



U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

OFFICE OF THE CHAIR

February 21, 2008

Honorable David M. Walker
Comptroller General
441 S Street, NW
Washington, DC 20548

Dear Mr. Walker:

This letter requests a Comptroller General opinion on a proposed policy to ensure proper use of Federal funds authorized under the Help America Vote Act of 2002 (HAVA). Congress appropriated the funds to United States Election Assistance Commission (EAC) for subsequent payments to states for improving the administration of elections for Federal Office. The issue addressed by the proposed policy is whether it is permissible for states to use HAVA funds to purchase voting systems to replace existing HAVA-compliant voting systems that were also acquired with HAVA funds.

Specifically, we ask whether the proposed policy is consistent with the requirements for the use of HAVA funds distributed to states under Sections 101 and 251 of HAVA and with the cost principles contained in Office of Management and Budget Circular A-87.

The proposed policy (Attachment 1) will revise policy previously developed by EAC staff (Attachment 2) in response to a question from the Florida on the use of HAVA funds. The EAC will consider and vote on the proposed policy at its public meeting on March 20, 2008, in Denver, Colorado. Consequently, we respectfully request a response, including oral advice, to our request by March 19. In that regard, we would be happy to meet with representatives of your office to discuss this matter in more detail or to respond to questions about our request.

Resolution of this matter is critical, as the EAC has received several inquiries from states regarding similar situations.

Yours truly,

A handwritten signature in cursive script, appearing to read "Rosemary E. Rodriguez".

Rosemary E. Rodriguez
Chair

cc: Congressman Jose Serrano, Chairman of House Appropriations Subcommittee on Financial Services and General Government
Congressman Ralph Regula, Ranking Member of House Appropriations Subcommittee on Financial Services and General Government



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Page Two

Attachment 1: Proposed Policy Clarification on the Allowable Uses of Help America
Vote Act Funds Authorized Under Titles I and II.

Attachment 2: May 2, 2007 EAC response to Florida

**FOR CONSIDERATION BY THE US ELECTION ASSISTANCE
COMMISSION AT ITS PUBLIC MEETING OF MARCH 20, 2008**

***PROPOSED POLICY CLARIFICATION ON THE
ALLOWABLE USES OF HELP AMERICA VOTE ACT FUNDS AUTHORIZED UNDER
TITLES I AND II***

This U.S. Election Assistance Commission (EAC) policy advisory clarifies the allowable uses of payments made to states under Sections 101 and 251 of the Help America Vote Act (HAVA). The EAC has determined that it is a reasonable use of HAVA funds to purchase any voting system regardless of whether the systems replaced were originally purchased with HAVA funds.¹ The basis for this policy advisory is explained in the following paragraphs.

Background

The funds received by a state under Section 101 may be used for the following purposes:

- A. Complying with the requirements under title III.
- B. Improving the administration of elections for Federal office.
- C. Educating voters concerning voting procedures, voting rights, and voting technology.
- D. Training election officials, poll workers, and election volunteers.
- E. Developing the State plan for requirements payments to be submitted under part I of subtitle D of title II.
- F. Improving, acquiring, leasing modifying or replacing voting systems and technology and methods for casting and counting votes.
- G. Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing non-visual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.
- H. Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations; obtaining general election

¹ The EAC had previously determined that the use of HAVA funds to replace voting systems purchased with HAVA funds was unreasonable and therefore not allowable.

information; and accessing detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

Section 102 funds can be used ONLY for the purposes of replacing punch card and lever voting systems with voting systems that comply with section 301(a).

Section 251 funds can be used to implement any of the Title III requirements including purchasing compliant voting systems, implementing provisional voting, providing information to voters in the polling place, developing and implementing a statewide voter registration list, and identifying voters. In addition, states and local governments can use HAVA funds to improve the administration of elections for Federal office when the state certifies that one of two conditions is met: (1) the state has met the requirements of Title III; or (2) the state notifies the EAC of the intent to use an amount not to exceed the amount of the minimum payment that the state either did or could have received under the section 252 formula for that purpose.

