain information from us must
14 receive public comment.

15 Some other acts that also
16 require public comment would be the
17 Government and Sunshine Act. That act
18 requires us to establish our procedures
19 for meetings through a regulation. The
20 thing that we can do there is define

21 things such as what is a public meeting.

22 It seems like a relatively simple concept,

1 but it's really not always that easy. It
2 certainly means any gathering of a quorum
3 of this Commission in which you deliberate
4 toward any sort of decision.

5 However, you can also establish
6 policies for telephonic meetings, or video
7 conference meetings, or different types of
8 meetings other than what you would
9 consider in-person meetings. So there are
10 some opportunities there for you to
11 define, if you will, different types of
12 meetings.

13 In addition, it allows you to
14 establish alternative voting procedures,
15 such as tally voting, or written voting
16 procedures that you can use, because while
17 the Government and Sunshine Act does
18 require that when you meet, you meet in
19 public, it also recognizes that there are
20 some times in which you have to take

21 action, and that there can be an

22 alternative means for doing that if you,

1 in fact, establish that.

2 The Paperwork Reduction Act is
3 an act that requires public comment, but
4 for a slightly different reason. We
5 covered that a little bit earlier today,
6 but the Paperwork Reduction Act,
7 essentially, seeks the input of the public
8 as to the collection of information that
9 we're making or on regulations that we're
10 promulgating that will impact the
11 responsibility of the public or members of
12 the public to respond or provide
13 information to us.

14 So under the National Voter
15 Registration Act, we're required to
16 collect certain information on a biannual
17 basis from the states with regard to their
18 activities under the NVRA, thus, there
19 will be Paperwork Reduction Act
20 implications in publishing those

21 regulations. Similarly, you collect

22 information on a biannual basis following

1 each Congressional or Federal Election,
2 using your Election Day Survey. That has
3 been adopted in accordance with the
4 Paperwork Reduction Act. And I know it's a
5 frustrating process because it is sort of
6 counter intuitive, in terms of the name
7 and the responsibility for the Federal
8 Government agency. There is no paperwork
9 reduction for us, but the idea is to
10 lessen the burden on those that we're
11 asking to respond. So those things have
12 been adopted in accordance with the
13 Paperwork Reduction Act.

14 Other things that we do that are
15 impacted by the Paperwork Reduction Act
16 are some research projects that we do,
17 conferences that are held, working groups
18 that are asked similar questions. Those
19 all have to be approved through the
20 Paperwork Reduction Act process.

21 Then we'll kind of move into the

22 category of things that are regulations

1 that require public notice. So that means
2 you don't necessarily have to get the
3 public's input, but you have to publish
4 them so that the public knows what the
5 rule is.

6 Generally speaking, these are
7 statements of policy that impact the
8 public. And, well, what might be
9 considered otherwise an internal policy
10 that impacts the public is, for instance,
11 our contracting policy. Our contracting
12 policy impacts the way that contractors or
13 bidders intersect with the Election
14 Assistance Commission. So in order to
15 give them notice of how it is that they
16 can act or how it is that we're going to
17 act with response to contracts, we can
18 publish that policy and make it available
19 to them.

20 Some other things that we have

21 already done that are part of this public

22 notice requirement are publishing manuals,

1 such as the voting system testing and
2 certification manual, and the upcoming
3 laboratory accreditation manual. Here
4 again, these things are policies or
5 programs that affect the public, how they
6 become involved with our testing and
7 certification program, what they can
8 expect, in terms of review of their
9 product. And in the past, the EAC has not
10 only met this requirement but exceeded it,
11 because we published that manual, not only
12 for notice but also for comment.

13 It was important to this
14 Commission that we have public buy-in on
15 that process, not only from the people
16 that would be directly impacted by it,
17 that being the voting system manufacturers
18 and the laboratories, but also members of
19 the general public. We wanted that to be
20 a transparent process and something that

21 they understood how it was going to work.

22 The Privacy Act is another

1 example of where public notice, but not
2 public comment, is required. We will
3 publish a list of records, if you will,
4 that requires or that contains Privacy Act
5 information; that is personal,
6 identifiable numbers, social security
7 number, your name, home address, home
8 telephone number, or anything that is
9 accessed by the use of that number. While
10 we do not have a great deal of information
11 with regard to the public that has that
12 sort of identifiable information, we do
13 have that kind of information with regard
14 to our own employees. Personnel records,
15 for example, can be accessed using a
16 person's name, social security number.
17 In fact, the Inspector General has already
18 completed his listing of Privacy Act
19 information.

20 Last in the category are

21 internal policies. Those are things that

22 just affect the EAC; personnel policies,

1 what time is everybody expected to be here
2 at work, how do they go about applying for
3 leave, how do they ask if they can work
4 from home today. Those are internal
5 policies the EAC has. Other than the
6 hours of operation of the general office,
7 which has to be published under the FOIA,
8 they don't generally impact the public.
9 So those are things that we can develop
10 without having to go out and give notice
11 to the public or get their comment, but
12 that certainly are required and helpful to
13 us in making sure that we have a uniform
14 and nondiscriminatory way of treating all
15 of our folks, making sure that all of our
16 issues run properly.

17 Let me take a moment to talk
18 about what it is that we've done at this
19 point to comply with these acts. I have
20 gone through and talked about the fact

21 that, in spirit, we have complied with a

22 number of these different acts. We

1 noticed this meeting under the rubric of
2 the Government and Sunshine Act seven days
3 prior to the meeting, provided the public
4 notice of what was going to happen.

5 We have also, as you are well
6 aware, been complying with the Freedom of
7 Information by providing tens of thousands
8 of pages of documents to Congress and
9 other people that have requested them.

10 What we have not done is necessarily
11 published the regulations that are
12 required to be provided under those acts.

13 The first step in doing that, in
14 terms of actually saving us money and a
15 lot of headache, is to establish a code of
16 federal regulations. What that does is
17 this; we can certainly publish everything
18 in the Federal Register and it's out there
19 for public notice, public consumption, but
20 it's expensive. And if we don't have a

21 CFR site, it doesn't have a permanent

22 location. So if we ever want to change

1 whatever we published, then we have to
2 re-publish the entire thing, as opposed to
3 perhaps re-publishing an amendment to a
4 section of that thing.

5 So CFR sites save you a little
6 money and a little headache, particularly
7 when it comes to publishing things like
8 the Voluntary Voting System Guidelines,
9 which the latest draft we received is 700
10 pages, from NIST. You can imagine the
11 expense involved in publishing something
12 of that nature.

13 So this week we actually sent a
14 letter over to the Office of Federal
15 Regulations, and requested that they
16 establish a site for the Commission. It
17 involved appointing certain liaison
18 officers, and we're awaiting their
19 response. But as Professor Lubbers
20 pointed out, that location would be in

21 Title 11. The FEC currently has all of

22 the chapters in this particular title, but

1 hopefully, we'll be assigned one of them
2 there. As soon as we have that assignment
3 done, we can begin then to publish our
4 regulations with notice that they would be
5 located in that particular designated site
6 of the Code of Federal Regulations.

7 So the second step we've done is
8 begin the process to contract with an
9 outside provider to assist us with
10 developing the administrative regulations
11 that we have to undertake. Under FOIA,
12 the Government Sunshine Act, and under the
13 Privacy Act, there is something that
14 Professor Lubbers alluded to with regard
15 to Government agencies or employees
16 testifying or providing documents.
17 Because the Help America Vote Act has been
18 recognized to have a privacy right act by
19 several Courts, we believe it is prudent
20 for us to establish what are called 2(e)

21 regulations, providing regulations on how

22 a third party or non-Government agency

1 requests that an employee of their agency
2 testify on their behalf or provide
3 information in a piece of litigation. So
4 that would also be included in that.

5 We're hopeful that that
6 contracting process will be concluded in
7 the very near future, and we would be able
8 to award that contract, get that work
9 started.

10 Now, having said that, it's
11 pretty easy to go out and talk to someone
12 else about providing administrative
13 regulations. It's another entire issue to
14 go out and talk to an outside party about
15 helping you put together things that
16 impact the programs and internal
17 operations of the agency. Those things
18 are a little bit more internalized or
19 specific as to the agency. It would be
20 difficult for us to expect someone else to

21 understand our testing and certification

22 program, for example. It would be

1 difficult for us to go out and ask someone
2 to understand the National Voter
3 Registration Act, and what the Commission
4 wants to do with that, and how those
5 regulations should be put together.

6 So one of the things that we're
7 anticipating is, of course, getting a
8 report from our Inspector General and from
9 Clifton Gunderson about different policies
10 we have to implement, and we will take
11 those recommendations, send them out to
12 the program areas, and ask those program
13 staff to say, okay, yes, we definitely
14 need these types of regulations, but in
15 addition, these types of policies or
16 procedures would be helpful to us in order
17 to run our program more efficiently, so
18 that we can create a comprehensive list of
19 internal and external policies and
20 procedures that need to be developed.

21 Then we can start working with either

22 consultants or outside folks to work with

1 those program areas to develop their
2 specific needs and their specific policy.
3 With that, if you have any questions, I'll
4 be happy to answer.

5 I guess the last word is that
6 while the EAC has had to make some
7 difficult choices in the past, we're
8 catching up and turning our focus
9 internal. And these are very important
10 things, and we should expect that we'll be
11 spending a good deal of time on developing
12 it. It won't be a simple process, but it
13 is in the works.

14 VICE-CHAIR RODRIGUEZ: I'm going
15 to ask if we need a five-minute break?
16 Okay, yes. We will take a five-minute
17 break and be back at 11:16.

18 (Short Recess.)

19 VICE-CHAIR RODRIGUEZ: Let's go
20 ahead and resume. Thank you, very much.

21 Commissioner Hillman has indicated that

22 she has some questions, so go ahead.

1 COMMISSIONER HILLMAN: Sure.

2 And to all the panelists, thank you, very

3 much. It's an awful lot of information,

4 and at this end of it, to get into this

5 particular law or procedure or whatever,

6 would probably only add to my confusion.

7 But Professor Lubbers, I do have

8 a question for you, and that is, to your

9 knowledge, is there any law that assigns

10 responsibility for how a brand new agency

11 gets the information, independent agency?

12 If we were part of HHS or something, a

13 piece of cake, but how a new agency gets

14 the information it needs to know, what its

15 responsibilities are, and how to proceed.

16 And some things are more important than

17 others.

18 MR. LUBBERS: Unfortunately, no.

19 COMMISSIONER HILLMAN: Because

20 we have been compelled, I think, by the

21 beginning of this agency in that I think

22 HAVA assumed precision with the execution

1 of when Commissioners would be appointed.
2 And so the fact that Commissioners were
3 appointed almost a year late, that we
4 didn't have a budget in the first year,
5 2004, meant really we were operating well
6 through 2005 before we could even see our
7 way to assigning resources, hiring an
8 Inspector General, and getting started.
9 And so if you're doing a case study to
10 help inform Congress about if you ever
11 even think you want to start another
12 independent agency, don't do it to any
13 agency what was done to the EAC, because
14 given the issues that we're working on, a
15 two-year cycle with external deadlines
16 that have nothing to do with us. Those
17 are the dates of the federal elections and
18 all the political nuances of the work that
19 we do. That was just -- I would use the
20 word scandalous, I think.

21 Is there anything that you have

22 heard, Professor Lubbers, from the other

1 panelists that you would take -- I don't
2 know if I want to say exception to, maybe
3 exception to, or perhaps you would have a
4 difference perspective, in terms of EAC's
5 responsibility?

6 MR. LUBBERS: No. I mean, I
7 certainly have nothing to contribute to
8 the discussion by the Inspector General
9 and the contractor. I think that's
10 something I am not even competent to talk
11 about very much.

12 I did find Juliet's statement to
13 be very well informed and perceptive. I
14 don't have any objections or reservations
15 about what she said at all. I think she
16 has a good grasp of these requirements,
17 and now it's just a matter of putting
18 collective noses to the grindstone and
19 getting it done.

20 I can understand why you thought

21 that other things were more pressing

22 before you turned your attention to these

1 procedural rules, but I think now is the
2 time to do that.

3 COMMISSIONER HILLMAN: In a
4 couple of points in your presentation, you
5 alluded to some gray area, at least that's
6 what I heard. It's not crystal clear,
7 it's not black and white. And I am
8 wondering if you would agree that there
9 are some places where EAC sort of has to
10 work through the full scope of its
11 responsibility to implement something.

12 And I don't know if this is a good
13 example or not, but under the
14 Administrative Procedure Act, you said it
15 applies, in the first paragraph, applies
16 to the EAC, although it does not
17 specifically mandate implementing
18 regulations. So does not specifically
19 mandate suggests it does and it doesn't.

20 MR. LUBBERS: Well, the APA is

21 intended to cover all the different

22 agencies' operations, so it has to be

1 written in a rather general framework, and
2 it has a lot of exceptions and so forth.
3 Primarily, it covers rulemaking and
4 adjudication. Since you really don't have
5 any sort of adjudication, I guess maybe
6 you could think of the decertification
7 proceedings as a type of adjudication, but
8 it's not the kind of adjudication that is
9 covered by the APA with its requirement
10 for administrative law judges and trials,
11 that sort of thing.

12 So if you were an adjudicative
13 agency, then you would need to have rules
14 of practice for your adjudications. Even
15 though APA doesn't specifically require an
16 agency that adjudicates to have those
17 rules, all adjudicative agencies that I
18 know publish their rules of practice.

19 So that's part of the reason I
20 was trying to be a little bit general when

21 I was discussing the APA. I think the APA

22 applies to you, but it doesn't have that

1 many specific requirements for you guys.
2 The only rulemaking that you do that comes
3 up, as Julie said, was the NVRA
4 rulemaking. Everything else is covered by
5 specific statute, such as the requirements
6 in HAVA.

7 COMMISSIONER HILLMAN: Another
8 question I have for you, and it actually
9 is a question to Julie about an
10 observation you made, and that is, that
11 under the Congressional Review Act, and
12 you would suggest that perhaps the EAC's
13 Voluntary Voting System Guidelines must be
14 submitted to Congress before they can take
15 effect. And my question, Julie, would be,
16 we did submit the guidelines to Congress.
17 Did we do it under this procedure or were
18 we just lucky?

19 MS. HODGKINS: Regardless, we
20 did it. We did, in fact, submit the

21 guidelines to Congress and all of the

22 actions that we take. To be quite honest,

1 I was not aware of this act before

2 Professor Lubbers brought it up, but as

3 prudence would have it, we had full

4 compliance.

5 COMMISSIONER HILLMAN: We had

6 good gut instinct.

7 MR. LUBBERS: There are some

8 specific requirements about how to do it.

9 You have to send it over to the Government

10 Accountability Office, but those are

11 technicalities.

12 COMMISSIONER HILLMAN: Now, you

13 also talked about special requirements

14 concerning withdrawal, suspension,

15 revocation, or annulment of a license, and

16 suggest that could possibly apply to our

17 decertification of a voting system. Can

18 you talk a little bit about that?

19 MR. LUBBERS: I probably should

20 have researched this a little more before

21 I said that. Section 5588(c), which I

22 referenced there, doesn't have very much

1 to say about license revocations. It just
2 says, basically, that agencies, before
3 they revoke a license, should give the
4 license holder a chance to come into
5 compliance. But even that requirement can
6 be waived if there is a public interest in
7 revoking a license immediately. So it's
8 just a very limited provision that only
9 has special application to license
10 revocation.

11 And to the extent that your
12 decertifications are considered to be
13 license revocations, then you might have
14 to consider whether or not before you
15 decertify, you give the license holder an
16 opportunity to come into compliance before
17 you decertify. But if you think it's
18 necessarily to immediately decertify, in
19 the public interest, then you can make
20 that showing.

21 COMMISSIONER HILLMAN: Thank

22 you, very much.

1 And my general question is for
2 Inspector General, but I want to thank you
3 very much. And I am very serious, if you
4 undertake a case study, please case study
5 EAC, and make sure that Congress and GAO
6 and everybody else knows what happens when
7 an agency is set up the way we were set
8 up.

9 Mr. Crider, you made a statement
10 about return on investment for our
11 auditing. Could you talk a little bit
12 more? You actually used a formula.

13 MR. CRIDER: One of the things
14 we talked about, in terms of what bang for
15 the buck, what are we getting when we do
16 an audit. If we don't find any findings,
17 great. But right now, when we go out and
18 do an audit, what we have found so far,
19 Clifton Gunderson's work, we have
20 identified 2.4 million dollars in

21 exceptions in the work that they have

22 done, in terms of possible return to the

1 program, in various states.

2 The audits cost us \$500,000. So
3 right now, we're looking at about five to
4 one, in terms of what we're getting back
5 for our money.

6 COMMISSIONER HILLMAN: When you
7 say -- EAC is not getting it back. It
8 going back to the voter?

9 MR. CRIDER: Going back to the
10 election fund. In some cases, we have had
11 some concern from the treasury. When we
12 talk about the program review, the
13 program, we feel that it's very valid.

14 COMMISSIONER HILLMAN: Ms.
15 Leswing, I look anxiously for the final
16 report because we have long awaited the
17 assessment so we could move forward. I
18 appreciate what you have done to work with
19 Mr. Crider to expedite that so we could
20 get our information. Thank you.

