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United States Government Accountability Office
Washington, DC 20548

B-306475

January 30, 2006

Mr. Roger La Rouche
Acting Inspector General
Election Assistance Commission

Subject: *Help America Vote Act of 2002: Audits and Recovery of Funds*

Dear Mr. La Rouche:

You requested information on how the Government Accountability Office (GAO) will implement section 902(c) of the Help America Vote Act of 2002 (HAVA). Pub. L. No. 107-252, § 902(c), 116 Stat. 1666, 1728 (Oct. 29, 2002) (*codified at* 42 U.S.C. § 5542(c)). Section 902(c) provides that recipients of funds provided pursuant to HAVA shall repay certain amounts if the Comptroller General makes a determination as a result of certain audits that the recipient did not comply with program requirements or received an excess payment. In an audit of California's use of HAVA funds, conducted on behalf of the U.S. Election Assistance Commission (the Commission) by the Department of the Interior, Office of Inspector General (DOI-OIG), auditors questioned some of California's costs because they were either unallowable or unsupported. You would like to know if the Comptroller General must make a determination under section 902(c) for an agency to recover funds, and if so, what procedure he will apply in doing so. For the reasons set forth below, the Comptroller General need not make a determination under section 902(c) before an agency making payments may take corrective action on questioned costs.

HAVA authorizes various federal agencies to make grants or provide payments of federal funds to the states and various other entities for purposes related to election reform. *See, e.g.*, Pub. L. No. 107-252, § 101, 116 Stat. 1666, 1668-69 (Oct. 29, 2002) (*codified at* 42 U.S.C. § 15301). The U.S. General Services Administration (GSA) disbursed \$27,340,830 of HAVA funds¹ in fiscal year 2003 to California to improve the

¹ GSA paid the funds to California pursuant to section 101 of HAVA, *codified at* 42 U.S.C. § 15301. Congress appropriated the funds to GSA for such payments on February 20, 2003. Miscellaneous Appropriations Act, 2003, Pub. L. No. 108-7, div. N, 117 Stat. 537 (Feb. 20, 2003). Such payments are to be deposited into an election

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administration of elections. In an audit of California's use of these funds conducted by the DOI-OIG on behalf of the Commission, auditors took exception to some costs and found others to be unsupported. As found in the DOI-OIG audit report, the auditors questioned these costs because California did not comply with applicable regulations and requirements.²

Section 902 of HAVA has a number of subsections relevant to this discussion. Subsection 902(b)(1) authorizes each agency making a grant or payment to audit any recipient of the funds. Pub. L. No. 107-252, § 902(b)(1), 116 Stat. 1666, 1727 (Oct. 29, 2002) (*codified at* 42 U.S.C. § 15542). Subsection 902(b)(3) provides that "all funds provided under this Act shall be subject to mandatory audit by the Comptroller General once during the lifetime of the program involved." *Id.* at § 902(b)(3). Finally, subsection 902(b)(6) authorizes the Commission to conduct "a special audit or special examination" of a recipient upon a vote of the Commission. *Id.* at § 902(b)(6).

In addition to the provisions of section 902(b) for federal audits of HAVA funds discussed above, section 902(c) provides:

"If the Comptroller General determines as a result of an audit conducted under section 902(b) that—

"(1) a recipient of funds under this Act is not in compliance with each of the requirements of the program under which the funds are provided; or

"(2) an excess payment has been made to the recipient under the program,

"the recipient shall pay to the office which made the grant or payment involved a portion of the funds provided which reflects the proportion of

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fund established and maintained by California. 42 U.S.C. § 15304(d). These funds remain available indefinitely, except for appropriated funds that remain unobligated as of September 1, 2003. *Id.* at § 15304(c)(2)(B). The Commission is deemed to be the office making the grant or payments for purposes of section 902 of HAVA. 42 U.S.C. § 15542(b)(4).

² GSA informed California that these include the Cash Management Improvement Act, 41 C.F.R. subtitle C (2005) (GSA's "common rule" for uniform administrative requirements for grants and cooperative agreements with states and local governments), OMB Circular Nos. A-87, A-102, and A-133, and California procurement regulations. U.S. Election Assistance Commission, Office of Inspector General, *Final Report: Audit of Expenditures of Help America Vote Act Funds by the California Office of the Secretary of State*, Rep. No. E-HP-CA-01-06 (Washington, D.C.: December 2005).

the requirements with which the recipient is not in compliance, or the extent to which the payment is in excess, under the program involved.”

Pub. L. No. 107-252, § 902(c), 116 Stat. 1666, 1728 (*codified at* 42 U.S.C. § 15542(c)).

Because this provision refers to audits specified in section 902(b), you have inferred that the authority of agencies making HAVA payments to take corrective action is limited by section 902(c) to when the Comptroller General makes determinations. However, we cannot draw such an inference.

The audit and recovery provisions in section 902 are not the exclusive authority for audits of HAVA funds and corrective actions resulting from such audits. While section 902(b) provides GAO, the Commission, and agencies making HAVA payments with the authority to audit the recipients of those funds, other audit authorities also exist on which an agency may rely to audit recipients’ use of HAVA funds. For example, the Commission is a “designated federal entity” under the Inspectors General Act of 1978; therefore the Commission has an inspector general with the authority to conduct audits of HAVA funds paid by the Commission. *See* 5 U.S.C. App. §§ 8G(a)(2), (g), 4(a); 13 Op. Off. Legal Counsel 54, 66 (1989). In addition, there is no indication either in the language or the structure of section 902 that Congress intended that HAVA supersede the audit authority of other inspectors general of federal agencies making HAVA payments, such as the Department of Health and Human Services,³ under the Inspector General Act. *See* 5 U.S.C. App. § 11(2). Further, in cases where a state expends in excess of \$500,000 of federal awards, the state must undergo a single audit or a program specific audit to comply with the Single Audit Act, as amended (Single Audit Act). 31 U.S.C. § 7502(a)(1)(A); OMB Cir. No. A-133, 68 Fed. Reg. 38,401, § ____ .200 (June 27, 2003).

