



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Secretary Of State TITLE-SERIES: 153-10

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Loan and Grant Programs Under the Help
America Vote Act (HAVA) for the Purchase of
Voting Equipment, Election Systems, Software,
Services and Upgrades

CITE STATUTORY AUTHORITY: W. Va. Code 3-1-48(l)

The above rule has been authorized by the West Virginia Legislature.

Authorization is cited in (house or senate bill number) SB 182

Section 64-9-16 Passed On 3/23/2021 12:00:00 AM

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

May 21, 2021

This rule shall terminate and have no further force or effect from the following date:

August 01, 2026

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes
Donald Kersey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 10
LOAN AND GRANT PROGRAMS UNDER THE HELP AMERICA VOTE ACT (HAVA) FOR
THE PURCHASE OF VOTING EQUIPMENT, ELECTION SYSTEMS, SOFTWARE,
SERVICES AND UPGRADES

§153-10-1. General.

1.1. Scope. -- This Rule establishes procedures for administration and eligibility of West Virginia counties to apply for and receive funding to improve the administration of elections for federal office, including to enhance election technology and make election security improvements, payable from the County Assistance Voting Equipment Fund created by the Help America Vote Act (HAVA), 52 U.S.C. § 20901 *et seq.*

1.2. Authority. -- W. Va. Code §3-1-48(1).

1.3. Filing Date. -- May 21, 2021.

1.4. Effective Date. -- May 21, 2021.

1.5. Sunset Provision. -- This Rule shall terminate and have no further force or effect on August 1, 2026.

§153-10-2. Definitions.

2.1. For the purposes of this rule:

2.1.1. "Approved" means authorization granted by the State Election Commission or the EAC.

2.1.2. "Clerk" means the Clerk of the County Commission or other official charged with the administration of elections.

2.1.3. "Election Assistance Commission" or "EAC" means the federal agency created by HAVA to provide programs for voting assistance to state and local governments.

2.1.4. "Election system" means any mechanical device, hardware, software, or combination thereof designed to work or operate in conjunction with, secure, maintain, or improve any part of the voting process or systems, including but not limited to accessible electronic voting systems and e-pollbooks.

2.1.5. "Electronic pollbook" or "e-pollbook" means an approved electronic device containing voter registration information for the purpose of facilitating voting at the precinct.

2.1.6. "Electronic voting system" means one or more approved accessible integrated devices that utilize an electronic component for the following functions: ballot presentation, vote capture, vote recording, or vote tabulation.

2.1.7. The “fund” means the County Assistance Voting Equipment Fund bearing the designation “1615” by the State.

2.1.8. “Grant” means a sum of money authorized for disbursement by the State Election Commission to a county subgrantee from the Fund to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements, such as electronic voting system upgrades, cybersecurity enhancements, physical security upgrades, and e-pollbooks.

2.1.9. “HAVA” means the Help America Vote Act, 52 U.S.C. §20901, *et seq.*

2.1.10. “HAVA Grant Board” means a body authorized by W. Va. Code §3-1-48 for the purpose of making recommendations to the State Election Commission to issue grants to West Virginia counties from the Fund consistent with this Rule. The HAVA Grant Board shall be comprised of members appointed by the Secretary from the following agencies and organizations:

2.1.10.a. The Director of the Elections Division of the Secretary of State’s office who shall act as Chairperson of the Board;

2.1.10.b. A representative from a disability rights organization;

2.1.10.c. Two Clerks of opposite political parties from the West Virginia Association of County Clerks; and

2.1.10.d. A representative from the Governor’s office.

2.1.11. “Loan” means a sum of money borrowed by a county from the Fund that is expected to be paid back to the State.

2.1.12. “Nonpayment of the loan installments” means a nonpayment of two consecutive monthly payments or nonpayment of an annual payment when over thirty days have passed beyond the scheduled payment date.

2.1.13. “Physical security” means equipment and techniques employed to securely administer a federal election, such as to protect hardware, software, networks and data from physical actions, tampering, and events that could cause loss or damage to election systems due to burglary, theft, vandalism, terrorism, fire, flood, or natural disaster. The term also includes the addition of necessary and reasonable resources and staff to protect the integrity of a federal election, such as unanticipated increases in election materials and supplies, cleaning or sanitization supplies, temporary staff, and other items or expenditures permitted by federal law.

2.1.14. “Program” means the county loan and grant programs created to facilitate the improvement of the administration of elections for federal offices, including programs to enhance election technology and make election security improvements, such as electronic voting system upgrades, cybersecurity enhancements, physical security upgrades, and e-pollbooks.

2.1.15. “Secretary” means the West Virginia Secretary of State.

§153-10-3. Eligibility for Grant Funding for Election Systems and Election System Upgrades.

3.1. Any county commission requesting a grant from the Fund shall file an application verified by their Clerk with the Secretary.

