TESTIMONY OF

CURTIS W. CRIDER
INSPECTOR GENERAL
U.S. ELECTION ASSISTANCE COMMISSION

BEFORE THE

U.S. ELECTION ASSISTANCE COMMISSION

MAY 27, 2010

Chair Davidson and Commissioners Bresso and Hillman, thank you for inviting me to testify today. I am pleased to be here this morning to discuss the U.S. Election Assistance Commission's Proposed Maintenance of Effort (MOE) Policy and the comments submitted by the Office of Inspector General (OIG) regarding this proposed policy.

Before I begin, I must qualify my remarks so that both the Commission and the listening public understand the scope and limitations of my comments. Neither my presence here today, nor any of the comments that I make should be construed as an affirmation, acceptance, or approval of the proposed MOE policy. My comments are offered to assist the EAC as it works to adopt an MOE policy. It is the EAC's sole responsibility and obligation to craft and adopt policy statements such as this one. Let me further clarify that my oral remarks here today as well as the written comments provided on April 19, 2010, address only the substance of the proposed policy and do not address the EAC's authority or procedure in proposing and adopting this policy.

The nature of our comments can be summarized fairly simply. The OIG believes that whatever policy the EAC adopts should conform to the letter and spirit of the Help America Vote Act (HAVA) as well as other applicable federal statutes, regulations and guidelines concerning the administration of grants. The OIG identified several areas in which the proposed policy and applicable law did not align.

The first instance was the applicability of the proposed MOE policy to subgrants or subawards made by states (EAC's primary grantee) to units of local government such as counties, parishes, and municipalities. A framework of federal guidance on the administration of grants by states and units of local government is already in place. However, EAC's policy does not follow that guidance. Office of Management and Budget Circular A-102, also known as the Common Rule, provides that requirements placed on the grant flow through to subawardees. A link is created between the receipt of funds under the grant or subgrant and the requirements that impact the grant. The EAC's proposed policy would break that link and have only those local governments who received funds by appropriation from the state legislatures during the base year subject to the MOE requirement.

As stated more fully in our written comments, we believe that the proposed application of the MOE policy neither comports with the letter of applicable federal law nor Congress' intention in passing HAVA. HAVA was intended to improve, not maintain the process and procedure for conducting federal elections. Congress used the MOE provision to ensure that the federal investment in the election process would increase, rather than maintain, spending by states and local governments as they prepare for and conduct elections. The impact of limiting the application of the proposed MOE policy to local governments that received appropriations from the state legislatures is to allow those

local governments to supplant their local expenditure on elections with the available federal funds. This treatment does not protect the investment made by the American public in elections and does not honor the spirit of HAVA. This is the same position taken by the Congressional Research Service in an opinion provided by Representative Charles Gonzalez in June 2008, a copy of which was provided to the EAC.

The second area of concern relates to the aggregation of MOE expenditures permitted by the proposed policy. Simply stated, one unit of local government's expenditure on elections cannot be used to satisfy a deficit in spending by another or even by the state. Section 254(a)(2) of HAVA requires the states to monitor each of the local jurisdictions' efforts at compliance, including the distribution and use of HAVA funds to local governments for their use in meeting the HAVA requirements. Each unit of government that receives HAVA funds should be accountable for meeting the grant requirements and demonstrating that they have met the MOE requirements. This is consistent with information previously provided to EAC by the Office of Management and Budget in May 2008. The OIG would encourage the EAC to discuss this matter further with OMB.

The third instance in which the proposed policy deviates from HAVA is permitting states to depreciate or pro rate expenses for capital assets. The MOE requirement in HAVA requires the maintenance of all expenses, including those for capital assets. Furthermore, the MOE requirement was specifically intended to cover expenses for capital assets. MOE applies to expenses that are allowable under HAVA, including the purchase of voting machines and equipment for statewide voter registration databases. These are capital assets. To comply with HAVA, EAC should expect jurisdictions to maintain all covered expenditures, including those for capital assets.

In addition to these items, the proposed policy impinges on the authority of the Office of Inspector General and the independence of its audits. The proposed policy suggests that EAC approval of a state's plan would influence or limit audit findings. The proposed policy also would allow states to propose what are acceptable forms of documentation of expenses. The OIG conducts audits and issues findings based upon its assessment of state's compliance with HAVA, allowable use of HAVA funds, and the existence of appropriate supporting documentation for those expenses. EAC's action to approve a state's plan will not insulate a state from an audit finding if it is warranted. All appropriate findings will be reported and EAC will have the opportunity and responsibility to resolve those findings.

