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March 24, 2010

Via Electronic Mail Only

The Honorable Donetta Davidson, Chair
U.S. Election Assistance Commission
1201 New York Avenue, Suite 300
Washington DC 20005

Re: Proposed Policy on Maintenance of Expenditures

Dear Commissioner Davidson:

Thank you for the opportunity to comment on the EAC's proposed policy on the maintenance of expenditures (MOE) requirement in the Help America Vote Act (HAVA) of 2002.

1. During the EAC's February meeting, the EAC requested feedback on the proposed dates for receiving voluntary State MOE plans. After considering the proposed dates in light of the 2010 election calendar in Maryland, I suggest that the dates be moved into 2011. Although the EAC plans to distribute templates and checklists by early summer 2010, Maryland – and many states with late summer or early fall primary elections – will be in the midst of preparing for the primary and general elections and will be unlikely to devote the necessary resources to draft an MOE plan. A deadline of March 2011 for the voluntary State MOE plans with a target of April or May 2011 for the MOE plans to be in place seems reasonable.
2. The proposed policy allows states to determine whether county expenditures allowable under § 251 of HAVA can be used to meet the State's annual MOE. A practical consequence of the proposed policy is that a state could remove **all** state funding of expenditures allowable under § 251 of HAVA and rely exclusively on the counties to meet the MOE requirement. This outcome would seem to violate Congress' intent when it included an MOE requirement in HAVA. As noted in a Congressional Research Service memo to Congressman Gonzalez dated June 12, 2008, MOE requirements are "designed to ensure that federal payments supplement rather than supplant state expenditures in a particular area or for a particular project." If a state uses federal funds to *supplant* state funds and then uses county spending to meet the annual MOE requirement, the state has failed to meet the intent of the MOE requirement. There are now fewer funds available to make election administration improvements.

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Also, if a state uses county spending to meet a specific fiscal year's MOE requirement, the proposed policy requires lower tier recipients to substantiate their MOE contributions. While the EAC's templates will likely be helpful with this process, it adds an additional reporting requirement on the counties. While the proposed policy makes clear that the counties contributing to the MOE requirement will have reporting requirements, it is unclear whether these counties will also be directly incorporated into an audit of the state's HAVA funds.

The proposed policy appropriately ties a State's MOE requirement for a specific fiscal year to whether the State spent federal funds in that fiscal year. The nexus between spending and the MOE requirement should also apply to counties; that is, a state may only use county expenditures allowable under § 251 of HAVA to meet its MOE requirement if the county spent federal funds in that fiscal year. If a county did not spend federal funds in that fiscal year, its spending should not be used to meet the State's MOE. This approach is consistent with the approach taken by the Congressional Research Service in its memo to Congressman Gonzalez. The analysis supporting applying the MOE requirement to the counties assumes that the counties have received a sub-grant from the state. The proposed policy should require this nexus, not leave it up to a state's discretion.

A county that receives federal funds from the State understands the reporting and auditing requirements that accompany federal funds. Adding an MOE requirement to a county that already understands its other reporting and auditing requirements would not be unexpected. However, applying an MOE requirement and the accompanying reporting and auditing requirements to a county that did not spend – and may not have even received – federal funds seems unfair.

3. While "lower tier recipient" is defined, additional language in the definition would be helpful. Since the term "recipient" implies that the jurisdiction *receives* something, the definition should include what the jurisdiction receives.

If the Commissioners agree that there should be a nexus for the counties between the spending of funds and contributing to the annual MOE requirement, the definition of "lower tier recipient" could incorporate the receipt and spending of federal funds. Alternatively, defining "eligible lower tier recipient" (a term not currently defined in the proposed policy and without a definition, it is unclear what makes a lower tier recipient "eligible") to include receipt and spending of federal funds would address this issue.

4. During the EAC's January meeting, Mr. Abbott gave an example relating to when county expenditures are used to calculate the baseline MOE for fiscal year 2000. The example related to a state forwarding a portion of sales tax revenue to a county which used the funds to pay for election expenditures allowable under § 251 of HAVA. This example of indirect state funds was useful, and I encourage the Commissioners to consider including it in the appropriate place in the policy.

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5. During the EAC's February meeting, there was discussion about the need for the proposed policy to reflect the agency's responsibility to provide technical assistance and guidance and to avoid terms and phrases that gave the EAC the authority to approve state MOE plans and provided guarantees about future audits. While the most recent version of the proposed policy generally reflects the discussion, the response to #18 suggests that the EAC "accepts" (and therefore could reject) a state's MOE plan. Since the EAC does not have the authority to accept or reject MOE plans, I would suggest replacing "accepted" with "received" or a similar verb.

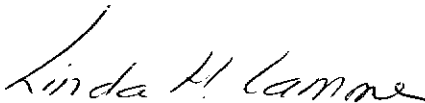
In addition to the comments described above, I offer the following technical, non-substantive comments:

1. Consistent use of terms – As the term "lower tier recipient" is defined in question #5, I would suggest replacing "jurisdictions," "lower tier jurisdictions," "lower tier entities," and "lower tier fund recipients" with "lower tier recipient" throughout the document.
2. Incorrect reference – The parenthetical reference in #12 is incorrect. I believe that it should refer to #7.
3. Typographical error – In #14, "it's" should be "its."

Finally, I would like to recognize the efforts of the Commissioners, Mark Abbott, and other staff members at the EAC that developed the proposed policy and engaged in conversations with State and local election officials on this important issue. While there might be disagreement about the content of the policy, the process leading up to the proposed policy was open and led to productive conversations.

Thank you again for the opportunity to comment on the proposed policy. If you have any questions concerning these comments, please do not hesitate to contact me or have your staff contact Nikki Baines Trella at 410.269.2843.

Sincerely,



Linda H. Lamone
State Administrator

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