



**U.S. ELECTION ASSISTANCE COMMISSION  
1225 New York Ave. NW – Suite 1100  
Washington, DC 20005**

MEMORANDUM

TO: Commissioner Hunter

CC: Commissioner Hillman, Commissioner Rodriquez,  
Commissioner Davidson, Executive Director Wilkey

FROM: Gavin Gilmour

DATE: April 14, 2008

RE: **Proposed MOE Policy Change**

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On April 9, 2008, Commissioner Hunter forwarded an e-mail inviting staff to comment on a proposal to amend the Election Assistance Commission's (EAC) present policy on Maintenance of Effort (MOE). This memorandum provides comments on that proposal.

The Office of the General Counsel (OGC) has concerns with the proposal, which are outlined below. Our concerns cover a variety of issues including: challenging the assumption that the term "State" used in Section 254(a)(7) of HAVA is unambiguous, outlining important legal and policy factors that must be considered when interpreting the MOE requirement, and identifying applicable implementation concerns. The most significant concern is that the proposal conflicts with HAVA's requirement that States hold units of local government accountable for meeting the requirements of the State Plan, including MOE. See Section 254(a)(8) of HAVA.

Before these concerns are addressed it is important to provide background with regard to the current policy and the proposal.

**BACKGROUND**

MOE is a means by which Congress and thereby the Federal Government requires States to share in the expense of funding a particular endeavor. Specifically, MOE requirements are used to assure that the Federal funding actually increases the amount of funding to a particular program or task.

Section 254(a)(7) of the Help America Vote Act of 2002 (HAVA) creates a requirement that States maintain the effort or level of funding that each State expended in the fiscal year preceding November 2000. It does this by requiring each State's State Plan to include:

(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 to November 2000.

MOE, then, is a baseline number (dollar amount) that reflects what the grantee previously expended for certain election administration costs. States are required to maintain this amount of expenditure in addition to spending HAVA funds. What is at issue between the current EAC policy and the proposal is what this baseline amount includes.

The current EAC policy regarding MOE is contained in EAC Advisory 07-003A. That policy, in pertinent part, requires States to include the expenditures of its local governments when calculating its MOE. The proposal to change the current policy would require the Commission to strike any reference "which requires county and/or local governments to comply with maintenance of effort requirements."<sup>1</sup> As we understand it, the purpose of the proposal is to limit the application of MOE to the States by excluding the expenditures of its political subdivisions from the calculation of the based MOE amount. According to the proposal, this change reflects the language of HAVA. In essence, the proposal tacitly rejects the present EAC policy's more inclusive definition of the term state (one of the 50 constituent sovereign units of the United States and the entities identified at 42 U.S.C. §42 U.S.C. §15541, including all subordinate governmental subdivisions therein—such as counties and other local bodies).

## **SPECIFIC CONCERNS**

**I. The Term "State" is Ambiguous.** The proposal is based primarily on the proposition that the meaning of the term "State" in HAVA §254(a)(7) (42 U.S.C. 15404(a)(7)) is unambiguous and should be read to exclude a State's county and local bodies from the calculation of its MOE. OGC does not agree that the term is unambiguous, consistent with the following.

a. States do not agree on the meaning of "State." Perhaps the most compelling information regarding the question of ambiguity is based on the plans submitted by the States to obtain HAVA funding. According to State plans filed with the EAC, it appears that approximately half (23) of the States read the term at issue consistent

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<sup>1</sup> It is important to note that the phrasing of the proposal (strike any reference "which requires county and/or local governments to comply with maintenance of effort requirements") seems inconsistent with the language of the current policy. This, at a minimum creates implementation concerns that are discussed below.

with EAC's present policy, including county and local expenditures as part of a State's MOE. The lack of agreement among the States indicates that the term *is* ambiguous and was subject to more than one interpretation.