21 MS. HODGKINS: Commissioner

22 Hillman, if I might just make a point

1 about your question with regard to
2 licensing. This is a question that we
3 significantly researched prior to issuing
4 our testing and certification program
5 manual. We actually don't believe that
6 the certification that's issued is a
7 license because of the voluntary nature of
8 the program and the fact that the voting
9 system vendors are not required to have
10 that license or certification, if you
11 will, in order to sell their product. It
12 is a voluntary program.

13 States, as you know, can adopt
14 it, but it is not mandatory. So I wanted
15 to make sure that was said.

16 COMMISSIONER HILLMAN: Actually,
17 I should have asked the question to
18 Mr. Crider and our general counsel, as to
19 whether there is anything that you have
20 heard that you would take exception to or

21 say that perhaps this needs further

22 exploration for EAC?

1 MR. CRIDER: I think the general
2 counsel did an excellent job, in terms of
3 the overall statutes, but there is a
4 myriad of other things the EAC has to
5 comply with. They hit some of the bigger
6 ones. There is tons of OMB guidance,
7 plenty of other statutes out there.
8 There's a whole lot of things out there
9 the EAC has to comply with that you need
10 to be aware of.

11 I think general counsel has been
12 looking into some of those, in terms of
13 are we in compliance with those. I think
14 the EAC is actually complying. It's just
15 a matter -- we don't have the policies,
16 procedures, and operating guidance to
17 guide our steps. We're complying with a
18 lot, maybe just by pure luck, I don't
19 know, but just like with travel
20 regulations.

21 COMMISSIONER HILLMAN: Good

22 intuition, not pure luck.

1 MR. CRIDER: There's things out
2 there we're complying with. We need to
3 develop our own internal stuff, in terms
4 of how is EAC going to operate in the
5 future. Some of it is to protect
6 employees, in terms of the public, in
7 terms of how we do our business, making
8 sure people understand what we do, why we
9 do it. I think there's things we have to
10 comply with other than the statutes
11 pointed out this morning that we need to
12 be cognizant of.

13 MR. LUBBERS: Could I mention
14 something in addition to that? As an
15 independent agency, the OMB executive
16 orders do not apply directly to your
17 agency, assuming you can establish to the
18 OMB's satisfaction that you are an
19 independent agency, which I think you can.
20 So there is a regulation that OMB has set

21 up for the review of agency rules,

22 proposing final rules that have to be

1 cleared by OMB. That only applies to the
2 purely executive agencies, not the
3 independent agencies.

4 There are two aspects of the
5 executive order though on rulemaking that
6 the President did apply to independent
7 agencies. One of them is to participate
8 in the semi-annual agenda of regulations
9 which comes out twice a year, which is a
10 Government-wide listing of all pending
11 rules. And there is also an annual
12 regulatory plan that is also published
13 once a year in one of those agendas
14 published in the Federal Register. So
15 those, the register plan and regulatory
16 agenda, are a responsibility that the
17 President asks the independent agencies to
18 participate in. And so far as I know,
19 they are participating in them. They
20 haven't tried to dispute that.

21 So that may be something, if you

22 do begin to do some rulemaking under NVRA,

1 you might need to add that to your list,
2 but I'm not sure about the OMB Circular.

3 MR. CRIDER: We have a question
4 pending with OMB right now as to what
5 guidance, and we have not gotten a
6 response back in writing, but there's been
7 a number of phone calls back and forth
8 with general counsel and OMB because we
9 have a question about that too; are we an
10 agency, in terms of the OMB guidance.

11 MR. LUBBERS: With respect to
12 the Paperwork Reduction Act, we were
13 discussing during the break that the FEC
14 is exempt from the Paperwork Reduction
15 Act, and perhaps you could make a case to
16 Congress that you should be too.

17 An alternative approach would be
18 there is a provision in the Paperwork
19 Reduction Act that allows OMB to delegate
20 oversight of the forms, and

21 questionnaires, surveys, to a designated

22 agency person. I think they have done

1 that with respect to the Federal Research
2 Board, maybe with the FCC, Federal
3 Communications Commission. So if this
4 really becomes a burdensome thing for you,
5 you might be able to secure permission
6 from the OMB office to have one of your
7 general counsel or executive director be
8 the person who reviews these forms, under
9 the standards set forth in the act.

10 MR. CRIDER: One of the
11 advantages of getting an exception from
12 the Paperwork Reduction Act is several
13 acts are tied into the Federal Reduction
14 Act, so there is some tie in.

15 VICE-CHAIR RODRIGUEZ: Very
16 good.

17 Commissioner Davidson, do you
18 have any questions?

19 CHAIR DAVIDSON: To continue on
20 with that conversation, I think it's

21 important in Congress, in asking for

22 information from us that we do not have,

1 basically, when we tell them it is going
2 to take us some months to get the form
3 approved, by the time we get information
4 from the states, it's outdated. It is an
5 issue. I do agree that maybe we need to
6 look into it further, how we actually
7 proceed forward, and do our business a
8 little bit better and more accurate so
9 that the public knows information that's
10 up to date, instead of dated information.

11 The one question I have, and
12 it's just kind of a clarification that I
13 wanted to make sure that we made is to Ms.
14 Thompson. Excuse me. Ms. Hodgkins.

15 In dealing with the
16 certification program for the laboratories
17 and the manufacturers, my memory is that
18 we set a very specific process for
19 decertification in that manual, that they
20 do have a right, before they are

21 decertified, that they do have some
22 rights. Does that take care of the issue

1 that was discussed prior?

2 MS. HODGKINS: Okay. Let me see
3 if I can answer the second question first
4 and then the first question second, okay,
5 because we don't believe that the
6 licensing commission -- we don't have to
7 comply with that particular provision, in
8 terms of the APA.

9 Now, having said that, you are
10 correct, there is a very specific process
11 that will take place in order to end up in
12 a decertification involving suspension,
13 investigation. And, unfortunately, I am
14 probably not the best versed in the
15 details of that program. I am certain
16 Mr. Hancock or Mr. Gilmore could provide
17 you with the details on exactly, step
18 wise, the process that is taken.

19 CHAIR DAVIDSON: Well, it's not
20 exactly -- I didn't really feel that we

21 had to bring up the whole process that was

22 involved in it, but I do want to make sure

1 that the record shows that it did go
2 before a lot of public meetings before we
3 adopted it, and it was even adopted at a
4 very public meeting where we had, I think,
5 CNN coverage or we had TV coverage.

6 So the process has been, I
7 think, pretty well documented. So I just
8 wanted to make sure that was clear, for
9 the record, we had taken that measure.

10 MS. HODGKINS: Absolutely. As I
11 stated previously, we took the extra step
12 asking for comments, not just asking for
13 comments from the vendors, from the
14 laboratories that were going to be
15 impacted, but from members of the general
16 public so they would know what the process
17 was.

18 CHAIR DAVIDSON: Very good. The
19 other thing is, can you clarify, when you
20 said that the rules underneath the NVRA

21 would be treated as if they were law if it

22 went to court, am I correct to say this

1 would be like any other law that the
2 Courts, obviously, can see fit to do
3 whatever they want to, but they do review
4 it as law up front?

5 If they felt like we go
6 something unconstitutionally, in writing
7 the procedures, that could be a means that
8 somebody take us to court after the whole
9 process was done, but the Courts still
10 review it as a law?

11 MS. HODGKINS: That's correct,
12 as long as it is properly adopted through
13 the notice and comment period.

14 There is a case called Chevron,
15 a very famous case, that regulations that
16 are properly adopted are given great
17 deference. So that if they did not act
18 arbitrarily or capriciously in entering
19 into that regulation or requiring that
20 particular provision, interpretative

21 guidance or whatever you want to call it,

22 with regard to the statute that gives us

1 authority to do that, then that will be
2 given deference by the Court and viewed as
3 appropriate.

4 MR. LUBBERS: But the Court
5 could review it for constitutionality, as
6 they could any law.

7 CHAIR DAVIDSON: That's what I
8 just wanted to clarify. Thank you.

9 The last question I have was on
10 what we have to do as a board making
11 public meetings. Any time that there's
12 four of us, whether it's a conference call
13 or anything like that, how do we -- that
14 was an interesting statement. I don't
15 think I was clear on the ending of how we
16 would actually do a conference call; how
17 would we notify people and allow them to
18 clear that conference call. Like if
19 something came up, an emergency before an
20 election, and we wanted to get a hold of

21 all of Secretaries of States and Directors

22 of Elections, can a conference call be

1 utilized, and what would we have to do to
2 do that?

3 MS. HODGKINS: By regulation,
4 you could establish a process for having a
5 non in-person meeting, I will call it, but
6 it would require a regulatory process to
7 establish how that is done.

8 Essentially, we can provide
9 access to the public through a variety of
10 different means. Sometimes we Web cast
11 our meetings here. You can certainly
12 audio screen in the same way, but it does
13 require, as far as I know, that each
14 member be able to hear the other; that is,
15 the members of the Commission be able to
16 hear each other vote. We would have to go
17 through a regulatory process to establish
18 exactly how that was going to happen.

19 CHAIR DAVIDSON: It may not even
20 constitute a vote. It may just be

21 information that we want to get out, but

22 we would still go through the process.

1 MS. HODGKINS: You would notice

2 it in the same way you would a meeting.

3 It would be just a different concept of

4 what is a meeting.

5 CHAIR DAVIDSON: I appreciate

6 that. I appreciate the panel being here

7 today. It has been an eye opener for all

8 of us. Thank you.

9 VICE-CHAIR RODRIGUEZ: Thank

10 you, Madam Chair.

11 Commissioner Hunter.

12 COMMISSIONER HUNTER: One quick

13 comment on the NVRA. I think it's

14 obvious, no federal agency can regulate

15 over the extent to which Congress gives us

16 the authority to do so. I think it's

17 pretty obvious, if the Court were to see

18 that we extended our reach of authority,

19 they could determine that was arbitrary

20 and capricious. That was one comment.

21 I have a question for Professor

22 Lubbers. It sounds like we do have a

1 procedure for the certification program.

2 Could you point to something that's not

3 considered an adjudication; administrative

4 law judges, if we needed to borrow from

5 somebody in the future, what would you

6 suggest?

7 MR. LUBBERS: Well, you are

8 really raising what kind of due process

9 requirements should you give to a company

10 that is being decertified in this

11 situation, and there are lots of informal

12 stages that agencies undertake. One is

13 the Executive Office of the United

14 Trustees. It is part of the Department of

15 Justice, deals with bankruptcy. These are

16 U.S. trustees, who are officials around

17 the country, to rule on bankruptcy issues,

18 and they are appointed by the department.

19 So there are two issues they have been

20 dealing with. One is whether these

21 trustees are going to be disciplined for

22 doing something wrong. They are not

1 really federal employees, but there are
2 sort of a funny situation where they are
3 officers but they are not employees. The
4 Executive Office of the U.S. trustees has
5 set up a special, informal way of dealing
6 with these trustees.

7 The second, in the same agency,
8 the new bankruptcy law gave them authority
9 to approve credit counseling agencies.
10 And these credit counseling agencies are
11 accredited by this office. It sounds a
12 little bit similar to what you are doing.
13 And they are coming up with procedures now
14 for allowing these credit counseling
15 agencies to challenge the removal of their
16 accreditation. And so they have set up an
17 informal adjudication procedure within the
18 Executive Office of the U.S. Trustees.
19 They have somebody hear the case,
20 initially, and then there is appeals to

21 the director of the office. So it's a due

22 process procedure that they set up

1 voluntarily, even though Congress did not

2 specifically tell them to do so.

3 COMMISSIONER HUNTER: Thank you.

4 That's very helpful.

5 There is another context that

6 will become relevant in the future under

7 VVSG that was sent to us by the National

8 Institute of Standards and Technology.

9 There is a separate class called the

10 innovations class. It's intentionally not

11 very robust, and the EAC will have to look

12 at that and determine how best to decide

13 whether a new voting system could fall

14 under the innovations class and be

15 certified in sort of a separate track. I

16 think those things may be helpful for the

17 development of that in the future. We're

18 not doing that yet.

19 Thank you. I may have one more

20 question of Ms. Leswing. I have not -- we

21 haven't seen the report that you

22 reference. And I don't really know

1 exactly what you mean by process cycle
2 memos. You ID areas of interest and
3 provide recommendations to strengthen or
4 help operations.

5 Are you able to talk in a little
6 bit more detail about the report or is
7 that not permissible; that's my first
8 question. And my second question is, do
9 you think that your report will provide us
10 with the list that our general counsel was
11 talking about, of a comprehensive list of
12 internal procedures that we need to do?
13 Is your report going to actually have that
14 type of list that we have been waiting
15 for?

16 MS. LESWING: Yes. To answer
17 your first question, the process cycle
18 manual is a documentation of how each
19 program actually operates. For instance,
20 in the financial area, which I am more of

21 an expert in, from the start when an

22 appropriation is received, how is that

1 appropriation taken care of by the agency;
2 what kind of procedure do they perform,
3 what kind of documentation do they need to
4 maintain, how do they record it, how do
5 they disburse those appropriations, how do
6 they collect the data from those that
7 received those grants or money, up to the
8 time when they actually issue a report to
9 state that is the status, thus, this is
10 how the appropriation was received,
11 disbursed, and whatever the detail of
12 financial record that needs to be
13 presented.

14 That's actually a cycle memo
15 which actually describes the life of that
16 process, and at the same time identifying
17 each of those areas like, when you receive
18 the appropriation, are you supposed to
19 have the proper documentation. When you
20 disperse, you are supposed to have the

21 proper approval process. Those are the

22 controls within that process that we tried

1 to identify.

2 Now, once we identify, there are
3 some controls that could be missing. And,
4 usually, what we look at is what is the
5 risk of fraud or misappropriation or
6 misreporting. That's the area where we're
7 focusing in. Then we will then come up
8 with some recommendations or observations
9 to management, identifying, telling them
10 that we believe you need to strengthen in
11 this area, you need to require a second
12 level of review.

13 When those reports comes from
14 the states, you need somebody to prepare
15 reviews, so that external report that you
16 prepare to actually provide to the public
17 as to how you disburse the fund has been
18 quality controlled. Those are some of the
19 areas that we actually identify during
20 this process.

21 Now, I can't say that the list

22 will be all conclusive, but we will

1 actually hit all the areas, and we rely
2 heavily on management, on key people
3 because they are the persons who
4 understand the operations very well and
5 could actually -- sometimes, they even
6 could tell us that they believe that this
7 is the way things should be. We're
8 providing a list of policies and
9 procedures that we believe the agency --
10 the minimum policies and procedures that
11 they should have. And I believe as you
12 progress through the process and
13 identification working through that, there
14 will be more that will be identified, but
15 the basic or the minimum, as a result of
16 talking to various key people doing their
17 work, how they do their work, how they
18 report their work, we identify those areas
19 that we think management should look into.

20 COMMISSIONER HUNTER: Thank you.

21 MS. HODGKINS: Commissioner

22 Hunter, just to make sure my comments were

1 clear, my anticipation would be, just as
2 Ms. Leswing said, we would take their
3 recommendations, then go back to the
4 program staff to form what could be the
5 comprehensive list, not necessarily their
6 list would be comprehensive, but based
7 upon that list and the needs of the
8 program managers that we would identify.

9 MR. CRIDER: And as that process
10 is done in the future, we will identify
11 additional things that need to be done.
12 It's an evolving process. It will be a
13 continuing process, as we mature as an
14 agency.

15 MS. LESWING: Let me add, one of
16 the key things that we believe there is an
17 over arching need is for the agency to get
18 an assessment, a risk assessment of what
19 are the areas. Because of the limited
20 resources that you have, you need to

21 prioritize what you need to do first.

22 There are so many requirements that the

1 agency has to comply with, but what are

2 the impacts of those requirements.

3 So I think one of the things

4 that we had actually preliminarily

5 recommended is to do a risk assessment to

6 the strategic goals which we mentioned a

7 while ago. That's the foundation of

8 really how you are going to operate well

9 or set up your policies and procedures.

10 MR. CRIDER: Government

11 Performance Act, where you set up your

12 operating goals and objectives, and how

13 you are going to get there, and

14 performance measures.

15 VICE-CHAIR RODRIGUEZ: Thank

16 you.

17 Mr. Wilkey, do you have

18 anything?

19 MR. WILKEY: Yes, a couple of

20 observations. And I am glad Commissioner

21 Hunter and Commissioner Hillman both have

22 made some observations.

1 Number one, I'm sorry, Professor
2 Lubbers, that that commission was done
3 away with because I think it would have
4 continued to help agencies such as ours.
5 One of the most disconcerting things to me
6 when I arrived here was there was no
7 cookbook that you can pull off the shelf
8 to say, this is all of the requirements
9 that you have to meet, regardless of what
10 size agency you are.

11 And I think that the Commission
12 made a wise decision to meet fully its
13 statutory obligations under HAVA, and here
14 is where we are today. And I think now
15 we're looking internally to make those
16 processes work.

