

**United States Election Assistance Commission  
Public Meeting**

Monday June 28, 2010

Sheraton Chicago Hotel and Towers  
301 East North Water Street  
Chicago, Illinois 60611

VERBATIM TRANSCRIPT

The following is the verbatim transcript of the Public Meeting of the United States Election Assistance Commission ("EAC") held on Monday, June 28, 2010. The meeting convened at 10:01 a.m., CST. The meeting was adjourned at 2:42 p.m., CST.

**PUBLIC MEETING**

CHAIR DAVIDSON:

Good morning, I'd like to call the meeting to order and welcome everybody for coming. I will give comments in just a touch, but if everybody would turn their phones either to vibrate -- the BlackBerries if you -- I don't know if we would have the same problems here but some of the BlackBerries give us feedback problems, so if you would turn those, off I'd appreciate it.

Now we'll stand for the Pledge of Allegiance.

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[Chair Donetta Davidson led all present in the recitation of the Pledge of Allegiance.]

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CHAIR DAVIDSON:

I turn to Tamar Nedzar from the General Counsel Office to do roll call, please.

MS. NEDZAR:

Certainly. Commissioners please respond when I call your name.

Chair Donetta Davidson

CHAIR DAVIDSON:

Present.

MS. NEDZAR:

Commissioner Gracia Hillman.

COMMISSIONER HILLMAN:

Here.

MS. NEDZAR:

Commissioner Gineen Bresso.

COMMISSIONER BRESSO:

Present.

MS. NEDZAR:

Madam Chair a quorum is present.

CHAIR DAVIDSON:

Thank you. I would like for us to look at the agenda. And is there any changes? Or I need a motion to adopt the agenda.

COMMISSIONER HILLMAN:

So moved.

COMMISSIONER BRESSO:

Second.

CHAIR DAVIDSON:

All those in favor say aye. The motion carries.

[The motion carried unanimously.]

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CHAIR DAVIDSON:

I would really like to welcome everybody this morning. It's great -- what a great city Chicago is and what a great time to be able to share the 39<sup>th</sup> Annual Meeting with IACREOT, so welcome to all of you that are here from IACREOT. And we really appreciate you attending this meeting and starting your meetings a little earlier.

Election officials, we did bring some manuals of our Election Management Guidelines and they're outside. We encourage you to pick those up. There are some new ones out there. And I want to

remind everybody that we actually have election officials work with us on creating those Guidelines, so they are really relevant to your needs and very helpful in giving you some possibly new ideas for your office. So, please take some. And also, the whole set is available on our EAC website which is eac.gov. So, I would encourage you to look at that.

The other thing, talking about our website, we have just done a new design of the website and we're finding that people really like it. So, we encourage everybody to look at it. If you have suggestions you would like to make, we encourage you to do so. And let us know what you think, if you like it, or if you don't like it, or if you've got new suggestions.

A couple weeks ago underneath Chairman Hillman -- or Commissioner Hillman, I should say, she held an Advisory Board meeting, and it was a very successful meeting. And I want to congratulate her and the staff for a great job that they did to make everybody, I think, really appreciate that meeting, and people went home very pleased. I commend you for a job well done.

COMMISSIONER HILLMAN:

Thank you.

CHAIR DAVIDSON:

The -- today is a very busy day that we have scheduled. After we get through with our public meeting we're going to have a public hearing. So, if anybody is interested in signing up for that public hearing, please do so. It's right outside, the sign-up forms. So, please sign up and it's on testing and certification, and we want your input. It's why we're here today. So, we encourage you to

sign up and testify on that. It's on L&A, which is logic -- the accuracy and testing prior to the election, the accuracy and logic of the election, all the way through the audit process that you do after the election. So, it really involves the locals, so we really would like to have your input on that hearing.

Commissioners, I'd like to turn to you and see if you have any announcements or statements that you'd like to make.

Commissioner Hillman?

COMMISSIONER HILLMAN:

Thank you very much. This is a busy time for democracy in America. For those who haven't yet completed their Census forms, there's still time. And I know from my neighbors that the Census takers are very aggressive that follow-up, so it's easier to just fill out the form and respond than to try to avoid them.

Hopefully, our citizens are participating in the primaries throughout the season and that people are volunteering to work as poll workers.

Thank you.

CHAIR DAVIDSON:

Commissioner Bresso?

COMMISSIONER BRESSO:

Yes. Well, since our last public meeting I wanted to make everybody aware that my last name has changed. It was Beach, k8- but now it is Bresso. And my new e-mail address is [gbresso@eac.gov](mailto:gbresso@eac.gov). And also I'd like to let everybody know that the Standards Board will be having a virtual meeting on July 27<sup>th</sup>. It will begin at 1 p.m. Eastern Standard Time and end at 7 p.m. So those

of you who are interested in logging on and watching the meeting, you're more than welcome to. And if you have any questions or information, please contact me or my Counsel and Special Assistant Sharmili Edwards

CHAIR DAVIDSON:

Next, we'll get started on our old business and the first time on the agenda -- or the first thing on the agenda is the minutes from our April 8<sup>th</sup> meeting. Is there any comments to be made on the minutes?

COMMISSIONER HILLMAN:

Madam Chair, I'll move approval of the minutes and then I have an amendment.

CHAIR DAVISON:

All right, is there a second?

COMMISSIONER BRESSO:

Second.

CHAIR DAVIDSON:

Discussion?

COMMISSIONER HILLMAN:

This is just a technical amendment to the minutes. If you will see on page two, we list that the amendment of the agenda at our last meeting, which was our April 8<sup>th</sup> meeting, that the amendment to the agenda was handled before adoption of the agenda. And just as a technicality, adoption of the agenda is the main motion and then an amendment is dealt with. And once that amendment is approved, then we go on to finalize the main motion, which was adoption of the agenda.

So, I simply recommend that the paragraph under amendment of agenda be inserted under adoption of agenda, so it would read, "Commissioner Hillman moved to adopt the agenda as amended, which was seconded by Commissioner Beach," but that the amendment would come in the middle of that motion. I will be glad to give correct wording for the record, so that it reads clear the order in which things were dealt with.

CHAIR DAVIDSON:

Okay. Is there a vote to approve the minutes with the substantive changes that will be made to it to put it in the right order and changing the wordage that reflect that?

COMMISSIONER BRESSO:

So moved.

CHAIR DAVIDSON:

Second?

COMMISSIONER HILLMAN:

Second.

CHAIR DAVIDSON:

All those in favor say aye.

[The motion carried unanimously.]

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CHAIR DAVIDSON:

Thank you, the minutes are approved. We'll turn to Mr. Wilkey for his report.

MR. WILKEY:

Thank you Madam Chair, and we welcome everyone here at today's meeting. I want to particularly acknowledge, before I forget,

the Executive Director of the Chicago Board of Elections, Lance Gough, who is in the audience today.

Under Testing and Certification, we are reviewing comments received about our draft UOCAVA Pilot Program Testing Requirements and Manual. After the review is complete, the final requirements and manual will be presented to the Commissioners during a public meeting. The public is invited to view the comments on our website.

In other news, we submitted a required report to Congress on our progress to establish guidelines for remote electronic absentee voting systems. We approved the voting system testing application package for Dominion Democracy Suite 4.0 system. We issued a decision on temperature power variation, which pertains to voting system testing process. We also issued two decisions on coding conventions. We posted information regarding de minimus changes for the EAC-certified ES&S Unity 3.2.0.0. And finally, we'll be holding a meeting of our Technical Guidelines Development Committee July 8<sup>th</sup> and 9<sup>th</sup> at NIST, the National Institute of Standards and Technology, at their headquarters in Gaithersburg, Maryland.

Under State voting system reports, we've added three new reports to our collection of State voting system reports. The State of Connecticut submitted the reports, which deal with pre and post-election audits for the November 2009 elections. And since we have a number of election officials in the audience, we do encourage you to submit to us any reports you have on voting systems and voting systems usage.



Under Grants, we recently announced a \$500,000 grant to improve voting accessibility for recently injured military personnel. We extended the application deadline to July 28, 2010. Information about the grant is posted on our website.

We recently announced the winners of the 2010 Help America Vote Mock Election Program and the HAVA College Program. We're very excited that the funding of mock election programs this year will help educate 850,000 students about the electoral process. As most of you know, the college program supports efforts to recruit college students to serve as poll workers. Election officials are always looking for qualified poll workers, so programs like these are very important.

Under Requirements Payments, we received seven comments on our draft Maintenance of Expenditure policy and have posted them to our website. We'll be hearing more about them later today, along with other testimony from the public.

Since our last meeting, we disbursed nearly \$7 million in requirements payments. Payments went to ten States. Arkansas received 647,217 for 2010; Idaho 350,000 for 2010; Minnesota 1,169,637 for 2010; Montana 350,000 for 2010; Nevada 694,006 for 2009; North Dakota 350,000 for 2010; Rhode Island 350,000 for 2010; South Carolina 968,829 for 2010; West Virginia 755,964 for 2008 and 657,360 for 2009; and, the State of Wyoming 575,000 for 2008.

This brings the total amount of disbursed payments to 81.2 million for 2008, 53.3 million for 2009 and 10.8 million for 2010.

Under Funding Advisory Opinions, the Commission recently issued four new funding advisory opinions: FAO-09-005 Montana, related to post-election audits; FAO-10-001 Oregon, regarding purchase of closed-circuit surveillance cameras; FAO-10-002 Tennessee, concerning purchase of paper ballots; and FAO-10-003 New York, regarding purchase of a van for voter education and training activities related to voting systems.

Under Election Management Resources, as part of our accessibility work for HAVA, we recently published voter guides in Cherokee, Dakota, Navajo and Yup'ik, the most commonly spoken Native American and Alaska Native languages in the U.S. We've also translated our voter guides into Spanish and five Asian languages. If you would like copies you can call our office, Marcy Reedy at our office, (202) 566-3100. And they are also available on our website [eac.gov](http://eac.gov). Our Advisory Boards recently commented on the draft Recounts and Contest study, and the Standards Board commented on three new Election Management Guidelines Chapters on Technology in Elections, Elections Office Administration and Accessibility. All comments from virtual meetings are archived on our website. We're in the midst of moving these comments from the old site to the new site, and they will be available shortly.

Under Research, we recently posted a new guide to the Election Administration and Voting Survey. The purpose of the guide is to provide information to election officials responsible for completing the EAC Election Administration and Voting Survey. It

explains the processes and procedures associated with a State's submission, review and correction of survey data.

Under Tally Votes, the Commission certified 11 tally votes since our April public meeting. Submission of Proposed Privacy Policy Statement for Public Notice and Comment; Recipients of the 2010 Help America Vote Mock Election Program; Disbarment and Suspension Regulations for Public Comment; Recommendation to Reaccredit Wyle Laboratories; *Federal Register* Notice for Change of Address; 2010 Voting Technology and Accessibility Research – Military Heroes Initiative; the four Funding Advisory Opinions that I recounted in the earlier part of this report; the adoption of the final guide to the Election Administration and Voting Survey; the 2010 Help America Vote College Program grant recipients; and the appointment of our Chief Information Officer Mohammed Maeruf.

In other news, EAC recently co-hosted the Seventh Inter-American Meeting of the Electoral Management Bodies together with the Federal Election Commission and the Organization of American States. The purpose of the meeting was to bring together top election officials throughout the Americas to exchange knowledge and ideas to strengthen the democratic elections process in each of the member States. It was a terrific meeting, and we learned a great deal from officials throughout the southern hemisphere.

And lastly, as our Chair mentioned, we recently launched our new website, which has many new features and upgrades. The feedback we received on it has been very positive. We will continue to make incremental improvements and encourage our

stakeholders to use the new tools on the site to receive updates and share feedback with us.

Madam Chair, that is my report.

CHAIR DAVIDSON:

Thank you very much. Any questions Commissioner Hillman?

COMMISSIONER HILLMAN:

It's less a question than a request that you might, for the record, clarify what we are doing with respect to the UOCAVA Pilot Program Testing Requirements and the other issue that you reported on, establishing guidelines for remote electronic absentee voting systems. And I raise that because we are receiving a number of comments about this, at least, I certainly have in my office, and I think there's a perception that the Election Assistance Commission decided to do this all on its own. So, if you could kindly clarify why EAC is going through the process or the processes for both of those issues, I think it would be helpful.

MR. WILKEY:

Thank you Commissioner, I will do that. And for clarification, those requirements came as a result of the enactment of the MOVE Act by Congress.

COMMISSIONER HILLMAN:

The enactment of the MOVE Act. The MOVE Act being?

MR. WILKEY:

The MOVE Act was to increase participation of our UOCAVA voters throughout the world, military and overseas, and to establish pilot programs for using electronic remote access to the ballot.

COMMISSIONER HILLMAN:

Okay. And if you could just elaborate a little bit on EAC's relationship with DOD on this initiative, since most people know that it is the Defense Department that has responsibility with UOCAVA voters.

MR. WILKEY:

Yes, we've been meeting since last year with the Federal Assistance Voting Program, in DOD, to work with them. They have been through a number of meetings with us in which we have -- we have worked together with them and of course our other partner, the National Institute of Standards of Technology, to develop these interim standards and models for the transmission of ballots to our military and overseas voters.

COMMISSIONER HILLMAN:

I, for one, am pleased that the Election Assistance Commission has been asked to participate in the process to try to improve and expedite how our military and overseas voters can receive and return their ballots. And so, while I know there are people troubled about the use of Internet transmission, my attitude is that we look for solutions and not duck an issue because of potential problems.

CHAIR DAVIDSON:

Just adding to that, I believe on the website is the complete report that we gave to Congress...

MR. WILKEY:

That's correct.

CHAIR DAVIDSON:

...which includes a roadmap that the law required us to do, to make sure that everything that they intended with the MOVE Act is

actually accomplished. So, I think it's important that you can go on that new website and be able to look at that and understand what we're doing. And, in my opinion, it's better to have some procedures and policies out there than just leaving the States on their own, and maybe having ballots e-mailed and returned by e-mail not having the security that is needed.