b. EAC Commissioners do not agree on the meaning of "State." By proposing a change, it is evident that the EAC Commissioners do not agree on the meaning of "State." The interpretation of the proposal is in direct opposition to EAC's present policy (EAC Advisories 07-003 and 07-003A). The present policy was unanimously adopted by a vote of the EAC commissioners, including the interpretation of the meaning of State with Section 254(a)(7) of HAVA. In fact, the commissioners voted affirmatively on the matter twice, as the policy was clarified and updated in September of 2007. It seems problematic to maintain that a term is unambiguous when the very existence of a proposal to change the policy demonstrates that the EAC Commissioners may not agree on a definition previously adopted.

c. HAVA is inconsistent in its use and interpretation of "State." The term "State" is used throughout HAVA, including the part at issue (Title II, Subtitle D, Part 1, *Requirements Payments*). A review of the term's use demonstrates that it was employed with a variety of meanings, including the broader definition (State and local governments) rejected by the proposal. Given the various uses of the term in HAVA, it is problematic to suggest that it has an unambiguous, plain meaning in the present context. For example (looking at Title II, Subtitle D, Part 1, *Requirements Payments*):

- With respect to a State's certification in 42 U.S.C. §15401(b)(2), in order to use funds for "other activities" a State must certify that "the State has implemented the requirements of Title III." Certainly, one does not read the use of the term "State" here to imply that the county and local governments played no role in compliance with Title III. A quick review of HAVA requirements for State Plans clearly demonstrates that implementation of Title III is expected to be accomplished by all units within a State (including local government).
- Another example is found in the next section of the Part (42 U.S.C. §15402(d)). In determining a State's allocation of Requirements Payments "the voting age population of the State" must be considered. Here "State" must be read to have its broadest meaning, all residents within the geographic boundary of a state.
- The term State takes on yet another meaning in HAVA §253(b)(5) (42 U.S.C. 15403(b)(5)). This section requires that the State "appropriate" matching funds. Clearly, this use of "State" is specifically referencing a State's legislative body as only the legislative body can appropriate funding.

d. The Proposal's "Unambiguous" Interpretation Conflicts with HAVA's State Plan Requirements. As discussed in more detail, below, other paragraphs within the Section at issue require that MOE include the expenditures of a State's local

governments. Specifically, 42 U.S.C. 15404(a)(8) requires States to monitor “the success of units of local government in the State in carrying out the [State P]lan.” This includes the State Plan requirement for MOE found in the preceding paragraph.

**II. HAVA explicitly requires that MOE requirements include the expenditures of local governments.** HAVA § 254, *State Plan* (42 U.S.C. 15404) requires that a State include the expenditures of its local governments in determining MOE. This section dictates the contents of a State Plan; placing a number of requirements on States and outlining how the State will use and oversee its Requirements Payments while implementing HAVA. It is from this section that the MOE requirement emerges. (42 U.S.C. 15404(a)(7)). It is also in this section (the next paragraph--§254(a)(8)) that we find the requirement that States hold units of local government accountable for meeting the requirements of the State Plan, including MOE. This passage requires that the State Plan contain a section regarding:

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)(8), emphasis supplied).

In this section, State and local governments are independently identified, and each is expected to play a role to “carry out the plan.” Specifically, **HAVA requires the State to monitor “the success of units of local government in the State in carrying out the plan.”** The plan, as noted in the preceding paragraph, explicitly includes the MOE provision. (42 U.S.C. 15404(a)(7)). **The bottom line is that HAVA requires the State to ensure that units of local government are successfully implementing the State Plan, including the plan’s MOE requirements.** Given this fact, the proposed policy contradicts the plain meaning of HAVA.

**III. Interpretation of the meaning of “State” must account for the purpose of MOE.** Any interpretation of the MOE provision should include consideration of the overall purpose of MOE. “The purpose of Maintenance of Effort is to ensure that the federal assistance results in an increased level of program activity, and that the grantee... does not simply replace grantee dollars with federal dollars.” GAO Redbook, GAO/OGC-92-13, Appropriations Law – Vol II, Page 10-67. Thus, for the purposes of HAVA, MOE is intended to ensure that in each State the non-federal money expended for Title III activities does not decrease because of the addition of Federal money. In other words, MOE ensures that federal assistance

funding is not used to supplant grantee money, but represents an increase in overall expenditures.