17 Secondly, we have had a very
18 good relationship with Clifton Gunderson.
19 It is a process that, frankly, I view not
20 in animosity, by any sense of the

21 imagination. I am looking forward, and I

22 just received a preliminary draft from the

1 Inspector General, sitting down with him
2 reviewing it, and then sitting down with
3 the Commissioners and staff to take a look
4 at where we are.

5 I think that its been an
6 absolutely tremendous process in leading
7 us, giving us a blueprint about where we
8 need to go, and I have welcomed this from
9 the very beginning. The agency that I
10 came from was a two-year process to set
11 forth the various processes and
12 procedures. I wish I had had a Clifton
13 Gunderson to help me through that process.
14 So we thank you for the work that you have
15 done, and I can assure you that we'll be
16 continuing to work with you to make sure
17 that all of the recommendations that you
18 have given us will be followed.

19 I just have one question, and I
20 am sure you have worked with agencies of

21 our size, perhaps new agencies. Have you

22 found anything unusual in your process

1 that may have stuck out, in terms of where
2 we are and where we hope to go, that you
3 would like to comment on?

4 MS. LESWING: Actually, I don't
5 think so. I do work with small agencies.
6 Some of my clients are Federal
7 Communications Commission, Federal
8 Election Commission. I think a comparison
9 for you is the Department of Homeland
10 Security. The only difference is the
11 Department of Homeland Security has their
12 own law that pretty much tells them what
13 they need to do. Administratively, they
14 also tell them what they need to do versus
15 the Elections Assistance Commission pretty
16 much says implement HAVA versus these are
17 the administrative requirements that you
18 have to follow as well.

19 So I have not encountered or
20 experienced going into an agency where

21 they have not set up their policies and

22 procedures. Pretty much, we go into an

1 agency, they already have their policies
2 and procedural manual. The Federal
3 Communications Commission actually have
4 all the rulemaking, and the administrative
5 law judge, and they go through that
6 process.

7 MR. WILKEY: Thank you, ma'am,
8 and we look forward to continuing with
9 you.

10 VICE-CHAIR RODRIGUEZ: Ms.
11 Hodgkins, anything else?

12 MS. HODGKINS: I guess I wanted
13 to make one final point, and that is this,
14 don't leave here today with the concept
15 that the EAC has not been following a lot
16 of these laws. We have been providing
17 information. We have been complying with
18 the Paperwork Reduction Act.

19 What we need to do now is do a
20 good job of complying with the portions of

21 those acts that tell the public about how

22 we're complying with those acts, and

1 that's where we need to go.

2 VICE-CHAIR RODRIGUEZ: I think

3 we appreciate that, Ms. Hodgkins and Ms.

4 Leswing. I think of all the people on

5 this side of the table, I have the most to

6 learn because I have no federal

7 background, like my fellow Commissioners,

8 or the experience of longevity of other

9 Commissioners. I came from a highly

10 regulated local government, but I cannot

11 tell you how much I appreciate this

12 morning's information, questions from my

13 colleagues, and the work that's already

14 been done.

15 And I think too, we have to give

16 Congress credit for raising some of these

17 issues, also through oversight and putting

18 it on the front burner for this agency. I

19 believe we were going there. We were

20 headed there, but it does add a little bit

21 of extra impetus.

22 We're going to break for a lunch

1 break and get into the NVRA discussion

2 this afternoon. Thanks again to the

3 panel. We'll be back at 1:00.

4 (Noon Recess.)

5 VICE-CHAIR RODRIGUEZ: We will

6 reconvene the September 6th meeting of the

7 Election Assistance Commission, the

8 afternoon agenda. And now we're going to

9 have a briefing on the National Voter

10 Registration Act by our general counsel,

11 Ms. Julie Hodgkins, and Mr. Edgardo

12 Cortes, the Election Research Specialist.

13 Ms. Hodgkins.

14 MS. HODGKINS: Thank you, Madam

15 Vice-Chair, Commissioners.

16 Let me just start by saying my

17 presentation today is about the authority

18 of the NVRA, the authority of the EAC

19 under the NVRA, and some activities that I

20 believe we should undertake exercising our

21 authority under NVRA. So let's start with

22 National Voter Registration Act.

1 The constitutional authority for the
2 National Voter Registration Act is Article
3 1, Section 4 of the United States
4 Constitution, and Article 2, Section 1.
5 This is known commonly as the time,
6 manner, and place clause. Essentially, it
7 allows Congress to regulate the time,
8 manner, and place, of holding elections
9 for senators and representatives, and by
10 interpretation, Article 2, Section 1,
11 extends that same authority to elections
12 for the President of the United States.

13 The authority of NVRA or the
14 constitutionality of NVRA has been
15 regulated or has been litigated a number
16 of times, and its constitutionality has
17 been upheld in several cases, including
18 Acorn versus Edgar, and Voting Rights
19 Coalition versus Wilson.

20 Essentially, what does NVRA say

21 as to EAC. Well, it's probably important

22 to remember that NVRA was enacted before

1 EAC existed. So the first authorization
2 that is given is to the Federal Election
3 Commission. For all intents and purposes,
4 we can now substitute FEC with Election
5 Assistance Commission because HAVA
6 transferred that authority to EAC.
7 The regulatory authority that is given to
8 the EAC is found in Section 9 of the
9 National Voter Registration Act. And it
10 states, in consultation with the chief
11 election officers of the states, "shall
12 prescribe." If you can just insert the
13 letters EAC there, "shall prescribe such
14 regulations as are necessary to carry out
15 Paragraphs 2 and 3."

16 Paragraphs 2 and 3 require the
17 following activities; in consultation with
18 the chief election officers of the states,
19 shall develop a mail voter registration
20 application form for elections for federal

21 office. And Paragraph 3 states that not

22 later than June 30th of each odd numbered

1 year, shall submit to the Congress a
2 report assessing the impact of this act on
3 the administration of elections for
4 federal office during the proceeding
5 two-year period, including recommendations
6 for improvements in the federal and state
7 procedures forms and other matters
8 affected by this act.

9 Now, it's important to remember
10 that Section 9 is not the only section
11 that covers the national mail voter
12 registration form. Section 6-A of the
13 NVRA also requires that this form be
14 accepted and used by each covered state.
15 There are 45 covered jurisdictions, 44
16 states and the District of Columbia that
17 are required to comply with the National
18 Voter Registration Act.

19 Now, having said all of this,
20 having said that the constitutionality of

21 NVRA has been challenged and upheld

22 several times, there's never been a case

1 that has litigated the issue of the scope
2 of its regulatory authority that is or was
3 belonging to the FEC and now is belonging
4 to the EAC. That doesn't mean that there
5 aren't some statements that we can
6 consider as a part of what is our
7 regulatory authority.

8 The first thing that we can look
9 at, and I guess we can debate the
10 appropriateness of going straight to the
11 congressional authority, but it generally
12 applies, if you look at congressional
13 authority, if the language of the statute
14 is ambiguous, but we will run that risk
15 and take a look at that.

16 Congress made three statements
17 with regard to the regulatory authority
18 that is discussed in Section 9 of the
19 NVRA. First, in a House bill, I'm sorry,
20 in a House report. Second, in a Senate

21 report, and third, in a conference report.

22 The House report, essentially, allowed the

1 FEC, now the EAC, the general authority to
2 promulgate appropriate regulations
3 necessary to carry out the act. That
4 would be the entire act, the entire
5 National Voter Registration Act. So not
6 just talking about the National Voter
7 Registration form, but also talking about
8 the other provisions of the act that would
9 relate to things such as list maintenance,
10 such as how you send notices from one
11 jurisdiction to another, those sorts of
12 things.

13 So it would have covered a much
14 broader category of activities than what
15 ended up in the Senate amendment, limited
16 the Commission's authority to prescribe
17 only those regulations necessary to carry
18 out its specific responsibilities in
19 designing a mail application form and then
20 reporting to the Congress.

21 The conference report accepted

22 the Senate amendment, so the limitation is

1 that EAC now has the authority to regulate
2 or issue regulations necessary to design a
3 mail registration application form,
4 reading in Section 6, which is required to
5 be accepted and used by all states that
6 are covered, and in reporting to Congress.

7 The second thing that we can
8 look at is what the FEC did under its
9 authority, keeping in mind NVRA put a
10 pretty heavy burden on FEC and now on us.
11 There are 46 covered jurisdictions. And
12 while I won't venture to say there are an
13 equal number of different combinations of
14 requirements in each one of those states,
15 there certainly is no uniformity among the
16 states as to what is required to register
17 to vote in that state, what is the actual
18 requirement.

19 We can certainly look at some
20 things that are uniform, like being a U.S.

21 citizen, being at least 18 years of age,

22 but then you have some states that

1 require, for instance, that the person not
2 have been convicted of a felony or they
3 have not been adjudicated mentally
4 incompetent.

5 So the FEC, in putting together
6 its regulations and what it believed
7 should be on the form, exercised some
8 discretion in creating a single form.

9 Now, that was a difficult
10 concept, because at that time and probably
11 still today, we're looking at the fact
12 that it has to be a paper form. It would
13 be great if we could do that in an
14 electronic format where we could create 50
15 different forms, but unfortunately, we
16 still have to recognize that voter
17 registration agencies, more than the
18 registrar and other groups, have to be
19 able to print their form out and use it in
20 regular course.

21 So we can certainly look to what

22 the FEC did. They set forth a list of

1 common items that would be on the form.

2 And then they provided a catchall,

3 essentially, and any other requirement

4 that is required by state law, and that

5 was covered by an attestation clause.

6 What they didn't say was when or how the

7 form must be accepted and used. They did

8 make reference in 11 CFR 8.3, but they

9 didn't talk about that since its

10 inception, EAC has not promulgated its own

11 regulations under the act, under NVRA.

12 And HAVA, unlike in certain other

13 circumstances, did not make the FEC's

14 regulations defacto ours. HAVA did take

15 that position when it came to the 2002

16 VSS. It, essentially, transferred that

17 voting system standard to the EAC until

18 EAC had the ability to put together what

19 we now refer to as the Voluntary Voting

20 System Guidelines.

21 HAVA did not take that action

22 with regard to the FEC's regulations under

1 the NVRA, but it did transfer to the EAC
2 the responsibility for taking that. EAC
3 has made some statements with regard to
4 what its perceived authority is under the
5 NVRA in certain letters that it has sent
6 out to either Arizona or Florida relating
7 to questions that they had in changing
8 state-specific instructions.

9 While I won't bore you with
10 reading that quote, essentially, we cited
11 the constitutional authority for the act
12 and talked about, essentially, how that
13 impacts our regulatory authority. So the
14 question then is what is the EAC's
15 authority to regulate under the National
16 Voter Registration Act. I believe that
17 under the National Voter Registration Act,
18 the EAC has the ability to regulate or to
19 issue regulations that are necessary to
20 promulgate a form. That must inherently

21 mean that we have some discretion to

22 determine what should be on the form,

1 and perhaps what it means to be an

2 acceptable form under the act.

3 Ultimately, the determination of

4 what is necessary to promulgate the form

5 is a decision for the Commission to make.

6 It is a policy determination. And it

7 would possibly extend as far as answering

8 questions that were, frankly, beyond the

9 scope of what FEC had to consider. We

10 have had a lot of changes in the

11 registration community over the last,

12 well, almost 13 years since NVRA was

13 enacted. There are a lot more questions

14 about identification. There are new

15 identification laws. There's a lot more

16 questions about citizenship, and certainly

17 there has been a lot more involvement of

18 groups that are involved in voter

19 registration, and what regulations should

20 or should not apply to them, what

21 restrictions should or should not apply to

22 them in their role in registering people

1 too.

2 So I guess I put to you the fact
3 that I believe that EAC may take a more
4 broad approach to regulating under the
5 NVRA. It may consider some of these more
6 difficult questions under what is, in
7 fact, appropriate to accept and use the
8 form. However, it is a policy decision
9 for the Commission to make. If the
10 Commission decides to exercise its
11 authority in a more limited capacity,
12 frankly, that's a decision for the
13 Commission.

14 There is one thing though that I
15 think we should do immediately, and that
16 is because EAC has not acted at this point
17 to create its own regulations under the
18 NVRA. We're handicapped in our ability to
19 answer questions that are important to the
20 states and to the voters of this country,

21 in terms of what they need to know about

22 registering to vote in each of those

1 states. We have states that call and ask
2 or write and ask to change their
3 state-specific instructions, and yet we
4 have no regulatory basis on which to act
5 on those things.

6 The easiest way that I think the
7 EAC can begin to embark upon its
8 regulatory authority and the ability to
9 answer some of these questions in the
10 short run is to simply take the action of
11 transferring from the FEC the regulations
12 that it promulgated, and transferring
13 those to a section of the Code of
14 Regulations that would be assigned to the
15 EAC.

16 Now, there would be a few -- I
17 will call them administrative changes.
18 Perhaps there is an address for the FEC
19 that is in there that probably needs to be
20 updated to reflect our address, but,

21 essentially, transferring those things

22 over wholesale. This is an approach that

1 has been used by other Government
2 agencies, certainly by the Department of
3 Justice, the Treasury, when either new
4 agencies were created or when authorities
5 or responsibilities for a particular
6 action were transferred from one agency to
7 another.

8 The process is pretty simple.
9 Essentially, you enter into a joint
10 rule-making activity with the previously
11 authorized agency to, essentially, remove
12 those regulations from their section and
13 transfer them wholesale to the new
14 section. This could be done in a rather
15 expeditious fashion because of the fact
16 that, frankly, the FEC adopted these
17 regulations with notice and comment in
18 1994 so they have been subject to the APA
19 previously.

20 And there is an exception to the

21 APA that would allow you to forego notice

22 and comment on this ministerial transfer

1 or administrative transfer when the
2 agency, for good cause, finds that notice
3 in public procedure thereon are
4 impracticable, unnecessary, or contrary to
5 the public interest.

6 As I mentioned previously, I
7 believe it's probably unnecessary in that
8 these regulations were adopted via a
9 public comment procedure previously, but
10 in addition, I think it may be contrary to
11 the public interest because you would be
12 delaying the ability of EAC to answer
13 questions and to make changes to the
14 federal form which, of course, is
15 important for an upcoming presidential
16 election.

17 The second thing that has to be
18 done in order to do this in an expeditious
19 fashion is to consider the exception that
20 is allowed under 5 USC 553(b)(3)(b), which

21 allows the agency, again, for good cause

22 to forego the 30-day publication

1 requirement. Now, all of this has to be
2 coordinated with the FEC. And while I
3 have had some exploratory conversations,
4 we would certainly have to coordinate with
5 the FEC, get their agreement to do this,
6 and would then have to, essentially, write
7 in the notice that would be published
8 telling the public that these regulations
9 have been moved from one place to another,
10 giving them notice of where you would find
11 these things at.

12 So in order to do that, I would
13 have to recommend to you that you do two
14 things. First, you would have to enter a
15 finding by the Commission that the
16 transfer of the regulations do not require
17 notice and comment, and would not require
18 a 30-day publication period. And,
19 secondly, direct the staff to take
20 whatever actions they need to do to

21 coordinate with FEC and to make this

22 publication in the Federal Register for

1 this notice.

2 Now, I haven't said too much
3 about what our future activities should be
4 under the NVRA. I will say to you that
5 transferring the regulations from FEC to
6 us is not the end of the day. First of
7 all, the FEC regulations are not
8 consistent with HAVA. While the FEC
9 updated the National Voter Registration
10 form, they did not update their
11 regulations to require such things as the
12 check boxes for U.S. citizenship and the
13 questions regarding the age of the
14 applicant. So that would have to be done,
15 at the very least.

16 In addition, while the FEC
17 regulations certainly allude to the
18 process of having state-specific
19 instructions and the ability to change
20 them, it doesn't really say how you go

21 about doing that. So EAC would have to

22 enter some policy that would inform those

1 states as to how they would make such a
2 request and how we would consider such a
3 request, implementing, if you will, the
4 regulation that allows a change to the
5 state-specific instructions.

6 Now, in terms of what we would
7 do with these regulations after we get
8 them kind of alluded to what I will refer
9 to as the short form activity, that is, at
10 the very least, we have got to get these
11 things in conformance with our governing
12 statute.

13 I think the second possibility
14 is what I will call a more long-term
15 approach, certainly a more wholistic
16 review of the National Voter Registration
17 Act, what our desired regulatory action
18 would be under that particular authority,
19 and a wholesale revision, if you will, of
20 the National Voter Registration Act

21 regulations by the EAC.

22 This would take some time and,

1 frankly, I am not the best person to talk
2 to about that. And that's why Mr. Cortes
3 is here today to talk to you about,
4 essentially, what it would take, in terms
5 of time, resources, and steps to implement
6 each one of these different possibilities.

7 So, with that, if you have any
8 questions, I'm happy to answer them, but I
9 think Mr. Cortes would probably provide
10 you a great deal more information about
11 what it would take.