A copy of our comments have been provided with this testimony for your convenience of reference. (Attachment 1) The OIG encourages the EAC to consider these comments and to adopt a policy that comports with the letter and spirit of HAVA as well as other applicable laws, regulations and guidance. If you have questions regarding our comments or my testimony here today, I will be happy to try to address them.

ATTACHMENT 1

U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF THE INSPECTOR GENERAL
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April 19, 2010

Dr. Mark Abbott
Grants Director
U.S. Election Assistance Commission
1201 New York Ave, N.W., Suite 300
Washington, DC 20005

VIA HAND DELIVERY AND FACSIMILE TRANSMISSION 202-566-3127

RE: Comments on EAC's Proposed Maintenance of Effort/Expenditure Policy

Dear Dr. Abbott:

The following are the comments of the U.S. Election Assistance Commission (EAC) Office of Inspector General (OIG) to the proposed maintenance of effort/expenditure (MOE) policy posted by the EAC on its web site for public comment.

BACKGROUND AND OVERVIEW

The EAC is the grant-making agency with respect to the requirements payments authorized by the Help America Vote Act (HAVA). See 42 U.S.C. § 15401. One of the requirements related to that grant program is the requirement that states maintain their effort or expenditure at the same level as funds were expended for certain activities in the fiscal year preceding the November 2000 election for federal office.

> "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 to November 2000."

42 U.S.C. § 15404(a)(7). The MOE requirement is a condition precedent to a state receiving requirements payments funding. See 42 U.S.C. § 15403(a) and (b)(1); 42 U.S.C. § 15404(a). This provision is unique due to the availability of HAVA funds. The MOE provision creates an ongoing requirement to maintain effort for any year in which the recipient has and uses HAVA funds. Due to the fact that HAVA funds are "available until expended," the MOE requirement could impact recipients for many years. The EAC did not issue guidance or grant regulations interpreting the meaning of the MOE requirement, its application or penalties for non-conformance prior to the issuance of the requirements payments. However, by issuing an MOE policy the agency purports to guide the states in their efforts to comply with the MOE requirement. See EAC

Maintenance of Expenditure – PROPOSED Policy As Amended February, (sic) 19, 2010, question 3.

The comments submitted today by the OIG relate solely to the substance of the proposed MOE policy. These comments do not address the EAC's authority to issue or enforce such a policy or the appropriateness of EAC's procedure in adopting it. The OIG offers these comments to assist the EAC with identifying potential areas of inconsistency, to improve the process of evaluating states' compliance with the MOE requirement, and to provide the EAC with insight into the OIG's audit process as well as the duties and authorities of this office. The OIG's comments are not intended to be and should not be construed as an affirmation, approval or acceptance of EAC's proposed or final policy regarding maintenance of effort.

The OIG comments are organized by issue or concern. Each issue raised will identify the question number and substance of the proposed MOE policy that is impacted. For most, if not all of the concerns raised by the OIG, no proposed, alternative language is provided. It is the EAC's prerogative to develop and adopt policy language. The OIG merely offers comments and thoughts for consideration as EAC endeavors to adopt its final policy statement.

APPLICABILITY OF THE MOE REQUIREMENT

The EAC's policy includes a section on the application of the MOE requirement to grantees (states) and subgrantees (units of local government).

> **"4. Who is covered by this policy?**
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> This policy applies directly to the 50 states, four U.S. Territories and the District of Columbia (referred to as States) that are eligible to receive Requirements Payments. This policy may also impact "lower tier" recipients indirectly (see below). However, States are ultimately responsible for demonstrating compliance with MOE.
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> **6. Do States need to account for lower tier (local) spending during the base year in calculating MOE?**
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> MOE tracks State expenditures on a prescribed set of Federal election activities (see question 7), which includes any funds appropriated by the State to lower tier entities to support those activities. Under this MOE policy, States may exclude lower tier spending from MOE when the funds used by the lower tier entities are not derived from a State appropriation or expenditure."