In addition to the restriction on the uses of the funds imposed by HAVA, the General Services Administration (GSA) and EAC informed States when the funds were distributed that the funds were subject to financial management controls governed by certain circulars developed by the Office of Management and Budget (OMB).² The applicable Circulars were A-87 (the principles for determining allowable costs) and A-102 (now referred to as the common rule and which governs the administrative requirements for Federal awards such as standards for accounting and purchasing), and A-133 (the standards for the audit of Federal funds expended by state and local governments).

In May 2007, the EAC responded to an inquiry from the State of Florida concerning the use of HAVA funds. Specifically, Florida asked whether it was permissible to use HAVA funds to purchase voting systems to replace existing HAVA-compliant voting systems that were also acquired with HAVA funds. The EAC response stated that it was not reasonable for a state to purchase a HAVA-compliant voting system with HAVA funds and then replace that system using HAVA funds (the "Florida guidance"). The EAC reply was based on the cost principles contained in OMB Circular A-87.

It has been the practice of this agency to have EAC staff make determinations that are applications of existing law and/or regulation and for the Commission to be involved in policy or discretionary interpretation of HAVA. The Commission received the Florida guidance from staff in a public meeting on May 1, 2007. If Florida had appealed the guidance, as with any other, the Commission would have become involved with the resolution as the final authority.

²GSA informed each recipient that Title I funds were subject to OMB Circulars A-87, A-102, A-133, and the Common Rule (uniform administrative requirements for grants and cooperative agreements with state and local governments). In a June 11, 2004 tally vote, EAC Commissioners approved the application of OMB Circulars A-87 and A-102 (the Common Rule), and A-133 to Title II funds.

Since that May 2007 decision, the Congress has provided further guidance on the use of HAVA funds in the House report accompanying the Financial Services and General Government Appropriation bill for Fiscal Year 2008 (H.Rept. 110-207), as follows:

...the Committee believes that ensuring accurate, reliable, and accessible voting is more than reasonable; it is essential. The Committee notes that the technology for voting equipment has improved in recent years, and states now have more experience with different technologies. States should have options and the flexibility to acquire better equipment, including equipment that will provide a durable, accessible, voter-verified paper ballot.³

By letter dated January 23, 2008, Subcommittee on Financial Services and General Government Chairman Serrano, Vice Chair Kilpatrick and subcommittee members Hinchey, Ruppertsberger, Wasserman Schultz, Visclosky and Schiff, placed the Florida guidance before the Commission by asking for a reversal of the staff opinion therein.

Conclusion

The EAC does not mandate, endorse or recommend one system over another. It is the spirit and intent of HAVA that the states make voting systems decisions based upon what will best serve the individual state.

By adopting this revised policy, the Commission reverses the staff guidance and asserts that it is "reasonable," pursuant to the OMB circulars for state governing jurisdictions to use HAVA funds to replace voting systems purchased with HAVA funds, as long as such purchases comply with HAVA. Therefore, states will have the flexibility and opportunity to use these funds to meet the requirements of title III or to improve the administration of elections for Federal office.

³ The language was ultimately adopted as part of the Joint Explanatory Statement accompanying the Consolidated Appropriations Act of 2008 which was enacted in December 2007.



U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

May 2, 2007

Honorable Kurt Browning
Secretary of State
R.A. Gray Building
500 S. Bronough, Suite 100
Tallahassee, FL 32399

Via Facsimile Transmission & U.S. Mail

RE: Use of HAVA funds

Dear Secretary Browning:

The State of Florida has requested a formal opinion from the U.S. Election Assistance Commission (EAC) regarding the State's desire to use funding distributed under the Help America Vote Act of 2002 (HAVA) for the following purposes: 1) to replace touch screen voting equipment – previously funded in part by HAVA funds – with optical scan voting equipment, 2) to retrofit accessible voting units (touch screen systems) with voter verifiable paper audit trails (VVPAT), and 3) to fund the replacement of touch screen voting systems used in early voting with ballot on demand systems. By this letter, EAC is providing its opinion on each of the three expenditures listed above.

