United States Election Assistance Commission
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Washington, DC 20005

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New Hampshire Department of Justice, Assistant Attorney General James Kennedy's Written Statement in Support of National Association of Secretary of States' July 19, 2009 Resolution Regarding Grant and Payment Distinction

James W. Kennedy
Assistant Attorney General
N.H. Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3650

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I. INTRODUCTION

The State of New Hampshire has successfully implemented the applicable provisions of the Help America Vote Act of 2002 ("HAVA") through its proper allocation of HAVA payments. To date, through use of its HAVA payments, New Hampshire has: (1) created a centralized, statewide voter database; (2) provided accessible voting equipment in every polling place within the State; (3) conducted statewide election official and poll worker training; and (4) established administrative complaint procedures to remedy grievances and reporting absentee ballot statistics. Notably, New Hampshire has accomplished these tasks without exhausting its supply of HAVA funds. The balance of HAVA funds is held by the State to be used in conformance with the requirements of the HAVA statute consistent with the goals and objectives of HAVA.

II. BACKGROUND

Congress enacted HAVA and created the Election Assistance Commission ("EAC") to assist States in improving the administration of federal elections. See 42 U.S.C. 15301, section 101. Under HAVA, Congress issued payments to the States under Title I, wherein the Administer of General Services made a payment to each State to fulfill the activities identified under that Title. Id. Congress also issued payments to the States under Title II of HAVA, wherein it created the EAC to "make a requirements payment each year in an amount determined under section 252 to each State which meets the conditions described in section 253 for the year." 42 U.S.C. 15401, section 251 (a). Additionally, Congress made payments available to States under section 261 of Title II. 42 U.S.C. 15421, section 261. In addition to making payments available to the States, Congress made grant opportunities available for which entities could apply. See 42 U.S.C. 15441, sections 271 – 295.

With respect to both the issuance of payments and grants, Congress requires that "[e]ach recipient of a grant or payment made under this Act shall keep such records . . . as are consistent with sound accounting principles." 42 U.S.C. 15542, section 902 (a). Congress also authorized the "office" making a grant or payment to audit or examine the recipient of such a grant or payment made under HAVA. 42 U.S.C. 15542, section 902 (b)(1). As part of an audit or examination, Congress permits the office making the grant or payment to review records relating to HAVA payments. Id. It does not provide any authority for the office conducting the audit to perform any other function than review of the relevant payment or grant records.

Congress similarly requires the Comptroller General to conduct a mandatory audit "at least once during the lifetime of the program involved." 42 U.S.C. 15542, section 902 (b)(3). Congress further directed the Comptroller General to recoup funds if it is determined that the grant or payment was not used in compliance with the requirements of the program under which the funds were provided. See id., section 902 (c)(1).

In a letter dated January 30, 2006, from the Government Accountability Office, General Counsel Anthony H. Gamboa to EAC, Acting Inspector General Roger La Roche, General Counsel Gamboa advised that section 902 (c) only applies to "Comptroller General audits conducted under 902(b), not to other audits conducted under section 902(b) or other authorities." See N.H. Ex. 1. General Counsel Gamboa further advised that in conducting audits under 902(b), the General Comptroller is not restricted to 902(c). Id. General Counsel Gamboa did not advise the EAC that it had authority to audit outside the scope of HAVA or to perform any other function than review relevant grant or payments records as set forth in section 902(b)(1). See id.

Nevertheless, in various EAC publications, the EAC has seemingly adopted auditing rules outside HAVA relative to its section 902(b) audit function. In 2004, the EAC adopted

rules relative to its auditing function under section 902(b), which stated that the following Office of Management and Budget guidelines apply to these federal funds:

- A-87 – Cost Principles for State, Local and Indian Tribal Governments (Cost Principles)
- A-102 – Grants and Cooperative Agreements with State and Local Governments (Administrative Requirements).
- Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ("Common Rule")
- A-133 – Audits of States, Local Governments, and Non-Profit Organizations.

See N.H. Ex. 2, July 13, 2004 EAC Letter to Secretary of State William Gardner.

More recently, in its performance audits of States that received HAVA payments, the EAC advises that it requires States to comply with certain financial management requirements, specifically:

- Comply with the Uniform Administrative Requirements For Grants and Cooperative Agreements With State And Local Governments (also known as the "Common Rule") as published in the Code of Federal Regulations 41 CFR 105-71.
- Expend payments in accordance with cost principles for establishing the allowance or disallowance of certain items of cost for federal participation issued by the Office of Management and Budget ("OMB") in Circular A-87 (2 CFR 225).
- Submit detailed annual financial reports on the use of Title I and Title II payments.

See N.H. Ex. 3, May 4, 2009 Clifton Gunderson, LLP Performance Audit (on behalf of EAC) of the Administration of HAVA Payments Received by the State of Oregon.

By way of further example, as set forth on its website, in a section entitled, "Frequently Asked Questions," the EAC states:

> In addition to the restrictions on the uses of funds imposed by HAVA, when these funds were distributed by the General Services Administration (GSA) or the EAC, those funds were made subject to several circulars developed by the Office of Management and Budget, specifically OMB Circulars A-87 . . . .