EAC Maintenance of Expenditure – PROPOSED Policy As Amended February, (sic) 19, 2010, questions 4 and 6. As we read these sections, the calculation of the MOE baseline would not include expenditures of the units of local government, unless the units of local government had been appropriated funds for qualifying purposes from the state treasury in the base year. Likewise, the EAC's response to question 7, the EAC limits application of the annual MOE calculation to states and units of local governments that have received appropriations from the state.

> **"7. What types of expenditures must be used to calculate the MOE baseline amount and are eligible to count towards our annual MOE contribution?**
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> States must use all election expenditures that are allowable under Section 251 of HAVA, and that were funded directly by the State, or through a State appropriation to a lower tier entity in the base year, to calculate the baseline MOE. All allowable uses under Section 251 of HAVA, including: 1) purchase of voting equipment; 2) development and operation of a statewide voter registration list; 3) development and implementation of provisional voting for Federal elections; 4) provision of information to voters at the polling place on election day; 5) verification of information provided by persons seeking to register to vote; and, 6) improvement of the administration of elections for Federal office should be included in the baseline MOE.
>
> For example, State X appropriates $10 million for election activities eligible for funding under section 251 of HAVA. $2 million of the $10 million was appropriated to county Y to provide Federal provisional ballots on Election Day. The State's MOE is $10 million because it includes all funds appropriated to counties for that year as part of its aggregate MOE."

EAC Maintenance of Expenditure – PROPOSED Policy As Amended February, (sic) 19, 2010, question 7.

By interpreting the MOE requirement as applicable only to those units of local government that were appropriated funds by the state in the base year, the EAC has effectively limited the application of the policy to the state government and excluded most, if not all, of the units of local government. This determination is regardless of whether the state subsequently subgranted or subawarded requirements payments to units of local government. The impact of this interpretation would be to permit the subgrant or subaward of requirements payments to a unit of local government without requiring the subgrantee to abide by the MOE requirement and therefore ensure that spending on election-related, authorized purchases is increased by the grant of Federal funds. In other words, it would allow units of government to supplant local funding with Federal grant dollars. While the EAC may, in fact, have the authority to issue interpretative guidance

or interpretative rules regarding the application of HAVA's MOE requirement, the OIG submits that there may be a better choice of interpretation than the one currently advanced by EAC and one that more closely conforms to the purpose of the MOE provision, the legislative history, and the language of HAVA, itself.

Current Application Disregards Legislative History

When Congress passed HAVA in 2002, its members recognized the role of county and local governments in running elections. Congressman Ney in introducing the conference report before the U.S. House of Representatives made specific reference to the role of local governments and local election officials in administering the election process. He particularly pointed out the financial contributions made by both state and local governments to administer elections and touted HAVA as providing Federal financial assistance to share the financial burden of elections with these entities.

> "Our election system is dependent on tens of thousands of election officials and 1.5 million volunteer poll workers in over 7,000 jurisdictions serving over 150 million voters across this great county. In the general election for Federal office, all of these people come together during a 24-hour period to chose (sic) our leaders. It is an incredibly complicated process that must be choreographed precisely to ensure its success. This means that education and training is critical to the success of our election system. This legislation provides needed funds to complete that task across the United States.
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> * * *
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> While State and local governments have been charged with the responsibility for running elections for Federal office, they simply have received no assistance from the Federal government. This bill changes that.
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> * * *
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> The Help America Vote Act will provide Federal financial assistance to the tune of $3.9 billion in authorized funding over the next 3 years. We can no longer ask State and local governments to bear all of the expense without any assistance from us."

148 Cong. Rec. H7837-H7838 (daily ed., Oct. 10, 2002) (statement of Rep. Ney).

In addition, Congressman Ney recognized that states and local governments would be involved in implementing the changes that HAVA required and expending Federal funds to do so.