So with that, I'll turn it over to Commissioner Bresso for -- I make sure that I always get her name correctly...

COMMISSIONER BRESSO:

Yes.

CHAIR DAVIDSON:

...so that you can make comments or ask questions.

COMMISSIONER BRESSO:

Sure. Just to follow-up on what you said, prior to the MOVE Act, weren't there requirements or some sort of suggestions to EAC to look at these areas under the Defense Authorization Act in 2005?

CHAIR DAVIDSON:

You're absolutely correct. There was that, and then also, under HAVA, we have a requirement to review the Internet voting, and so it all kind of ties together. It was reminded to us that that was something that had been put on our platter underneath the Help America Vote Act that we needed to react to.

COMMISSIONER BRESSO:

Okay thanks. I do have just a couple of, I guess, clarifications. Under testing and certification you mentioned that the EAC issued two decisions on coding conventions. Can you explain what coding

convention is to members of the public that may not be familiar with the process? Because, I'm not as...

MR. WILKEY:

I think I'm going to have to defer that question to our certification unit, who would probably be able to give you a better answer than I could, but I can get that for you.

COMMISSIONER BRESSO:

Okay. Another question I have under -- I guess, it would be under our tally votes. We talk about the appointment of our Chief Information Officer Mohammed Maeruf. Are there any other job postings on our website, currently, that we're seeking to fill, any other positions?

MR. WILKEY:

I believe there is one that just closed, in our policy -- both of them have closed, one a vacancy in our Policy and Programs unit, and a vacancy in our Grants Division. Those have both been closed, and I believe, at the present time, in terms of the grant position, an offer has been made to fill that position with an individual. And, in terms of the Policy and Programs Division, those resumes are in and they're looking at them, now, to set up interviews. And that's it.

COMMISSIONER BRESSO:

Okay, because you know, under roles and responsibilities, the Commissioners really don't get involved in -- or don't get involved in any of the hiring of anybody, other than the General Counsel and the Executive Director and our SAs. But with these new additions, how many employees will be up to, here at EAC, once we get these positions filled?

MR. WILKEY:

With the Commissioner vacancy, and currently, our General Counsel vacancy, I believe it's 40.

COMMISSIONER BRESSO:

Okay, thank you.

CHAIR DAVIDSON:

And is it correct that, by HAVA, the Commissioners, as Commissioner Bresso explained, we don't have the authority to hire and fire, that is, under HAVA, that goes underneath your responsibility?

MR. WILKEY:

I believe that language, yes, is in HAVA. I'd have to defer to Counsel on that one.

CHAIR DAVIDSON:

And I have one more question. And also these were vacancies, it's not new positions?

MR. WILKEY:

Yeah, they were vacancies.

CHAIR DAVIDSON:

Okay.

MS. NEDZAR:

HAVA requires that the Commission appoint three positions within the agency; General Counsel, the Executive Director and the Inspector General. HAVA is silent as to who is the appointing authority for the other positions, but the Executive Director determines what staff is needed, under HAVA, and through the Rules and Responsibilities document that authority to...



COMMISSIONER BRESSO:

Hire...

MS. NEDZAR:

...post positions and hire people has been delegated to Mr. Wilkey.

COMMISSIONER BRESSO:

Thank you.

MR. WILKEY:

And I might also add, while I have the opportunity, that with the summer months here, that we have a number of interns on staff for the summer from various colleges across the country. And it's a wonderful opportunity for them to come to Washington and spend time learning about the EAC and about Congress and about government, in general. And so, we're always happy when we get some new ones every year, and we have a great group this year. And we look forward to having them for the summer.

COMMISSIONER BRESSO:

Okay, thank you.

CHAIR DAVIDSON:

Okay, we'll go to New Business, and they've been waiting patiently at the table.

The Help America Vote Act instructs the EAC to develop a national Clearinghouse for the elections. And the staff, working very closely with Jeannie Layson, really -- under Communications, she is our Communications, and then, Congressional Affairs Director -- they have been working very closely with the staff and seeking input, so that we can move forward on a policy concerning the Clearinghouse. Today, with Jeannie, she has an expert and

witness that, also, we're looking forward to getting testimony on, and I'd like to turn it over to Jeannie Layson, so that we can start that presentation. And you can introduce your expert witness and we look forward to it Jeannie, thank you.

MS. LAYSON:

Thank you Madam Chair. Good morning Commissioners, Executive Director Wilkey, and Associate General Counsel Tamar Nedzar. Thank you very much for facilitating a public discussion regarding staff's efforts to create a draft Clearinghouse policy for your consideration.

Today, I'm joined by Dr. Pimjai Sudsawad, the Knowledge Translation Program Coordinator at the National Institute on Disability and Rehabilitation Research. She will provide further information about the operation of a Federal clearinghouse. She has been a valuable resource to the Election Assistance Commission, and I look forward to her testimony.

In April, my testimony about the Clearinghouse focused on the defining language in the Help America Vote Act, and research conducted about clearinghouses, website content and information provided to the public by Federal agencies. Today, I will discuss staff's initial recommendations for the scope and content of the EAC Clearinghouse, as well as the recommended process to administer the policy. My goal today is to receive your feedback and incorporate it into a draft policy, including a 45-day public comment period for your consideration.

First, I'll talk about the scope of the staff's recommended policy. I recommend implementing a pilot Clearinghouse policy

limited in scope and duration, which would allow me to collect information about staff time and resources. For six months, I would track staffing hours and labor distribution by task, which would differentiate start-up activities from routine, ongoing activities. At the end of the pilot program, I would present a matrix consisting of two quarterly reports about time and resources, used to operate the Clearinghouse, allowing you to make an informed decision regarding the scope of a final policy, based upon available resources and level of effort required.

Under the content, the content of the pilot policy, as proposed by staff, would consist of information provided by local, State or Federal Government entities in five categories. Number one, voting system performance; poll worker information; contingency plans, pre-election activities; and, post-election day activities. Examples of pre-election activities would include logic and accuracy testing, voting system storage and security procedures, chain of custody procedures, polling place accessibility initiatives, polling place set-up plans and ballot distribution strategies. Regarding post-election activities, we would collect information in procedures about canvassing activities, recount procedures and audits.

I recommend beginning with these five topics based upon information I have collected from website statistics, public inquiries and staff input. For example, election officials and the general public continue to seek information about voting system performance. EAC's Voting System Testing and Certification Division also uses this information to further inform the Federal

testing process. EAC already has a policy in place to receive reports commissioned by Federal, State and local units of government, and I would recommend incorporating the existing policy into the pilot and continue collecting that information.

Poll worker recruitment, retention and training, continue to be a top priority for election officials everywhere. According to our 2008 Election Administration and Voting Survey, available at [eac.gov](http://eac.gov), nearly half of reporting jurisdictions had at least some difficulty getting enough poll workers. And not surprisingly, the poll worker section of our website always gets a lot of traffic. Between January 1 and May 1, 2010, it was the tenth most visited page on our website. In addition, one of EAC's most popular initiatives is the Help America Vote College Poll Worker grant program. Based upon the constant need for help at the polling place, I believe we must establish a central location that showcases innovations and creative recruitment strategies from States and local jurisdictions. This section would also include links to State-specific poll worker information sites, so visitors could easily sign up to be a poll worker or get more information.

Contingency planning in elections will always be necessary. It seems like there's a new, unanticipated event every year. At past EAC public meetings, election officials presented innovative approaches dealing with everything from weather disruptions to traffic jams, and there was considerable interest last year when EAC asked election officials for flu season contingency plans. We should build upon our efforts to collect and share these innovative

and creative approaches to prevent or mitigate disruptions during an election.

In addition, pre-election and post-election activities and plans are popular topics with not only election officials, but also with voters. We've covered many of these topics in EAC's Election Management Guidelines program and related videos, including polling place set-up, making polling places accessible, and pre-election testing. We would expand upon these resources by collecting information and procedures from States and local jurisdictions. I anticipate that this information would also inform the Research, Policy and Programs Election Management Guidelines initiative, available at [eac.gov](http://eac.gov).

Regarding the process, I recommend that all requests be submitted to the Executive Director for approval within 48 hours. And if the Executive Director declines a request, the Commissioners would serve as an appeal body, if necessary.

In summary, I recommend a six-month pilot Clearinghouse policy consisting of information submitted by Federal, State or local government officials in those five categories. And I base my recommendation on EAC's mission to assist with the improvement of Federal elections and our responsibility to provide resources and information about election administration to election officials and to the public.

EAC's Clearinghouse policy is of great interest to the public, and I appreciate the opportunity to continue having public discussions with the Commission. And I look forward to your questions.

CHAIR DAVIDSON:

Would you like to give some background on our guest?

MS. LAYSON:

Yes, yes. Again, this is Dr. Pimjai Sudsawad and she is the Knowledge Translation Program Coordinator at the National Institute on Disability and Rehabilitation Research. And I met her back in December of 2008. Our Research, Policy and Programs Director Karen Lynn-Dyson convened a meeting of Federal clearinghouse managers and Dr. Sudsawad was one of the attendees. And she was particularly helpful in helping us figure out where to get started with developing a Clearinghouse policy, as well as understanding how other Federal agencies manage theirs. So we've continued to rely upon her expertise, and I'm really pleased that she can be here with us today. She's got a lot of experience with Federal clearinghouses.

CHAIR DAVIDSON:

Dr. Sudsawad we look forward to your presentation, thank you.

DR. SUDSAWAD:

Good morning, and thank you for the opportunity to provide my testimony today. Again, my name is Pimjai Sudsawad and I am the Knowledge Translation Program Coordinator at the National Institute on Disability and Rehabilitation Research, Office of Special Education and Rehabilitative Services, U.S. Department of Education. We are a research-funding institute whose mission is to generate new knowledge on disability and rehabilitation, as well as to promote the effective use of such knowledge in order to improve

the lives of individuals with disabilities and to maximize their participation in society.

I am pleased to be here today to share information on our experience with information clearinghouses. It is within our mandate of the Rehabilitation Act of 1973, as amended, to widely disseminate information related to disability and rehabilitation to the public. Presently, we have two information clearinghouses for that purpose. The first one is AbleData available at [www.abledata.com](http://www.abledata.com) and the second one is the National Rehabilitation Information Center, or NARIC, available at [www.naric.com](http://www.naric.com).

AbleData provides information on more than 36,000 assistive technology products ranging from commonly known products, such as walkers and shower chairs, to lesser-known products, such as the vibrating paper money identifier and the voice output voting machine. AbleData provides services to the public through its website, a toll-free number, and e-mail contact.

AbleData houses an assistive technology product database whereby the public can directly search for information. The products are categorized into such groups as blind and low vision, computer aids for daily living, and so on. The user can simply click on a group link, and follow additional links to more refined categorizations under each group as needed. In addition, the user can also search for products with user-defined search terms, which will then be automatically matched with the existing indexing terms that connect to the products. All search terms are listed on the web site and fully clickable, and also available for download in both PDF

and text formats. The terms are continually updated based on the availability of new products and user feedback.

In addition, there is an information center that includes information and links to Internet-based resources both in the U.S. and abroad. This information center also includes links to upcoming meetings, conferences, workshops and other education opportunities, as well as links to assistive technology companies. AbleData staff have a process to determine whether each resource is appropriate for posting, taking into consideration such factors as content, authority, credential and affiliation. AbleData also produces its own publications and provides links to other publications and news items related to assistive technology.

Recently the AbleData website underwent an extensive evaluation and testing for usability and accessibility. Usability refers to how well users can use the website to achieve their goals and how satisfied they are with that process. Accessibility refers to how well users with disabilities can use a website to perform the same tasks as those performed by users without disabilities. As a result, the site underwent a major redesign and is currently fully accessible to and usable by all members of the public.

Our second clearinghouse, NARIC, provides access to both research-based and non-research based information on disability and rehabilitation. It also provides access to information on projects funded by NIDRR, our institution. NARIC presently contains more than 90,000 records, and provides services to the public through its website, toll-free number, e-mail contact, chat function and social media, including Facebook and Twitter.



NARIC collects information in two broad categories: information generated from NIDRR-funded projects and information generated from other sources. NARIC collects information directly from our grantees for publications, tools and consumer materials. For other sources, NARIC obtains information by searching through the existing publications related to disability and rehabilitation. NARIC collects textbooks, consumer books and training curricula for rehabilitation professionals, and NARIC also subscribes to different journals and provides articles for free or at a nominal cost to the public. Over 10,000 documents are available to the public, either directly posted on the web, or through NARIC's document delivery service.

NARIC also has a search function to help users find information they need. Similar to AbleData, NARIC has a thesaurus to categorize each record of information. They have also established a wiki site where the public can comment on the thesaurus and suggest changes, which NARIC will consider for the thesaurus revisions. It can be accessed at <http://rehabdatathesaurus.pbworks.com>.

Both clearinghouses track website usage and inquires. AbleData has recently developed a system to solicit users' feedback. NARIC obtains feedback more informally when communicating with patrons in response to their requests. Both have a formal outreach and marketing plan to ensure that the target users know about the project.

In conclusion, the following features may be worth considering when developing the EAC web site for clearinghouse:

First, user service channels, such as a toll-free number, e-mail contact, and chat room and other social media channels; categorization of information and search functions; information acquisition, vetting and updating; accessibility and usability evaluation and testing of the web site; user feedback system and suggestions regarding information to be included on the website; reporting of usage via a tracking system for number and types of inquiries; marketing and networking plan to promote the site; and, specific product development and distribution such as newsletter and listserv.

We believe that the EAC's plan to establish an information clearinghouse to make available election-related information to the public is a highly valuable and important initiative. If NIDRR can be of any further assistance, please let us know. I am happy to answer any questions that may come up any time after this presentation. Thank you.

CHAIR DAVIDSON:

Thank you very much. You've given us quite a list that we need to consider.

Questions for the panel. Commissioner Hillman?