Additionally, the EAC has in several of its publications characterized "payments" as "grants" and "grants" as "payments." For instance, in the following EAC publications, the EAC has characterized HAVA requirements payments and/or payments as grants:

- July 22, 2008 memorandum from EAC Office of General Counsel to Curtis Crider, Inspector General, N.H. Ex. 4;
- August 21, 2008 letter from EAC Director Thomas Wilkey to Steven Bradley, Office of Legal Counsel, U.S. Department of Justice, N.H. Ex. 5;
- August 22, 2008 letter from EAC Director Thomas Wilkey to New Hampshire Secretary of State William Gardener, N.H. Ex. 6;
- March 18, 2009 letter from EAC Director Thomas Wilkey to New Hampshire Assistant Secretary of State Anthony Stevens, N.H. Ex. 7.

On July 19, 2009, the National Association of Secretary of State ("NASS") passed a resolution by unanimous consent finding that:

> 1. Under HAVA, a "payment" is not a "grant," and a "grant" is not a "payment;" and
>
> 2. In effectuating its duties under HAVA, the EAC should create an accurate administrative record by using the term "payment" when the federal law means "payment," and it should use the term "grant" when the federal law means "grant."

III. DISCUSSION

A. The EAC Does Not Have Authority to Implement Rules Relative to Auditing States Under HAVA Section 902(b).

In conducting audits of grants or payments, the EAC has no rule-making authority. Section 209 of HAVA expressly provides:

> The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State

> or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993.

Therefore, in performing its auditing functions, the EAC must act in accordance with the express statutory provisions of HAVA, *i.e.*, section 902. Under this section the EAC "shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient which in the opinion of the entity may be related to or pertinent to the grant or payment." Section 902(b)(1). This is the extent of the EAC auditing authority. It cannot make any rule that "imposes any requirement on any State or unit of local government." Section 209.

For instance, the EAC in performing its auditing function under section 902(b) is not permitted to enact or otherwise adopt rules to perform that function. Rather, the EAC is restricted to audit relevant HAVA payment or grant information which States or other entities possess. Blacks law dictionary defines audit as "a formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards." Blacks Law Dictionary, Seventh Ed. 2000. Audit does not mean to create rules outside of one's delegated authority to review accounting records.

B. EAC Adoption of Rules Outside HAVA is Inapplicable to its Audit Function under Section 902(b).

Notwithstanding the prohibition against the EAC implementing rules, as set forth above, it has enacted and seemingly adopted auditing rules relative to its section 902(b) audit function. The Federal Administrative Procedure Act ("APA") defines "rulemaking" "as an agency process for formulating, amending, or repealing a rule." 5 U.S.C.A. § 551(5). A "rule" is defined in the APA "as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the

organization, procedure, or practice requirements of an agency." 5 U.S.C.A. § 551(4). The EAC actions described above qualify as administrative rules as they describe the EAC's section 902(b) auditing requirements. These rules expand the scope of the EAC's auditing function, which are of course made outside the scope of its statutory authority to audit States under HAVA. This action constitutes an administrative rule contrary to section 209 of HAVA.

In applying the rules outside HAVA to its audit review of States which received payments under Sections 101, 251 and 261 of HAVA, the EAC has added a requirement that does not exist in HAVA and has engaged in improper rulemaking. Adding a requirement to an existing statute and duly promulgated regulations without going through the proper rulemaking notice and comment procedures is a violation of the APA. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997), *cert. denied* 523 U.S. 1003 (1998). "[A]n interpretation that is 'additive to the regulation' rather than interpretive, or that spells out a requirement that is 'not fairly encompassed' by the regulation, is a substantive rule change that is invalid unless adopted through notice-and-comment rulemaking." Id. (cited in Nebraska Dept. Health and Human Svcs. v. United States Department of Health and Human Svcs., 340 F. Supp.2d 1 (D.D.C. 2004), remanded on other grounds, 435 F.3d 326 (U.S. App. D.C. 2006)). Moreover, pursuant to the APA, federal courts are instructed to "hold unlawful and set aside ... arbitrary [or] capricious" agency action. 5 U.S.C. § 706(2)(A) (2006 ed.).

Under HAVA, the EAC cannot comply with the APA because it does not have the authority to promulgate rules. In adopting rules outside HAVA to its audit review, the EAC has stepped outside its statutory mandate.

As noted above, in a letter dated March 18, 2009, EAC Executive Director Thomas Wilkey advised New Hampshire Assistant Secretary of State Anthony Stevens that the "audit

and recovery provisions in section 902 [of HAVA] are not the exclusive authority for the audit funds." N.H. Ex. 7. This is incorrect. The EAC has no rulemaking authority, and therefore, in conducting its audits under section 902(b), it is confined to HAVA.

Moreover, General Counsel Gamboa advised the EAC that section 902(c) only applies to "Comptroller General audits conducted under 902(b), not to other audits conducted under section 902(b) or other authorities," *i.e.*, not to the EAC. To the extent that the Comptroller General may enact rules relative to performing its auditing function under HAVA, such authority clearly is wholly inapplicable to the EAC 902(b) auditing function, as the EAC has no rulemaking authority.

