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May 20, 2008

The Honorable Rosemary Rodriguez, Chair
The Honorable Caroline Hunter, Vice Chair
The Honorable Gracia Hillman
The Honorable Donetta Davidson

U.S. Election Assistance Commission
1225 New York Avenue (NW)
Suite 1100
Washington, D.C. 20005

Dear Commissioners:

The newly formed 11-member EAC Liaison Committee of the National Association of State Election Directors (NASSED) unanimously supports Commissioner Caroline Hunter's proposal to modify EAC Advisory 07-003-A by eliminating "county or local government" from the Maintenance of Effort (MOE) requirement. This issue will be brought to the full membership of NASSED at our June Conference where unanimous support of this proposal is expected.

The EAC Liaison Committee supports the proposal for the following reasons:

1. The definition of "State" is unambiguous, meaning that "expenditures of the State" are clearly understood as expenditures of State government. The expansion of definition of "State" is contrary to law.
2. There is no evidence that any State election official is permitting local governments to replace local funds with Help America Vote Act (HAVA) funds. Quite the contrary is true: HAVA has substantially increased the election expenditures of all local governments.
3. State election officials uniformly agree that HAVA funds are intended to implement Title III requirements and make improvements in the conduct of elections through new and improved programs.
4. States that have chosen to grant HAVA funds to local governments have implemented more effective procedures than local MOE to protect against the replacement of local funds with HAVA

funds. States that have chosen not to grant HAVA funds to local governments are required by EAC Advisory to provide local MOE even though it is impossible for local governments to replace local funds with HAVA funds. Simply put, if the local governments are not given HAVA dollars, then they do not have the resources to replace funds.

5. There is no compelling reason to impose a huge burden on State and local governments by changing the "rules of the game" four years after State Plans were filed, programs implemented and most of the HAVA funds expended.

6. There are more effective ways to determine whether local government funds are being replaced by HAVA funds than inventing a local government MOE.

A State is a State under the HAVA Definition of "State"

Section 901 of HAVA defines "State" to include "the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands." There is no mention of "county or local governments" being included in the definition.

Section 254(a)(7) is clear in terms of what must be included in the computation of MOE:

"(7) How the **State**, in using the requirements payment, will maintain the **expenditures of the State** for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the **State** for the fiscal year ending prior November 2000."

"Expenditures of the State" means exactly what it says: expenditures of the State government. Once the definition of "State" is expanded to encompass "county or local governments, EAC will have to apply this definition every time "State" is used in HAVA.

It is instructive to read Sections 251 through 258 of HAVA with "State, county or local governments" substituted for "State" in each place where "State" is used. This exercise demonstrates that, contrary to the April 14, 2008 EAC Staff Memorandum, this substitution creates an absurd result. The fact is the EAC staff selectively substituted the expanded definition of "State" in only a single section of HAVA: Section 254(a)(7). The only ambiguity created by all of this is the Advisory's expansion of the definition of "State" to reach a specific outcome.

Where local governments were deemed necessary to the purposes of HAVA, Congress explicitly included them. See Sections 254(a)(2) & (8), Section 254(c) and Section 261.

Supplanting Local Funds with HAVA Funds

EAC Advisory 07-003-A states the purpose for imposing new requirements on the States:

"Because the intent of the MOE requirement is to prevent a State from replacing its own funding with Federal funding, expenditures at the State, county, and, where appropriate, the local level must be considered. In other words, a State, county or local government **may not** replace or supplant its prior level of funding with Federal dollars."

After 21 audits have been conducted by the Inspector General, no evidence has been produced indicating that States are permitting local governments to supplant local funding with HAVA funds.

There is no state election official who claims that HAVA permits local governments to replace local funds with HAVA dollars. Every State, county and local election official understands that HAVA funds are intended to implement the requirements of Title III and to improve the conduct of Federal elections. We understand that HAVA was designed to improve the election administration infrastructure of each State.

HAVA has substantially increased local government costs. There are additional maintenance cost and programming costs associated with voting systems. The complexity of HAVA provisions has required additional training of election day workers. It is inconceivable that State and local government expenditures would be any less than 2000 levels.