3.2. The application shall be on a form provided by the Secretary and shall contain the following information:

- 3.2.1. The name of the county;
 - 3.2.2. The amount of grant money requested;
 - 3.2.3. The proposed use of funds, including type of equipment, software, and services to be purchased and the quantity thereof, if applicable;
 - 3.2.4. A statement that the county has matching funds available equal to at least 15% of the cost of physical security upgrades or e-pollbooks and 50% of the cost of electronic voting systems, software, and services;
 - 3.2.5. A statement that the county has the authority to purchase election systems, or election systems upgrades, through lawful purchasing procedures, no later than 120 days from receipt of the award;
 - 3.2.6. A statement of the county indebtedness, arrearage, or obligation to the State of West Virginia or its agencies;
 - 3.2.7. A copy of the resolution passed by the county commission authorizing the county to purchase election systems or election systems upgrades pursuant to the program;
 - 3.2.8. The signatures of a majority of the county's commissioners and the Clerk; and
 - 3.2.9. The date of the application; and
 - 3.2.10. Other information required by the Secretary,
- 3.3. To be eligible for a grant from the Fund, a county applicant must meet all criteria in place at the time of the application and award, including, but not limited to, the following:
- 3.3.1. The county must be current in a repayment plan for any outstanding indebtedness, arrearage, or obligation to the State of West Virginia or its agencies;
 - 3.3.2. The county must possess the ability to meet any obligation to match funds; and
 - 3.3.3. The county must possess lawful authority to purchase election systems, or election systems upgrades, through lawful purchasing procedures no later than 120 days from receipt of the award.
- 3.4. A county commission must possess at least 15% of the cost of equipment, software, and services for e-pollbooks and may only obtain a grant from the Fund for up to 85% of the cost, to be determined by the HAVA Grant Board, based on availability of funds.
- 3.5. A county commission must possess at least 50% of the cost of the equipment, software, and services for electronic voting systems and may only obtain a grant from the Fund for up to 50% of the cost, to be determined by the HAVA Grant Board, based on availability of funds.
- 3.6. A county commission must possess at least 15% of the cost of equipment, software, and services for physical security measures to protect election systems and may only obtain a grant from the Fund for up to 85% of the cost, to be determined by the HAVA Grant Board, based on availability of funds.
- 3.7. Grants may be approved by the State Election Commission, upon a recommendation by the HAVA Grant Board, only for the purpose of improving the administration of elections for federal office by enhancing election technology and security. Grants may be used to purchase of election systems, election system upgrades, electronic voting systems, or provide for physical security. Purchases must be

certified or otherwise approved by the State Election Commission, when necessary, and made pursuant to a lawful local procurement procedure.

3.8. The Secretary, at his or her discretion, based on county need and funding availability, may waive a portion or all of the county matching funds required by this section.

§153-10-4. Eligibility for Loan Funding for Voting Systems, Software, and Services.

4.1. Any county commission requesting a loan from the Fund shall file an application with the Secretary.

4.2. The application shall be on a form provided by the Secretary and shall contain the following information:

4.2.1. The name of the county;

4.2.2. The amount of loan money requested;

4.2.3. The proposed use of funds, including type of equipment, software, and services to be purchased and the quantity thereof, if applicable;

4.2.4. A statement that the county has obtained at least 50% of the cost of the equipment, software, and services;

4.2.5. The date of the application;

4.2.6. The signatures of a majority of the county's commissioners and the Clerk; and

4.2.7. Other information required by the Secretary.

4.3. In addition to the application, the county commission shall provide to the Secretary a copy of the resolution passed by the county commission authorizing the county to purchase or lease the voting equipment, software, and services and to enter into the loan agreement.

4.4. A county commission must obtain at least 50% of the cost of the equipment, software, and services and may only obtain a loan from the Fund for up to 50% of such cost.

4.5. The State Election Commission may waive a portion or all of the 50% matching funds if the county commission demonstrates to the satisfaction of the State Election Commission that the county commission has exercised due diligence to raise the matching funds; that it is unable to obtain the matching funds; and that it has the ability to pay the installments on the loan when due.

4.6. A county commission may request a waiver of the matching funds by filing an application with the State Election Commission.

4.7. Loans may be approved by the State Election Commission only for the purpose of improving the administration of elections for federal office by enhancing election technology and security, including but not limited to the purchase of election systems, election system upgrades, electronic voting systems, or physical security. Purchased systems must be certified or otherwise approved by the State Election Commission when required, by the county pursuant to a lawful local procurement procedure.

§153-10-5. Application Review and Approval Process.

5.1. For the purpose of a county obtaining a grant from this program:

5.1.1. The Secretary shall notify each clerk of the option to apply for an election system grant from the Fund. The period to apply for a grant shall remain open for 30 days from the date of the notice given to the clerk.

5.1.2. No later than 10 days after the close of the period to apply for a grant, the HAVA Grant Board shall hold a public meeting at a location designated by the Secretary for the purpose of reviewing the properly submitted applications. The HAVA Grant Board shall vote on whether to approve or deny each application. In reaching its decision, the HAVA Grant Board should consider the following:

5.1.2.a. The amount requested by the applicant;

5.1.2.b. The total amount of all requests made by all applicants;

5.1.2.c. A pro rata fraction of funds available at the time of the request. The numerator of the fraction shall be the number of registered voters in that county, and the denominator shall be the total number of registered voters in the State as of the most recently passed federal presidential election.