12 VICE-CHAIR RODRIGUEZ: Are there
13 any questions at this point or shall we
14 continue with Mr. Cortes?

15 Mr. Cortes.

16 MR. CORTES: Good afternoon,
17 Commissioners.

18 What I am going to discuss today
19 is a time line, and resources for taking
20 this more long-term, wholistic approach to

21 redoing the NVRA regulations. This is

22 based on our discussions with current EAC

1 staff that were at FEC when the NVRA was
2 first passed, as well as our research into
3 what some of the steps required are going
4 to be.

5 Let me start off by saying that,
6 in terms of resources, when the NVRA was
7 first passed, the FEC had four full-time
8 staff members working on the
9 implementation of that act. In addition
10 to that, they had at least two attorneys
11 from their office of general counsel
12 working on the regulatory part of it.
13 With this staffing level, it took them
14 about 13 months from the passage of the
15 act until the time they published their
16 final regulations in the Federal Register.
17 And five months after those regulations
18 were published is when they actually
19 released the first version of the national
20 voter registration form. So with four

21 full-time staff and two attorneys, it took

22 the FEC about 18 months to get from start

1 to finish in that process the first time

2 around.

3 We currently, at EAC, have no
4 full-time staff dedicated to the NVRA
5 process or implementation. The NVRA is
6 currently handled by my division, which
7 also deals with HAVA funds management,
8 language programs, and the Help America
9 Vote College Program. So that's kind of
10 where NVRA falls in the scheme of EAC
11 currently.

12 We have estimated that it will
13 take EAC anywhere between 18 to 28 months
14 to work through this entire process. And
15 I will go through these step by step and
16 kind of delineate what exactly the steps
17 are and how long each of those steps would
18 take because there are some differences,
19 in terms of the requirements that we have,
20 compared to the requirements of FEC.

21 The first step, which Julie has

22 talked about this morning, is to determine

1 the scope of the regulations. And,
2 essentially, the Commissioners would have
3 to decide, based on the advice of general
4 counsel, in terms of what the regulatory
5 authority is. The Commissioners would
6 have to decide how much of that they want
7 to enact, how far -- if they want to
8 exercise their full responsibilities or if
9 they want to take a more limited approach.

10 Basically, the Commissioners
11 have to look at policy issues, what should
12 the EAC do, legal authority issues, which
13 Julie talked about, which is, what can the
14 EAC do. And then the practical issue,
15 frankly, of what is the EAC capable of.
16 We have that currently, in terms of our
17 overall time line, at about one to two
18 months, in terms of making that decision
19 to move forward with the rest of the
20 process. That, of course, depends on

21 everything else, all the other matters

22 that are pressing on the Commissioners'

1 time with the federal election year coming

2 up and all of that.

3 The next step, and some of these

4 steps run simultaneous, and we're trying

5 to move forward as much as possible, the

6 next step -- we have actually taken some

7 initial steps, which is developing the CFR

8 site plan. In order to publish

9 regulations, we have to have an actual

10 site in the Code of Regulations, which we

11 currently don't have. We have started to

12 work with the Office of Federal Register

13 to secure that site. Our understanding is

14 that we'll be located in Title 11, Chapter

15 2 of the Code of Federal Regulations.

16 Title 11 is federal elections and Chapter

17 1 of that title is the Federal Election

18 Commission.

19 So we actually have, because

20 they were the only other Federal

21 Government agency that deals with federal

22 elections, we actually have a nice

1 placement, in terms of easily being
2 located in the CFR. So that should take
3 us approximately two months to get through
4 the process of actually getting that site,
5 and then we have to develop -- we actually
6 have to develop the entire structure of
7 where everything is going to be located
8 within that site, and reserve certainly
9 portions for us to publish these
10 regulations.

11 The next step would be to issue
12 an advance notice of proposed rulemaking.
13 Basically, what this does is it allows the
14 public to know that the EAC is considering
15 issuing new regulations, and it asks for
16 public comments for EAC to consider prior
17 to developing draft regulations. This
18 would, hopefully, this advance notice of
19 proposed rulemaking would, hopefully,
20 coincide with the next step, which is an

21 initial research and information gathering

22 phase, where the EAC would go into the

1 process of gathering information on what
2 state needs are, in terms of the voter
3 registration form, concerns of groups that
4 conduct voter registration, and the
5 interest of voters out there.

6 So we would go out and collect
7 data, hopefully, doing some surveys and
8 additional data collection, holding
9 hearings. The first time around, the FEC
10 held six regional hearings where,
11 essentially, invitations were given. Each
12 time a regional hearing was held, FEC
13 provided a notice and invitation to every
14 election official within that region to
15 come and participate and listen in on the
16 discussion, and be available during the
17 public comment period.

18 So we would recommend that
19 during this period, we hold six to eight
20 regional hearings on the matter. And

21 then, in addition, we would recommend that

22 there be working groups where we would be

1 able to bring together election officials
2 and advocacy groups in a small
3 environment, talking about specific
4 issues, and get a better idea of the needs
5 that are out there from all sides. We
6 think that that information-gathering
7 phase will take us close to seven months,
8 and during this time, get comments from
9 the public.

10 We would have a Web-based
11 system, as we have for the VVSG, so we
12 could sort those comments and categorize
13 them. Once we've done these initial
14 steps, at that point, we would take all
15 this information, and we have compiled all
16 of this. Then we would, essentially, give
17 it back to the Commissioners and say, this
18 is everything that we have taken in, these
19 are the different concerns that are out
20 there from election officials, from voter

21 registration groups, from the public, in

22 terms of what we should or should not do,

1 and allow the Commissioners to potentially
2 re-assess the scope that they determined,
3 and see if there is perhaps something that
4 we missed that should have been included
5 but wasn't, or perhaps something that the
6 Commissioners wanted to address, but based
7 on feedback and research, determined it
8 was impractical or not realistic to
9 address. And so re-assessing that scope
10 would be important at that point.

11 Once that's done, we would then
12 begin drafting proposed regulations.
13 Basically, the staff would take the
14 information gathered during the process,
15 and based upon the scope that the
16 Commissioners have decided, and we would
17 take all of that and produce concise and
18 explicit regulations for the NVRA.

19 We would then -- I think this is
20 put as a separate step but it's something

21 we would do throughout the process, which

22 is to consult with the chief state

1 election officials. That's actually a
2 requirement in NVRA, that in producing
3 these regulations, that we consult with
4 the chief election officials of every
5 state. But we feel that aside from the
6 general public comment period, that
7 soliciting written comments or perhaps
8 convening a conference or on-line meeting
9 of chief state election officials would be
10 beneficial during this.

11 Now, one thing that the EAC is
12 facing that the FEC did not have to
13 contend with and that lessens this process
14 is the Paperwork Reduction Act. I think
15 there was some discussion earlier, in
16 terms of earlier this morning, about the
17 Paperwork Reduction Act. It's important
18 to know that the FEC is exempt from the
19 Paperwork Reduction Act, so during the
20 initial promulgation of NVRA regulations,

21 didn't have to go through this process.

22 And that process is going to add an

1 additional three to five months to all of
2 this, because the EAC is not exempt from
3 that act, and we do have to comply with
4 the requirements of the Paperwork
5 Reduction Act.

6 Once we have drafted the
7 regulation, once we have drafted
8 regulations, we would publish them in the
9 Federal Register, where they would be
10 available for public comment. Staff would
11 recommend an extended public comment
12 period of at least 90 days. Because this
13 is an issue with such great impact and
14 because its been such a long time since
15 regulations on this issue have been
16 produced, we would recommend an extended
17 public comment period.

18 At the end of that public
19 comment period, there would be a review of
20 the comments. The final regulations would

21 be written to take into consideration any

22 changes that the Commissioners wished to

1 make, based on the comments that were
2 received, and we would then publish the
3 final rules.

4 Once those final rules are
5 published, that's the point where we would
6 move into action in producing a new voter
7 registration form. I think the staff
8 envisions being able to figure out the
9 regulations first, and what should go on
10 the form, and at that point, be able to
11 conceptually just redesign it start from
12 scratch, essentially, to make sure that
13 the form is accessible, practical,
14 efficient, readable.

15 So that process would take
16 several months. Again, there is a
17 Paperwork Reduction Act process for that.
18 So that would take us through the entire
19 process.

20 Now, at the same time this is

21 going on, the other thing that we're

22 required to do in the statute but not

1 issued regulations for is to provide the
2 states guidance, essentially, on how to
3 implement the act. The FEC provided and
4 implemented, "National Voting Act
5 Requirements Issues", when the act first
6 came out. It was a publication that
7 talked about the approach that was taken,
8 all the issues for the states to consider,
9 things that even though they weren't in
10 the regulations, these are how you might
11 go about them.

12 You mentioned earlier that we
13 cannot regulate in the area of, say, list
14 maintenance, but we can certainly provide
15 guidance to the states on how to conduct
16 list maintenance on the NVRA. As a matter
17 of fact, we're required to provide them
18 that sort of guidance on how to implement
19 the act. And so the thought is while
20 we're writing the regulations, we would

21 also begin to put together a booklet, some

22 sort of guidance that would accompany the

1 new regulation so that as soon as those
2 new regulations are published, there is
3 guidance for the states on how to
4 implement those new regulations.

5 Again, this is all based on the
6 scope which Julie talked about, in terms
7 of there being an effort to completely
8 rewrite the regulations and go through the
9 process from beginning to end. And the
10 time line would be dependent on that scope
11 and would also be dependent on the
12 resources put into it, in terms of
13 staffing leveling. Things like public
14 meetings are also very expensive. We're
15 talking about regional meetings around the
16 country in a very short time period. So
17 there is cost and resources throughout
18 this time line that all of which will
19 determine how long it will actually take.

20 And that's what I have. I'm

21 sure that you all have questions about the

22 time line or about the presentation. I

1 will be happy to answer.

2 VICE-CHAIR RODRIGUEZ: Thank

3 you, very much, Mr. Cortes.

4 Ms. Hodgkins, do you want to add

5 anything to that before we start with

6 questions? Okay, Thank you.

7 Are there any questions? Who

8 wants to go first? Commissioner Hillman.

9 COMMISSIONER HILLMAN: Julie,

10 can you summarize for me, when you talked

11 about EAC's authority under NVRA/HAVA,

12 what's the floor and what's the ceiling?

13 I got a little lost. I understand about

14 the form, but in terms of we must at a

15 minimum do X, we cannot at any point

16 exceed Y.

17 MS. HODGKINS: Sure. I'll try

18 to do that, although some of it, I

19 believe, is a bit of a policy decision for

20 you guys to get. I will certainly give

21 that my best.

22 COMMISSIONER HILLMAN: I guess I

1 am not getting to policy. I am getting to
2 the finite constraints we have. We had a
3 discussion earlier this morning about EAC
4 not exceeding its authority, and I'm
5 trying to understand the boundaries of
6 that authority.

7 MS. HODGKINS: Sure. I
8 understand.

9 The authority is vested by the
10 National Voter Registration Act. And
11 while it sounds quite simple to issue
12 whatever regulations are necessary to
13 adopt a national voter registration form
14 and to require the states to implement or
15 report under the requirements to do the
16 biannual report on their implementation of
17 NVRA.

18 Now, there is probably a key
19 phrase there that we need to discuss a
20 little bit further, and that is, what does

21 it mean to have whatever regulations are

22 necessary. Well, the Courts have pretty

1 much decided that the term necessary is
2 not ambiguous in and of itself, but it is
3 a determination or a gap that is left for
4 the agency to make a determination on.
5 That's the policy thing that I am trying
6 to get to.

7 I can tell you what I think the
8 height of that is, but it is ultimately
9 the Commission's determination as to
10 whether or not it decides to extend its
11 authority to that full limitation.

12 Now, under my analysis, you have
13 to create a single form for the United
14 States to use, all 45 jurisdictions that
15 are covered. So that means you have got
16 to set what is going to be on the form and
17 you have to recognize that the law also
18 says that every jurisdiction has to accept
19 and use that form.

20 So inherent in establishing what

21 is to be on the form, you must consider

22 what is acceptable to complete that form.

1 And so not only would you consider, in my
2 opinion, the extent of your rule-making
3 authority, the items that are to be on the
4 form, but what is acceptable completion of
5 that form.

6 COMMISSIONER HILLMAN: And does
7 the law not tell us, all the least, some
8 minimums as to what must be on the form,
9 and is there a ceiling, in terms of what
10 EAC cannot add to the form at its
11 discretion?

12 MS. HODGKINS: The form is --
13 there are some things that EAC absolutely,
14 positively cannot abrogate, in terms of a
15 floor. The form has to include certain
16 things that are enumerated in Section 9(b)
17 of the National Voter Registration Act. I
18 was going to try to summarize them, but I
19 don't know if I can.

20 The first is that it shall

21 include a statement that specifies each

22 eligibility requirement, including

1 citizenship, contain an attestation that
2 the applicant meets such requirement, and
3 requires signature of the applicant under
4 penalty of perjury. So we cannot do
5 anything under this section. It may not
6 include any requirement for notarization
7 or other formal authentication, and it
8 must include in print, that is,
9 information required in Section 885(a) and
10 (b), a statement that this applicant
11 declines to register to vote, the fact
12 that the applicant has declined will
13 remain confidential and will be used only
14 for voter registration purposes, and a
15 statement that if an applicant does not
16 register to vote, the office at which the
17 applicant submits a voter registration
18 application will remain confidential and
19 will be used only for voter registration
20 purposes.

21 Now, let me go back and talk

22 about Section 9(b)(1) because this one is

1 a little bit more loose, in terms of its
2 requirement. The mail registration form
3 developed under Section A(2) may require
4 only such identifying identification,
5 including signature of the applicant and
6 other information, including data related
7 to previous registration by the applicant
8 as is necessary to enable the appropriate
9 state official to assess eligibility of
10 the applicant and to administer voter
11 registration and other parts of the
12 election process.

13 So while we must do the things
14 under two, we can't do more, if you will.
15 We can't have more items on the form than
16 is required to assess the eligibility of
17 the applicant or to otherwise administer
18 the voter registration process.

19 Clear as mud.

20 COMMISSIONER HILLMAN: Yes, that

21 helps me. I should have brought the NVRA

22 with me to see the words that are being

1 spoken to me.

2 So looking at the time line that
3 Mr. Cortes laid out for us, would
4 envisioning that time line envision if EAC
5 were to adopt in whole, except for name of
6 agency and address, the current FEC
7 regulations, then the revision process
8 outlined by Mr. Cortes would start after
9 that?

10 MS. HODGKINS: That's correct.

11 Essentially, what you would be creating by
12 transferring this is a regulatory -- I
13 hate to use your word floor, but
14 essentially, a base line or starting line,
15 and then your activity with regard to
16 revising those would start from that point
17 forward.

18 COMMISSIONER HILLMAN: Okay.

19 And what, based on your preliminary
20 research, would you envision would be the

21 process and the length of time for EAC, if

22 FEC agreed -- I can't see why they

1 wouldn't, but assuming FEC agreed for us
2 to adopt those regulations in whole for
3 them to be ours, to begin the longer
4 process?

5 MS. HODGKINS: Commissioner
6 Hillman, I would say that would take
7 probably less than 30 days, assuming that
8 you all make the determinations that I
9 have recommended, and that is, that the
10 notice and comment period is not
11 necessary, and the 30-day publication
12 period is not warranted.

13 We would, as I outlined before,
14 have to get consent of the FEC. And we
15 would then have to issue a notice in the
16 Federal Register, notifying the public of
17 the transfer or relocation of those
18 regulations to the EAC's location.

19 COMMISSIONER HILLMAN: Okay. I
20 think this is my final question, at least

21 for now, and hopefully, there will be time

22 later. If public notice were given and a

1 comment period provided, does the EAC have
2 discretion as to what the notice would be
3 and what the public could comment on?
4 What is it that would be covered under the
5 public comment period, if we were to do a
6 public comment period to accept the FEC
7 regulations in whole; would the comment be
8 on that process, to accept the
9 regulations, would the comment be on the
10 regulations themselves, can we determine
11 what it is that the public gets to comment
12 upon?

13 MS. HODGKINS: I think your
14 notice, as to what your intent is, would
15 dictate what the comment would be on.
16 If you noticed it for comment on the
17 substance of the regulations that you were
18 transferring, then it would be on that
19 part. That's the part that seems a bit
20 unnecessary to me, considering these were

21 already adopted on the substance of these

22 items.

1 I don't know. To be quite
2 honest, I'm not sure that you could just
3 do a notice for comment on the transfer.
4 That seems a little counter intuitive to
5 me, but we could certainly look into
6 whether or not that's possible.

7 COMMISSIONER HILLMAN: And when
8 was that done; when did the FEC do the
9 public comment when were they commented
10 on?

11 MS. HODGKINS: Publication of
12 their final notice was in 1994.

13 COMMISSIONER HILLMAN: Well, I
14 will save my comment for later because I
15 would be interested to see if there's any
16 record or archives as to what kind of
17 objections might have been raised at that
18 time, despite the fact that the
19 regulations were adopted, if there were
20 any public comment objections raised about

21 the now existing regulations.

22 MS. HODGKINS: The FEC would

1 have any information on that.

2 COMMISSIONER HILLMAN: Okay.

3 MR. CORTES: Just to add to that

4 point, the final rules that were published

5 in the Federal Register include not only

6 the final rules, but they list all the

7 types of public comments, why the FEC did

8 or did not take those comments into

9 account in publishing the final rules.