BACKGROUND

As you are aware, there are three funding programs under which the EAC or its predecessor, the General Services Administration (GSA), distributed money to the States to implement the provisions of HAVA. Those sources are Section 101, Section 102 and Section 251 funds.

Permissible Uses of HAVA Funds

The funds received by a state under Section 101 can be used for the following purposes:

- A. Complying with the requirements under title III.
- B. Improving the administration of elections for Federal office.
- C. Educating voters concerning voting procedures, voting rights, and voting technology.
- D. Training election officials, poll workers, and election volunteers.
- E. Developing the State plan for requirements payments to be submitted under part 1 of subtitle D of title II.
- F. Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.

G. Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing non-visual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.

H. Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

Section 102 funds can be used ONLY for the purposes of replacing punch card and lever voting systems with voting systems that comply with Section 301(a) of HAVA.

Section 251 funds can be used to implement any of the Title III requirements, including purchasing compliant voting systems, implementing provisional voting, providing information to voters in the polling place, developing and implementing a statewide voter registration list, and identifying voters. In addition, states and local governments can use HAVA funds to improve the administration of elections for Federal office when the State certifies that one of two conditions is met: (1) the state has met the requirements of Title III; or (2) the state notifies EAC of its intention to use an amount not to exceed the amount of the minimum payment that the state either did or could have received under the Section 252 formula for that purpose.

In addition to the restrictions on the uses of funds imposed by HAVA, when these funds were distributed by either GSA or EAC, they were made subject to several circulars developed by the Office of Management and Budget, specifically OMB Circulars A-87 (governs the use of federal funds to purchase goods for state and local governments), A-102 (governs the management of federal funds for state and local governments), A-122 (governs the use of federal funds to purchase goods for non-profits) and A-133 (dealing with audits). These circulars further restrict the appropriate uses of Federal funds requiring generally that costs paid for by HAVA funds are allowable, allocable (directly or through an indirect cost rate), and reasonable.

Allowable Costs

A cost is allowable if it is necessary for the proper and efficient performance and administration of the federally sponsored program. Costs that fall within the specifically identified uses of HAVA funds in either Sections 101, 102 or Title III are allowable.

Allocable Costs

A State can allocate an expense by charging only a portion equal to the percentage of use for HAVA related purposes to the HAVA grant. This can be accomplished by either using only that percentage of HAVA fund per unit cost or by seeking reimbursement from the other departments within the state for their portion of the usage. The question of allocability arises generally in one of two circumstances. First, is the cost allocable to the program to which it is

billed? The fact that a cost is allowable under one or more funding programs of HAVA does not mean that it is allocable to each and every program. For example, if an expense is not directly related to meeting any of the Title III requirements, it is allocable only to Section 101 funds and Section 251 funds pursuant to the provisions of Section 251(b) that allow for the use of Title II funds for the improvement of the administration of elections for federal office only up to the minimum payment amount. Second, is the cost allocable to benefit a Federal election? Most of the uses identified in HAVA require the funds to be used to benefit a Federal election. Thus, costs that strictly benefit a state or local election are not allocable to the HAVA funding programs.

Reasonable Costs

A State must also conduct some assessment as to whether the costs are reasonable. This is done by determining that the cost is justified based upon factors such as the frequency of use, leasing versus purchasing, and actual cost for the good or service.

FACTS RELATED TO FLORIDA'S SITUATION

Currently pending in the Florida state legislature is a bill that would direct the State to replace all touch screen voting systems used on Election Day and in conjunction with early voting with optical scan voting equipment. In addition, this bill would require the retrofit of touch screen systems that are needed to provide accessibility to disabled voters with VVPAT units. The State of Florida seeks an opinion as to whether it can use remaining HAVA funds to finance these purchases and replacements.

Your request focuses exclusively on the use of Section 251 funds that Florida has remaining at this time. According to information provided by your office, Florida has approximately \$91 million of Section 251 funds available in its election fund. Furthermore, you anticipate the cost of replacing touch screen systems with optical scan voting equipment to be \$22,861,850; the cost to retrofit touch screen system with VVPATs to be \$7,816,210; and the cost to replace early voting touch screen systems with ballot on demand systems to be \$5,000,000.