In determining how EAC defines MOE, the Congressional purpose must be considered. Providing an interpretation that would allow some States to decrease the relevant pre-Federal election expenditures is unacceptable. In fact, because some States historically expend most election funding at the local level, the proposed policy would have the effect of thwarting the purpose of MOE for these States. Such a reading may almost entirely remove MOE requirements for some States, allowing them to simply replace local funding with Federal and decrease total expenditures. The proposal has the additional problem of treating States differently, which is discussed below.

**IV. The proposal would treat States unequally.** The proposed amendment to the current MOE policy would limit what is included in a State's MOE requirement, by excluding the relevant expenditures of units of local government. Limiting MOE in this way will result in inequitable treatment of the various States and of the counties, cities and municipalities that are subgrantee recipients of the funds.

In the arena of elections, funding is made available from various sources (State, county and/or local) to fund the equipment, processes and operation of elections. Some States provide and maintain all of the voting equipment, the Statewide voter registration database, and have a hands-on approach to managing elections in each of its counties, cities, towns, etc. Some states operate on the other side of the spectrum as well, where all equipment is purchased, maintained, and operated by a subdivision of the State, such as a county, city, municipality, town, or township. If EAC does not include the expenditure of local governments in the definition of what constitutes a State's MOE, the resulting policy would penalize States that centralize election management at the State level. Such an application would mean that decentralized States (whose counties and municipalities primarily fund elections) would have a lower total MOE. Such an approach does not accurately reflect the cost of election administration or the purpose of MOE (as discussed above). Decentralized States would report little or no MOE and could then use Federal funding to supplant county and/or local funding, which was previously used to support elections.

In applying HAVA's MOE provision, EAC must strive to ensure that its interpretations do not treat States unequally or unfairly. The proposed change has no policy impact other than reducing MOE for certain states. To the extent that this policy is seen as encouraging a particular State election management system (centralized or decentralized), EAC's actions would also be inappropriate as it is not for the EAC to decide which system of state management is best.

**V. OMB Circular A-102 (Common Rule) requires that statutory requirements are made a part of any subgrant of funds.** OMB Circular A-102 (the Common Rule) establishes the administrative procedures required of States, local and Indian

governments that are issued grants by the Federal government or are subgrantees of Federal funds. See 41 C.F.R. 105-71.100, *Purpose and Scope of this Part*. As part of those administrative requirements, the Circular prescribes the rules that apply to subgrants made by States to local governments:

### **Subgrants**

(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:

- (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 regulation;**
- (3) **Ensure that a provision for compliance with ‘ \_\_\_\_ .42 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(a), emphasis supplied

Maintenance of effort is a requirement of the grant made to States pursuant to Section 251 of HAVA. As such, when a State makes a payment to a local jurisdiction such as a county, city, town or other municipality, this requirement must be communicated to the subgrantee and the subgrantee must conform to the requirement. EAC’s present policy is consistent with this requirement. Moreover, even if the EAC adopts the proposal, units of local government receiving HAVA funding (subgrantees) will be required to demonstrate compliance with the statutory requirements imposed upon the original grantees (States), including MOE.

**VI. The proposal is inconsistent with EAC’s decision on matching funds.** In considering whether to change EAC’s interpretation of MOE, the commissioners must consider other policies that would be affected by the interpretation. Matching funds are another cost sharing tool Congress uses (like MOE) to ensure that Federal funds are not used to supplant grantee funds. In EAC Advisory 05-001, the EAC determined that a State could apply local government expenditures toward meeting its obligation to provide matching funds under Title II of HAVA.