10 COMMISSIONER HILLMAN: Is it a

11 lot of stuff?

12 MR. CORTES: There is quite a

13 bit.

14 COMMISSIONER HILLMAN: Okay.

15 Thank you.

16 VICE-CHAIR RODRIGUEZ: Thank

17 you, Commissioner Hillman.

18 Commissioner Davidson.

19 CHAIR DAVIDSON: Just to stay on

20 this subject, I have a couple questions

21 and I may come back when subjects change.

22 But in discussing taking the regulations

1 that are already promulgated by the FEC
2 and bringing them in-house to the EAC so
3 that we can start the process, obviously,
4 transferring them to us is the first step
5 in having the public notice of the new
6 address so that we can start moving
7 forward.

8 My question is, I think one of
9 the first things we need to do is make it
10 HAVA compliant. Do you think, in just
11 making it HAVA compliant, that we would
12 have to go through this long period of
13 time after we got them in-house, just to
14 make it HAVA compliant to the law?
15 Because I think that's one of the first
16 steps that HAVA intended by putting things
17 into the law.

18 MS. HODGKINS: I think it would
19 require a process. Even though you are
20 making what seems like intuitive changes

21 because they are required by law, it is a

22 substantive change to the regulation. And

1 so, therefore, there would still have to

2 be a notice and comment period.

3 Now, granted, it would probably

4 be a shorter notice and comment period

5 that you would want to put out there

6 versus a whole rewrite of this statute.

7 We would want to give the public a much

8 greater opportunity to comment, more time

9 to think about it, that kind of thing,

10 than if we're just saying, oh, by the way,

11 the form now has a check box for

12 citizenship and age. That wouldn't

13 require as much time, but it still would

14 require a notice and comment period.

15 CHAIR DAVIDSON: And I agree

16 with that statement, but I guess one of

17 the things I think is important is, one,

18 that we get the regulations over so that

19 we can start the process, but two, so at

20 the same time that we're working on the

21 other, we go ahead and make it HAVA

22 compliant. So when we put out the other

1 proposed rules or regulations, that it is
2 completely clear to the public what the
3 existing HAVA-compliant regulations and
4 rules are.

5 MS. HODGKINS: And I don't know
6 that they are necessarily mutually
7 exclusive or sequential. That is sort of
8 a decision for you guys to make. If you
9 wanted to take the steps to get the
10 regulations cleaned up as quickly as we
11 can, in terms of the law, certainly we can
12 do that, and then address the wholesale
13 look, re-look at the issues. We can do
14 that sequentially or simultaneously,
15 whatever it is that is your pleasure.

16 MR. CORTES: Right. That time
17 line, to get back to your base question,
18 that time line will not be as lengthy as
19 the one I described. The one I described
20 was talking about a total rewrite. The

21 process of changing the regulations to

22 incorporate the HAVA mandates would be a

1 much shorter process. It would still
2 require the public notice and comment
3 period. Probably a minimum of 30 days is
4 the public notice and comment period. It
5 would still require the Paperwork
6 Reduction Act process. That, I think, is
7 kind of up in the air, but -- so there
8 would be some length of time it would
9 take, but it would not take nearly as long
10 as an entire rewrite of the regulations.

11 CHAIR DAVIDSON: Am I being fair
12 picking some areas of the paperwork
13 reduction time frame and the public
14 hearing time frame, and actually staff
15 getting it prepared that would hold up as
16 if we said we were not going to move
17 forward until we did all these things? It
18 would hold up the process of us getting it
19 in-house, to where we could start making
20 some changes.

21 MR. CORTES: Well, I think it

22 would still be a step that would come

1 after what general counsel has
2 recommended, in terms of transferring the
3 current regulations over, wholesale. We
4 have to have some regulations in place
5 first before we can go through the
6 changes, before we can make changes to
7 them.

8 I think that if we try to
9 transfer them with changes, the time
10 period will be lengthier and will be a
11 greater amount of time without any
12 regulations in place.

13 I think if we transfer them
14 first wholesale from FEC, we could
15 certainly do an intermediate step between
16 that and a total rewrite which would
17 incorporate the HAVA provision. I will
18 say that the folks over at the FEC have
19 actually discussed, shortly after the
20 passage of HAVA, amending the regulation.

21 They did amend the actual form. They

22 amended the voter registration form to

1 include, in particular, the check boxes
2 that are required in HAVA, and they had a
3 discussion about issuing regulations,
4 updating their regulations to reflect
5 those changes.

6 The decision was made over there
7 that this was now going to be under the
8 purview of the EAC. And they essentially
9 decided to wait, and that it would be a
10 matter that the EAC would take up once it
11 was established.

12 MS. HODGKINS: Mr. Cortes, I
13 don't mean to belabor your point or to
14 contradict you at all, but there could
15 actually be a situation where we would
16 rewrite the regulations themselves without
17 transferring them. I don't want you to
18 understand or believe that that's not an
19 option. It would be. It's a much
20 lengthier option. I don't think it would

21 ever serve the public interest in trying

22 to make sure that we have a voter

1 registration form that is accurate, in
2 place, and contains all the accurate
3 information with regard to the
4 state-specific instructions prior to the
5 2008 election. That's why I proposed that
6 particular method.

7 But, yes, it is absolutely
8 possible that you could just scrap what's
9 there now and start over from scratch
10 today. It would just be a much longer
11 process.

12 CHAIR DAVIDSON: And time being
13 of the essence, obviously, that's an
14 issue. I will reserve the right to come
15 back on the issue.

16 VICE-CHAIR RODRIGUEZ: Thank
17 you. Commissioner Hunter.

18 COMMISSIONER HUNTER: Ms.
19 Hodgkins, you reference in your testimony
20 two letters that the EAC has sent; one to

21 Florida, and one to Arizona. Do those

22 represent policy decisions of the EAC?

1 MS. HODGKINS: The one to
2 Arizona would, because it actually kind of
3 came up in a strange situation, so let me
4 do a little background.

5 The initial letter was sent by
6 Mr. Wilkey, who is the executive director.
7 And at the time, it was at least the
8 staff's understanding those types of
9 questions with regard to changing
10 state-specific instructions went to staff
11 for decision, so he sent the letter.

12 Subsequently, a Commissioner
13 raised that issue to a vote of the
14 Commission, in which case the vote that
15 was proposed actually failed but
16 effectively created a policy statement by
17 the Commission to uphold the letter that
18 Mr. Wilkey sent.

19 So if that's not as confusing
20 as I can be, I don't know what else I can

21 do.

22 COMMISSIONER HUNTER: Thank you.

1 And then my other comment, your recitation
2 of the law and all the different ideas out
3 there was right on point. I appreciate
4 your ability to explain it very, very
5 clearly. I think it's a very difficult
6 area to understand, and I agreed with all
7 of your explanations of the law and
8 regulations.

9 But as you know, because we have
10 talked about this before, my view of the
11 EAC's regulatory authority is that it is
12 very limited, and I think that the FEC
13 exercised it in a way that was intended by
14 Congress, intended by the actual law of
15 the NVRA, and I think they did it in a way
16 that satisfied the requirements of NVRA,
17 which is, create a federal form.

18 There is not a lot of
19 legislative history with respect to
20 exactly why they wanted a specific federal

21 form. It may be worthwhile to note that

22 under Motor Voter, when somebody gets a

1 simultaneous drivers license application
2 and voter registration form, that voter
3 registration form is a state form. That
4 federal form has to be available at public
5 service agencies, but also it's very
6 obvious in NVRA, in a lot of different
7 areas, that it was clearly contemplated
8 that the states could have their own state
9 form.

10 So there was never a -- you must
11 use the federal form exclusion. It was
12 you can use the federal form or also
13 submit your state form, but if somebody
14 uses a state form, it must be accepted and
15 used.

16 With that framework in mind, and
17 obviously, the Constitution reserves the
18 right of the states to establish their own
19 voter eligibility requirements under
20 Article 1, Section 2, and the 17th

21 Amendment, which is in Ms. Hodgkins'

22 testimony. With that in mind, reserving

1 the right of states to set their own
2 eligibility, if the EAC, in my opinion,
3 goes too far in its regulatory authority,
4 I think we run a very serious risk of
5 impermissibly eroding that constitutional
6 right of the states to set that
7 eligibility requirement.

8 I think that's why the FEC said
9 that is not an easy task, but here's our
10 attempt to get all of the different
11 requirements from the 47 states in one
12 form. And that's why they attached state
13 instructions because everybody recognizes
14 that states have different eligibility
15 requirement. So I think it's important,
16 obviously, to have a federal form also.
17 It is required by law, but it's also
18 important because there could very well be
19 circumstances where somebody might not be
20 able to access the state form, for

21 whatever reason.

22 And I have seen examples of that

1 in my own experiences and that's,
2 obviously, completely inappropriate and
3 that's why the federal forms should be
4 available widely so those who cannot
5 access the state form, for whatever
6 reason, have the opportunity to use the
7 federal form.

8 Again, I just really see this
9 authority as very limited, and I think
10 that my opinion is backed up by the actual
11 plain language of the NVRA which states
12 that the Commission shall prescribe only
13 -- I'm sorry. That is the conference
14 report. That the Commission -- from the
15 NVRA -- shall prescribe such regulations
16 as are necessary to develop the form. And
17 I don't know that just because the
18 political landscape has changed over the
19 past ten years, everyone agrees that it
20 has, I don't know that means that,

21 therefore, the agencies should become more

22 expansive in its realm of setting federal

1 form. I think those differences in state
2 laws can be easily handled in the state
3 instructions portion of the federal voter
4 registration form.

5 Thank you.

6 VICE-CHAIR RODRIGUEZ: Thank
7 you.

8 Do you have anything to add,
9 counsel?

10 MS. HODGKINS: Just to say that
11 I don't think we have any disagreement
12 that the NVRA does significantly limit
13 EAC's ability to regulate. If it hadn't
14 been for the Senate report and the
15 conference report, we would have a much
16 broader authority. I certainly agree with
17 that point.

18 I guess, just to reiterate the
19 concept I have been talking about, and
20 that is national constitutionality of this

21 act is very broad. It is the statutory

22 authority that is more limited, and it is

1 the Commission's responsibility to fill
2 that gap and decide what that limit is,
3 what is necessary in order to implement
4 the National Voter Registration form.
5 That's been clearly upheld by a number of
6 different Courts, that is the
7 responsibility of the agency. So that's
8 the task that is, in fact, before you.

9 COMMISSIONER HUNTER: Could I
10 make one more comment? I agree with
11 everything you said. However, I think
12 that while it's true that the
13 constitutionality of the NVRA has been
14 upheld, it was upheld only to the extent
15 that it didn't impermissibly interfere
16 with the states' ability and right to set
17 its own eligibility standards.

18 MS. HODGKINS: I don't think
19 there is any dispute on that point.

20 COMMISSIONER HUNTER: It is a

21 caveat, its been upheld, but only to the

22 extent it doesn't do that. And if we're

1 over expansive, we could be running afoul
2 of the constitutional protection of the
3 states.

4 COMMISSIONER HILLMAN: Can I
5 just ask for clarification; what would you
6 consider overly expansive? You used that
7 term a couple times, and I'm not sure.

8 COMMISSIONER HUNTER: Well, to
9 be honest with you, I am having a
10 difficult time, and that's why I am glad
11 we're able to listen to some people later
12 this afternoon. Maybe they will be able
13 to help me understand.

14 I have a difficult time
15 understanding exactly what else we should
16 be in the business of putting on the form,
17 or requiring for acceptance, or dealing
18 with whether or not their voter
19 registration agency followed state law or
20 didn't follow state law. I don't see that

21 as within the parameters of our authority.

22 And I'm not sure that Ms. Hodgkins is

1 saying that those things are not. I think
2 she is, but anyway, I have the caveat,
3 pretty much because I don't envision
4 exactly what we're talking about, but I
5 think that pretty much anything that goes
6 beyond just creating the federal form and
7 affixing state instructions to that is
8 outside of the scope.

9 Does that answer your question?

10 COMMISSIONER HILLMAN: Sort of.

11 It's creating the form, yes.

12 MS. HODGKINS: That's really

13 another question.

14 VICE-CHAIR RODRIGUEZ:

15 Mr. Cortes, do you have anything to add?

16 MR. CORTES: I guess I would

17 just add that the FEC, I think, took a
18 fairly limited approach in its regulatory
19 authority, but they did make decisions,
20 they did make policy decisions on things

21 to not only include but exclude from the

22 form because they didn't believe that

1 certain things met or were necessary to
2 determine eligibility of the applicant,
3 such as gender, for instance. There is no
4 box or nowhere on the federal form to
5 include gender information regarding
6 naturalization, place of birth. Those
7 things are things that FEC made a
8 definitive statement that they didn't feel
9 those things were necessary to properly
10 administer elections or to assess the
11 eligibility of the applicant.

12 So they did, in those instances,
13 though it was limited, it was the decision
14 that the FEC made. It was based on their
15 determination. So, you know, they limited
16 themselves, but they did it through a
17 policy decision, not, I think, because the
18 NVRA told them that they couldn't. They
19 made the call to include or not include
20 those things.

21 MS. HODGKINS: Well, I think the

22 point is they were responsible for

1 interpreting the statute and making the
2 determination, whatever they felt they
3 believed fell within or without the
4 statute, and that is inherently the
5 authority of an agency that is given that
6 regulatory authority.

7 COMMISSIONER HILLMAN: So that
8 is our responsibility.

9 VICE-CHAIR RODRIGUEZ: Okay. I
10 will reserve my questions until after the
11 public input.

12 I will ask if anybody needs a
13 break now?

14 COMMISSIONER HILLMAN: Let me
15 ask one more question before we take a
16 break.

17 Can the EAC adopt regulations?
18 Assuming, and I don't assume anything, but
19 if we were to adopt in whole the FEC
20 regulations, could we do that without them

21 being HAVA compliant; could we adopt

22 regulations and then make them HAVA

1 compliant after the fact, or would we have
2 to make them HAVA compliant along the way?

3 MS. HODGKINS: I think I
4 understand your question. And I think
5 that the best case scenario is, obviously,
6 to have whatever it is HAVA compliant.

7 I guess the question is, does
8 the transfer mean that you adopt the
9 regulations. I think there is some
10 inherent quality that these are yours.

11 COMMISSIONER HILLMAN: But
12 wouldn't that be the process, isn't that
13 what the process would be?

14 MS. HODGKINS: It would be,
15 essentially, a relocation.

16 COMMISSIONER HILLMAN: No.

17 MS. HODGKINS: Otherwise, if you
18 are accepting in whole what has already
19 been adopted by the FEC previously, I
20 don't know that you are making a

21 determination as to the substance of those

22 regulations.

1 COMMISSIONER HILLMAN: Well, so
2 the question is, should we be?

3 MS. HODGKINS: That's a very
4 good question.

5 VICE-CHAIR RODRIGUEZ: Are we
6 in need of a break or shall we keep going?

7 COMMISSIONER HILLMAN: We are so
8 far ahead of schedule.

9 CHAIR DAVIDSON: We have five
10 speakers.

11 COMMISSIONER HILLMAN: Are we
12 ahead of schedule? I think we're an hour
13 ahead of schedule or hour-and-a-half.

14 VICE-CHAIR RODRIGUEZ: Let me
15 call out the speakers and see who is here.

16 Jim Dickson, Myrna Perez, Scott
17 Novakowski, Nancy Tate.

18 COMMISSIONER HILLMAN: I saw
19 somebody go out, probably to call and see
20 where she is.

21 VICE-CHAIR RODRIGUEZ: David

22 Becker.

1 CHAIR DAVIDSON: All right.

2 Let's take a ten-minute break and give

3 Mr. Dickson and everybody some time.

4 (Short Recess.)

5 VICE-CHAIR RODRIGUEZ: All

6 right. Are we ready to start?

7 We have five speakers signed up

8 for public comment, and I want to thank

9 them in advance for participating today.

10 You have four minutes in which to make the

11 presentation.

12 Our first speaker today is Jim

13 Dickson with AAPD. Mr. Dickson.

14 MR. DICKSON: Thank you, very

15 much. I will be submitting written

16 materials to supplement what I am about to

17 say. For truth in lending, I was part of

18 the disability civil rights community's

19 leadership team which worked on the

20 passage of the Help America Vote Act. In

21 fact, I have one of the pens that

22 President Clinton used when he signed the

1 law which happened also to be on my

2 mother's birthday.

3 It was Congress's intent, which

4 was clearly articulated in the floor

5 discussion, that social service agencies

6 function as efficiently as the Department

7 of Motor Vehicles when it comes to

8 offering, collecting, and forwarding,

9 voter registration forms to the boards of

10 election. This is because Congress

11 recognized that in the cases with people

12 with disabilities and many poor people, we

13 have no reason to go to the Department of

14 Motor Vehicles. There is data from New

15 York City which shows a huge discrepancy

16 in the percentage of people in New York

17 City who have drivers licenses or

18 non-driver ID. It is a huge disparity

19 compared to the percentage -- and we're

20 talking of poor people who have that DMV

21 cards -- and the rest of the state.