5.1.3. No later than 10 days after the HAVA Grant Board meeting, the State Election Commission shall meet to consider the recommendations of the HAVA Grant Board. The State Election Commission shall review and decide upon the recommendations of the HAVA Grant Board. Unless the decision of the HAVA Grant Board is arbitrary and capricious, the recommendations should be adopted by the State Election Commission: *Provided*, That any clerk whose application is denied by the HAVA Grant Board may appear and present good cause to the State Election Commission as to why their application should be granted.

5.1.4. The decision of the State Election Commission shall be full and final.

5.1.5. Upon approval, the county and State Election Commission shall execute any and all necessary documents required by each and perform their duties accordingly.

5.2. For the purpose of a county obtaining a loan from this program:

5.2.1. Upon receipt of a completed application for a loan, the State Election Commission shall review and approve the application, deny the application, or request additional information within 45 days. Any denial shall include a letter setting forth the reason or reasons for the denial. Any county commission receiving a denial has 30 days to amend its original application in order to comply with any necessary changes required by the State Election Commission.

5.2.2. Once a county commission has met all of the requirements of this rule, the State Election Commission shall approve the loan if funds are available.

5.2.3. Upon approval, the county commission and the State Election Commission shall enter into a contract for the repayment of the loan by equal monthly or annual payments for the length of the contract, not to exceed five years to obtain the equipment, software, and services.

5.2.4. Upon written request by the county commission, the State Election Commission may extend the repayment of the loan on a year-to-year basis for a period not to exceed five additional years. Nothing in this section should be construed to allow a loan to continue for more than 10 years from the date of the signing of the agreement.

5.2.5. Unanimous approval by the State Election Commission is required when a county commission applies for a subsequent loan from the Fund while such county commission has an outstanding loan from the fund.

§153-10-6. Repayment of Loans.

6.1. The county commission shall promptly enter into a contract with the State Election Commission for a no-interest repayment of the loan over a period not to exceed five years or the length of the contract to obtain the equipment, software, or services, whichever is less, notwithstanding any subsequent agreement granting an extension pursuant to subsection 5.2.4 of this rule.

6.2. No county commission may apply for and receive a loan if that county commission currently has an outstanding loan from this fund which is in default.

6.3. Upon nonpayment of the loan installments by the county commission or other breach of the loan agreement, the Secretary may institute a civil action, mandamus, or other judicial or administrative proceeding to compel performance by the county commission.

6.4. The Secretary will cease any legal action upon full payment of the default amount by the county. The defaulting county commission is liable for any legal costs incurred by the Secretary in order to obtain compliance.

§153-10-7. Ownership.

7.1. All equipment, software and services acquired through the Grant program described in section three of this Rule shall be purchased by the county and shall be the county's exclusive property. The equipment shall be solely owned by the county.

7.2. All equipment, software, and services acquired through the Loan program described in section four of this rule shall be purchased by the Secretary from the vendor under a contract and shall be immediately turned over to the county. The equipment shall be solely owned by the county.

§ 153-10-8. Special Provisions During an Emergency.

8.1. The Secretary, upon declaration of a State of Emergency or Preparedness by Governor pursuant to W. Va. Code § 15-5-6, may suspend a requirement contained in this rule if the requirement cannot be met due to measures that are necessary to comply with federal law; measures that are necessary to respond to an epidemic, pandemic, or public health crisis; or measures that are necessary to respond to an emergency. Examples of requirements which may be suspended pursuant to this section include, but are not limited to, the following:

8.1.1. The application deadlines for subgrantees set forth in section five of this rule: *Provided*, That that the Secretary shall issue uniform guidance for the grant application and review process in the event of a statewide emergency;

8.1.2. The pro rata allocation formula set forth in section five of this rule;

8.1.3. The application review and approval timelines for the HAVA Grant Board set forth in section five of this rule, including the timeline for public meetings; and

8.1.4. Any other provision of this rule that the Secretary determines may delay necessary action for conducting a federal election during a State of Emergency.

8.2. In the circumstances described in section 8.1. of this rule, the Secretary may take steps to initiate the grant application review and approval process described in section five of this rule,

including calling necessary meetings of the State Election Commission and HAVA Grant Board, in accordance with applicable state and federal law.

8.3. Notwithstanding the requirements of this rule, a county's application for a grant to pay for items, supplies, or materials necessary to prepare for a federal election, or to fund a purpose not expressly provided for in this rule, may be approved by the Secretary if otherwise permitted by federal law.

8.4. The provisions of this rule do not confer any additional authority upon the Secretary of State or State Election Commission to distribute HAVA funds appropriated by the United States Congress beyond the authority set forth by state and federal laws and regulations.