COMMISSIONER HILLMAN:

I do. I want to start with a broad understanding of the concept of clearinghouse and, if appropriate, a conversation between the two of you might be useful. As I think of the concept of a clearinghouse, it connotes that the agency has the discretion to filter what gets posted and what doesn't, versus a warehousing concept where all information pertinent to a topic gets posted

irrespective of the source of the information, and the agency doesn't filter out, or the sponsor doesn't filter out what comes in and what doesn't. So, in the context of how government -- Federal Government agencies operate clearinghouses, and for Ms. Layson, in the specific context of clearinghouse requirements under HAVA, how does the clearinghouse, specifically, at the Department of Education, the one you just described, if, at all, filter? And how does that fit in the concept of a clearinghouse?

DR. SUDSAWAD:

Here, this contractor, they operate pretty independently as far as information to be -- to be put in, because the information that is featured in there is really something to -- that we would like to make available to the public freely, because it is recent information, let's say NARIC. So it's -- they would gather information that's already available someplace else and put it there, so that it would be one-stop shopping for anybody who would like information on disability and rehabilitation. There's really no -- we don't have a set policy, per se, from us as to, you know, this is what you need to include, this is what you don't. The contractor did present information to us to review to see, do you have any comments on, you know, what would be the criteria that they would include in the clearinghouse, and we just leave it to them to actually implement those criteria, which is pretty loosely, because this is a research publication. So, it's nothing controversial that we would be concerned about.

MS. LAYSON:

Well, I think it's a delicate balance, quite frankly, and something that staff has struggled with to try and figure what that balance is,

because, obviously, we don't have all the best information. We know that there are entities out there that have great best practices, in terms of election administration. They have good research and good data and good information that would be helpful to voters.

What we want to make sure that we are able to do, however, is make sure the information that we do include in the clearinghouse is accurate and current, because at the end of the day, if we're encouraging the public, voters, to come to our website for information, I think we have a responsibility to make sure what we post is accurate, if we're going to ask them to rely on it. So, it's a delicate balance, quite frankly.

COMMISSIONER HILLMAN:

So, back to Dr. Sudsawad. How do you -- how does your agency ensure if you've got tens of thousands of documents, the accuracy, I mean, getting to that point? I mean, clearinghouse connotes some kind of filtering versus just warehousing whatever information is submitted gets posted irrespective of the source?

DR. SUDSAWAD:

We have -- like I mentioned, we have two parts, for instance, NARIC. We have the research based on -- research based information. For the research based, these are all publications. They already have been through the screening, per se, as far as peer review process, that it's already available, you know, through books, journal articles, or any other newsletter of reputable organizations.

Now, in terms of other non-peer review materials, they would be coming from our grantees, which we fund for them to do the

work. So, in a way, the work has already been reviewed through the peer review process before it's being implemented. Therefore, any product coming out of that work it's already, essentially, been reviewed and, you know, assured that it's appropriate and it's something that's valuable. So, by the very nature of this clearinghouse, it has been through a process one way or the other that we can, pretty much, feel that this is something that it's okay to make available to the public, because these are information already published and reviewed.

COMMISSIONER HILLMAN:

So, specific to the EAC Clearinghouse, the recommended policy, Ms. Layson, we're talking about information, reports, studies, surveys, whatever, that have been produced by a government. These are government documents for the pilot run of our Clearinghouse?

MS. LAYSON:

Yes Commissioner, that's correct.

COMMISSIONER HILLMAN:

Okay, moving to another question. Do you happen to know offhand, or remember offhand the number of days required in our Notice and Comment Policy for Public Comment? You're recommending 45 days, and I'm wondering if that is more or less than what is recommended in our policy.

MS. LAYSON:

I believe it's more. I believe the floor, and I'm looking to the Associate General Counsel, is 30 days, I believe.

MS. NEDZAR:

The default is 30 days. There is the availability for some flexibility in consultation with the Executive Director, but the default position is 30 days.

COMMISSIONER HILLMAN:

So, you're saying that our Notice and Public Comment Policy requires 30 days for the public to review and comment on policies that EAC is considering?

MS. LAYSON:

Yes.

COMMISSIONER HILLMAN:

Okay, because I would hope that whatever the -- for some reason 60 days was sticking in my head from something -- I would just hope that whatever the comment period is for this, it would be no less than what our existing Notice and Comment Policy requires.

MS. LAYSON:

Oh, I absolutely agree with that. It should be at least 45 days, because I think that again, as I said, you know, we don't necessarily have all the best solutions. There may be someone out there who can comment on this draft policy who may have a good idea. And also, this is something that is of great interest to the public. It's one of our major responsibilities under the Help America Vote Act, and I definitely think it should be out for at least 45 days.

COMMISSIONER HILLMAN:

And my final question, for now. When you talked about the process for considering items to be posted in the Clearinghouse, you said that the Executive Director would have 48 hours, I assume that means business hours, to consider a request for approval, and

then, if he declined the request, it says, at least in the written submission, that the matter would be moved to the next public meeting for discussion, and the Commissioners would serve as the appeal body, if necessary. If the Commissioners don't need to serve as an appeal body, why would it come to a public meeting for discussion?

MS. LAYSON:

I believe I was modeling that on another policy that we have, and I can't remember off the top of my head what it was. But there was another instance in which, and it may be the tally vote process, in which, if something wasn't decided within a certain timeframe it would be moved to the next meeting. But certainly that process is up to the Commissioners, and if they want to change it. My goal was to move it to, as I said, the next public meeting, so that there could be a public discussion about the item.

COMMISSIONER HILLMAN:

And I guess I'm a little curious about this, because I don't think any of our other policies -- I mean, the tally vote policy does provide that provision, but it's based on, if something doesn't happen...

MS. LAYSON:

Right.

COMMISSIONER HILLMAN:

...within the required timeframe, not if there's a denial. And I guess as busy as we are, I would not want a policy to make work if it's not necessary. If somebody submits a document and it's not approved for posting, and if they don't file an appeal on it, I just would have to request a lot of information as to why we would then discuss that

matter at a public meeting if nobody is appealing it. But that's just my initial thoughts, right now. Thank you.

CHAIR DAVIDSON:

Okay, Commissioner Bresso?

COMMISSIONER BRESSO:

Okay, thanks. Ms. Layson I have two just general questions about the Clearinghouse policy, and then a question on scope and process.

But, I'll start with my general questions, and I know myself and my colleagues, you know, have been out at several conferences, and at different States, witnessing, you know, different procedures that they may have in place, or a training that they're doing that are, you know, creative and innovative. Would our Clearinghouse be able to showcase what they are doing, would be able to put, actually, what States are doing to showcase? And would you be able to explain that a little bit?

MS. LAYSON:

Absolutely. We know that there are a lot of, especially at the local level, there are a lot of innovations going on, and they're using social media to conduct training, to get information out. And we, certainly, would be able to accommodate that, including videos, links to social media sites for these election officials. So, we certainly would be able to incorporate that.

COMMISSIONER BRESSO:

Okay. And I know we currently have a policy for EAC's voting system reports. And correct me if I'm wrong, I think there are very few election officials that have actually posted, you know, their



reports to our Clearinghouse. What, in this policy, would, I guess, entice them or make it different or encourage them to post reports? Is there anything?

MS. LAYSON:

Well, I think the new design of our website will help us there. And also, quite frankly, I think we have a responsibility to step up the push for them to provide that information to us. So, I think it's a combination of making it easier for them to do so, as well as having a more attractive and easier to use portal for their peers to be able to look at that information and use it.

COMMISSIONER BRESSO:

Okay, now turning to the scope, you discussed having a six-month timeframe to review what has -- or what may have been posted to our Clearinghouse, the type of traffic or volume that we receive. I'm just wondering, because of the election cycle, perhaps, rather than doing six months from the date that we implement the policy, because, you know, with the 45 days, I don't know when that would be, maybe to start the time clock after Election Day, because, you know, from November, six months out may provide more information to test, because, if we, August 1<sup>st</sup> implement this policy, you know, we're looking at February of, you know, looking back at things. And I think, with different States' canvassing procedures and policy, that we may be able to get a better sense of what's out there, if it's extended six months after the election date. And that's just an idea that I'm throwing out there. I don't know if you have any thoughts on that.

MS. LAYSON:

I think that's a very good suggestion, and something that I'll certainly want to get the Commissioners' input about, today, as staff moves forward to present a draft for your consideration. So yes, I think that's a good idea.

COMMISSIONER BRESSO:

Okay. And one last thing, under process, was just mentioned about having the request be submitted to the Executive Director for approval within 48 hours. Now, the current voting system Clearinghouse policy that we have goes to the Commissioners for 48 hours, correct?

MS. LAYSON:

That is correct.

COMMISSIONER BRESSO:

And doesn't go to the Executive Director?

MS. LAYSON:

That's correct.

COMMISSIONER BRESSO:

Now, the Clearinghouse -- developing and maintaining a Clearinghouse is an action that EAC is authorized to do under HAVA. Now, under Section 208 of HAVA, it talks about requiring a majority approval for actions and it says, "Any action which the Commission is authorized to carry out under this Act may be carried out only with the approval of at least three of its members." So in essence, if we wanted to approve a policy with the Executive Director giving approval, it would be, essentially, the Commission then delegating or abrogating their authority under HAVA to the Executive Director to do this. Is that correct?

MS. LAYSON:

I think staff's thought was that we would ask the Commissioners to limit or set staff's discretion through this Clearinghouse policy, so that you would clearly define the parameters of the Clearinghouse, and staff would apply the rules. I think that if we do a good job with the Clearinghouse and we get a lot of interest, I can see a situation where it could be burdensome for the Commission if you had to approve every request for a submission. But, that's certainly something, again, that I want the Commission's feedback on. But, initially, our thought was that the Commission would set those parameters and staff would apply the rules accordingly.

COMMISSIONER BRESSO:

Okay, I mean, I just didn't understand, if there was a reason why, under the old policy, we're deviating from what Commissioner Hunter had put in hers, where the Commission reviewed everything, because I think it's very important as a full-time, you know, paid Commissioner that I review everything under this Act and I have the authority to approve. But certainly, that's something that we can discuss with my colleagues.

MS. LAYSON:

Absolutely, and I think that's another reason why a pilot policy is a good idea, because depending on what the Commission decides, either way, that may work, it may not work. So, it's a good opportunity for us to take some time and see what works best. So -  
- but that's clearly up to the Commissioners.

COMMISSIONER BRESSO:

Okay, thanks. And Ms. Sudsawad, I have a couple of questions for you. In your testimony, you mentioned that AbleData clearinghouse provides information on assistive technology products. Does your agency avoid the appearance of endorsing products displayed in the clearinghouse?

DR. SUDSAWAD:

Yes.

COMMISSIONER BRESSO:

And if so, how do you do that?

DR. SUDSAWAD:

Yes, definitely, we ask the contractor to put the disclaimer right up front that this is not -- in no way, endorsing from the government, it's just information for people to be able to surf information they need. We don't even provide the price, because that would associate with, you know, have a -- we don't want to have any association with the company. So, we just provide contact information, information itself, picture, what to contact, with a big disclaimer.

COMMISSIONER BRESSO:

Okay. And my other question for you talks about your statistics. You said both clearinghouses track website statistics. Can you provide more detail about the types or the variety of visitors that you get to your clearinghouse?

DR. SUDSAWAD:

Yes, for AbleData we have people come to visit us from 120 countries around the world. The majority is from the U.S., but we also have visitors from Europe, China, you know, in Asia, in Africa,

all kinds of countries. We also track the hits of the website, how many hits we receive, and it's run about 5 million hits a month. And we also -- they also discern how many visitors we have, which we can't go down to the single visitor itself, because we do not track IP address, per se, because of the privacy, but we can track per server. So, we have about 200,000 of those per month. And that kind of helps us justify, you know, the existence of the website and the contract itself, too.

COMMISSIONER BRESSO:

Well, thank you for your testimony. It's very informative as we go through this deliberation process. And thank you for appearing before us today.

I have no further questions.

CHAIR DAVIDSON:

Okay, my questions, I'll guess I'll start off with Dr. Sudsawad. How many employees do you have in trying to meet the requirements that you're meeting? I mean, when I think about the employees, we have 40 total within our whole office and we know some of this will involve some of them to make sure that information is accurate and searching out knowing how -- how much can we do. So, can you give us an idea of employees and -- that you have?

DR. SUDSAWAD:

You mean the NIDRR staff, who work with this contract?

CHAIR DAVIDSON:

Yes.

DR. SUDSAWAD:

Actually only -- we have myself as the program officer, and then we have the core contract office representative. We also have the contract office, which we have, you know, contract officer, we have a contract specialist. However, on a day-to-day operation -- they're involved in the front end, and also in terms of contract operation, technical operation of the contract, per se, where they need to receive invoice, you know, and that type of thing. But, in terms of day-to-day operation, only myself and the core are involved. So -- and again, because we are a little bit different, we tend to be inclusive rather than exclusive.

As I mentioned before, we don't screen information ourselves, because the type of information that's being put in is information that's meant to be distributed widely to the public anyway, such as research-based information, any, you know organization about disability that we think that it would be useful for people to know about or, for instance, information about assistive device, which is neutral information. So, it's not anything controversial.

But, I do work with a contractor pretty closely, you know. When they want to initiate something, new such as when they think about doing Twitter or Facebook, I was consulted and we talk about, you know, what might be things to be considered and things like that. But normally, I don't screen information day to day, so that would be different if that's what you aim to do, because that actually would be much, much more involved. And that's something that probably would have to be considered pretty

seriously as to if that -- who is going to be reviewing it and what's the procedure.

CHAIR DAVIDSON:

I think one of the concerns that we have -- I mean obviously, the election officials and, you know, whether it's State or localities that is providing information that I don't know that we have the concern that we have from other outside organizations, or making sure that the information is accurate. Do you have anything like that -- we have lots of people that would like to put things up on our website. How would you go about, you know, setting out some priorities, taking it step by step to see how much you could accomplish making sure that we don't overburden a small agency?