22 In other words, Congress's fear

1 was that if NVRA was focused just on DMV,
2 the legislation might create a discrepancy
3 in the voter registration rate among poor
4 people and people with disabilities. And
5 very, very sad to say, because the agency
6 piece has not been implemented, or where
7 it has been implemented, it's really not
8 nearly enough. It's sloppy, it's
9 minimalist, such a discrepancy has
10 occurred.

11 We have a greater percentage of
12 disabled and poor people who are not
13 registered as compared to the rest of the
14 population than we did when the NVRA was
15 signed into law on May 20, 1993 -- 1993.
16 We think that this absolutely has to be
17 corrected. It would be very, very helpful
18 if the EAC would issue best practices.
19 There are some places which have made
20 serious attempts. Unfortunately, very

21 few, at treating social service and

22 disability agencies in the same way as the

1 Department of Motor Vehicles. And we
2 think that those states should be looked
3 at, and best practices should be issued.

4 The last point that I want to
5 make this afternoon is, those of us who
6 were involved in the creation of the Help
7 America Vote Act had thought and expected
8 that the requirement for an electronic,
9 interactive voter registration database
10 would address this. And yet again, we
11 have been seriously, seriously
12 disappointed, to put it mildly.

13 The real crisis that we have as
14 a country is the lack of participation in
15 our electoral system. And the lower voter
16 registration rates amongst people with
17 disabilities and amongst poor people are a
18 significant reason at a time when this
19 nation is, for the first time in our
20 history, looked on poorly by the rest of

21 the world.

22 We have to repair that. And one

1 significant step that the elections
2 community can do is to solve this lack of
3 participation in implementing the will of
4 Congress in disability and social service
5 agencies will be a huge step so that we
6 can hold our heads up in the face of the
7 rest of the world and say we're the
8 healthiest democracy on the planet.

9 Thank you, very much.

10 VICE-CHAIR RODRIGUEZ: Thank
11 you, Mr. Dickson.

12 Our next speaker is Myrna Perez.
13 Ms. Perez is counsel at the Brennan Center
14 for Justice at NYU School of Law.

15 MS. PEREZ: Thank you for having
16 me today. There is a lot that could be
17 said on the topic of EAC regulatory
18 authority on NVRA, but I am going focus on
19 two specific issues. First, is the ways
20 in which EAC can affect the goals of the

21 NVRA in a manner that's consistent with

22 it's regulatory authority, and the second

1 is, I want to discuss the federal forum.

2 Jim Dickson did an excellent job
3 of explain the need for increased NVRA
4 compliance. I'm not going to belabor that
5 point so you saved me a few seconds. But
6 in addition to best practices, which we
7 would agree could be done by the EAC,
8 there are other things relevant to the
9 actions that the EAC currently does with
10 respect to information-sharing things that
11 can be tweaked and things that could be
12 built upon that would be helpful to other
13 states.

14 For example, encouraging the
15 sharing of information with respect to
16 training, of course material, of training
17 schedules, among the states that currently
18 do NVRA compliance well were made
19 available, then perhaps other states would
20 have something they can build upon and

21 they wouldn't have to start off from

22 scratch.

1 Another thing the Brennan Center
2 believes could be done is to tweak the
3 current survey that is sent to the state
4 as part of the biannual report to reflect
5 issues that are relevant today, like, for
6 example, why are so many voter
7 registration applications being rejected,
8 what is the cause. Perhaps that would
9 reveal whether there are database design
10 problems, problems were matching criteria,
11 or problems with usability in forms.

12 Another thing the EAC could do
13 very easily would be to issue state report
14 cards. The information is already there
15 in your annual report. It would not be
16 horribly difficult to compile it by state,
17 especially since it is already done in the
18 context of years, in many respects, and
19 let states know how they are doing with
20 respect to other states, and how they have

21 been doing in the past.

22 You could do an absolute

1 performance, a relative performance. You
2 could decide to issue to the actual chief
3 election officer or include it as an
4 appendix in your biannual report so it
5 would be available to the public and
6 Congress.

7 The second thing I am hoping to
8 discuss or I would like to discuss with
9 you is the federal form. The thing that
10 is very, very important is for everyone to
11 remember that there are exceptions to the
12 APA notice and comment process, but these
13 exceptions cannot be interpreted to
14 swallow the rule. There should be a
15 presumption that notice and comment is
16 what is going to happen with respect to
17 changes to the federal form. And in the
18 event that there is not notice and
19 comment, it needs to be for a very, very
20 good reason, and there needs to be some

21 sort of deliberation and thought into what

22 those categories are.

1 And to that end, the Brennan
2 Center would recommend defining certain
3 categories that may be of the types of
4 changes that you may need to make that
5 could have public weigh-in, and decide
6 whether these categories were
7 appropriately identified, and then limit
8 the lack of notice and comment
9 specifically to those particular
10 categories. Now, some of the ones that
11 may work for this would be, for example,
12 like obvious spelling errors, grammatical
13 errors, unintentional format changes,
14 perhaps changes to the mailing addresses
15 of states in either the general or the
16 state instruction forms. We're looking
17 for information that is easily verified
18 and that people can agree upon rather
19 easily that this is not going to mislead
20 the public or subject the EAC to some sort

21 of legal controversy with respect to

22 interpretation.

1 But having said that, there are
2 certain categories that the Brennan Center
3 believes must be subject to notice and
4 comment, and that would include changes
5 made to the application, redesigning the
6 form. It has to deal with design, and
7 accessibility, and readability, and the
8 public should always have an opportunity
9 to weigh into that.

10 Also, changes to the substantive
11 information to the general instruction and
12 state instructions, those are also kinds
13 of things that should have some sort of
14 notice and comment because we've seen
15 there is a great deal of controversy and
16 disagreement as to how a particular law
17 should be interpreted, and it will
18 consistently change, depending on what
19 state has its review. Experts and the
20 public should comment on what they think

21 are appropriate things to be subject to

22 the form.

1 VICE-CHAIR RODRIGUEZ: Thank
2 you, very much. May I ask you to sit in
3 the front row, just in case we have
4 questions for you.

5 MS. PEREZ: I am happy to do
6 whatever you ask. Thank you. I am at
7 your service.

8 CHAIR DAVIDSON: Mr. Novakowski,
9 from Demos, A Network for Ideas and
10 Action.

11 MR. NOVAKOWSKI: Good afternoon.
12 My name is Scott Novakowski, senior policy
13 analyst at Demos: A Network for Ideas and
14 Action. Demos is a non-profit,
15 non-partisan research and advocacy center,
16 dedicated to helping America reach its
17 highest democratic ideals.

18 For the past two years, I have
19 worked as part of a coalition team, Demos,
20 ACORN, Project Vote, and now Lawyers

21 Committee for Civil Rights Under Law,

22 working to ensure full implementation of

1 the public assistance requirements of the
2 NVRA, which, we have found to be lacking.

3 The NVRA gave the Federal
4 Elections Commission authority to make
5 regulations concerning aspects of the law.
6 Specifically, we believe EAC has the
7 authority to adopt regulations under the
8 NVRA with respect to the national mail-in
9 voter registration form and reporting of
10 information for the EAC annual report to
11 Congress, just as the FEC did prior to
12 HAVA.

13 While we expect the bulk of the
14 discussion to be surrounding the adoption
15 of regulations concerning the national
16 mail-in form, we also encourage EAC to
17 accept public comments on additional
18 possible regulations specifically
19 governing the EAC's biannual report to
20 Congress. To the extent this would

21 require notice, a comment period, as

22 opposed to simply adopting FEC

1 regulations, we believe it's worth the

2 additional time and study required.

3 As I mentioned, under NVRA, EAC

4 clearly has regulatory authority, when it

5 comes to the Commission, to report to

6 Congress. The EAC's report is one of the

7 only research projects to collect and

8 present in a centralized fashion

9 comprehensive information on voter

10 registration. Unfortunately, going back

11 to the years when the report was done by

12 FEC, its been plagued by incomplete

13 reporting, and in some cases, no reporting

14 at all. To correct this problem, we

15 recommend that the EAC use it's regulatory

16 power with respect to the reporting to

17 include within the report a list of states

18 that have provided incomplete data or

19 failed to provide data at all.

20 To further ensure enforcement of

21 the law, we recommend that the EAC provide

22 list of states to the Department of

1 Justice, at a minimum providing the
2 department with such a list would assist
3 them in determining whether follow-up
4 contacts or investigation should be
5 commenced to determine the reasons why
6 states are failing to report.

7 And then, finally, we strongly
8 recommend that the EAC use its authority
9 under NVRA to help improve compliance with
10 public assistance requirements of the law.
11 NVRA states that the EAC shall provide
12 information to the states with respect to
13 the responsibilities of the states under
14 this act. Demos strongly encourages the
15 EAC to issue best practices on NVRA public
16 assistance, voter assistance
17 implementation. Over the past couple
18 years doing this work, we have had quite a
19 bit of interaction with states and have
20 developed a state of best practices that

21 we believe will increase voter

22 registration with public assistance

1 agencies.

2 Those best practice are included
3 in my written testimony. I won't go
4 through them now, but Demos is definitely
5 available for further discussion on those.

6 We applaud EAC for holding
7 today's hearing and hope you seriously
8 considering the recommendations. Thank
9 you.

10 VICE-CHAIR RODRIGUEZ: Thank
11 you. If you would you stay in the front
12 row.

13 Ms. Nancy Tate, Executive
14 Director, League of Women Voters.

15 MS. TATE: Thank you. The
16 League of Women Voters of the United
17 States believes that the voter
18 registration process is one of the most
19 important aspects of the election
20 administration system, but we believe that

21 this process needs improvement. And we

22 believe there are some important issues

1 regarding the process that the Commission
2 should review.

3 The league urges the Commission
4 to look carefully and comprehensively at
5 voter registration systems as a whole in
6 determining what steps to take to improve
7 implementation of NVRA. At that point,
8 the Commission will be better able to
9 determine what responsibilities and
10 authority it has under NVRA that can be
11 best employed to implement needed
12 improvements.

13 As you consider voter
14 registration systems, we ask that you make
15 ample room for the public to participate.
16 In a democracy, election systems need to
17 have the support of the public and they
18 need public legitimacy. Because
19 registration impacts every voter, it is
20 especially important throughout your

21 consideration that the public be involved,

22 including interested organizations and

1 diverse individuals from around the

2 country.

3 HAVA and the NVRA do provide the

4 Commission with authority to improve voter

5 registration systems. Under HAVA, the

6 Commission can act, quote, "only with the

7 approval of at least three of its

8 members", end quote. This precludes any

9 acts by staff of the submission or by

10 individual commissioners, unless

11 explicitly authorized by the authority for

12 the Commission as a whole to act by

13 issuing guidance best practices, or

14 statements by commissioning studies and

15 holding meetings, provides important

16 authority.

17 The Commission, as a whole, also

18 has a formal regulatory authority under

19 NVRA pursuant to the Administrative

20 Procedures Act to develop the mail-in

21 voter registration application form for

22 federal elections.

1 The league strongly urges the
2 Commission to develop internal procedures
3 for invoking its authority under HAVA and
4 NVRA. At a minimum, these procedures
5 should be made public and provide for
6 public participation at appropriate steps
7 in the decision-making process. They
8 should provide clear direction to staff,
9 and they should be consistent with the APA
10 and the procedures of similarly situated
11 agencies.

12 The Commission has now reached a
13 point in its own development that clear
14 and public procedures are needed. In our
15 view, the NVRA has not fulfilled its
16 promises because of the way it is being
17 implemented or not being implemented
18 around the country. We believe the
19 Commission has an opportunity to ensure
20 better voter registration opportunity for

21 all citizens, and to ensure that voter

22 registration rules are properly

1 maintained.

2 There are three issues that we

3 would like to bring to your attention.

4 First, we believe there is room for

5 improvement in the management of the

6 statewide voter registration databases.

7 As technology develops, it should be

8 possible to better integrate the

9 registration databases with those of other

10 agencies, such as the departments of motor

11 vehicles. It should be possible to

12 develop better, more accurate matching

13 systems for data from a variety of

14 sources, and it should be possible to

15 guard against erroneous purging.

16 Second, several states have

17 imposed severe restrictions on third-party

18 voter registration efforts. In 2005, the

19 League of Women Voters of Florida was

20 forced to stop all its voter registration

21 activities in that state because of

22 burdensome restrictions that could have

1 resulted in bankrupting that league.

2 The Florida league was able to block this

3 unreasonable restriction in the courts,

4 but unfortunately, this is not an isolated

5 example.

6 Organizations such as the league

7 are crucial to assuring that voter

8 registration is available to every voter.

9 The facts also show that the league and

10 others are key to ensure that minority

11 voters have access to registration. In

12 2004, 15 percent of African-American and

13 Hispanics had been registered to vote as a

14 result of an organized drive, a rate much

15 higher than the 8.9 percent for white

16 voter.

17 The mail process is one of the

18 areas under your jurisdiction and

19 authority. We help you will give

20 attention to that since twenty percent of

21 registrations which come by mail.

22 Thirdly, the league is deeply

1 concerned that the NVRA is not being
2 implemented in the social service
3 agencies. The numbers suggest that is
4 very weak in all those respects, and I
5 agree with earlier speakers, this is an
6 area that needs significant improvement.

7 As the Commission considers its
8 next steps regarding administration of the
9 NVRA, we ask that you keep these three
10 substantive concerns in mind, and we urge
11 that you develop public procedures to
12 ensure clear and consistent administration
13 of the Commission's responsibilities.

14 Thank you for this opportunity.

15 VICE-CHAIR RODRIGUEZ: Thank
16 you. I will ask you to stay close.

17 David Becker, Director,
18 Democracy Campaign, People for the
19 American way.

20 MR. BECKER: Good afternoon.

21 Thank you for the opportunity to

22 participate today. Given the very

1 interesting discussion that happened
2 earlier, I had extensive prepared remarks.
3 I am going to have use half of those to
4 address the issues that I think came up
5 earlier today that I think were very
6 important.

7 In my experience having served
8 as a senior trial attorney in the voting
9 section of the Justice Department for
10 seven years and now serving as the
11 director of the Democracy Campaign, People
12 for the American Way, I think there are
13 three areas that I would like to highlight
14 for you all that I think need a lot more
15 development before an important decision,
16 such as altering or adopting regulations
17 regarding NVRA for the first time in this
18 agency's history, should be considered.

19 First, the scope of authority to
20 regulate regarding NVRA. I think there is

21 no question the Courts consistently held

22 that the NVRA is the constitutional

1 exercise of Congress's authority.
2 Commissioner Hunter, you raised a very
3 good point when you suggested that that
4 authority to regulate this agency's or
5 FEC's authority prior to HAVA, the
6 authority to regulate in this area,
7 however, is seriously limited. And I
8 would agree with that. I think there is a
9 serious limitation on the ability of this
10 agency to regulate in this area.
11 Primarily, the specific regulations that
12 would be permitted would be related to the
13 creation of a national mail voter
14 registration form.

15 Also, I'd like to highlight the
16 fact that any regulations that do occur
17 could not conflict with the express and
18 unambiguous language of the statute. This
19 might be an area on which I respectfully
20 might disagree with you, Commissioner

21 Hunter, with regard to Article 1, Section

22 2's ability to moderate Congress's

1 authority under Article 1, Section 4
2 regarding its authority to regulate
3 federal elections. I think that,
4 consistently, that Article 1, Section 4
5 authority, Congress has been consistently
6 held to be very broad. Supreme Court -- I
7 don't know the exact number, but it's over
8 ten cases held that authority to be very
9 broad and clear. Courts have agreed and
10 have not found that Article 1, Section 2
11 moderates that broad thorn.

12 One example I give to you is
13 ULKHAVA. ULKHAVA is the statute that
14 authorizes and requires states to accept
15 absentee ballots from overseas for
16 military voters. If a state decided that
17 it wanted to, for residency purposes, no
18 longer allow a citizen who was living
19 overseas to vote by mail, that state does
20 not have the power to do that in federal

21 elections, because ULKHAVA is a

22 constitutional exercise of Congress's

1 authority to regulate elections under

2 Article 1, Section 4.

3 Similarly, NVRA, you have

4 authority to put out a mail voter

5 registration form. The statute is

6 ambiguous. There is no authority for

7 states to choose to reject that form or

8 condition its acceptance or any additional

9 qualification. And I would suggest to you

10 it would probably be outside the authority

11 granted to you under NVRA to regulate, if

12 you were to permit states to at condition

13 its acceptance on qualifications that

14 aren't actually included in the form

15 itself.

16 I will quickly go through my

17 other two points since my first one took

18 about four minutes. Second, as

19 Commissioner Hunter pointed out during one

20 of the questions, the Arizona letter was a

21 policy determination, and you, Ms.

22 Hodgkins, as well. And I think it would

1 not do justice to the EAC's credibility to
2 reverse policy determinations that have
3 been made previously while litigation
4 regarding application of those policy
5 determinations is ongoing, and all appeals
6 are exhausted, and final judgement is
7 issued and appeals exhausted. I think
8 stake holders have a right to expect some
9 level of consistency from an agency and
10 know that the legal analysis that's
11 occurred has been thoughtful and reasoned,
12 and that they can expect when you tell
13 them something, that's the way they are
14 going to apply, and that you are not going
15 to change that based on the ruling of one
16 Court in one particular situation.