The matching funds advisory is fundamentally inconsistent with the MOE proposal. If the proposal is adopted and the expenditures of local governments may not be considered in determining a State’s obligatory spending under MOE, then it must follow that such expenditures may also not be credited to the State to fulfill the State MOE or matching fund requirements. The bottom line is that states cannot have it both ways, if the expenditures of local governments shall not be counted as

an obligation, they also may not be counted as a credit. If the EAC chooses to amend its MOE policy, it must also amend its matching fund policies. This will require many States to return to their legislatures and appropriate new moneys for the Election Fund as required by Title II of HAVA.

**VII. Problem Language in the Proposed Policy.** Notwithstanding the above, the proposed policy, as written, proffers a fundamental misstatement regarding EAC's original MOE advisory. The proposed policy's recommendation requests the Commission strike any reference "which requires county and/or local governments to comply with maintenance of effort requirements." EAC's present policy places no such requirements on county and/or local governments. Question 4 in the present policy states:

***Question 4: How should States document that they have maintained their effort?***

***Response 4: The first step in documenting MOE is to determine the base level of expenditure in the State fiscal year preceding November 2000 (base year). This number should be derived by examining the State and county or local government spending on HAVA funded activities during the base year. These activities include:***

- *Purchasing voting equipment;*
- *Developing, operating and/or maintaining a list of registered voters who are eligible to vote in Federal elections;*
- *Providing information to voters at the polling place on Federal elections;*
- *Implementing and/or operating a system of provisional voting during Federal elections;*
- *Verifying voter registration information using other Federal, State, county or local data;*
- *Other activities that improve the administration of elections for Federal office.*

*Once a base level of expenditure is obtained, the State can demonstrate that it has maintained its effort by providing documentation that shows that the State spent the same amount of money (base level of expenditures) on any election-related activities during any Federal fiscal year in which the State had and used requirements payments distributed under Title II of HAVA.*

*A State can also demonstrate that they have maintained their effort by documenting the same or greater level of expenditures as the base level of expenditure in each year that the State had and used requirements payments. (Emphasis added)*

The policy was amended by unanimous vote of the commissioners to further clarify this point. Question 7 in the present policy States:

***Question 7: Are counties responsible for proving their own compliance?***

***Response 7: Ultimately, documentation should be available for audit from each of the counties showing that the MOE requirement has been met. However, EAC will work through its grantee, the State, to determine whether the counties have met the requirement.***

The EAC's current policy holds the grantee (the State) responsible for the expenditure of HAVA funds. These funds may ultimately be expended by a variety of state agencies and political subdivisions, including county, city and other local governments, but it is the state that must ensure compliance with MOE. The grantor (the EAC) remains responsible for ensuring that HAVA funds are expended consistent with HAVA and that records are properly kept for auditing purposes in all circumstances. The EAC has the authority to audit such records wherever they reside. 42 U.S.C. §15542(a) – (b)(2); 41 C.F.R. §105-71.137 & §105-71.140 (Common Rule).

It is, in fact, impossible to hold a particular county responsible for complying with MOE, as the requirement applies to total expenditures, statewide. The fact that a particular county spent less state funding (as defined in the present policy) in a given year than it did in the MOE base line year ending FY 2000 (see 42 U.S.C. 15404(a)(7)) is irrelevant as long as the total amount of state expenditures is equal to or greater than those of the MOE baseline.

**VIII. Implementation Concerns.** The proposal policy creates implementation problems. First, it attempts to strike references that the policy is applicable to local governments, when the policy does not have that effect. Beyond this problem is a greater concern. The proposal does not accurately describe what portions of the existing policy are to be stricken. The proposal speaks in negatives, noting only what should not be included in a definition or policy. It does not provide a new working definition or a new policy statement.

Given that the agency may, in adopting this proposal, be reversing several previous policies, it is vital that this action is performed with precision and does not create additional uncertainty and confusion. If the proposal is adopted, the old policy will still have to be reviewed and amended by staff. In addition, based upon the proposal's lack of clarity the revised policy may have to be voted on by the commissioners before it may be implemented. Although changing the existing policy is not recommended, if this action is taken it should be done by issuing a replacement policy or amending the existing policy in detail.