States Employ Different Approaches to Requirements

The April 14, 2008 EAC Staff Memorandum attempts to make the point that the States do not agree on what "State" means. Quite the contrary is true when a serious analysis of the State Plans is made. First, staff neglected to include amendments to State Plans of certain States that changed the MOE submission in their original State Plan. Second, there is a distinct difference among States over how HAVA funds are spent. Many States are not providing any HAVA funds to units of local government, while others are granting HAVA funds to local governments. HAVA leaves this decision to the States (not to the States, counties and local governments).

It is difficult to justify the burden of compiling local government MOE if the State provides no HAVA funds to local governments. For these States it is impossible for local governments to supplant local funds with HAVA funds because the local governments are **not** given any HAVA funds by the State. For these States EAC Advisory 07-003-A is over inclusive because it imposes a burden requiring thousands of hours on a State that literally has provided no HAVA funding to any local government.

It is totally appropriate for States granting HAVA funds to local governments to require some type of MOE. However, any such local government MOE is over and above the HAVA required MOE on expenditures of the State. It is not surprising that in 2003 States venturing for the first time into the State Plan process used Section 254(a)(7) instead of Section 254(a)(2) to describe, in part, how they would monitor distributions of HAVA funds to local governments. A large amount of confusion existed in those early days over what exactly the State Plan required.

Many states adopted sound processes other than local government MOE for the purpose of meeting the stated objective of EAC Advisory 07-003-A. It may serve the Commission well to seek information from those States that have distributed HAVA money to local governments on how they monitor the funds. The truth of the matter is that the HAVA MOE requirement is a very poor gauge of whether local funds are replaced by HAVA dollars. Most local governments are on a fiscal year that ended either December 31, 1999 or June 30, 2000. Neither fiscal year captured the peak spending prior to the November 2000 election.

Changing the Rules near the End of the Game

All election officials know that the rules cannot be changed in the middle of a process. EAC never indicated an intention of viewing Section 254(a)(7) to include a local government MOE until Advisory 07-003 was adopted. This policy was adopted nearly four years after State Plans were submitted and most of the HAVA funds expended. In fact, the Inspector General's Audit Program, January 2007, which is no longer on EAC website, sought to verify that "the state maintained a level of state expenditures...at least equal to the amount the state expended in the state fiscal year ending prior to November 2000."

This late change in policy places a huge burden on States and local governments. Numerous comments to EAC have stressed that this delay has made compilation of local MOE impossible in several States because the necessary financial records no longer exist. Further, it is extremely difficult, if not impossible, for local governments to dissect their pre-November 2000 spending into the same MOE categories that States are required to provide. For example, the Advisory would require local governments to include in their MOE their spending to develop, create and maintain lists of registered voters for Federal elections. That is an extreme expansion of Section 254(a)(7). Pre-HAVA voter registration systems maintained by local governments are not HAVA compliant and are not being funded by requirements payment, i.e. with HAVA funds.

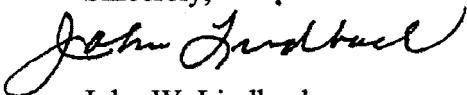
We submit that it is unfair to impose an undue burden on State and local governments by changing the policy this late in the game. If EAC believes that the plain reading of MOE requirement is deficient, it should seek a legislative change rather than attempting to change the meaning of "State" in one subsection of HAVA.

Alternative Audit Methods

The Inspector General could devise audit plans to determine if local governments that received HAVA funds from the State have supplanted their local funds with Federal dollars. This data would be far superior to the data compilation being sought by the Inspector General. States have been asked to provide total election spending as the local MOE. While that may be an easier compilation, it is not what Section 254(a)(7) calls for.

For the reason set forth above, we urge each Commissioner to vote to approve the proposal to modify Advisory 007-003-A. The resources necessary to comply with a local government MOE would be better used to prepare for and conduct the most challenging general election faced by election officials in recent time.

Sincerely,



John W. Lindback
President, NASED



Christopher M. Thomas
Chair, EAC Liaison Committee

cc: Thomas Wilkey