You also provided information regarding the amount of Federal money distributed under HAVA that was previously used to partially fund the purchase of voting equipment that is now intended to be replaced. You explained that in fiscal years 2001 and 2002 payments were made on a per-polling place basis to each county in Florida for the purchase of voting equipment. The State later reimbursed itself in the amount of \$11,581,377 for these payments from HAVA Section 102 funds that were distributed to it. Specifically, based on the total amount of Federal funding, \$11,581,377 the following counties that currently use touch screen voting equipment were paid the following amounts in fiscal years 2001 and 2002 for the purchase of those systems:

COUNTY	FY 2001	FY 2002
Broward	\$556,987	\$556,987
Charlotte	\$56,780	\$56,780
Collier	\$86,522	\$86,522
Hillsborough	\$288,408	\$288,408
Indian River	\$34,248	\$34,248
Lake	\$77,510	\$77,510
Lee	\$135,191	\$135,191
Martin	\$36,051	\$36,051
Miami-Dade	\$556,086	\$556,086
Nassau	\$37,853	\$37,853
Palm Beach	\$478,577	\$478,577
Pasco	\$118,968	\$118,968
Pinellas	\$310,939	\$310,939
Sarasota	\$127,981	\$127,981
Sumter	\$43,261	\$43,261
TOTAL	\$5,890,724	\$5,890,724

Thus, over the two fiscal years, a total of \$5,890,724 in Federal funds was used to reimburse these payments to the affected counties.

Florida has certified to EAC that it has met all of the requirements of Title III of HAVA, including purchasing HAVA-compliant voting equipment. Thus, Florida may use all of the remaining Section 251 funds to meet the purposes of Title III or for activities that improve the administration of elections for Federal office.

ANALYSIS OF FLORIDA QUESTIONS

Florida may use its remaining HAVA funds to finance the retrofit of touch screen voting equipment with VVPATs. Florida also may use HAVA funds to finance that portion of the cost to replace touch screen voting systems with optical scan voting systems that has not previously been financed with Federal HAVA funds.

Retrofit of Touch Screen Voting Systems with VVPATs

EAC has previously determined that VVPATs are not required by Section 301(a) of HAVA. See Question 12, HAVA Funding FAQs. Therefore, purchase of these pieces of equipment does not meet the requirements of Title III. However, EAC has determined that they are an improvement to the administration of elections for Federal office. This means that a State may use HAVA funds distributed under Sections 101 and 251 (when appropriate certifications are made) to fund activities that are an improvement to the administration of elections for Federal office, including the purchase of VVPATs to retrofit existing voting equipment.

The State of Florida has submitted a certification to EAC that it has achieved compliance with Title III of HAVA. As such, Florida may use any of its remaining Section 251 funds or Section 101 funds to finance the purchase of VVPATs to retrofit existing voting equipment. This cost is estimated to be \$7,816,210.

Replacement of Touch Screen Systems with Optical Scan

Section 301(a) of HAVA requires that a voting system meet certain requirements in order to be considered compliant. Those requirements include:

- Allowing the voter the ability to change his or her selections prior to casting a vote;
- Notifying the voter of an overvote and the consequences of casting an overvote;
- Providing a permanent paper record of the election that is auditable;
- Providing accessibility to individuals with disabilities including persons who are blind or visually impaired;
- Providing accessibility to persons for whom English is not their first language when required by Section 203 of the Voting Rights Act; and
- Meeting or exceeding the error rate as established in the 2002 Voting System Standards developed by the Federal Election Commission.

Neither HAVA nor EAC has limited a State's right to choose from various different makes, models and types of voting equipment that meet these requirements. As such, a State could choose to meet the requirements by purchasing an optical scan voting system (as long as it was augmented with an accessible voting unit in each polling place), a direct record electronic voting system (DRE), or even a ballot marking device.