17 I'd like to talk about one
18 example of that. Outside of Arizona, as
19 you know, there is a case going on in
20 Missouri right now, a case regarding

21 Missouri's compliance with a voter list

22 maintenance provision. That case and a

1 case that was in final judgement where the
2 Federal Government was a party, and the
3 case where discovery was completed. They
4 are appealing the case going forward,
5 maintaining a consistent position.
6 Although I may not agree with that
7 position, and I don't, the consistency is
8 something that I think is important. And
9 until they have exhausted their appeals, I
10 think it's very unlikely they will switch
11 their position on that. I think that's
12 generally the policy for an agency. If an
13 agency were to adopt a position where it
14 reversed it's position based on
15 preliminary ruling or even a final
16 judgement by a higher court in Missouri,
17 for instance, I think you could expect
18 that the Secretary of State in Missouri,
19 who is a defendant, would request a
20 similar ruling from this agency, asking

21 for you to issue a letter stating that the

22 DOJ is wrong, based on the Court's ruling,

1 and I think she would be entitled to it.

2 And that could do damage to the DOJ's

3 ability to further litigate.

4 Finally, it wasn't clear from the earlier

5 published postings this morning. And the

6 discussion I have been present for has

7 been really very enlightening, and I

8 appreciate it. I know the agency has

9 adopted a new transparent policy. We very

10 much applaud that, appreciate all your

11 efforts to adopt that more.

12 I would urge that it would be

13 best for us, to terms of developing

14 testimony in these areas, providing you

15 with some kind of advice and comment if we

16 could get specifics earlier on in the

17 process. As I stated, I wrote some of the

18 written testimony out. A lot of the

19 concerns I had were, honestly, addressed.

20 I think you are admirably trying to make

21 this a very transparent process. We

22 appreciate that. And I had concerns prior

1 to coming here there was going to be a
2 real rush to judgement on this, that there
3 was not going to be as thoughtful a
4 process, and it's very clear you intend it
5 to be. I am grateful for that. I look
6 forward to, as you consider making these
7 changing and adopting regulations for the
8 first time under NVRA, making sure that
9 it's done right, and not necessarily that
10 it's done fast.

11 Thank you, and I am able to
12 answer any questions.

13 VICE-CHAIR RODRIGUEZ: Thank
14 you, Mr. Becker.

15 Does anyone have any questions
16 for any of our speakers? Julie, do you
17 want to add anything before we start
18 taking questions?

19 Commissioner Hillman.

20 COMMISSIONER HILLMAN: It's a

21 two-part question. They are joined and I

22 don't think they can be separated. It

1 gets to sort of the tail end of the
2 discussion Commissioners were having
3 before we received the presentations from
4 the five of you, and that is, whether you
5 would see a fundamental difference if the
6 EAC were to describe its process as the
7 existing NVRA regulations being
8 transferred to EAC, for EAC to begin its
9 longer process, or if the EAC were to
10 adopt the existing regulations, whether
11 EAC can, in fact, make changes to
12 regulations that it has not adopted. And
13 I don't know whether there is a nuance
14 there that the groups would be concerned
15 about.

16 If the EAC, whether through
17 adoption or transfer, were to take the
18 existing NVRA regulations in whole and
19 only change the name of agency and address
20 so that it would be appropriately parked

21 in our little chapter in the CFR, and we

22 did that without public notice and public

1 comment, would that give any of you
2 heartburn? So I would ask, in particular,
3 Mr. Becker and Ms. Perez.

4 MR. BECKER: This is David
5 Becker again. Heartburn might be too
6 strong a word. I think, certainly, simple
7 transfer every time of the regulations
8 poses less of a concern and would, in our
9 view, require a lower level of scrutiny
10 than adopting wholly new regulations.

11 However, I would suggest that I
12 think even in that circumstance, it would
13 be best, for reasons of transparency and
14 credibility, to go through a robust public
15 comment period. I think it's been a long
16 time since those regulations were first
17 adopted. HAVA has passed since then, as
18 was clear from Ms. Hodgkins' testimony,
19 there have been issued, that have
20 developed over time that were not as

21 prominent back in 1994. And so I would

22 urge that there be a very robust public

1 comment period, and there not be any
2 attempts to speed the process through on
3 that. I think it's important.

4 COMMISSIONER HILLMAN: On the
5 transfer.

6 MR. BECKER: There is no
7 question that the level of public comment
8 might not need to be equal of that of
9 adopting completely new regulations, but
10 it would do the whole process a disservice
11 to go through the minimum public comment
12 at the same time.

13 I think there is an intermediate
14 level of scrutiny that we could apply
15 where the public could have ample time to
16 provide comments for you all to ask
17 questions. So I would encourage that. In
18 general, it's always better. It's now
19 been, I think, almost five years of this
20 agency's existence without the regulations

21 applying to this agency, unless I am

22 mistaken. You can correct me if I'm

1 wrong. Three. Three's closer to five, so
2 it would be better, I think, to, again,
3 get this right. Again, that might not
4 require full public comment. It might not
5 require 28 months of comment, but it would
6 require a substantial amount of time so
7 that you would be sure that everyone who
8 needs to be heard on this is being heard.

9 COMMISSIONER HILLMAN: Ms.
10 Perez, I am interested in a comment on
11 that from you as well.

12 David, before you leave, do you
13 see a distinction between the terminology
14 adopt and transfer back? Should the EAC
15 be adopting or should the EAC be
16 transferring?

17 MR. BECKER: I'd probably want to
18 do some additional research on that, from
19 an administrative law perspective. I'd be
20 happy to get an answer back to you in

21 writing because I think that's an

22 important distinction.

1 COMMISSIONER HILLMAN: Thank

2 you. Did I mispronounce your name?

3 MS. PEREZ: Its Perez. I

4 actually have little to add, but one thing

5 that I do think that this discussion has

6 illustrated is what I would call like --

7 sort of not being cute, and I think that's

8 what's sort of very important with respect

9 to the APA exceptions. It's really

10 important to think about what the issue is

11 and not see how interpreting labeling one

12 way versus labeling something another

13 changes the situation because it's not a

14 matter of a label. It's a matter of

15 substance.

16 This could particularly be

17 problematic under the exceptions because

18 there is enough case law for someone to

19 pull out their hair over what is actually

20 binding. The best way is to play it safe

21 and let the public comment. You can never

22 go wrong with an abundance of caution,

1 especially on something like that.

2 COMMISSIONER HILLMAN: What
3 about on the issue of transfer versus
4 adoption?

5 MS. PEREZ: I am also not an
6 admin lawyer, but I'd be happy to research
7 it.

8 VICE-CHAIR RODRIGUEZ: I would
9 like to just read the proposed motion that
10 we're considering. It's not on the table
11 now, but just so it's perfectly clear, the
12 motion would be, if it were offered by one
13 of the Commissioners, I move that the EAC
14 direct its staff to work with the FEC to
15 enter into a joint rulemaking to transfer
16 the FEC regulations on the National Voter
17 Registration Act to the EAC, and that the
18 EAC staff be directed to take whatever
19 steps are necessary to establish a CFR
20 site for the EAC to obtain concurrence of

21 the FEC, and to transfer these regulations

22 to EAC.

1 COMMISSIONER HUNTER: Can I make
2 a comment on that? Yes, I think I might
3 need to change that.

4 MS. TATE: Go ahead. I was
5 going to go back to the earlier question.

6 VICE-CHAIR RODRIGUEZ: Please
7 do.

8 MS. TATE: I don't have an
9 opinion and I am not a lawyer so I am not
10 going to weigh in on the transfer issue.

11 But in terms of the public comment, I
12 would tend to agree with the two previous
13 speakers on that particularly in light of
14 the value of being able to take advantage
15 of the opportunity to see what the public
16 thinks about existing components of the
17 regulations, because it would be unclear,
18 of course, whether you were intending to
19 change anything.

20 Certainly, nobody wants to make

21 work for the sake of making work. But as

22 it has been noted, since there's been a

1 number of years, it could present a
2 positive opportunity to hear what concerns
3 there are out there that could influence
4 your thinking down the road about areas
5 you might want to go back and look at in a
6 more substantive way.

7 VICE-CHAIR RODRIGUEZ:
8 Commissioner Davidson.

9 CHAIR DAVIDSON: The one thing
10 that I guess is confusing to me, with the
11 transfer, I see that's changing of the
12 address and the agency's name. I agree
13 with you, public comment, even making it
14 HAVA compliant, and that's much faster, as
15 our staff indicated, a faster moving type
16 process. And at that time, there would be
17 really some substance, the public even
18 making comments on HAVA or anything else
19 in the future. I would think that that
20 would be the real opportunity to get,

21 excuse the phrase, more of the meat of the

22 subject out there at that time.

1 How do you feel about that? Would
2 just getting it in our hands, that's one
3 issue, and then moving forward, obviously,
4 making it HAVA compliant, as indicated in
5 our testimony earlier that we wanted to
6 do, would be the first step. And that
7 wasn't as long of a process as doing any
8 type of new rewrite or whatever.

9 MS. TATE: Well, as I indicated
10 before, we're basically supportive of
11 public input in as many parts of your
12 process as possible. If you determine
13 that all you are changing is something as
14 simple as the name, and you decide that's
15 not the best use of your time, then I
16 guess that would be your decision.
17 Unfortunately, I missed your earlier
18 discussions so I am not as aware what you
19 may have indicated on what your future
20 plans are. But at the moment, I don't

21 know what your future plans are, so there

22 is some possible myth created switching it

1 over, people not understanding what the
2 ramifications are. So you would need to
3 have some amount of explanation laying it
4 out in a transparent way so people
5 understand how this step fits into your
6 longer step, and when you would be getting
7 public input.

8 VICE-CHAIR RODRIGUEZ:
9 Commissioner.

10 COMMISSIONER HUNTER: I have a
11 comment but first I would like to ask Ms.
12 Hodgkins, I think you may have mentioned
13 this in your testimony, I can't remember.
14 If she could elaborate on what she learned
15 from other entities of the Federal
16 government. At least from my perspective,
17 I was told and if you believe that it is
18 accurate to say that the regulations
19 should be in EAC's own chapter of the CFR,
20 in order to do varied administrative

21 things like changing the Secretary of

22 State's address, if you believe that it

1 should in our chapter in order to do
2 something purely administrative like that,
3 then this almost by definition has to be
4 the first step.

5 So you transfer it into our chapter.
6 You can do very minor administrative
7 things like that, and then open it up to
8 public comment, as has been discussed. I
9 don't think anybody is interested in not
10 receiving public comment.

11 My only potential concern that
12 could be categorized as something we could
13 do more quickly is ensure we can do very
14 small things, like changing the address.
15 And I think Ms. Hodgkins might have some
16 examples of other entities that have done
17 this sort of thing when Congress has
18 transferred authority from one entity to
19 another, which has happened, as we all
20 know, numerous times, and the best example

21 is Homeland Security.

22 MS. HODGKINS: Thanks for the

1 segue because the two examples that I do
2 have here in front of me follow the
3 implications of the Homeland Security Act
4 in the transfer either from the Department
5 of Treasury to the Department of Justice
6 or from the Immigration and Naturalization
7 Service to Homeland Security.

8 And so in those instances, I
9 believe, actually, in both these
10 instances, the receiving agency only
11 adopted a portion of the regulations that
12 the other entity had because there was
13 only a portion of the function of the
14 transfer, but there is a very -- as you
15 can see, this one's about twenty pages
16 long, a notice explaining what the
17 transfer is about, why it was required,
18 etc. And it does explain in more detail
19 as well why they only adopted portions of
20 the regulations of the transferring

21 agency.

22 Now, in one instance, it was

1 done as a joint rulemaking activity
2 because Department of Treasury and
3 Department of Justice both existed as
4 agencies prior to, whereas in the other
5 instance where it went from a division of
6 INS to Homeland Security, there was a new
7 creation there. I think that's why there
8 is a difference why one was done as joint
9 rulemaking.

10 COMMISSIONER HUNTER: Is it
11 accurate to say in either of those
12 examples of substance of any rule that was
13 amending; is that accurate?

14 MS. HODGKINS: That's correct,
15 that's correct.

16 VICE-CHAIR RODRIGUEZ: I will
17 mention now that the advancement project
18 submitted written comments and so did
19 Project Vote. Both of these available to
20 the public, both of these available to the

21 folks in the room. We will make them

22 available by the end of the meeting.

1 Are there any other questions?

2 Mr. Wilkey, do you have any other

3 questions.

4 MR. WILKEY: Well, I'm not going

5 to ask a non-lawyer to enter into the

6 legal discussion. I will just let the

7 legal department get involved in that. As

8 I mentioned to you on the break, it is

9 like deja vu; 17 years ago I was involved

10 with this law and, in fact, served on the

11 committee of the FEC to help develop those

12 regulations. And I know there was a great

13 deal of work put into the area of what was

14 on the form, what should be on the form

15 and so on, with the states. I will tell

16 you just for the record, my particular

17 interest in the whole subject something

18 that I have been screaming about for all

19 of these 17 years in a lot of different

20 areas, is that that form, whatever happens

21 to it down the road, is something that

22 every individual who picks it up can read

1 it, understand it, fill it out, and submit

2 it without any problem.

3 And secondly, to bolster the

4 argument of Mr. Dickson, that we find a

5 way, and I realize this is not part of the

6 regulatory process, that we find a way

7 finally to do our level best in the area

8 of best practices or otherwise to make

9 sure that the full engagement of state

10 agencies, not just DMV, be involved more

11 efficiently in the role that was

12 envisioned by this law.

13 Those are the two areas.

14 Certainly, as we go around this road, that

15 I will be paying particular attention to.

16 I will leave the regulatory debate between

17 you and our legal counsel.

18 VICE-CHAIR RODRIGUEZ: Thank

19 you.

20 I'm going to take a moment

21 because I have the gavel and say that I am

22 the Commissioner on the steepest learning

1 curve here today, and I want to thank
2 everybody for their participation, for
3 their comments, and for participating in
4 my edification.

5 Would anyone like to make a
6 motion at this point?

7 COMMISSIONER HUNTER: I move the
8 EAC find the transfer of FEC to the EAC
9 section of the CFR does not require notice
10 and comment or posting for 30 days, that
11 this action is unnecessary since these
12 regulation respect adopted by the EAC
13 through a notice and comment procedure and
14 would run contrary to the public interest,
15 and that additional public notice and
16 public comment would unreasonably delay
17 the ability of the EAC to consider changes
18 to the national voter registration form
19 needed for the upcoming elections.

20 CHAIR DAVIDSON: I will second

21 it.

22 VICE-CHAIR RODRIGUEZ: And then

1 discussion on the motion.

2 COMMISSIONER HUNTER: The only
3 comment is, it is reiterating what I said
4 earlier. I am not in favor of not having
5 public comment as a default, but our
6 research indicates this is the best way to
7 move forward to put this in our chapter to
8 make changes to the form and then have a
9 further process for public comment.

10 CHAIR DAVIDSON: I also see that
11 I think it's important to note that this
12 is only a change of address and change of
13 agency, that in moving forward, I also
14 agree with the public comment, that it
15 should be a very open process, and that we
16 should have a real public comment period.
17 I do see that there's some issues that
18 possibly could come up before the election
19 that we maybe shouldn't be taking that
20 long to get it into our agency. So that

21 is my discussion and I do view this as a

22 transfer, only as a transfer.

1 COMMISSIONER HILLMAN: My
2 comment on this, that that's a different
3 motion than the one that I heard the
4 Vice-Chair share, that we would be
5 considering, and I just have to say that I
6 could not support that motion that's on
7 the floor now.

8 VICE-CHAIR RODRIGUEZ: I will
9 explain there is a little bit of not
10 confusion right now, but the order of the
11 motions that we were going to consider.
12 The motion Commissioner Hunter made
13 before, the motion to transfer, and so
14 this motion basically says that the EAC
15 finds that the notice and comment and
16 posting for 30 days is unnecessary, so
17 just in terms of clarification.

18 COMMISSIONER HUNTER: The
19 question to Ms. Hodgkins, do you think
20 that's the appropriate order to be

21 proceeding?

22 MS. HODGKINS: Well, I don't

1 I know that it matters which order you take
2 up the motions. If you desire to go
3 through a transfer process like the one
4 that I described involving the Homeland
5 Security Act, Title 5 -- I'm sorry. Title
6 5, Section 553 does require a finding by
7 the agency that that publication and
8 notice is unnecessary. So if you desire
9 to go through that process, you would have
10 to make a finding.

11 Now, if you don't desire to go
12 through that process, if you want to go
13 through a full rulemaking process,
14 including notice and comment, publication
15 for 30 days, etc., then obviously you
16 don't have to make a finding.

17 COMMISSIONER HUNTER: Okay.

18 Thank you.

19 VICE-CHAIR RODRIGUEZ: I have a
20 question for our general counsel. Can we

21 determine a finding without waiving the

22 comment or the posting?