Thus, there is no basis to support the EAC's adoption of rules in performing its section 902(b) audit function under HAVA.

C. The EAC's Characterization of Payments as Grants and/or Grants as Payments is in Error.

In enacting HAVA, Congress expressly used the terms "payments" and "requirements payments." See Sections 101, 251, 261. Congress also used the term "grants" and authorized the EAC to award "grants" under Section 271 through 295. Congress did not intermingle the two terms or indicate that one term could be used for the other.

Under the principles of statutory construction, Congress' use of the term "payments" in Sections 101, 251 and 261, and not in Section 271 through section 295, where it used the term "grant," is significant. "Where the Legislature uses the same words in several sections which concern the same subject matter, the words must be presumed to have been used with the same meaning in each section." Med. Prof'l Mut. Ins. Co. v. Breon Labs., Inc., 141 F.3d 372, 377 (1st Cir. 1998) (internal quotation omitted); see also United States v. Nippon Paper Indus. Co., LTD, 109 F.3d 1, 4-5 (1st Cir. 1997).

Under HAVA, Congress used the term "grants" in relation to specific activities, see sections 271-295, and "payments" in relation to other specific activities, see sections 101, 251, and 261. Had Congress intended to apply the same meaning to "payments" and "grants" it would not have expressly segregated the two terms throughout HAVA. Id. Thus, under HAVA, a "payment" is not a "grant," and a "grant" is not a "payment."

With specific reference to EAC adoption of OMB A-87 Circular, it has seemingly applied this rule to HAVA payments. Attachment B, 15(1) of OMB A-87 provides that "[c]apital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except where approved in advance by the awarding agency." On its website, in a Power Point format, the EAC has a section entitled, "Managing, Reporting and Proper Record Keeping of Funds Received Under the Help America Vote Act of 2002." See http://www.eac.gov/election/hava-reporting. On page forty-two (42) of that Power Point, the EAC has declared:

States Must request PRE-approval for:

1. Capital Expenditures over $5000 . . . .

2. ALL expenditures related to renovations or purchases of real property.

To the extent that this assertion is meant to apply to HAVA Sections 101, 251 and 261 payments, it is in error. Again, under section 209, the EAC has no rulemaking authority. Its authority to audit States' use of payments is restricted to HAVA.

Even if the EAC has the authority to go outside HAVA to perform its audit function under section 902, the "Purpose" section of the OMB Circular A-87 specifically states that it applies to "Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments . . . ." Emphasis added. OMB Circular A-87

defines "award" as "grants, cost reimbursement contracts and other agreements between a State, local and Indian tribal government and the Federal Government." See Attachment B, Section 15. OMB Circular A-87 does not relate to "payments."

Assuming Congress meant for the EAC or any auditing authority under HAVA to subject States to OMB Circular A-87 it would have used the term "grant" in sections 101, 251 and 261. However, where HAVA provides federal money to the States in Sections 101, 251 and 261, it expressly used the term "payments" and not "grants," thereby eliminating the OMB Circular A-87 from the auditing process.

Even in Section 902 of HAVA, where Congress authorizes the "office" making a grant or payment under this Act to "audit and examine any recipient of a grant or payment . . . ," an express categorical distinction is made between "grant" and "payment." Because HAVA payments to the States are not awards, *i.e.*, grants, cost reimbursement contracts and other agreements between a State and a federal agency, to the extent that the OMB Circular A-87 could apply to HAVA "grants," there is no argument that it applies to HAVA "payments."

Moreover, it is clear that OMB Circular A-87 applies where there is an "awarding agency." The EAC and its predecessor, the Administrator of General Services ("AGS"), had no discretion to "award" States payments under HAVA. Rather, HAVA mandated that States receive payments in accordance with the provisions outlined in the Act. Thus, the EAC and the AGS are not awarding agencies under HAVA.

Simply said, OMB Circular A-87 applies to "awards" - not "payments" and the EAC does not have the statutory authority to enact a rule which says otherwise. Therefore, the EAC cannot, pursuant to OMB Circular A-87, require that States request pre-approval for capital

expenditures over $5000 and all expenditures related to renovations or purchases of real property.

IV. CONCLUSION

Accordingly, for the reasons set forth above, the EAC does not have the statutory authority to apply rules outside HAVA when performing its section 902(b) function in auditing States. Moreover, the EAC use of the term "grants" for "payments" and "payments" for "grants" is wholly inappropriate as the two terms are expressly distinguishable in HAVA.

WHEREFORE, for the reasons stated herein, the State of New Hampshire respectfully requests that this Honorable Commission:

A. Affirm the July 19, 2009 NASS Resolution relative to the distinction between payments and grants;

B. Restrict the EAC's section 902(b) auditing function of States to HAVA; and

C. Grant such other and further relief as justice may require.

Respectfully Submitted,

Michael J. Delaney, N.H. Attorney General
OFFICE OF THE N.H. ATTORNEY GENERAL

August 31, 2009

/s/ James W. Kennedy
James W. Kennedy
Assistant Attorney General
N.H. Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3650

APPENDIX

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Exhibit