According to the information provided by your office, the State of Florida issued grants to counties in state fiscal years 2001 and 2002. Counties used those State funds as well as county funds to purchase voting systems. Some purchased DREs while others purchased optical scan voting systems. The State of Florida ultimately reimbursed itself for the grants made to all counties in 2001 and 2002 with HAVA funds that were made available to the State in 2004. Furthermore, the State of Florida has submitted a certification to EAC, dated August 28, 2006, that it has met all of the requirements of Title III of HAVA, including meeting the voting system requirements in Section 301.

Pursuant to pending legislation, the State of Florida would replace the State-certified HAVA compliant voting systems in 15 of its counties with optical scan voting equipment. The three part test of allowability, allocability and reasonability must be applied to this request. It is quite clear from the language of HAVA that the purchase of HAVA-compliant voting equipment is allowable. Based on the information provided by your office, the State desires to replace HAVA compliant DREs with HAVA compliant optical scan voting systems. So, the purchase is allowable. Similarly, the costs are allocable to the program from which the State desires to fund this replacement, specifically HAVA Section 251 funds.

The last point of assessment is whether the expense is reasonable. The State has already received and paid out to the 15 affected counties \$12,255,000 in Federal HAVA funds for HAVA compliant voting systems. It is clear from the information provided by your office, that the \$12,255,000 was not the sole source of funding for the purchase of DRE voting equipment by these affected counties. Thus, either additional State or county funding must have been used to purchase voting equipment in these counties. Now, the State desires to replace those DREs with optical scan voting equipment, which is also HAVA compliant, and seeks to use Federal HAVA funds to finance that replacement. While it is reasonable to fund the purchase of reimbursement of HAVA compliant voting equipment one time, EAC has determined that it is not reasonable to fund that expense twice. Thus, the State of Florida may fund that portion of the replacement cost that has not previously been funded or reimbursed using Federal HAVA funds. Based upon the information provided by your office, the total replacement cost is \$22,861,850. Of that requested amount, \$5,890,724 has previously been paid for using Federal HAVA funds. Thus, the State of Florida may use \$16,971,126 of HAVA funds to finance the replacement of HAVA compliant DRE voting systems with HAVA compliant optical scan voting systems.

Ballot on Demand Systems

According to the information provided by your office, the State of Florida proposes spending \$5,000,000 to finance grants to counties for the purchase of ballot on demand systems for early voting sites. This is additional equipment to the optical scan reading devices that are to be replaced using the \$22,861,850 mentioned above. These systems will allow for ballots to be printed on site and on demand at early voting sites. These on demand ballots will be read by the optical scan systems that the state seeks to purchase. Under the definition of a voting system as contained in HAVA Section 301(b), a ballot on demand system is a component of a voting system that is used to define and print ballots. As such, it is both allowable under Section 251 as the expense meets a requirement of Title III and is allocable to Section 251 and to Federal elections in general. Last, using HAVA funds to purchase ballot on demand systems is a reasonable expense for the purposes of providing the appropriate ballots at early voting sites without incurring excessive charges to print all ballot styles in advance of early voting. As such, Florida may use the requested \$5,000,000 to fund grants for the purchase of ballot on demand systems.

Other Sources of Funding

The State of Florida might consider the application of three alternatives for funding the replacement that it desires to make.

Option 1: Reimbursement for State expenditures on voting system purchases

First, the State of Florida may consider whether it wants to seek reimbursement for State expenditures in FY 2001 and FY 2002 for the purchase of voting equipment that has not been reimbursed by Federal funds. Section 251(c) of HAVA specifically allows those funds to be used to reimburse expenditures related to the purchase of HAVA-compliant voting equipment made after the November 2000 election and prior to the passage of HAVA.

In FY 2001 and FY 2002, the State of Florida made grants to its counties for the purchase of voting equipment. The total of those grant payments was \$24,093,750. These grants were paid out of State funds. The State sought reimbursement from HAVA Section 102 funding for only \$11,581,377 of the \$24,093,750 in grant funds that were distributed. As such, the State is still eligible to seek reimbursement from Section 251 funds for the remaining \$12,512,373 that was distributed by the State from State funds.