Likewise, the head of an executive agency has independent authority to collect a claim of the U.S. government for money or property arising out of the activities of the agency. 31 U.S.C. § 3711(a)(1); *see also Old Republic Insurance Co. v. Federal Crop Insurance Corp.*, 947 F.2d 269, 275 (7th Cir. 1991); B-303927, June 7, 2005. Under this provision, a “claim” includes any amount of funds determined by an agency official to be owed to the government, including payments disallowed by audits performed by the inspector general of the agency administering the program and overpayments. 31 U.S.C. § 3701(b); 31 C.F.R. § 900.2(a) (2005). In cases where an agency has entered into an agreement with a state, the agency may determine and enforce its rights under the agreement. *See, e.g.*, 41 C.F.R. § 105-71.143 (2005);

³ Under HAVA, the Secretary of Health and Human Services (HHS) is required to make payments to each eligible state and local government unit to ensure voting access for persons with disabilities. Pub. L. No. 107-252, § 261, 116 Stat. 1666, 1698 (Oct. 29, 2002) (*codified at* 42 U.S.C. § 15421).

see also Alabama v. Shalala, 124 F. Supp. 2d 1250, 1261 (M.D. Ala. 2000). In addition, when a single audit or program-specific audit under the Single Audit Act results in audit findings, the awarding agency must issue a management decision stating whether the findings are sustained, the reason for the decision, and the expected corrective action of the recipient, which includes repaying disallowed costs. OMB Cir. No. A-133, 68 Fed. Reg. 38,401, §§ __.400(c)(5), __.405 (June 27, 2003); *see also* B-303927, June 7, 2005 (granting agency has the responsibility to recover grant funds misused by the grantee).

The recovery provision of section 902(c) does not supersede these preexisting authorities of agencies awarding federal funds to take corrective action, as section 902 can be construed consistently with these authorities and there is no evidence in the statute or the legislative history of HAVA that Congress intended for HAVA to supersede these authorities. It is a general principle of statutory construction that specific and general statutes covering the same subject should be construed consistently to give each statute maximum effect when possible. *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); B-163375, Sept. 2, 1971. Section 902(c) of HAVA and the preexisting recovery authorities can be construed to coexist with respect to HAVA payments because section 902(c) does not state expressly that the Comptroller General's determination is the exclusive procedure by which funds may be recovered.

We read section 902(c) to apply only to Comptroller General audits conducted under 902(b), not to other audits conducted under section 902(b) or other authorities. Section 902(c) provides notice to recipients that they must repay funds to the granting agency "if" the Comptroller makes a determination based on an audit under section 902(b). The word "if" connotes only a condition precedent to a recipient's requirement to repay HAVA funds if the Comptroller General conducts an audit and makes a determination that a recipient of HAVA funds is not in compliance with program requirements or the recipient received an excess payment. It is not an instruction to the Comptroller General to review each audit under section 902(b), but rather, prescribes the results of audits the Comptroller General conducts. The framework Congress established for audits under section 902(b) suggests only that Congress sought to ensure opportunities for the Comptroller General to make findings under the criteria set out in section 902(c). Agencies have independent authority to take corrective action related to funds paid under HAVA when the agency determines that a recipient has received an excess payment or has improperly used funds.

Interpreting section 902 as compatible with, rather than superseding, preexisting authority for administratively adjudicating allowable grant costs avoids potential constitutional problems. *See Bowsher v. Synar*, 478 U.S. 714 (1986). If we were to read section 902(c) to require a Comptroller General determination before an agency could take corrective action, such an interpretation would raise significant constitutional concerns. Congress was aware when enacting section 902(c) that GAO is an auditing and investigating organization within the legislative branch.

31 U.S.C. §§ 712–717. Indeed, as noted above, we have found no evidence that Congress intended the Comptroller General to effectively assume the programmatic responsibility of implementing HAVA that would be inherent in assigning final decision-making authority to him. Accordingly, and consistent with longstanding practice of construing statutes to avoid constitutional infirmities, *see United States v. Morrison*, 529 U.S. 598, 607 (2000) (analysis of a congressional enactment begins with the presumption of constitutionality), we construe section 902(c) as applicable only to audits that GAO conducts.

If GAO were to determine as part of any GAO audit that a recipient of HAVA funds is not in compliance with program requirements or that the recipient received an excess payment, then GAO would make appropriate recommendations to the paying agency. Each paying agency must determine the liability of the recipient with respect to the HAVA funds and take any necessary corrective action available to the agency under law.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

cc: Jeanette M. Franzel, Director
Financial Management and Assurance

DIGEST

The Help America Vote Act of 2002 provides that if the Comptroller General determines as a result of an audit that a fund recipient is not compliant with program requirements, or that an excess payment has been made, the recipient must return a certain portion of the payment. However, the Comptroller General need not make such a determination before a paying agency may audit and take corrective action on questioned costs. This provision of the Act does not supersede the independent statutory authority of agencies to audit and take corrective action on the use of federal funds. If the Comptroller General were to make a determination under the Act as a result of any audit he conducts, he will make an appropriate recommendation for the agency to determine liability and to take corrective action.