1 MS. HODGKINS: It would be
2 unnecessary. I think I understand your
3 question. If you decide to go through a
4 notice and comment period, the finding is
5 unnecessary. If you desire to use the
6 exemption that is under Section 553, then
7 you do have to make a finding.

8 VICE-CHAIR RODRIGUEZ: And
9 earlier you advised us to take this step
10 to use the language impracticable,
11 unnecessary, or contrary to the public
12 interest, and that's the status quo.

13 MS. HODGKINS: No, that is the
14 exception. The status quo would be a
15 minimum of 30 days publication for public
16 comment.

17 VICE-CHAIR RODRIGUEZ: And
18 Commissioner Hillman has indicated that
19 she's not in favor of the motion.

20 Based on the testimony today and

21 particularly a point that Ms. Tate made

22 she wasn't here for the morning's

1 discussion and she doesn't know what our
2 future plans are, I think you said most
3 people don't know what our future plans
4 are, and you are correct. We made a lot
5 of progress this morning, but it seems to
6 me that because most people don't know
7 this current thinking by the Commission,
8 that maybe it's wise to post, to lay out
9 our plans, and to go ahead and notice our
10 change and post.

11 COMMISSIONER HILLMAN: I have a
12 question. Well, it is on this motion. My
13 question is, the Commission still has to
14 take action to direct staff to begin
15 discussions with FEC about the transfer?

16 MS. HODGKINS: That's correct.
17 It would still be a rulemaking activity.
18 It would be a joint rulemaking activity,
19 so you would want to instruct us to take
20 that action on your behalf and to consult

21 with the FEC in that regard.

22 CHAIR DAVIDSON: If this motion

1 passed, would that be the second motion
2 that the Commission should be making, is
3 to direct the staff to move forward to
4 work with the FEC?

5 MS. HODGKINS: Regardless of
6 whether the motion on the table passes or
7 fails, you would still need to address
8 that motion.

9 VICE-CHAIR RODRIGUEZ: Is it
10 possible that FEC might say we really
11 encourage you to go through the full 30
12 days notice and posting?

13 MS. HODGKINS: That's absolutely
14 possible. Like I said, I have only had
15 exploratory conversations.

16 VICE-CHAIR RODRIGUEZ: And
17 that's because the Commission hasn't
18 acted?

19 MS. HODGKINS: Correct.

20 MR. WILKEY: I do have a

21 question. Let me understand. The

22 Commission would have to say the motion

1 passed that we the staff enter into
2 discussions with the FEC. The FEC would
3 formally have to take a vote.

4 MS. HODGKINS: I'm not going to
5 speak for what the FEC would have to do in
6 terms of that. They may, in fact, think
7 that's what they need to do, but that's up
8 to them to make that decision.

9 MR. WILKEY: All right. Just
10 clarification.

11 VICE-CHAIR RODRIGUEZ: Where's
12 Professor Lubbers. Okay. Well, then, are
13 we ready to vote on the motion on the
14 floor to suspend or to find that we do not
15 require notice and comment on posting for
16 the transfer action?

17 Okay. All those in favor of the
18 motion, indicate by saying I?

19 COMMISSIONER HUNTER: I.

20 VICE-CHAIR RODRIGUEZ: All those

21 opposed?

22 COMMISSIONER HILLMAN: Nay.

1 VICE-CHAIR RODRIGUEZ: I will
2 join Commissioner Hillman in the no vote,
3 again, based on my earlier comment.

4 We're now ready for the next
5 motion.

6 CHAIR DAVIDSON: I have a
7 question. Shouldn't we be making some
8 type of a motion on how we proceed in the
9 comment period to move forward so that we
10 can start the process?

11 COMMISSIONER HILLMAN: Well, my
12 understanding and what I am appreciating
13 is the need for EAC to begin the process
14 to move the regulations from FEC to EAC.
15 And that was the discussion before, about
16 whether it sends a signal one way or the
17 other, if we say we're doing a transfer of
18 the regulations versus EAC is adopting
19 those regulations. And I'm not sure that
20 I have heard a lot of clarity about that,

21 but we would have to do something to get

22 this process started.

1 I would say, however, that the
2 language you read earlier, Madam
3 Vice-Chair, I believe the last part of
4 that language said and to transfer these
5 regulations to EAC. That sounds directive
6 to me. That sounds like these regulations
7 are going to get transferred without
8 notice and public comment. And so whether
9 we take a two-step action or one-step
10 action by adding language to say public
11 notice and comment, I'm not sure because
12 I'm not sure what joint rulemaking means.

13 Do we have the latitude to agree
14 with FEC; is there a prescribed procedure
15 that tells FEC to do exactly what EAC is
16 doing. I mean, I don't understand what
17 that is.

18 MS. HODGKINS: Just as one
19 agency can enter into its own rulemaking
20 agent activity, two agencies can join

21 together and make rules together, if you

22 will. What FEC's portion of this would be

1 would be, essentially, removing the
2 existing regulations from their portion of
3 Title 11. That's all they have to do.
4 We're the ones that are then receiving the
5 regulations. And I support, with or
6 without changes, with or without
7 substantive changes, that we want to
8 notice and make it available for public
9 comment.

10 VICE-CHAIR RODRIGUEZ: Any
11 further questions? Commissioner Hunter.

12 COMMISSIONER HUNTER: One
13 comment I would like to make or maybe ask
14 my colleagues is, are we talking about
15 providing public notice for comment, and
16 is the comment narrowed to should we or
17 should we not transfer regulations, and
18 that's the issue for the public to
19 comment, or is it much more broad to
20 include something like what the public

21 think about the FEC's regulations in

22 general, because that's a very different

1 question? And, clearly, we want to do the
2 latter at some point in time. However,
3 coming up with a notice of proposed
4 rulemaking and going through all of that,
5 I think is obviously going to be much more
6 time consuming, much more time consuming,
7 yes, to say the least.

8 COMMISSIONER HILLMAN: I asked
9 that question, and I think what I recall
10 you saying is that was a decision that the
11 Commission would make, whether we wanted
12 just to get this process started, narrow
13 of scope of what we're doing to transfer
14 in whole the regulations and change the
15 name of the agency and the address on it,
16 and then at a later point, begin a more
17 substantive process to consider changes to
18 the regulations.

19 COMMISSIONER HUNT: I would
20 agree with that concept. I think that

21 might be something that we could attempt

22 to make a motion on at this point.

1 COMMISSIONER HILLMAN: Can I try

2 something and see if this works.

3 So my motion would be that the

4 EAC direct its staff to work with the FEC

5 to enter into a joint rulemaking to

6 transfer the FEC regulations on the

7 national voter registration act to the

8 EAC, and that the EAC staff be further

9 directed to take whatever steps are

10 necessary to establish a CFR site for EAC

11 to obtain the concurrence of the FEC and

12 to post notice for a comment procedure to

13 transfer these regulations to EAC.

14 CHAIR DAVIDSON: Can we accept a

15 friendly amendment to say a comment period

16 of 30 days?

17 COMMISSIONER HILLMAN: Whatever

18 would be the regulation. I don't know.

19 MS. HODGKINS: The minimum is 30

20 days.

21 VICE-CHAIR RODRIGUEZ: I'm

22 sorry. Commissioner Hillman, will you

1 repeat the additional language?

2 COMMISSIONER HILLMAN: So the

3 last part of the motion would say, and to

4 post for a 30-day public comment

5 procedure. A friendly amendment to

6 transfer these regulations to EAC. So I

7 am adding post notice for 30-day public

8 comment period, to transfer these

9 regulations.

10 COMMISSIONER HUNTER: And I

11 think another friendly amendment might be

12 to add that post notice for a 30-day

13 comment period regarding the transfer of

14 the regulation, so it's narrowed as we

15 just discussed.

16 COMMISSIONER HILLMAN: Well, the

17 motion talks about the transfer.

18 COMMISSIONER HUNTER: Well, it

19 just needs a little bit of clarification,

20 I think.

21 CHAIR DAVIDSON: Definitely.

22 Anything to help the public understand

1 what we're doing would be a plus. I think

2 that sometimes we take things for granted.

3 VICE-CHAIR RODRIGUEZ: Let me

4 read the motion with its friendly

5 amendments.

6 I move that the EAC direct its

7 staff to work with the FEC to enter into a

8 joint rulemaking to transfer the FEC

9 regulations on the National Voter

10 Registration Act to the EAC, and that the

11 EAC staff be directed to take whatever

12 steps are necessary to establish a CFR

13 site for the EAC to post notice for a

14 30-day comment procedure regarding the

15 transfer, public comment procedure,

16 regarding the transfer of these

17 regulations to EAC.

18 COMMISSIONER HILLMAN: I have in

19 there and to obtain concurrence of the

20 FEC, and I didn't hear that, to establish

21 a CFR site for EAC to obtain concurrence

22 of the FEC and to post notice for a 30-day

1 -- and then whatever you said.

2 COMMISSIONER HUNTER: And the

3 last part still stands. So it's post

4 comments for a 30-day public comment

5 procedure regarding transfer of these

6 regulations, and to transfer these

7 regulations to the EAC.

8 VICE-CHAIR RODRIGUEZ: Okay.

9 COMMISSIONER HILLMAN: Well, I

10 am not comfortable with the transfer of

11 these regulations to the EAC. I was

12 specifically working to soften that

13 because for me it sounded directive that

14 this would happen and could happen without

15 public comment. So I think the public

16 comment period comes first. The intent is

17 to transfer the regulations, but my motion

18 wouldn't say that, and to transfer.

19 COMMISSIONER HUNTER: We wrote

20 in the public comment period, but I think

21 that if we take out to transfer these

22 regulations, then we would have to have

1 that vote again at a later date. We could

2 just incorporate it now.

3 COMMISSIONER HILLMAN: I

4 couldn't accept that friendly amendment.

5 Let me read back my motion and see, with

6 friendly amendments, and let's just log

7 through this.

8 Okay. That the EAC direct its

9 staff to work with the FEC to enter into a

10 joint rulemaking to transfer the FEC

11 regulations on the National Voter

12 Registration Act to the EAC, and that the

13 EAC staff be further directed to take

14 whatever steps are necessary to establish

15 a CFR site for EAC to obtain the

16 concurrence of the FEC and to post notice

17 for a 30-day public comment procedure

18 regarding the transfer of these

19 regulations to EAC.

20 That ought to give general

21 counsel heartburn when she tries to figure

22 out what I just said.

1 VICE-CHAIR RODRIGUEZ: Hold on

2 just one second.

3 COMMISSIONER HUNTER: Could I

4 ask a question or do you want me to hold

5 off for a second?

6 VICE-CHAIR RODRIGUEZ: Okay.

7 MS. HODGKINS: Is there a

8 second?

9 VICE-CHAIR RODRIGUEZ: The

10 motion was made and amended a couple of

11 times, but I do not think its been

12 seconded.

13 Do we have a second?

14 CHAIR DAVIDSON: I will second

15 it, for discussion issues.

16 VICE-CHAIR RODRIGUEZ: Thank

17 you. Commissioner Hunter.

18 COMMISSIONER HUNTER: My

19 question for Ms. Hodgkins is, the motion

20 still directs the EAC. I think this is

21 what Commissioner Hillman was trying to

22 ask earlier, directs staff to enter into a

1 joint rulemaking to transfer FEC
2 regulations, but it doesn't actually
3 transfer them. Is that the distinction
4 that we're now actually talking about?

5 MS. HODGKINS: Well, it
6 authorizes us to begin the process of
7 entering into a joint rulemaking with the
8 intend of transferring regulations.

9 Now, there would be intervening
10 steps in the middle. You may have
11 comments that you want to make,
12 alterations to the regulation that is,
13 quote, "being transferred", so I can't
14 tell you that you wouldn't definitely need
15 to have a vote at a later time. I can
16 only tell you this would be the beginning
17 of the process.

18 COMMISSIONER HUNTER: You're
19 saying you may or may not need a vote at a
20 later date?

21 MS. HODGKINS: Depending on what

22 the comments are, what it is you want to

1 do with the comments that you may or may

2 not receive during the comment period.

3 VICE-CHAIR RODRIGUEZ: But if we

4 wanted to transfer, we would have to take

5 another action.

6 MS. HODGKINS: Potentially.

7 CHAIR DAVIDSON: So it's

8 unknown.

9 MS. HODGKINS: It's a maybe.

10 COMMISSIONER HUNTER:

11 Commissioner Hillman, may I ask again what

12 your reservation is for including

13 transferring these regulations after the

14 receipt of public comment?

15 COMMISSIONER HILLMAN: Because I

16 don't want to prejudge where we'll be at

17 the end of the 30-day comment period, nor

18 do I want there to be any confusion in the

19 public when they read this motion as to

20 what EAC was intending. And we're not --

21 the spirit of my motion is that EAC is not

22 intending to transfer the regulations

1 until after the 30-day public comment
2 period and whatever that entails. I am
3 not trying to have this motion so specific
4 that it speaks to every single step that
5 has to be taken between today and the end
6 of the 30-day public comment period
7 because I am sure there has to be some
8 other things done, and I don't know what
9 they are.

10 I just don't want the motion to
11 be viewed at all that somebody could think
12 there is any way EAC could just, you know,
13 transfer the regulations in the middle of
14 the 30-day public comment period. I don't
15 mind the two-step process, but there may
16 be some part of the process, for example,
17 when we do the VVSG, you know, we take a
18 vote at the end of the public comment
19 period to adopt the VVSG. I would
20 encourage EAC taking a vote at the end of

21 the 30-day public comment period to

22 formally transfer the regulations. So

1 that's the pattern that I'm trying to

2 follow.

3 VICE-CHAIR RODRIGUEZ: Okay. Is

4 there any further discussion on the

5 motion? Maybe we should do roll call,

6 just to be clear. We're ready to vote.

7 Okay. I'm not going to reread the motion.

8 All those in favor of the motion posed by

9 Commissioner Hillman, indicate by saying

10 I? General Counsel Hodgkins will take the

11 vote.

12 MS. HODGKINS: Commissioner

13 Hunter?

14 COMMISSIONER HUNTER: I.

15 MS. HODGKINS: Commissioner

16 Rodriguez?

17 VICE-CHAIR RODRIGUEZ: I.

18 MS. HODGKINS: Commissioner

19 Hillman?

20 COMMISSIONER HILLMAN: Yes.

21 MS. HODGKINS: Chair Davidson?

22 CHAIR DAVIDSON: I. Madam

1 Vice-Chair, there are four votes in favor,

2 and the motion carries.

3 VICE-CHAIR RODRIGUEZ: So we

4 have concluded our business with respect

5 to the NVRA and made some progress.

6 COMMISSIONER HUNTER: May I may

7 a request that I enter a statement for the

8 record?

9 VICE-CHAIR RODRIGUEZ: Yes,

10 please. Yes. Commissioner Hunter will

11 enter a statement into the record. Would

12 you care to read it for us?

13 COMMISSIONER HUNTER: I don't

14 think you want me to read it.

15 VICE-CHAIR RODRIGUEZ: Are there

16 any closing remarks from Commissioners or

17 our general counsel or our executive

18 director?

19 COMMISSIONER HILLMAN: I have a

20 question. What is the close time for

21 people who may have wanted to submit

22 written comments but were not planning to

1 be here to speak?

2 MS. HODGKINS: I believe, and
3 Bert can correct me if I'm wrong, but I
4 believe, for the public comment period or
5 the public hearing portion, we closed that
6 at 5:00 yesterday.

7 VICE-CHAIR RODRIGUEZ: But we
8 did allow some today, as they arrived.

9 MS. HODGKINS: Well, see, that's
10 why somebody can correct me.

11 VICE-CHAIR RODRIGUEZ: Any
12 further comments from members of the
13 Commission?

14 COMMISSIONER HILLMAN: I do want
15 to say that I am very glad that we have
16 moved this past. It's taken a lot of
17 reflection and a lot of work, and I
18 appreciate everything that the staff has
19 done to inform us and to brief us. And I
20 am pleased that we're moving this process

21 forward, and hopefully, being very mindful

22 of Edgardo Cortes's comments about the

1 resources needed to allow EAC to do the
2 kind of job on this that we will need to
3 do, that our budget and our staffing will
4 enable us to do it.

5 VICE-CHAIR RODRIGUEZ: Any
6 further comments?

7 I want to thank everybody who
8 has sat with us today, the speakers. And
9 we meet again on October 4th. Do we know
10 what time?

11 MR. WILKEY: In the morning.

12 VICE-CHAIR RODRIGUEZ: 10:00 a.m.
13 on October 4th.

14 Thank you. This meeting is
15 adjourned.

16 (Whereupon, at approximately
17 3:45 o'clock p.m., the above
18 meeting was adjourned.)

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2 **CERTIFICATE OF COURT REPORTER**

3

4 I, Jackie Smith, court reporter in and for
5 the District of Columbia, before whom the foregoing
6 meeting was taken, do hereby certify that the
7 meeting was taken by me at the time and place
8 mentioned in the caption hereof and thereafter
9 transcribed by me; that said transcript is a true
10 record of the meeting.

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Jackie Smith

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