Because this would be a reimbursement of funds previously outlaid by the State of Florida, the money would be returned to the general fund and could be recommitted to any activity that the State desires, including purchasing optical scan voting equipment. Assuming that Florida seeks reimbursement for these previously expended State dollars, it would impact the amount of Federal funding that has been used to fund the purchase of equipment that the State now seeks to replace. Specifically, the amounts that would be considered as having been allocated to the affected counties under this option would be:

COUNTY	FY 2001	FY 2002
Broward	\$1,158,750	\$1,158,750
Charlotte	\$118,125	\$118,125
Collier	\$180,000	\$180,000
Hillsborough	\$600,000	\$600,000
Indian River	\$71,250	\$71,250
Lake	\$161,250	\$161,250
Lee	\$281,250	\$281,250
Martin	\$75,000	\$75,000
Miami-Dade	\$1,156,875	\$1,156,875
Nassau	\$78,750	\$78,750
Palm Beach	\$995,625	\$995,625
Pasco	\$247,500	\$247,500
Pinellas	\$646,875	\$646,875
Sarasota	\$266,250	\$266,250
Sumter	\$90,000	\$90,000
TOTAL	\$12,255,000	\$12,255,000

Thus, the previously stated amounts that EAC would be able to fund under the request to replace DREs would change. EAC would have to exclude from the requested replacement money a total of \$12,255,000. The total allowable use of HAVA funds for that request would be limited to \$10,606,850. However, in light of the fact that Florida would receive \$12,512,373 in reimbursement funds, this would more than cover the amount that EAC would have to exclude from the request, \$12,255,000.

Option 2:

Second, Federal grant circulars would allow the State to use the proceeds from the sale or trade of the DREs in the affected counties for its own purposes, which certainly could include the purchase of new optical scan voting equipment.

Option 3:

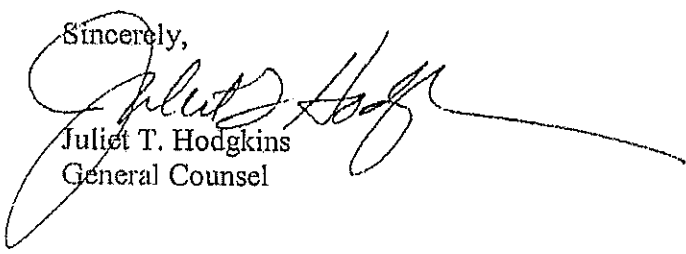
Third, there are several bills pending in Congress that would require the existence of a voter verifiable paper record and apparently would cover the costs of replacing DREs that are not currently equipped with voter verifiable paper audit trails (VVPATs) with optical scan voting equipment. If any of these bills pass, HAVA would be amended to specifically allow these costs and would potentially provide an additional funding source for States that desire to make a change of the sort proposed by Florida.

CONCLUSION

If the State of Florida maintains its request without choosing to implement any of the alternative funding options, the State may use \$29,787,336 of HAVA funds to finance the replacement of DRE voting systems (\$16,971,126), the retrofit of DRE systems with VVPATs (\$7,816,210), and the costs of distributing grants for the purchase of ballot on demand systems (\$5,000,000). If the State of Florida chooses to maintain its request and seek reimbursement under *Option 1* of the alternative funding sources discussed above, the State may use \$23,423,060 of HAVA funds to finance the replacement of DRE voting systems (\$10,606,850), the retrofit of DRE systems with VVPATs (\$7,816,210), and the costs of distributing grants for the purchase of ballot on demand systems (\$5,000,000). In addition, the State of Florida will receive up to \$12,512,373 in reimbursement funds from Section 251 of HAVA that it can use for any purpose, including purchasing optical scan voting equipment.

Thank you for your request and your efforts to implement HAVA in Florida. Please contact us with any additional questions that you may have concerning this opinion or any options that you wish to exercise.

Sincerely,


Juliet T. Hodgkins
General Counsel