DR. SUDSAWAD:

Actually, in these two contracts we actually -- the one that accepts information from outside is AbleData, which is -- manufacturer of course can nominate themselves to be listed, you know, with their product. But, in terms of NARIC, as far as I recall, and actually, we do not -- we do not accept people wanting to post something. We actually are going out and search for information systematically and that's how -- that's how it's got control in a way of what's going to be put on the website, because we don't accept nomination for posting, but rather we go out and search. The contractor will go out and search journals, different journals they subscribe to. There are a lot of journals in the field of rehabilitation and disabilities. They also actively go to different websites to search for any new information that might be of interest to the people with disabilities, because the contractors who work with this contract, they also have

staff who are people with disabilities themselves. So actually, they are very familiar with the content and the area that they're working with. So, because we don't accept nominations or submission for posting from outside, so that issue is not an issue for us.

CHAIR DAVIDSON:

Okay, all right, I understand. I will say, Commissioner Bresso stole one of my suggestions, the six months with election time, I didn't think was enough, either.

COMMISSIONER BRESSO:

Um-hum.

CHAIR DAVIDSON:

So, that was -- I mean, I even have "is six months enough time" written down. I think that, obviously, that we really need to study this out and collect information through the election, and I think there will be a lot of things, hopefully, they'll just post it because of the election and moving forward. So, I think that we do need to look at that six-month period.

COMMISSIONER BRESSO:

Whether we extend it, or maybe, just start it at a different point.

CHAIR DAVIDSON:

Yeah, whichever, you know. We can think about that whether you want to start it at a different point or if you want to extend it. So, I really don't have a preference there, I just think we need more time.

Is there any follow-up questions that we have?

COMMISSIONER HILLMAN:

Well, this is not so much a follow-up question for the panelists, but I just wanted to respond to something that Commissioner Bresso



said. And I'm not sure what my final position would be on whether or not the Commissioners should approve or be involved in the approval process of each and every submission, particularly since under this pilot project we're talking about submissions from government entities. But, I do want to say that, I, for one, view any time the Commission delegates a responsibility to the Executive Director, particularly responsibilities that can be determined as inherently staff responsibilities, I do not, ever, consider that abrogating my responsibility as a member of this Commission. So, I just want to be on the record, and be clear that I view delegating as a responsible thing for the Commissioners to do, and I don't want to be viewed as abrogating any of my responsibilities if I were to choose to do that.

CHAIR DAVIDSON:

All right, thank you very much. We appreciate it. Yes?

MS. LAYSON:

Madam Chair, if I could. Dr. Sudsawad has some additional information I think that may be helpful to you regarding her contractor and the scope of the contractor that, I believe it's the Able...

DR. SUDSAWAD:

Yeah, both AbleData and NARIC, in terms of the budget.

CHAIR DAVIDSON:

Okay.

DR. SUDSAWAD:

These, both, are five-year contract and the budget of NARIC is right now -- last year is \$853,674 last year.

CHAIR DAVIDSON:

For the contract?

COMMISSIONER BRESSO:

For one year?

DR. SUDSAWAD:

Yes, for the contract yearly, right, it's about \$800,000 something.

COMMISSIONER BRESSO:

\$800,000, for one year?

DR. SUDSAWAD:

Per year, right.

COMMISSIONER BRESSO:

Okay.

DR. SUDSAWAD:

So, five years, that would be -- and then...

COMMISSIONER BRESSO:

But the scope -- and I'm sorry to interrupt -- but the scope of information that you have on that website is much larger than what we would collect in the pilot. Is that accurate?

MS. LAYSON:

Absolutely.

COMMISSIONER BRESSO:

Okay.

MS. LAYSON:

Yes.

COMMISSIONER BRESSO:

So, our cost may not be 800,000, but over time, if it does grow, then it could get up to that amount.

DR. SUDSAWAD:

It could.

COMMISSIONER BRESSO:

It's feasible.

CHAIR DAVIDSON:

Okay, thank you very much.

MS. LAYSON:

Thank you.

CHAIR DAVIDSON:

We're going to take a -- I'd just like to do about a five-minute break, just so have our next panel ready. And if everybody will be back in the room promptly in -- ten after 11, we will start with the next panel.

Thank you.

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[The Commission recessed at 11:06 a.m. and reconvened at 11:16 a.m.]

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CHAIR DAVIDSON:

We're ready to start again. I'm a couple, three minutes late. I apologize.

The next thing on our agenda is considering -- the consideration of the Maintenance of Expenditure Policy, MOE. Everybody has heard that a numerous amount of times. And, as most of you know, we have been working on this maintenance agreement for quite some time. The Help America Vote Act requires the States to meet an annual Maintenance of

Expenditures, based on the expenditures for Title III, expenditures in the fiscal year prior to November of 2000.

It is my goal, today, to adopt a policy that outlines how States can meet that Maintenance of Expenditures, and get started on how we will work forward. Obviously, we know, and as I said when I proposed a draft, myself, probably way over a year ago, that it would not be perfect. And we may not be perfect today, but hopefully we can get something out and move forward.

So, I'm going to turn the meeting over to Dr. Abbott and he can introduce his expert witness also today. And Dr. Abbott, we'll begin with you.

COMMISSIONER HILLMAN:

Madam Chair, before Dr. Abbott begins, I just want to add to your comment with respect to EAC's consideration of a maintenance of, what was then called effort, now expenditure policy. And obviously, the Commission -- members of the Commission have changed since we first started considering how we would put together and adopt such a policy. And it is true that every time somebody put a policy on the table, if it wasn't perfect enough for somebody else, a new policy was thrown on the table, and it was almost like people were trying to trump one the other. And so, I'm glad to see that we have finally stopped with that way of proceeding, and that we can come to some resolution on this, so that we can get started operating under a policy adopted by the Commission.

And Dr. Abbott, I would just ask, we have an awful lot of papers and information about this, and so, if you could, before you begin your presentation, just let me know which documents you will

be referring to, so I will know what to have in front of me and what to consider. Okay? Thank you.

CHAIR DAVIDSON:

Okay, Dr. Abbott.

DR. ABBOTT:

Thank you, Chair Davidson, Commissioners, Executive Director Wilkey. We have -- this presentation and information for you is a continuation of a meeting we had on February 22<sup>nd</sup>, where we introduced a draft Maintenance of Expenditure or Maintenance of Effort policy. And I'll probably use both terms today. I think they're interchangeable for the purposes of conversation.

So, for today's purpose what we'd like to do is, I'd like to walk through the changes that have occurred to the draft Maintenance of Effort policy since the February 22<sup>nd</sup> meeting. Those changes are a result of input from the public, input from our Inspector General, extensive input from the Commissioners, you, in terms of editing for clarity, and also helping us take a closer look at some of the questions that were in the draft policy and I think strengthen them. We also have input from six States, as well as, the National Association of State Election Directors provided written testimony which we've responded to, as well, here.

I'm joined on my right by Christopher Thomas, who is the long-time Director of Elections for the State of Michigan. He's also the Secretary for the National Association of Election Directors. And he will be here speaking -- and the Chair of the EAC Liaison Committee. So, Mr. Thomas has been instrumental in helping us put this policy together. He is well versed in what we have written

in the draft, and he's very well versed in where the States are, in their opinion of this draft policy. So, I'm very happy that he was able to join us here today. And I thought we would lead this off by hearing from Mr. Thomas, and then, we will go through and talk about the major changes to the draft policy, and I'll field questions from you on any outstanding issues that we should resolve, prior to, what I understand will be a vote on the issue.

MR. THOMAS:

Thank you, good morning. I think perfection would be an adopted policy.

[Laughter]

CHAIR DAVIDSON:

Would you pull the mic just a touch closer to you?

MR. THOMAS:

I will indeed, I will indeed. I would like to take this moment to recognize Janice Winfrey, the City of -- Detroit City Clerk, who is with us today, as an IACREOT member. So, I'm glad to see that she is here. I also am going to make a disclaimer knowing that I have a roomful of local election officials behind me. So, when the term 'lower-tier entities' is used, that's a financial term, and it's not a term that any State election director with their back to local election officials would ever use. But, I'll be using it throughout this presentation, in that, it is referenced in the Maintenance of Expenditure policy.

I thank you for the opportunity to testify on this critical topic of maintenance of State expenditure. I'm representing the National Association of State Election Directors, and Michigan Secretary of

State Terri Lynn Land. From the outset, let me express NASED's thanks and appreciation for making your staff available to continue working on this vexing policy. The Commission has brought excellent Federal resources to bear on the application of Maintenance of Expenditure to our complex and diverse election administration system.

Mr. Thomas Wilkey, your Executive Director, and Dr. Mark Abbott, Director of Grants, have been especially committed to finding a reasonable resolution to a 2007 policy. I would like to make the following points today.

Section 254(a)(7) of HAVA, while an obtuse provision, does make sense as a maintenance of State expenditures provision, not as a Maintenance of Effort provision, when the historical manner of financing elections is considered.

Second. Imposing a blanket Maintenance of Effort obligation on every lower-tier entity that conducts elections is impossible, overkill, and does not reflect the reality of ever increasing costs of election administration over the past decade.

And third, flexibility is an absolute necessity for States to maintain the State expenditures in the face of the economic downturn and the shrinking budgets.

The plain reading of HAVA requires States to specify, in the State plan, their pre-November 2000 expenditures that must be maintained each year. The proposed policy correctly limits the requirements to State funds specifically appropriated for election purposes, enumerated in Title III of HAVA. If the State appropriated funds for lower-tier entities to spend for these

purposes, it is appropriate to include spending by lower-tier entities in the maintenance of State expenditures.

In December of 2002, shortly after HAVA became law, a number of election official organizations convened a conference to consider the implication of HAVA. This, of course, was long before any Commissioners were appointed. The House and Senate Committee staff made presentations on various aspects of HAVA to give election officials a feel for the thinking on the Hill, during the consideration of HAVA. They were all over the map when questioned about the meaning of Section 254(a)(7), which is the State expenditures. I believe this provision was added late in the Congressional process, meaning that little input was permitted. I do believe that this section reflects the reality that, traditionally, States have not funded elections. Funding has primarily been a local responsibility. While States have maintained staff to train local election officials and oversee the uniform implementation of election laws, in addition to other election duties, the States have not contributed significant finances to the day-to-day operations of elections. I can understand the view of some local election officials, who may have feared that the States would fund State operations with HAVA money, instead of pushing the resources to the local level where they are needed. When reading 254(a)(7) from this perspective, it makes sense.

Let's face it, HAVA is what some, in the Federal Government, would call "unique." Providing no year money and allowing States, instead of the Federal Government, to earn interest is not exactly the way business is normally done. Requiring every



lower-tier entity to document a Maintenance of Effort number and maintain that every year is way over the top.

My introduction to MOE came via an audit conducted by your Inspector General. The ramifications of the 2007 MOE policy became crystal clear when told that over 1,600 local -- lower-tier entities would have to go through this exercise. In December of 2007, I had the opportunity to meet with the General Counsel staff. I was so sure that this had been some type of mistake, because "State" means just that, the State of Michigan which does not include 16 lower-tier entities. When HAVA -- within HAVA, Congress used local government when it was necessary to include both State and local governments within that State, and you can find that in the Help America Vote College program. It was clear that the General Counsel had created a convoluted construct to justify the inclusion of over 7,000 lower-tier entities into the definition of "State." The proposed policy recognizes a central reality. Even after nearly \$3 billion HAVA dollars have been spent, few, if any, local election officials will assert that it cost them less today to run elections, than in 2000. I think I heard some Amen's in the audience. The cost of elections has continued to increase, making lower-tier MOE a costly exercise, to prove a point that should be obvious to any casual observer.

Michigan acknowledged a \$1.5 million Maintenance of Expenditure to reflect our annual maintenance of our statewide voter registration file in 2000. Today, that maintenance is \$1.9 million per year. The proposed policy is reasonable to implement. The State is more likely to have records of specific appropriations

made to lower-tier entities for particular election purposes. Most lower-tier entities would not be able to reconstruct financial records of transactions that occurred more than ten years ago. Of the 1,514 cities and townships in Michigan, the vast majority are staffed by part-time clerks, who are paid a flat fee stipend for conducting elections and performing all other duties as clerks of their communities. To require an MOE in these communities is absurd.

Finally, the proposed policy invokes reasonable flexibility by allowing States to aggregate expenditures each year among the expenditure categories. This is critical, as needs shift, budgets shrink, and hopefully, some technology efficiencies are realized. There can be no harm in rolling up all the State expenditures, in a given year, to calculate maintenance of State expenditure.

The proposed policy rightly accomplishes a reasonable and legally correct application of Section 254(a)(7). Even though the proposed policy is unable to address the capital expenditures made in the base year, NASED strongly urges the Commission to adopt this policy at your earliest convenience. Congressional intervention may be necessary to remedy the capital expenditure issue. In any event, no one from the Federal Government is likely to suggest that a State repeat the capital expenditure year after year.

So, thank you for taking time to hear me out on this proposed policy. I truly commend you, each Commissioner, and your staff, for supporting the efforts to improve the MOE policy.

Thank you.

CHAIR DAVIDSON:

Before you start, Dr. Abbott, I failed to mention that our Inspector General had supplied testimony for this meeting and could not attend. And that will be put into the record, so that everybody knows that. But, I think there's also testimony -- we were supposed to have this meeting a month ago, for everybody to know, and it had to be cancelled, due to the Chair couldn't show up, she was sick in bed. So, I definitely appreciate everybody, but some of our testimony from individuals that were experts, and our IG, was not able to attend this meeting. So, their testimony will be put into the record.

So, Dr. Abbott, as you give a presentation, I would also like for you to discuss the issues that our Inspector General had put into his testimony, this last time, and respond to the issues that you feel need to be responded to, so that we would be able to go through, as well as, any really comments that were presented on the -- from the draft to the policy that we are proposing today, and so that we can go through them. And then, the Commissioners may have additional, in a little bit.

So, I'll begin with you and let you start. Thank you.