> "I would note that meeting the requirements of this act will not be cheap. If we want and expect State and local governments to meet the requirements we are imposing on them, we will have to provide the funding that will make it possible for them to do so. If we do not, we have done nothing more than pass another unfunded mandate to the States, and we do not want to do that. This bill will cause States and localities to fundamentally restructure their election systems in a host of tremendous ways. We need to provide the funding to make sure that happens.
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> * * *
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> Historically, elections in this country have been administered at the State and local level. This system has had many benefits that have to be preserved. The dispersal responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run and thereby be able to control the outcome. This leaves the power of responsibility for running elections right where it needs to be: in the hands of the citizens of this country. Local control has the further added benefits of allowing for flexibility so that local authorities can tailor their procedures to meet demands and unique community needs.
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> Further, by leaving the responsibility for election administration in the hands of local authorities, if a problem arises, the citizens who live within their jurisdictions know whom to hold accountable. The local authorities who bear the responsibility cannot now and not in the future be able to point the finger of blame at some distant, unaccountable, centralized bureaucracy.
>
> By necessity, elections must occur at the State and local level. One-size-fits-all solutions do not work and only lead to inefficiencies. States and locales must retain the power and the flexibility to tailor solutions to their own unique problems. This legislation will pose certain basic requirements that all jurisdictions will have to meet, but they will retain the flexibility to meet the requirements in the most effective manner."

148 Cong. Rec. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

The United States Senate, likewise, recognized the contributions and role that local election officials play in conducting elections. In his statement, Senator Dodd, introduced letters of support from various organizations, including the National Association of Counties. 148 Cong. Rec. S10417 (daily ed. Oct. 15, 2002) (statement of Senator Dodd) Similarly, Senator McConnell, a co-sponsor of the legislation, not only discussed the role that local election officials play but explained his personal experience as a local election official.

> "Nearly 2 years ago, this Nation had a painful lesson on the complexities and complications State and local election officials face in conducting elections. In response, legislators on both sides of the Hill introduced legislation to address the problems exposed in the 2000 election. The various pieces of legislation ran the gamut in approach and emphasis, but all were unified in their goal of improving our Nation's election systems.
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> The best way to achieve both of these goals is by establishing an independent, bipartisan election commission. The commission will be a permanent repository for the best, unbiased, and objective election administration information for States and communities across America.
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> And that is really important because what happens--I used to be a local official early in my political career--is that you are confronted with vendors selling various kinds of election equipment, and there is really no way to make an objective analysis of what your needs are. On the other hand, this new commission will be a repository for expertise and unbiased advice to States and localities across America about what kind of equipment might best suit their situation."

148 Cong. Rec. S10418-S10419 (daily ed. Oct. 15, 2002) (statement of Senator McConnell).

Based upon these statements, the members of Congress voting to approve and pass HAVA understood well the role that units of local government and their election officials played in conducting Federal elections and the role that they would play in implementing the requirements of this new piece of legislation. They anticipated that local governments financed elections prior to HAVA and that financial assistance provided under HAVA would be passed to local governments for purposes of fulfilling the requirements of this Act.

Current Application Frustrates the Purpose of MOE

Recognizing that units of local government have received and are spending HAVA funds as well as the fact that those local governments financed all or portions of the election administration function prior to the passage of HAVA, the EAC's interpretation of which grants and subgrants are subject to HAVA's MOE requirements fails to adequately protect the Federal investment in elections. Allowing states to subgrant funds to units of local governments without requiring that they maintain their prior election expenditures opens the door for local governments to divert local funds previously set aside for election functions to other needs. This could result in Federal dollars only maintaining, rather than increasing, spending on election administration.

The Government Accountability Office (GAO) has studied and reported on maintenance of effort provisions in various pieces of legislation.

> "When Congress wants to avoid this result [replacing state/local funding with Federal funding], a device it commonly uses is the "maintenance of effort" requirement. Under a maintenance of effort provision, the grantee is required, as a condition of eligibility for federal funding, to maintain its financial contribution to the program at not less than a stated percentage (which may be 100 percent or less) of its contribution for a prior time period, usually the previous fiscal year. The purpose of maintenance of effort is to ensure that the federal assistance results in increased level of program activity, and that the grantee . . . does not simply replace grantee dollars with federal dollars."

Government Accountability Office Principles of Federal Appropriations Law, Vol. II, Ch. 10, p. 10-102 and 10-103.

Because of the bifurcated nature of election funding (both at the state and local level), failing to pass HAVA's MOE requirement to the local units of government through the subgrant process would defeat the protections that MOE was intended to afford. A basic tenant of statutory construction is that a statute should not be read so as to render language meaningless or as mere surplusage.

> "A basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.'" (citing Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

Congressional Research Service Report for Congress, Statutory Interpretation: General Principles and Recent Trends (Aug. 31, 2008), p. 12.

