



U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF INSPECTOR GENERAL
1225 New York Ave. NW - Suite 1100
Washington, DC 20005

January 5, 2009

U.S. Election Assistance Commission
1225 New York Avenue, NW, Ste. 1500
Washington, DC 20005

Via Electronic Transmission
havafunding@eac.gov

RE: MOE Advisory 09-001

Dear Commissioners:

This letter is submitted on behalf of the U.S. Election Assistance Commission's Office of Inspector General in response to the request for comments on MOE Advisory 09-001 posted in the Federal Register, Vol. 73, No. 240, p. 75698.

In general, the proposed Advisory 09-001 ("proposed advisory") closer reflects the requirements of HAVA and OMB Circular A-102 than previous proposals to change EAC Advisories 07-003 and 07-003-A. However, there are several areas in which the proposed advisory must be clarified or modified in order to conform to HAVA and/or OMB Circular A-102.

In accordance with the ongoing duties and responsibilities to review existing and proposed legislation and regulations relating to programs and operations of the EAC, the Office of Inspector General respectfully provides the following comments and concerns on specific provisions of the proposed advisory.

Calculation of Base Level of Expenditure

The definition of the base level of expenditure as required by maintenance of effort requirement of HAVA includes expenditures for which the requirements payments distributed under Section 251 may be used. Those uses are:

(b) USE OF FUNDS. --

(1) IN GENERAL. – Except as provided in paragraph (2), a State receiving a requirements payment shall use the payment only to meet the **requirements of title III.**

- (2) **OTHER ACTIVITIES.** – A State may use a requirements payment to carry out **other activities to improve the administration of elections for Federal office** if the State certifies to the Commission that –
- (A) the State has implemented the requirements of title III; or
 - (B) the amount expended with respect to such other activities does not exceed an amount equal to the minimum payment amount applicable to the State under section 252(c).

HAVA, Section 251(b); 42 U.S.C. §15401(b).

The proposed advisory limits the base line calculation to the requirements of title III and does not include activities to improve the administration of elections for Federal office. See proposed advisory, notes 3 and 6 on page 2; note 10 on page 3; and notes 13 and 16 on page 4. The maintenance of effort base line and demonstration of compliance with the maintenance of effort requirement must include activities to improve the administration of elections for Federal office. The proposed advisory should be amended in each of the above referenced locations to include activities to improve the administration of elections for Federal office.

In note 2 on page 2 of the proposed advisory, how a state can determine its base line expenditure in the state fiscal year preceding November 2000 is inconsistent with the requirement as set forth in HAVA. The note makes reference to the state's entire *budget*, when the requirement of the law is to calculate the state's relevant *expenditures* for the fiscal year preceding November 2000. It is unclear as to whether this note represents a misstatement of the HAVA maintenance of effort requirement or an attempt by EAC to make a policy statement with regard to accepting budgetary figures as evidence of a state's expenditures for a particular fiscal year. EAC may be within its authority to make a policy determination as to whether it will accept the budget figures from the state as evidence of its expenditures. However, if it is the EAC's intent to allow such proof, a more demonstrative statement in the text of the advisory would be a better way to express that intent. Regardless of whether this is a misstatement of the HAVA requirement or an attempt at a policy statement regarding the proof of the state's expenditures, this section should be clarified.

EAC should give the states greater guidance on what constitutes an expenditure to be considered in the base line calculation and how that expenditure would be documented. The language contained in the proposed advisory gives no information other than that contained in HAVA. For example, the proposed advisory does not tell states which types of voting system purchases are considered qualifying expenditures during the base year. Likewise, no guidance is given as to base year expenditures on voter registration systems. Some clarifying and explanatory language should be offered by EAC as to each category of qualifying maintenance of effort expenditures.

Subaward of HAVA Title II Requirements Payments and MOE

In this section and the one that follows it, the proposed advisory contains the term “subaward” but does not define it. In addition, in some instances the proposed advisory makes reference to the subaward of a grant. EAC is aware that some states did not use formal subgrant agreements to make distributions of funds to its counties. To the extent that the use of the term subaward would be meant to only apply the maintenance of effort requirement when a formal subgrant agreement was in place, this would punish the states that acted properly and reward those states that acted improperly. EAC should use a term in its proposed advisory that would be defined to include all transmissions of funds to a unit of local government regardless of whether the state did so properly, using a subgrant agreement, or did so improperly, failing to use a subgrant agreement.

Calculation of Base Level of Expenditure for Subrecipients

The second portion of this section, which suggests if the subaward was made to a county for a specified purpose, that the maintenance of effort calculation would be limited to prior expenditures on that same activity, is inconsistent with the provisions of HAVA. The maintenance of effort requirement in HAVA is for all activities funded by the payment, not just those for which the current payment is used.

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.

HAVA, Section 254 (a)(7); 42 U.S.C. § 15404(a)(7).

If a state makes a subaward to a county or unit of local government of even one dollar, the full maintenance of effort requirement attaches to that county or unit of local government. EAC may determine that there is a level of subaward that is so small that it is not worth pursuing documentation of the maintenance of effort, but the requirement is still in place.

A similar misstatement of the coverage of the maintenance of effort requirement is contained in note 16 on page 4 of the proposed advisory. In that note, the advisory seems to suggest that maintenance of effort can be restricted to a particular type of expenditure and if an expenditure of that sort is not made then maintenance of effort does not attach. This note should be amended to reflect that when even one dollar of HAVA funds is used in a fiscal year, then the entirety of the maintenance of effort requirement is invoked.

Satisfaction of MOE by Sub-recipients

It is important to state clearly in this section that the state is ultimately responsible for demonstrating compliance with the maintenance of effort requirement, regardless of

whose expenditures will be analyzed (state or counties/units of local government). If the state assumes responsibility for the entirety of the maintenance of effort for itself and any counties or units of local government, then the state's documentation should identify the base year calculation (for the state and any covered county or unit of local government). In this instance, the state also should document state expenditures in each fiscal year to which maintenance of effort is applicable showing that the state spent at least the same amount as in the base year.

However, if the maintenance of effort requirement passes to the county or local government and the state does not assume sole responsibility for the maintenance of effort, then the requirements for documenting compliance with that requirement likewise pass to the county or unit of local government. This requirement attaches to the counties, individually, not collectively. The language used in the first numbered bullet in this section is not consistent with the discussion that EAC had with OMB about the passage of the maintenance of effort requirement to the county or local government and the subsequent audit and documentation of those expenditures. If the state transfers cash (money) to a county or local government, then the county or local government is responsible for maintaining its effort (calculated by analyzing that county's or that local government's expenditures in the fiscal year preceding November 2000). One county cannot make up for a shortfall in maintenance of effort by another. In this scenario, the state is responsible to EAC for ensuring that each covered county or unit of local government is complying with the maintenance of effort requirement.

Conclusion

We appreciate the Commission's work to develop a policy statement regarding maintenance of effort. The states and this office will benefit from a clear statement by the agency identifying what entities and expenditures are covered by the maintenance of effort requirement in HAVA.

Please contact me if you have any questions or concerns about the comments that we have provided.

Sincerely,



Curtis Crider
Inspector General