DR. ABBOTT:

Thank you, Chair Davidson. We, also, are submitting, for the record, testimony from Mr. John Webster. Mr. Webster is a former CFO of the Library Congress. He's a CPA. He sits on the Government -- Association of Government Accountants. He provided written testimony in preparation for the meeting that was cancelled. It related, primarily, to the Inspector General's

comments on our draft policy, and that is, in fact, in the record, and I will reference it, generally, as I go through my presentation today.

Just for the benefit of the folks in the audience, and to kind of get us going again, I'm going to read what the statute actually requires for us, on this, just so that we can set the context here. Within HAVA, there is one paragraph and it's -- I'll be referring to it as the Maintenance of Expenditure paragraph. And in every day terms, this paragraph basically says, listen States, if, in fact, you have decided in 2000 to begin implementing HAVA reforms, as outlined in Title III of HAVA prior to the passage of HAVA, or prior to getting any money, specifically in the year 2000, because that's the base year, you should continue doing those activities. We don't want our money to replace the money you've already budgeted for these reforms. So -- now to put that in lawyer speak, it says, 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. So, that little paragraph is what we've been working on for a few years now, and I believe we're close to a policy.

But let me walk through the changes from the last policy.

COMMISSIONER HILLMAN:

Dr. Abbott?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

Did lawyer's take ownership of that paragraph, isn't that Congressional-speak? Some lawyers would say "not me."

[Laughter]

DR. ABBOTT:

Fair enough, I think of attorneys working on the Hill, so I apologize -  
- should I apologize to the attorneys or to the Hill staff? I'm not sure.

That is, in fact, our language. I think the language is clear on its face, and we have written a policy that reflects, as Mr. Thomas points out, that language, and the reality of how elections and election reform, as envisioned by HAVA, has been carried out in the last eight or nine years.

So, what I'm -- I'm going to refer to several documents and, as Commissioner Hillman asked, I will tell you which document I'm referring to, as we walk through this.

What I would like to do is not go through each part of the policy, because I think that would take a long time. I'd like to talk about just the major changes that we made to the policy, as a result of one of four kinds of input. So, we made changes as a result of Commissioner input. We made changes, extensively, based on the IG's comments. We made changes based on the written testimony received from six States. And that testimony and our responses to each one -- I'm sorry, that public input and our responses to that public input are posted on the website and in the record. So, I'll refer to that. We call that comments tracker. I will refer to that document today. And then, we made some changes just based on the benefit of another read of the policy. We've had public comment, now, for going on 60 days, and time to take a look at it

and make sure that the document actually says what it needed to say, and in a few places we've made some clarifications, so that we can strengthen our position.

So, let me get going on this. So, the first thing we changed was question ten, which was EAC's review of the plans. So, in the prior version, we talked about the Executive Director concurring with the plan when we read it, and some people took that to be approval of the plan. The IG took issue with that issue, I believe, as did a number of our States. That question is now gone. So, you won't find the question in here. We've omitted it. What we've done is, we've, basically, said what we're planning to do now is an assessment of any State that voluntarily submits an MOE plan to us.

Yes, Commissioner Hillman.

COMMISSIONER HILLMAN:

I'm trying to follow you. So, I'm looking at a document that says "MOE Policy for Public Comment" dated 6/18, and there are some track changes.

DR. ABBOTT:

Yes, so, in that policy, the question, of course, that has been deleted is not here, because it would have been very...

COMMISSIONER HILLMAN:

So, it doesn't show that it's been deleted?

DR, ABBOTT:

No, it would have been very confusing for us. The document would have got very unwieldy. So, what you have, in front of you, is a policy that has some -- the latest round of insertions, which are in

red or green. I think they're in red on your version. And the questions that were dropped are just simply no longer in the policy.

And the...

COMMISSIONER BRESSO:

So, you're referring to something that we don't have in front of us, but was in the original policy that went out for public comment?

DR. ABBOTT:

Well, what I've said is, we've dropped the question.

COMMISSIONER BRESSO:

Right.

DR. ABBOTT:

So, you don't have the dropped question...

COMMISSIONER BRESSO:

But, it's not in our policy...

DR. ABBOTT:

No...

COMMISSIONER BRESSO:

Okay.

DR. ABBOTT:

...because it's been dropped. So, what we have, in front of us, is what, hopefully, will be the one that we'll deliberate on and make changes to, as we go on here today.

COMMISSIONER HILLMAN:

So, it's not the current number ten?

COMMISSIONER BRESSO:

Right, it's not the current number ten.

DR. ABBOTT:

It's not the current question number ten, but number ten does address how we manage to deal with this.

COMMISSIONER HILLMAN:

So, just for my benefit, restate the question that's been deleted.

DR. ABBOTT:

So, the question that was deleted referred to -- and I don't have the number of the question, I apologize, we've reordered these a few times -- the question referred to whether or not the Executive Director would do any kind of concurrence or approval of the plan.

CHAIR DAVIDSON:

I think we all remember that section.

COMMISSIONER BRESSO:

Yes.

DR. ABBOTT:

I can get you the exact question if you bear with me.

CHAIR DAVIDSON:

I apologize for interrupting, but I think we all remember that, because we had quite a bit of conversation about it.

COMMISSIONER BRESSO:

We had deliberation on it.

DR. ABBOTT:

The level of detail, in terms of what question I dropped, I'm not prepared to do that. I can do that, but it will take quite a bit more time for me to go through and do that. So, if we can -- if it's okay, I'll move forward, just in referencing general to the concept of concurrence of the plans.



We removed that. What we have said now, is, if you voluntarily submit your plan for how you will capture your base year and maintain your yearly MOE contributions, we will do an assessment of that plan for you. The assessment of a plan will point out any weaknesses that we see, either in your methodology, your rationale, the documentation that you're going to keep, to justify your MOE. We will point those things out to you in the form of technical assistance, if you -- so you'll get something back, written, from us that shows where we think there might be some issues with your plan. And then, of course, the States are free to do with that, what they will. So, that's the first major change. And then, I'm going to come back to this one, at the end, because we've added some additional language related to the audit resolution process, and we'll talk about that in just a moment.

Question number 18, Mr. Thomas referred to this as the capital expenditures in the base year. Question 18 is still there, but we've just clarified that we are unable to exclude those on their face at this point in time. So, in the first draft of the policy, we had hoped to amortize costs of equipment out over the life of the equipment, so that it would reduce the costs in the base year calculation for your MOE calculation. The statute doesn't support that interpretation. The Inspector General pointed that out, as did our consultant John Webster, so we have adjusted the language accordingly. There may be other ways to address this issue down the road, but it won't be here in the MOE policy.

The next is question number 24, which is EAC's role in the audit resolution process.

COMMISSIONER BRESSO:

What was -- what is it, now, in our policy?

DR. ABBOTT:

It's currently 24.

COMMISSIONER BRESSO:

24 talks about the voluntary MOE plans and the process for submission, it doesn't talk about the audit process. I think you may be referring to 16. Is that possible?

DR. ABBOTT:

It's possible, or question 18, if I got-- if I inverted those two, let's see. Commissioner Bresso, you suggested 16?

COMMISSIONER BRESSO:

You're talking -- you referenced the audit resolution process. And, in looking at this, quickly, right now, it appears that question 16 has language in there regarding the audit resolution process. Is that...

DR. ABBOTT:

Yes, thank you, that is, in fact, the question.

COMMISSIONER BRESSO:

Okay.

DR. ABBOTT:

So, in response to the initial round of questions from the Inspector General, they pointed out that the language we used appeared to be infringing on the Inspector General's authority to audit our programs. And, of course, that was not our intention. So, we've clarified the language to talk about the fact of what the EAC's role is in an audit, which is the resolution of the audit. So, when we're looking at an issue related to MOE, and the resolution of an audit,

we'll be looking at the series of recommendations and questioned costs that come forth from the Inspector General through their auditor.

In our role as audit resolution, which is in the -- under the domain of the Executive Director at EAC, we will look at those questioned costs or recommendations based on the audit and make a determination. What we've said here is part of our determination will be based on that assessment of a plan we did. In other words, we're telegraphing, up front, what we think your plan needs to have in it, and if you've met that level of specificity or you've done what we -- our assessment has asked you to do in your plan. You're not guaranteed of anything in an audit, but, at least, you have the knowledge, going forward, that what you're doing, we think, is reasonable and, we think, meets the MOE policy, as you have passed it. This is a pretty basic tenet of good grants management, which is, you should tell your folks up front if they're grantees what your expectations are of them, and what they need to do to meet them. So, like any part of a funded project, whether they submit an application and then you approve the application and put money on it, or whether it's a series of policies that they're implementing at your recommendation, they should have a good degree of confidence up front that what they are, in fact, doing you concur with or you have assessed, and you believe it's reasonable interpretation of the policy.

Now, you might have a perfect -- if you're a State, you might have a great MOE plan, but not do the documentation, just like you might have done an excellent procurement process for a major

contract, but not kept any of the documentation to show that it was competitively let contract. That would result in a finding, that finding would be resolved by the EAC management and MOE would work the same way. If you have a great plan, but you don't follow it, you're still going to probably have an audit resolution that's not to your liking, but at least you knew up front what exactly -- what the expectations were of the agency. So, this question clarifies that, question 16.

And then, finally, the last thing we did, and let me just check the question number before I say the question number, we clarified question eight. This was in response to the IG's first and second set of comments, which I will address in a moment, but also in response to comments we received from the States, one State, in particular, which called into question what State expenditure you use to calculate MOE in the base year. We went on in question eight to clarify that we do not consider revenue redistributed from the State to counties used at the counties' discretion to be capturable in MOE. In other words, if you have general revenue -- if you have a general revenue stream from sales tax or property tax that gets sent back down to the county, for the county to finance the county operational budget, even if that budget includes activities for elections, even if that budget includes activities for election reforms, as envisioned in HAVA, in the base year, it's not a qualified expense, because it's not a State expenditure of funds. So, we clarified this question to make sure that we're crystal clear that what we're talking about are State expenditure of funds. For example, the State appropriated money for all counties to purchase

provisional ballots that met the definition of HAVA's provisional ballots in the Title III reforms, and that money went to the counties and they bought those ballots. That would be something that we would want to capture in MOE at the local level, but simply a county buying provisional ballots, on their own, with whatever revenue stream they want would not be part of an MOE base year calculation. This question clarifies that.

Are there any questions at this point?

COMMISSIONER BRESSO:

I have questions, but I'll reserve them for discussion, at the end, after you're done with your presentation.

CHAIR DAVIDSON:

Would it -- I mean, if it's -- each one of them, do you want to address it as we go?

COMMISSIONER BRESSO:

I thought that we were going to have a presentation on the policy, and then, after that we can go back and answer questions or offer any changes.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BRESSO:

If you want to do that now, we can certainly do that now, but I thought it would be better to go through the whole policy, and then go back if we have anything...

CHAIR DAVIDSON:

Okay, all right.

COMMISSIONER BRESSO:

...just for expediency, unless you prefer a different method.

CHAIR DAVIDSON:

Okay, all right, go ahead, continue then.

DR. ABBOTT:

So, those are the major changes to the policy since the last version that we've had in front -- you know in this meeting in February.

There are other changes that are not material. They are edits for clarification, primarily, and so, I've hit the four major areas that I consider major policy implications.

But I would like to talk about a couple of things, and I want to just shift gears and talk about the Inspector General's second round of comments.

COMMISSIONER HILLMAN:

The what, second round of comments?

DR. ABBOTT:

Second round of comments. The Inspector General gave us an initial round of comments during the public comment period, and then, a second set of comments came in after we published the second version of the MOE for public comment.

COMMISSIONER BRESSO:

Are you talking about the June 22<sup>nd</sup> letter that he had sent?

DR. ABBOTT:

That's correct.

COMMISSIONER BRESSO:

Okay.

DR. ABBOTT:

This is issued for the record. So, in the letter they say, "We believe that this application of MOE policy" and it's the one that I just described to you, in terms of State versus local MOE, "leaves the program open to supplementation of local expenditures of Federal funds. In other words, the language of the EAC policy allows lower-tier entities to replace their local dollars with Federal funds. It does not ensure that the Help America Vote Act grant program will increase rather than maintain election spending."

So, I just want to -- so that's the first set of major issues the IG has with the current policy. And I just want to point out a couple of things, here, from our perspective.

First, the statute is directed, of course, to State expenditure, not local, so local expenditure does not come into play here.

The second thing is something I related to you earlier. This requirement is tied to Title III reforms of HAVA. Title III reforms of HAVA has a basket of seven activities that are allowable to use our money on. So, these funds are not just for the administration of elections. These funds are to implement some very specific criteria, and the one general criterion that you can use to use the money is the improvement of election processes, so, by definition, you're not hanged for something you did in the past. If you paid for something in the past and called it an improvement, that would be an audit issue, a finding would be issued, and we would settle that in the audit resolution process.

And finally, the purpose of requirements payments is not to boost spending of elections -- or spending on elections by the Federal Government. The purpose of the requirements payments

was to help States implement the reforms required by HAVA. So, this notion that somehow we've created a policy that is allowing local funds not to be used to implement it simply is not the case. The statute and the purpose of the Help America Vote Act was not to simply fund elections generally, it was to implement these reforms. So, we find no basis for this concern as addressed in the Inspector General's letter here.

COMMISSIONER HILLMAN:

Can I just ask a point of clarification on that? Is there a difference -- when you say the expenditures by local jurisdictions does not count, is there a difference, in terms of whether they're spending State and local money, versus, if they are spending a grant or a distribution of HAVA funds that was given to the local jurisdiction by the State, for the purpose of meeting one of the HAVA requirements?

DR. ABBOTT:

That's a fair question. The -- we are only talking about non-Federal money. So, if, in a fact, a local received HAVA funds to do any of these activities, it would not be included or envisioned as part of the MOE base year. So, it could be any non-Federal funds used in the base year appropriated by the State for a specific purpose. If it's done -- regardless of who has spent the money to do whatever was envisioned with those funds, whether it's a State or local, it would be collected as MOE under our policy. If, in fact, it's simply a local expenditure and the localities get a lot of their budget from the State, right, discretionary money flows through the State -- from the State, then it would not be included in MOE.