By enacting a piece of legislation that both recognized the role of local governments in financing and operating elections and requiring that prior effort be maintained, Congress intended to protect the Federal investment in elections both at the state and local government levels. The current interpretation offered by the EAC ignores what was clearly contemplated by Congress: units of local government both spent money on elections prior to HAVA and would be required to expend HAVA funds to implement the newly imposed requirements. In order to give full effect to the language of HAVA and to fully protect the Federal investment in elections, EAC should interpret the MOE requirement to apply to both states and local governments.

Current Application Does Not Acknowledge Statutory and Regulatory Requirements

Both the language of HAVA, itself, as well as the provisions of the Office of Management and Budget Circular A-102 (Common Rule) appear to require that a requirement that applies to the state in the grant from EAC and through its state plan would flow through to the units of local government via a subgrant of those funds. HAVA permits subgrants of funds to the units of local government for purposes of carrying out the required and authorized activities. However, in doing so HAVA requires the state to monitor the performance of the units of local government in carrying out the state plan, which includes an MOE requirement.

> "(2) How the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in paragraph (1), including a description of --
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> (A) the criteria to be used to determine the eligibility of such units or entities for receiving the payment; and
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> (B) the methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed, consistent with the performance goals and measures adopted under paragraph (8).
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> (8) How the State will adopt performance goals and measures that will be used by the State to determine its success **and the success of units of local government** in the State in carrying out the plan, including timetables **for meeting each of the elements of the plan**, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met."

42 U.S.C. § 15404(a)(2) and (a)(8) (emphasis added). Likewise, the Common Rule requires that states making subgrants ensure that subgrantees are aware of requirements imposed by Federal statute.

> "(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:
>
> (1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed on them by Federal statute and regulation;
(3) Ensure that a provision for compliance with §105-71.142 is placed in every cost reimbursement subgrant; and
(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies."

41 C.F.R. §105-71.137.

The Congressional Research Service has opined based upon these provisions that it would be a permissible construction to read the MOE requirement to apply to subgrantees (units of local government).

> "There are two arguments that support the conclusion that when a state provides a subgrant to a political subdivision of the state under title II of HAVA , that the MOE requirement 'passes through' to the sub-grantee. The first argument stems from a reading of sections 254(a)(7) and (a)(8) of HAVA (footnote omitted). The first section imposes the MOE requirement on the states as a part of the State Plan. The second provision requires the states to hold units of local government accountable for complying with the provisions of the State Plan. The State Plan must contain a description of:
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> > How the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan,...
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> Under this section, units of local government are expected to carry out the State Plan, which includes a MOE requirement. Imposing a MOE requirement on localities as they expend HAVA funds is arguably a reasonable reading of section 254(a)(8). Such an interpretation also serves the purpose of assuring that HAVA grant funds do no supplant local funds. If the state MOE requirement does not pass through to localities when they expend HAVA funds, then states can replace local funding with federal funds and decrease total expenditures, thus thwarting the underlying purpose of an MOE requirement.
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> The second argument relates to the application of the Office of Management and Budget (OMB) Circular A-102 (the Common Rule), which imposes certain government-wide requirements on federal agencies that provide grants and cooperative agreements with a state and local governments. This circular requires federal agencies to adopt a grants management common rule so that the management of grants and

cooperative agreements with state and local governments is consistent and uniform among federal agencies. If the provisions of a specific grant program prescribe policies or requirements that differ from those in OMB Circular A-102, the provisions of the particular grant program will govern.

When states distribute HAVA funds under section 251 to counties or units of local government the Common Rule requires that the state MOE requirement pass through to the sub-grantees. The requirement that subgrants include federal requirements imposed on primary grantees is articulated in 41 C.F.R. §105-71.137(a):

> States shall
> (1) ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;
> (2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulations;...

Since federal requirements imposed on the primary grantee pass through to the sub-grantee, a strong argument may be made that the state MOE requirement must be adhered to by localities that receive a grant under title II of HAVA. Monitoring and documentation responsibilities remain with the primary grantee and are subject to audit by the EAC."

Memorandum from Congressional Research Service to Rep. Charles A. Gonzalez (June 12, 2008), p. CRS-5 (footnotes omitted).

EAC's proposed policy apparently does not address these provisions of OMB Circular A-102 (the Common Rule) and why the MOE requirement should not pass through to the subgrantee.