COMMISSIONER HILLMAN:

So, if I can just, to further clarify that, could I ask Mr. Thomas to give an example of what he would consider a local expenditure that would be included in Maintenance of Expenditure?

MR. THOMAS:

I, frankly, think there are very few. One, I'm not aware of many. I've canvassed a number of States, and there's only a few that actually appropriated money in that base year for specific purposes enumerated in HAVA. So, for example, one might be doing a statewide voter registration system, that money was given to the local jurisdiction to spend, to say, let's buy equipment for them to operate that system. One could argue that that would, then, be part of the State MOE; that it was State appropriated money in the fiscal year prior to the November 2000 election, where the purpose was to provide local units the ability to buy hardware to operate a statewide voter registration system, for example. Then, I would see that as creating an MOE connected to the State.

COMMISSIONER HILLMAN:

Okay, thank you. I apologize for the interruption, but I needed to get my head wrapped around that.

CHAIR DAVIDSON:

Well, an additional follow-up on that, is it correct, though, that the Inspector General would be able to know that by the State's MOE that was given that showed that money went down to the localities, if that had occurred and that that system had to meet the HAVA requirements, also, is my understanding. Am I correct?

MR. THOMAS:

Well, if you're asking me that question, yes, they would be -- the way I understand this proposed policy, they would be appropriated funds. So, there would be a track record, an audit trail in the appropriations directing the State to provide this money to local units for this specific purpose. Whether the actual system actually meets a hundred percent of the HAVA requirements of a statewide system, I think, would be up to argument. There were a number of systems out there, including Michigan's, that hit, you know, nine out of ten points, but not all of them. For example, we didn't have a connection with the Social Security Administration. But nonetheless, we did report, and have reported, \$1.5 million of State appropriated funds, not given to local units, but paid for by the Secretary of State for the maintenance of that system.

COMMISSIONER BRESSO:

I have a follow-up on that.

CHAIR DAVIDSON:

Go right ahead.

COMMISSIONER BRESSO:

Mr. Thomas, under your example then, if the State appropriation came from a redistribution, let's say, and you're saying that if the locality was not given any guidance or told what to do, but they went on their own and did a Title III activity, then it wouldn't be considered? Because, in my mind, it's still a State appropriation whether or not depending on -- whether or not they were told to purchase something or not told to purchase something. And it's still under that Act. I guess, I want more clarification on that.

MR. THOMAS:

Certainly I would say, no, it is not. There are all kinds of distributions of State money to local jurisdictions, for them to exercise discretion on how they spend that money. So, if the State did not, by appropriations, make that a State expenditure for one of the enumerated HAVA purposes, then, no, it cannot be included in the State Maintenance of Expenditures. I mean, it's no different than if they got it from their own property tax, locally, or this redistribution of money from the State. The source of the money would only fall under this policy if it was given a State HAVA purpose. In reality, you're not going to find that. I don't believe it exists, except in, maybe, some very, very limited cases. Because as I noted, States just traditionally have not sent money, much to the chagrin of local election officials, have not sent money to local election officials with instructions on how to spend it on behalf of elections. That just traditionally, in almost every State, that has not been the way elections have been financed.

CHAIR DAVIDSON:

Maybe I can give an example and you can tell me if I'm right or wrong. But the State of California used to, they haven't been paying their locals recently, for every registration, so much, it was a few cents, per registration each year, for registering new voters. There was no requirement on the counties on how they spent that money. It just went into their election fund. That doesn't fall under HAVA, because it's not one of the issues that HAVA required under our Title III. Am I correct?

MR. THOMAS:

That's correct. I mean, if California -- even if they said specifically, "I will send you two cents for every single voter you register who has not been previously registered," I don't see any HAVA requirement to do that. So, therefore, I don't see how one can call that a HAVA requirement that would be factored into State Maintenance of Expenditures. I believe that -- remember, I think as Dr. Abbott indicated, this is not Maintenance of Effort on how you run elections, how you finance. That is not the case. If that were the case, then you could say, yes, everything you spent on elections would be your Maintenance of Effort and you have to keep spending that amount and you cannot use HAVA money to make those types of expenditures. But that's not what HAVA says. HAVA says it is State appropriated money, State expenditures for requirements, so Title III requirements, the enumerated seven categories. And I think you have to look that narrowly. When you go broader than that, yeah, you got a policy that has attempted to be promulgated. But that's not what this statute says.

COMMISSIONER HILLMAN:

Can I use an example, and then, tell me where this one goes? So, in the baseline year, a local jurisdiction receives -- a local election office has access to money, whether it's distributed from the State or the county or the city or the town government, and they determined in that year, to improve the voter education materials; signage at the polls pointing to the accessible entrances and posting voter rights and responsibilities. That is one of the issues, is it not, Dr. Abbott?

DR. ABBOTT:

Um-hum, um-hum.

COMMISSIONER HILLMAN:

Okay. So, if they did that on their own, and it came from cigarette taxes, soft drink taxes, whatever, is that included in Maintenance of Expenditure?

MR. THOMAS:

No.

COMMISSIONER HILLMAN:

Okay.

MR. THOMAS:

No, not without a specific State appropriation for that purpose.

COMMISSIONER HILLMAN:

Okay, so it gets to the definition, then, of what's an appropriation. I mean, some would argue any distribution of funds is an appropriation. If it's coming from a larger pool, we collected \$1 billion in sales taxes, and so \$10 million of that is being appropriated to town "X," that's an appropriation, no specification, except that's their appropriation for them to apply to their expenditures, for whatever. If the appropriation doesn't specify election improvement, is it or is it not part of the Maintenance of Expenditure?

DR. ABBOTT:

So, we're using the term appropriation here, but the statute uses the term expenditure. So, the difference -- so, in our conversation we're talking about appropriations. In our language, in the policy, we say expenditure. The difference, here, is not about a distinction. A general allocation of funds through an appropriation process,

which is how everything is financed in government, whether it's State, Federal or local government, is not necessarily a State expenditure for HAVA purposes. They appropriated money. It goes down. The actual expenditure is at the local level. So, the locals have discretion as to how they use that money. You could not, under any definition we have been able to see, say, "Okay, because they decided to spend it on these activities you, State, we're going to hold you accountable for that." The State did not expend those funds for those activities. They didn't require the locals to expend those funds for those activities. That was something the locals chose to do on their own. It's not a State expenditure of a HAVA allowable activity. That is how the current policy is envisioned.

COMMISSIONER BRESSO:

I guess, if I just may, with the way that I'm reading the policy, and maybe it just needs some word changes, but I think the overall policy says any State appropriation, which means that you follow the appropriation down. I think that's what our policy is saying. And I don't understand how, if we're redistributing, it's still a State appropriation, even though we're not telling them what to use, but they do an activity that's under Title III and they received State money to do it, but they weren't told by the State to do it. How is that different?

DR. ABBOTT:

So, in our draft policy, if we've used the term appropriation, and we've done many versions of this policy in the last month, then I think that's an error, and we should change the language and say --

to match the statute and say expenditure. And then, you know, we could write three more paragraphs on what we believe that means, but I don't think that's necessary. I think this record, which states the EAC's intentions, moving forward, as to how we're going to look at that, is what we need to have on the record, if we eventually pass the policy. But we should not use the term appropriation where I think expenditure is warranted.

CHAIR DAVIDSON:

So, we could still move forward and change any -- later change anything if we find that appropriation is being use misappropriately.

DR. ABBOTT:

I anticipate, in this conversation, several changes to this document. That's not what we did last time, and if that is one we need to make, then we should make it.

COMMISSIONER BRESSO:

So, are you suggesting we should reword the question and answer to number eight in our binder, because it's using the word appropriation, which could mean more than what our intention is, and it should be changed to expenditure?

DR. ABBOTT:

Well, in question seven, in context, it's a State appropriation for a specific expenditure.

COMMISSIONER BRESSO:

Is it number seven or number eight?

COMMISSIONER HILLMAN:

It's used in seven, as well.

COMMISSIONER BRESSO:

Oh, okay.

DR. ABBOTT:

So, I think the language in seven is appropriate.

COMMISSIONER HILLMAN:

Yeah, it says "appropriated for that purpose."

COMMISSIONER BRESSO:

"For that purpose."

CHAIR DAVIDSON:

And then, in section eight, the second line of the answer there where "through a State appropriation," is that correct there?

COMMISSIONER BRESSO:

I just think the first sentence and the second sentence may be inconsistent. And that was part of what I was going to discuss later on, but if you want to take this on now, that's fine.

CHAIR DAVIDSON:

Well, we might as well address it now, because we're right in the middle of it, I think.

COMMISSIONER BRESSO:

Um-hum.

CHAIR DAVIDSON:

What was your suggestion that you were wanting...

COMMISSIONER BRESSO:

Oh, I didn't have a language suggestion, I just wanted to talk about it, because I didn't understand exactly what -- to me, it was confusing.

DR. ABBOTT:



I don't think it's in conflict with what I've said here, but there is, you know, an added element to this, which is, oftentimes, the money is appropriated to the Secretary's office, who then sends the money down to a local level for a specific purpose. So, when we're trying to write a policy that captures what our intention here is, which is State directed -- the State's directed expenditures for HAVA allowable activities, there are a couple of different ways that they can do that. And so, I don't -- we should, obviously, not have any inconsistency in the policy, but we should just keep our eye on what's important here, which is, we're trying to make sure that we draw a bright line distinction between a State expenditure or State directed activity financed with State funds, and something that's done discretionary at the local level, which we don't think should be included.

COMMISSIONER BRESSO:

Even though it was derived from a State fund?

DR. ABBOTT:

Well, that would be our -- I mean, that's something that reasonable attorneys would argue. If the money is collected from a local sales tax in that county, and then, redistributed back to that county, whose funds is it? I don't think we need to get to that level of detail. I think we just need to have a policy that states our preference and -- well, actually our interpretation of the statute.

COMMISSIONER BRESSO:

Well, of course, a local tax, I would never expect, if it's given back up to a State general fund, and then given back to the county or a locality, should be used, if it's given for elections purpose. But, if

it's derived from a State property tax, and then, we appropriate it down, then, that's a whole other issue, because it's a State appropriation.

DR. ABBOTT

But, it's not a State -- it's not a State expenditure, it's a local expenditure.

COMMISSIONER HILLMAN:

It does get complicated, and I think, in reading eight, it says discretion. And I think that's -- you know if appropriation/discretion and then, expenditure, sort of follow in the same explanation. There's no black or white here, and I think that's what leads to the confusion of how EAC is interpreting the HAVA requirement, you know. For the benefit of the people who are listening, and not seeing the language, we are talking about -- I want to make sure we're all talking about the same thing. What's number eight in the revised draft says, "What types of expenditures must be used to calculate the MOE base line amount and are eligible to count towards our annual MOE contribution?" And it says, "States must use all election expenditures and that were funded directly by the State or through a State appropriation to a lower-tier entity." And so, election expenditures is what triggers that calculation, is that correct?

DR. ABBOTT:

That's correct.

COMMISSIONER HILLMAN:

Irrespective of whether we're using expenditures or appropriations or contributions or grants or whatever way money can flow from State to local, it is election expenditures.

DR. ABBOTT:

Correct.

COMMISSIONER HILLMAN:

Is that correct?

DR. ABBOTT:

That's correct.

COMMISSIONER HILLMAN:

Okay. And so then, further it says, "EAC does not consider the redistribution of State revenue from States to," Chris Thomas' favorite word, "lower-tier entities, where the entities have discretion on how the funds are to be spent." So, the State expenditure is the lower-tier, but it's not directing that it be an election expenditure. Is that...

DR. ABBOTT:

That's our intention.

COMMISSIONER HILLMAN:

Okay.

DR. ABBOTT:

And let me just give a couple words of context, here, that I think are very important. When trying to figure out a policy that's reasonable, and places a reasonable burden on States, and a reasonable burden on localities, we looked at this issue very carefully. And the reason that we're being -- we're recommending such a bright line distinction, is that we don't believe that it's reasonable or fair to put

the 6,500 or 7,000 local jurisdictions in a position where they have to prove that they didn't have expenditures in the base year. And the reason we don't think that's reasonable and the reason we don't think it would actually net us anything, other than a lot of burden, is that the localities were simply not doing HAVA reforms in 2000. HAVA had not been invented yet. They were not implementing, on their own, statewide databases. They were not, necessarily, buying equipment, and if they were, they got reimbursed for it, you know. The basket of seven activities that are allowable, there, just simply, was not much activity going on there. So, to put every single local jurisdiction in a position of proving that ten years ago they didn't do this stuff, and that nets us, maybe, one percent, a half percent of the amount of money we've spent on election reform in the last ten years, it doesn't seem reasonable. And so, if we're not careful and we implement a policy that is vague or ambiguous in this area, the unintended consequence is that we open up an area for audit that, frankly, should not be opened up.

Now, they may audit this anyway, and the Inspector General may choose to go and ask localities to show that they didn't have anything in 2000. That is their prerogative. But what we recommend that you telegraph and what you put in a policy is that EAC does not believe that to be reasonable and we do not believe that it will actually capture any amounts of funds that are significant enough to warrant the amount of burden that we would be placing on localities, with the policy that asks them to do that documentation.

So, that's the reason these two questions are worded the way they are.

CHAIR DAVIDSON:

And one more I think that is kind of confusing, as you get down to the bottom, in your example, where you mentioned sales tax, the State has collected sales tax, and they percent out the sales tax, down to the counties. It goes to county commissioners. They don't give a percentage of it to the county clerk to run elections, and then a percentage to run motor vehicle. It's given to the counties and the county then takes all of the revenue, and they allocate the revenue out. Part of that revenue may be county revenue, maybe the only revenue that came in from collecting -- selling lists for voter registration. It may have been things like that. It's all the revenue that goes in, and then, they give that revenue out the following year, within the budget. So, they're collecting revenue one year, give it out, really basically, the following year.

Chris, do you want to add?

MR. THOMAS:

Yeah, I would just note I doubt there's any county election official who would have a clue as to what the contents of their budget -- the money that they've been allocated by their county commission comes from the sales tax distribution or the property tax distribution. That money all goes to the county, it doesn't go to the election official.

CHAIR DAVIDSON:

Yeah.

MR. THOMAS:

And, it is then budgeted -- you know the election official puts their budget in. If it's approved, they've got the drawdown to spend the money. But, I do think Commissioner Hillman, you know, your point it's discretion, there's got to be some purpose attached to the State expenditure. And if there's no purpose attached to it, then I don't see how it fits inside this policy.

COMMISSIONER HILLMAN:

The exception would be if a tax had been specifically approved for the purpose of generating funds for elections. I don't know if there's ever been any such...

COMMISSIONER BRESSO:

Yeah.

COMMISSIONER HILLMAN:

That would be a wonderful idea, but I don't think it's ever happened.

MR. THOMAS:

Hallelujah.

COMMISSIONER HILLMAN:

That would be a tax I'd gladly pay.

DR. ABBOTT:

The example I gave on the provisional ballots is an actual example from a State that does that cost every year. The money gets distributed to the Secretary of State, and then it goes to localities to pay for that. They have used that in their MOE calculation because they believe it's a State expenditure, even though, in fact, their ballots are purchased at the county level. But the money had a dedicated purpose when the State appropriated it, and, thus, it's counted.

CHAIR DAVIDSON:

Okay. So it's -- every State is so different that you just can't specifically address each one of them, obviously...

DR. ABBOTT:

That's correct.

CHAIR DAVIDSON:

...in our guidelines.

DR. ABBOTT:

And that's why the policy...

CHAIR DAVIDSON:

In the policy.

DR. ABBOTT:

...calls for State-specific plans developed by the States taking into account their own unique situations. We think that's very important that that's a principle tenet of the plan.

COMMISSIONER BRESSO:

Is there any other language that we can insert here that would clarify it? Because I still, you know, for those that, maybe, aren't watching the webcast and don't have this in front of them, if they're just reading the policy and don't understand our intentions, our examples, that we can clarify it. Because, I think the first sentence, and then the second sentence, is still unclear and inconsistent.

COMMISSIONER HILLMAN:

Commissioner Bresso, can I ask, can you explain further what your concern is? I don't mean about this...

COMMISSIONER BRESSO:

I guess, it's the word redistribution I'm having concerns with.

COMMISSIONER HILLMAN:

The concern of, not just the word, but what is the underlying policy concern about, that you're trying to address?

COMMISSIONER BRESSO:

It's not the policy concern as much as the way we are articulating our policy in this paragraph. I'm not quite sure it captures what we're trying to say. I don't know if we have suggestions for alternate, clarifying language. I'm not trying to put General Counsel -- or Counsel on the spot. I don't know if she's been following or has anything that she would suggest.

DR. ABBOTT:

We could suggest EAC does not consider revenue from States provided to lower-tier entities, where the lower-tier entities have discretion on how the funds are spent, to be eligible State expenditure that would be required for inclusion. So, we could just take out the redistribution entirely, and say, EAC does not consider -- Tamar are you getting this -- EAC does not consider State revenue distributed from States to lower-tier entities, then continue on.

CHAIR DAVIDSON:

Is the Commissioners okay with that?

COMMISSIONER HILLMAN:

I guess, my only question would be, there must have been a reason why the term redistribution was put in here, and does anything alter with respect to -- I mean, we're talking about Federal-speak here and Federal interpretation, and when analysts and others look at it,



if their favorite buzz words aren't in there, they assume it's not compliant.

DR. ABBOTT:

Right, we use the term redistribution to kind of reinforce the notion that it's discretionary on the part of a locality and not the State. I think the paragraph still holds without the use of the word. It was a reinforcing word and not one that we were told was necessary by the folks that helped us design this. So, I think it can come out without doing any material change other than, for clarity sake, to our intention.

CHAIR DAVIDSON:

Commissioner Bresso?

COMMISSIONER BRESSO:

Okay, that's fine, so I just want to be clear, one more time. What we're saying is, State gives locality money, and tells them, spend it the way you want. The locality happens to spend it on a Title III activity, but, because they had the discretion to do so, it wouldn't be counted in the baseline MOE, because then, that's not deemed a State expenditure, it's deemed, then, a local expenditure, even though it derived from State funds, originally?

DR. ABBOTT:

That's correct.

COMMISSIONER BRESSO:

So, without giving a specific purpose attached to the State expenditure, then, it no longer becomes a State expenditure when it hits the county or locality or jurisdiction, that's what we're saying, to be clear. I just want to get this in my mind.

DR. ABBOTT:

Yes, that's correct.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

Okay, the next one?

COMMISSIONER BRESSO:

Are we going to...

CHAIR DAVIDSON:

Does that cover everything?

DR. ABBOTT:

Those are the major changes. I think we still have some issues on the table from the Commissioners, and so, at this point, I would take any general questions, but also, row back to any specific things that you would like to address in the policy before going forward.

CHAIR DAVIDSON:

Commissioner Hillman, would you like to start?

COMMISSIONER HILLMAN:

Yeah, just a point of clarification, and it's just something you touched on it, Dr. Abbott, but we didn't examine it too much, in this discussion anyway.

The Election Assistance Commission's Inspector General offered an observation that there is language in the proposed policy suggesting that if a State voluntarily submits an MOE plan, that EAC reviews and provides comment or guidance on, that that plan

is an important factor in the resolution of any audit issues addressing MOE. Is that a fair statement?

DR. ABBOTT:

That is a fair statement, and it's a distinction that's important. It helps in the resolution, but not in the execution of the audit. Execution of the audit is at the auditor's discretion, and the IG's discretion. They may choose to follow the plan. They may decide that they want to look and make sure -- test the validity of the plan. And so, they may go and look for other expenditures that, maybe, should have been included in that plan. And that there are omissions, if the State took shortcuts, or has a different interpretation than the Inspector General arrives at, after reviewing this, then, in fact, they would issue findings related to that.

COMMISSIONER HILLMAN:

But, he goes on to say, and I say, "he", because the Inspector General is a man, EAC should take care to protect the independence of its audits and audit resolutions. And his suggestion is that States and local jurisdictions will misinterpret our language to suggest, "But you said if we did this, there wouldn't be." And so, it is legitimate to consider -- for EAC to consider whether that verbiage, and perhaps, this goes to Mr. Thomas, that verbiage could be misconstrued by the State and the local jurisdictions within that State to say, "But we submitted our plan to you, and so, why are we now being questioned on it, and why isn't EAC finding in our favor," if there is an audit finding that needs resolution?

DR. ABBOTT:

I'll go first, if that's okay, I spent some time on this issue.

COMMISSIONER HILLMAN:

Sure.

DR. ABBOTT:

The current policy, as drafted, takes care to not, in any way, shape, or form, stray, under the territory that is the Inspector General. We talk, specifically, about the resolution of audits. We talk, specifically, about the fact that the plan will be the basis for helping us resolve any findings. It's not the only thing that we'll look at though. So your concern -- and the way the Inspector General has worded this, I find to...

COMMISSIONER HILLMAN:

Let me just clarify, it's not my concern. But what I want to get to is, does it, and I think this is where Mr. Thomas can be helpful, does that language suggest, is it -- would it be fair for a State to say -- and I'm not talking about the independence of the Inspector General to conduct audits. That's -- I'm talking about, if there's an audit item that needs resolution, that lands at EAC, beyond the Inspector General's office, and so, the Executive Director, and maybe, the Commissioners, would be asked to weigh in, depending on how it gets resolved up the chain. Is there the possibility or the probability, that States or locals would misinterpret what EAC is trying to say in the question, about their voluntary submission of their MOE plan for review by EAC, would somehow guarantee that these issues were all covered, and we're on the right path, and there should not be an audit question here?

MR. THOMAS:

My most favorite section of HAVA is 253(c).

COMMISSIONER HILLMAN:

Could you speak up a little louder, since it's your most favorite section? I want to hear it.

MR. THOMAS:

My most favorite section of HAVA is 253 (c), which says, "Methods of compliance left to discretion of State. The specific choices on methods of complying with the elements of a State plan shall be left to the discretion of the State." You have entered this field and offered guidance in 2007 on what Maintenance, at that time, called Effort met, which the IG interpreted to be very, very far reaching. I think, frankly, at least, the experience I had with them, was that all 1,600 of my jurisdictions were in the soup.

COMMISSIONER HILLMAN:

Were what?

MR. THOMAS:

Were in the soup, we were in the exercise of determining an MOE. As we have pointed out, since that time, and others, it's, I think, not a proper reading of the law.

So, where we started was the discussion of perfection. Your earlier draft, I think, gave us great cover, and I think you have watered that down and modified it, and I certainly would accept that. I think all you give us, in this draft, is that, if I explain to Dr. Abbott in the Grants Department how I arrived at my \$1.5 million, and I make a demonstration that that's consistent with this policy, and he reviews it, and says, "Yeah, as long as you're telling me everything, and as long as you've disclosed everything," because he's not conducting an audit, I don't view what he's done as a

decision of the agency, because there's no audit, he's not come out and looked at all our books and everything, then I'm going to go forward with that. And we might have some tense discussions with the IG. And we're going to rely on 253(c). And we're going to rely, just as he has relied, on the 2007 MOE policy. We would rely on the 2010 MOE policy as a correct policy.

Now, if the Commission -- if let's say a finding is created and that goes up the chain to you, and if you find that from the evidence provided that we don't even comply with the 2010, then, yeah, we're going to get a finding that you're going to endorse. But, if he is arguing that we didn't include all the part-time clerks in Michigan, I would be surprised that, based on this policy, you would support that position. I mean, any time you create a policy, we're going to have to take it and run with it, and accommodate the IG in the way that we think the policy exists.

COMMISSIONER HILLMAN:

Going back, Dr. Abbott, and I'm looking, specifically, at what is now question 16. And there is a sentence there that I think gives me mild heartburn, from the perspective of an entity receiving -- because this wouldn't just be, necessarily, States or local jurisdictions, it could apply to some other funds. I mean, we don't necessarily have that right now, but it could. But the "for example" sentence; "A State plan that was assessed as adequate by EAC, and who followed that plan in its entirety, will be significantly less likely to have an adverse management decision than the State whose plan was assessed as not adequate." I understand what we're trying to say in the example, but I really do wonder if that

isn't, somehow, saying to a State, you know, wink, wink, "You give us our plan, and we see it's okay, we got your back."

DR. ABBOTT:

What it's saying is, if you give us a plan that we find is reasonable, and meets the law and the policy as written, and then, you followed that plan, we believe that that is sufficient. It's the same as if we're doing discretionary grants and we approved a budget and project plan for an activity, that later was questioned as to whether or not it was an allowable activity. If an activity is allowable and we've approved it, that's -- you can take that to the bank. No one is going to come back later and say, "Oh, you actually can't do this project because it's not allowable, because the Inspector General said it's not allowable." If we have a policy that it is, in fact, allowable and you've done what you said you are going to do, you should be okay.

Now, I said earlier in my testimony that, if, in fact, you either didn't follow your own plan, or your own plan is, as Mr. Thomas alluded to, isn't whole, then, in fact, no, that would be something outside of your plan that we never viewed, looked at, and we would take that under advisement, just like we would any audit recommendation from the Inspector General.

COMMISSIONER HILLMAN:

Right, I'm with you on that. I'm with you and I'm not...

DR. ABBOTT:

I'm sorry, I may be missing your question, I apologize.

COMMISSIONER HILLMAN:

I'm not philosophically opposed to that concept. But three years from now, when Dr. Abbott has retired and is in the Cayman Islands, and there's a new Commission here, and somebody comes up and says, "Yeah, but EAC said my plan had me covered, and now, there's a finding that's saying, questioning, and I followed my plan." So, this language doesn't sound like what you said. This language says, "will be significantly less likely to have an adverse management decision."

DR. ABBOTT:

Um-hum.

COMMISSIONER HILLMAN:

And I just -- I remain uncomfortable about that. And the only thing I can think is to either tighten up the "for example" language to say what you said when you just answered my question, or to strike that, because I do think it leaves open a door not that everybody is -- it is an example, but not everybody is going to understand what the intention was, just based on this language. And if this policy has the life it should have, those sitting here may not be here when an issue comes up.

DR. ABBOTT:

Right, so the example was initially intended to get people to submit plans, and then, if the plan was not assessed as adequate, fix the plan. In other words, the distinction we were trying to draw with the example was between a plan that was deemed -- that we assessed as adequate versus one that wasn't. If your plan isn't assessed as adequate, you can take that to the bank that when you get audited



you're going to have a real big problem, right, because we don't find merit there. So, that was the purpose of the example.

In terms of taking it out, I think that's fine. We have an audit resolution process and policy that we follow for all issues related to HAVA funds, and this policy would fall under that. So we don't need it here, in this part of the document at all, if we think it's going to lead to unintended consequences.

CHAIR DAVIDSON:

Before -- I think Commissioner Bresso has a suggestion that might address some of that, so if you would go ahead with your suggestion on...

COMMISSIONER BRESSO:

As long as Commissioner Hillman is done, if she just wants to continue asking Dr. Abbott questions.

CHAIR DAVIDSON:

Did you want to continue asking questions or if this...

COMMISSIONER HILLMAN:

I'll just see where we go. I'll see where we go.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BRESSO:

Well, I agree with Commissioner Hillman, I have those same concerns that she just articulated. And also, with the second sentence, when it discussed, "remedies for violation of MOE, either a grantee's allocation of Federal funds is reduced by the same

portion -- proportion as its contribution fell below the required level, or the grantee loses all grant funds for the fiscal year.” And then, the GAO Red Book is cited. And I actually pulled the GAO Red Book, and I know the Commissioners have a copy, and what it goes through, is, different examples of Maintenance of Effort statutes that are in -- that are used by different agencies. And one specific that is referred to says, “The Maintenance of Effort statutes will invariably provide fiscal sanctions if the grantee does not meet its commitment. Sanction provisions are two types. Under one version, the grantee’s allocation of Federal funds is reduced in the same proportion as its contribution, fell below the required level.” Now, I have grave concerns about any sort of levy on the States without notice, or going through a regulatory action process. I mean, I think it violates due process. And we also have suspension and disbarment regs that we’re considering, and we’ve adopted debt collection regulations from the Treasury. So, while these may be examples that are used in other statutes, MOE -- I mean, HAVA does not have sanctions for MOE or any sort of Maintenance of Effort type of statute for penalties in HAVA. So, to use the GO Red Book as the standard that we’re going to audit to, for penalties, without giving States notices and they’ve already received these funds, I think is problematic and causes due process concerns.