AGGREGATION OF MOE EXPENDITURES IS IMPROPER

In the current proposal, the EAC would allow states to aggregate the MOE expenditures of the state and any covered units of local government to determine whether the state, as a whole, has met the MOE requirement for a particular year. See EAC Maintenance of Expenditure – PROPOSED Policy As Amended February, (sic) 19, 2010, questions 11, 15, 16, and 20. The guidance proposed by EAC is in direct contradiction to guidance provided to the EAC in May 2008 by the Office of Management and Budget (OMB). In a May 15, 2008 meeting with officials from the OMB Office of Federal Financial Management, representatives from EAC were informed that the grant requirements including MOE flowed with the funds to local governments and that each individual unit

of local government was responsible for meeting its own MOE requirement.[1] One local government can not rely on expenditures of other local government entities to bridge a gap or shortfall in another's MOE spending.

While it is proper to look to the grant recipient to enforce grant requirements on all subgrantees, allowing aggregation of MOE expenditures for purposes of demonstrating meeting those requirements does not protect the individual requirement that states and local governments maintain their level of effort. HAVA requires that states choosing to subgrant funds monitor the performance of those subgrantees.

> "(2) How the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in paragraph (1), including a description of --
>
> (A) the criteria to be used to determine the eligibility of such units or entities for receiving payment; and
>
> (B) the methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed , consistent with the performance goals and measures adopted under paragraph (8)."

42 U.S.C. § 15404(a)(2). This requirement, particularly read in combination with the performance measurement requirements of paragraph (8), denote the State's responsibility to monitor each unit of local government and to hold accountable one or more officials for meeting those performance requirements.[2]

Each, individual unit of local government that receives and uses HAVA funds should be held accountable for demonstrating that they have met the grant requirements and maintained the same level of spending on authorized expenditures as was made in the fiscal year ending prior to the November 2000 election.

The EAC should consult with the OMB Office of Federal Financial Management to ensure that its policy is consistent with government-wide policy related to the administration of maintenance of effort and other grant requirements.

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[1] Attendees at this meeting included current and former EAC Commissioners and their assistants, staff from the EAC Office of General Counsel, staff from the EAC Office of Inspector General, staff from the EAC Grants Division, as well as the OMB budget analyst assigned to EAC, representatives from the OMB Office of Federal Financial Management and a representative of the OMB Office of General Counsel.

[2] Paragraph (8) requires: "How the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan, including timetables for meeting each of the elements of the plan, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met." See 42 U.S.C. § 15404(a)(8).

EAC'S ACCEPTANCE OR APPROVAL OF A STATE'S PLAN WILL NOT DICTATE WHETHER AUDIT FINDINGS ARE ISSUED

Statements contained in the current version of the EAC's proposed MOE statement would purport to impinge upon the independence of the audits conducted by the OIG. In questions 10 and 18, the EAC makes reference to the acceptance of approval of a state's plan for meeting MOE as impacting an audit subsequently conducted related to the state's compliance with the MOE requirement. While the state's plan may serve as a guide to evaluating the state's compliance with the MOE requirement, approval of such a plan will not insulate the state from findings related to MOE in audits conducted by the OIG.

The OIG is an independent division of the EAC. It is separately authorized to conduct audits of the EAC programs and operations, including all of its grant programs. See the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3 §§ 2, 6(a)(2). Audits conducted by the Inspector General must comply with the generally accepted government auditing standards. See 5 U.S.C. App. 3 § 4(b)(1)(A). Those standards require independence. As such, the OIG will neither sign off on nor consider the EAC's acceptance or approval of a state's MOE plan as dispositive of any determination of whether a state has complied with the MOE requirement of HAVA.

Although an audit program has not been developed with regard to auditing a state's compliance with the MOE requirement, it is likely that a state's approved MOE plan will be used as a guide to evaluate its compliance with the MOE requirement to the extent that the approved plan conforms to applicable Federal law and regulation. The language of HAVA and applicable Federal laws and regulations will control. Other documents that will be considered include grant award documents and applicable OMB circulars.

Audits encompass reviewing not only the policy or plan for compliance, but also how that plan is implemented. Any audit of a state's compliance with MOE will include an assessment of whether the state has implemented the approved plan in a manner that complies with the MOE requirement. Thus, EAC's approval of a state's MOE plan will not preclude findings related to the state's implementation of that plan or the MOE requirement as a whole.

Auditors will also consider whether the state has adequately documented the expenditures that establish the level of MOE from the base year as well as the expenditures in subsequent years that are submitted as MOE-qualifying expenditures. According to HAVA and government auditing standards, auditors will judge whether records are consistent with sound accounting principles and are sufficient to support MOE expenditures. See 42 U.S.C. § 15542(a). Despite the fact that EAC purports to allow states to define what is acceptable documentation of MOE, the OIG will not consider those designations binding in evaluating the ability of the state to support its expenditures.

The EAC's proposed policy is correct in stating that EAC will ultimately resolve audit findings; however, neither the state by submitting an MOE plan nor the EAC by approving it will limit the scope or result of an audit conducted by the OIG.

DEPRECIATION OF CAPITAL ASSETS IS NOT ALLOWED BY LAW

The proposed EAC policy would allow states who had MOE base-year capital expenditures to depreciate the value and application of those expenditures on the same schedule that the IRS allows depreciation of the same items for tax purposes. While this approach may allow a state to avoid an apparent penalty for having made capital expenditures in the base year, it is not supported by the plain language of HAVA.

HAVA requires that the grantee maintain the same level of expenditure as was made in the base year, not some portion of that expenditure.

> "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 to November 2000."

42 U.S.C. § 15404(a)(7). Furthermore, HAVA requires that MOE include expenditures in the base year that would otherwise have been allowable grant expenditures. Many of these expenditures are by definition for capital assets. HAVA allowable expenditures include the purchase of voting equipment (42 U.S.C. § 15481), state-wide voter registration lists which involve large computer equipment purchases (42 U.S.C. § 15483), and other expenditures on capital assets such as warehouses, vehicles, and improvements to office buildings that have been specifically allowed by the EAC. See FAO-09-08; FAO-09-04; and FAO-09-09.

The EAC is not at liberty to waive a portion of the MOE commitment. There is no statutory authorization to do so. GAO has recognized that other statutes confer this authority in certain instances, but that when there is no statutory authority to waive compliance, the agency must require compliance and repayment, as necessary.

> "Some maintenance of effort statutes authorized the administering agency to waive the requirement for a specified time period if some natural disaster or other unforeseen event caused the shortfall....
>
> * * *
>
> If a grantee fails to meet its commitment and the noncompliance cannot be waived, any disbursement of federal funds in excess of the amount permitted by the program statute must generally be recovered. 51 Comp. Gen. 162 (1971). Failure to require repayment of such funds 'would, in

> effect, constitute the giving away of United States funds without authority of law.' *Id.* At 165."

Government Accountability Office Principles of Federal Appropriations Law, Vol. II, Ch. 10, p. 10-104 and 10-105.

Allowing for the reduction of MOE expenditure requirement on a depreciation schedule as proposed by the EAC is tantamount to a waiver of a portion of the MOE requirement. There is no statutory authority for EAC to do this and EAC cannot give away Federal funds in this manner.

USE OF INAPPROPRIATE TERMINOLOGY

In question 22 and its response, the EAC's proposed language misuses the phrase "fiscal year" in comparison to the wording of the MOE requirement in HAVA. The current language of question 22 and its response is:

> **"22. How do States establish a baseline MOE when the year before FY 2000 was not an election year and the election administration costs in that year were lower than in an election year?**
>
> HAVA is clear that the timeframe for setting the baseline MOE is the year before November 2000."

The use of "FY 2000" in the question is inconsistent with the language of the MOE requirement which states that the baseline year is the fiscal year preceding the November 2000 election. See 42 U.S.C. § 15404(a)(7). The question should state "...when the fiscal year before November 2000...." Likewise, the response should use the phrase "fiscal year" and not "year" in order to be consistent with the MOE requirement contained in HAVA.

CONCLUSION

The OIG believes that the proposed policy is a step in the right direction. Guidance to the states is critical to having them understand and comply with the MOE requirement. The OIG asks that the EAC consider the comments that it has offered to improve and clarify the intent and effect of the guidance that it is giving to states and local governments regarding the MOE requirement.

As always, the OIG is willing and available to discuss these comments and the EAC's proposed MOE policy.

Sincerely,

Curtis Crider
Inspector General

cc: The Honorable Donetta Davidson, Chair
The Honorable Gineen Bresso, Commissioner
The Honorable Gracia Hillman, Commissioner