So, what I would suggest is just striking the “for example” section -- for example sentence, and then, the sentence after that. And then, I have question 16, the answer would read, “If a State fails to meet its MOE, it will be addressed through EAC’s audit resolution process. The State’s MOE plan and the EAC’s

assessment of it will be a consideration when the EAC resolves any questioned costs of policies related to MOE arising from the Inspector General or single State audits.”

COMMISSIONER HILLMAN:

I guess the only thing I would say is, your first sentence assumes failure, whereas, what I see in the current language answering the question, it says an audit finding. You’re saying, if a State fails to meet, and that assumes that it was found that the State failed to meet versus EAC being asked to address an audit finding. And so, that would be one...

COMMISSIONER BRESSO:

Tweak?

COMMISSIONER HILLMAN:

...yeah, concern I would have, with respect to the shorter language.

COMMISSIONER BRESSO:

So, you’d be fine with question 16 if the first, I guess, sentence states -- the first two sentences stayed as is, striking everything after “for example” and on. But perhaps, instead of using a “major factor in how EAC resolves any questioned costs or policies,” maybe, we can use how it would be a factor?

COMMISSIONER HILLMAN:

Well I guess, I really hadn’t focused on whether or not it is appropriate or inappropriate for EAC to put in this policy, and it’s a question for Dr. Abbott, about the remedies for violation of MOE. I mean, if we strike that, then, it doesn’t give any notice as to what the likely outcome could be. And I think we have a responsibility in answering this question, to say what the likely outcome would be.

COMMISSIONER BRESSO:

But I think the...

COMMISSIONER HILLMAN:

So, I was only focusing on signaling...

COMMISSIONER BRESSO:

Okay.

COMMISSIONER HILLMAN:

...to a State that the voluntary submission of their plan would mean that they wouldn't likely have any issue with an audit concerning MOE, and we just can't guarantee that.

COMMISSIONER BRESSO:

Well, the remedies, to go to your question that are there for the violation of MOE, I don't think comport with HAVA. And I don't think we can use the Red Book as the example, because I think it would have to go through a regulatory process before we would develop that. Now, there may be other violations through the audit resolution process that are already out there, and that should be part of the answer to this, but to cite to the Red Book, I don't think this applies at all.

COMMISSIONER HILLMAN:

It cites the Red Book?

COMMISSIONER BRESSO:

Yes, if you look at footnote...

COMMISSIONER HILLMAN:

But, it's not in the policy. We're not citing the Red Book in the policy, so...

COMMISSIONER BRESSO:

Yes, we are.

COMMISSIONER HILLMAN:

...I guess -- the answer to number 16 doesn't say anything about the Red Book. So, this is all new information, and while it may or may not be pertinent, it's more than I can chew on in 30 seconds.

COMMISSIONER BRESSO:

It does cite the Red Book, though. It has a footnote to the Red Book.

COMMISSIONER HILLMAN:

Oh, I see, down at the bottom, okay. So, Dr. Abbott, I have no idea what to do with this.

DR. ABBOTT:

So, one possibility is, we say, possible remedies for this, because it's not us that are going to be making the recommendations for the remedies, it's the Inspector General. And we know that when they find missing MOE, they're going to suggest one of these two remedies as a recommended course of action. Just like if you have a disallowed cost,, HAVA doesn't tell you, anywhere, if you have a disallowed cost, you have to pay the money back, right? That's part of the audit resolution process, and there's no separate set of regs, except for the Circulars, that would apply. So, we could say possible, we could strike it entirely. I think we all have to be mindful that it's our responsibility to let States know, and understand what the implications are for not failing to meet their MOE obligations.

COMMISSIONER HILLMAN:

I mean, I think Commissioner Bresso, I agree with that because we have been confronted with audit findings that required the State to

pay back the funds that were not properly spent, and in one case, EAC determine that the funds would be put back into the election fund. HAVA didn't say that. EAC came to that on its own within the context of existing Federal regulations, OMB circulars, whatever the universe holds for us.

COMMISSIONER BRESSO:

And that is fine, because the States have been on notice for that. They know that's our practice. What's referred...

COMMISSIONER HILLMAN:

No, it came up at the time -- no, that wasn't something we -- we weren't in the luxury, in 2004, of saying, all the what ifs, "let's pass a policy." We came to that policy when we were confronted with a situation. So, all I'm saying is that if we know, now, based on our experience, what a likely outcome would be, then I think it's fair to say what the likely outcome would be. That's all I'm saying. I mean, I'm not ready to just not put the States on notice what happens if you violate MOE. Now, whether we want to couch it in more Federal bureaucracy language that says "in accordance with past practice or Circulars," or whatever, I don't know.

COMMISSIONER BRESSO:

And I agree with you that, you know, whatever remedies are available should be included. I don't believe that the remedies that are being cited here are ones that can be used against the States, because it's telling them to, right here, if you look at page 82, it says, "Maintenance of Effort statutes will invariably provide fiscal sanctions if the grantee does not meet its commitment." Okay. "Sanction provisions are two types. Under one version, the

grantee's allocation of Federal funds is reduced in the same proportion as its contribution fell below the required level." Are we really going to reduce the State's proportion of their contribution below the required level? I don't think we've ever done something like that. And I don't know how we would go about doing that because it's going back to the election fund. So, we're telling States that we may consider this now, when they never knew that before, before they were -- because they already have this money, and they're already been doing their maintenance -- meeting their Maintenance of Effort.

So, I think if we want to adopt this, it should go out, first for notice and public comment, and sort of a regulatory process, because we already have the suspension and disbarment we use for grants, and we have a debt collection regulation that we use. We've never used this, and this is not part of something that's a sanction in HAVA for MOE. HAVA is even silent on that. We can't use anything in a State plan against a State, and I know Mr. Thomas said that earlier. So, I don't -- if you have any suggestions of what we've used before to deal with these violations, I'm happy to put that in there. But, I'm not going to put something in there that I don't think applies.

COMMISSIONER HILLMAN:

I don't see how it doesn't apply. So, I mean, you know, you're sort of -- we haven't been confronted with that issue. That doesn't mean it wouldn't apply if we were. I don't think we can sit here and say it doesn't apply. We don't know, because this -- it hasn't come

up to us yet. We haven't been confronted with what is the remedy if there is a finding that a...

COMMISSIONER BRESSO:

But, doesn't the auditors determine what the remedy is?

DR. ABBOTT:

Yes, they recommend a remedy.

COMMISSIONER BRESSO:

So, why are we then choosing what remedy they already use?

DR. ABBOTT:

These are the remedies that the IG said they would be using.

COMMISSIONER HILLMAN:

I don't see us -- I don't think we're choosing here, I think we're giving another example. I don't see that this says EAC's policy is, or EAC will. It says there are two remedies for violation of MOE.

COMMISSIONER BRESSO:

But they're not the only two remedies.

DR. ABBOTT:

And we could change it to say...

COMMISSIONER HILLMAN:

And it doesn't say it's our -- I mean, we can soften the intro to that. It doesn't say EAC adopted this or -- it just says these are the remedies.

DR. ABBOTT:

We can say, generally, there could be, or there are possibly -- we could just use, "For example, remedies may include" or we can strike that. It is, in fact -- once we hear definitively from the Inspector General how they're going to -- what they're going to



recommend, we can go on with further clarification outside of the policy. So, whether it's, you know, in a bulletin or an e-mail or however we choose to communicate with States what the implications are going forward missing an MOE, we have an obligation to let them know what the stakes are here. It would be a mistake to put a policy out, and then never let anyone know what the implications are if you don't actually do what you say you're going to do. That would be the gotcha kind of actions that hurt our relationships with our grantees, going forward.

COMMISSIONER HILLMAN:

So, is it -- could we say in here that the Inspector General -- if such an occurrence happened, that the Inspector General or the EAC considered the Inspector General's recommendation for this? I mean, if -- we're going to tie it back to what EAC will be responding to as the Inspector General's recommendation for remedy. Is that correct?

DR. ABBOTT:

Right, so we could say, possible audit recommendations for remedies for violation, or something like that.

COMMISSIONER HILLMAN:

Would come from the Inspector General?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

I'm not ready to wordsmith right this second, because we can get in trouble if we try to wordsmith this, but if we could write it out and look at it right after the break.

CHAIR DAVIDSON:

I was going to say we need to take a lunch break. I was just going to ask how many other issues that we have, and then, maybe break for lunch. Or if there's only one issue, maybe we work on amendments when we come back.

COMMISSIONER BRESSO:

Okay, I have, definitely, a question on number 13 that I know is going to have some discussion, and obviously, this one that we have to finish. And I did also have a question on number five.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BRESSO:

So, if you want to break now, because on question...

CHAIR DAVIDSON:

Question number 13? Why don't we go ahead and consider them and then, that way we can work on amendments while we're on break, if there's amendments that we want to do.

COMMISSIONER BRESSO:

For 13? Okay.

CHAIR DAVIDSON:

For 13 and five.

COMMISSIONER BRESSO:

Okay. For 13, what it reads are, what are the reporting requirements associated with MOE once a State has an MOE plan on file with the EAC?" Now, the answer says, "Pursuant to Section 254(a)(12) and Section 258(3) of HAVA, each State is required to submit as part of its annual report a description/analysis of how it

has met or exceeded the MOE for the preceding fiscal year. Appropriate backup documentation, as described in the State's MOE plan, must be kept on file and made available to EAC staff during site visits or to auditors or other officials during an audit or investigation." Well, I'm guessing that what was intended here was more of a recordkeeping requirement rather than a reporting requirement, because when I look at Section 258(3) it says -- well the first part says, "not later than six months after the end of each fiscal year for which a State received a requirements payment. Under this part, the State shall submit a report to the Commission on the activities conducted with the funds provided during the year and shall include in the report," as part of number three, "an analysis and description of the activities funded under this part," under this part referring to requirements payments, "to meet the requirements of the Act an analysis and description of how such activities conform to the State plan under Section 254."

Now, this section has nothing to do with reporting of MOE, it has to do with reporting of requirements payments. I don't think the intention of HAVA was to have States report on MOE, which are State funds, not Federal funds. And this refers to Part I, subtitle (d), which is requirements payments. So, I do not think Section 258 applies or even requires MOE -- requires States to report MOE to us every six months after they receive their money, as they do requirements payment.

And with the same section 254(a)(12) it says, "In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes

from the State plan for the previous fiscal year, and how the State succeeded in carrying out the State plan for such previous fiscal year.” This refers to changes to State plans, and the MOE baseline I don’t think would change. The only thing that would change is if there’s a change to the State plan. So, that is not a reporting requirement either for MOE. So, my suggestion is to have what are the recordkeeping requirements associated with MOE, and then state pursuant to section 902(a) of HAVA each State is required to keep records consistent with sound accounting principles, which include MOE, appropriate documentation including documentation described in a State’s MOE plan must be kept on file by the State and made available to EAC staff during site visits, auditors or other duly authorized representatives during an audit or investigation. And I say, duly authorized representatives, because other officials, to me, that language is vague and I don’t know who other officials are, it could be anybody So, I think, perhaps using the language, duly authorized representatives, at least, you know, states that this person is authorized; not just an official who may not be authorized. So, that’s the suggested change I have and you have my language right here.

CHAIR DAVIDSON:

Dr. Abbott, do you have any comments on that or...

COMMISSIONER BRESSO:

I can give...

DR. ABBOTT:

I haven’t seen it, and I don’t have comments. The language seems appropriate to get what we need. I think that States do report,

however, every year annually, and they use Section 258 as the basis for that report. So, asking them -- we get a report every -- a narrative report, every year from the States, and in that report they tell us how they're doing on their State plan. We know that part of the State plan is MOE, because it's number seven in the State plan. So, it's probably not unreasonable to ask them to let us know how they're doing against their baseline in that report, but certainly not necessary if we've covered it with another part of the statute. So, I think there's no problem with the change.

CHAIR DAVIDSON:

All right, so you're okay with the change of...

COMMISSIONER HILLMAN:

Have you seen the language?

DR. ABBOTT:

I just heard it.

COMMISSIONER BRESSO:

Here, I'll give it to him.

COMMISSIONER HILLMAN:

Okay, so we could put that on -- we're going to have to pick this back up later, right?

CHAIR DAVIDSON:

Right, right.

COMMISSIONER BRESSO:

Yes.

COMMISSIONER HILLMAN:

So, we could put on that table for consideration?

CHAIR DAVIDSON:

Um-hum, absolutely. Okay, and then, you said section five?

COMMISSIONER BRESSO:

I have a question with question five. It says, "What does EAC mean by the term, lower-tier entity and recipients?" And it says, "A lower-tier entity is a political subdivision of a State. Depending on the State lower-tier recipients, may include, but are not limited to, counties, cities, townships and other jurisdictions. A lower-tier recipient is a lower-tier entity that receives 251 HAVA -- Section 251 HAVA funds," and it says "or equipment from the State." So I guess, my question is, so if a local jurisdiction -- if a State purchases equipment for a local jurisdiction, they don't have any discretion and they're given the equipment to use and this was all done in the MOE baseline year, does that mean that it would trigger MOE for that local jurisdiction...

DR. ABBOTT:

No...

COMMISSIONER BRESSO:

...because they did not have discretion?

DR. ABBOTT:

It does not mean that. This particular question is just definitional only. And so, there has been a lot of confusion on the part of States and localities as to what triggers general Federal reporting requirements and recordkeeping requirements. And it's not only the transmission of funds. It's the transmission of equipment, as well, per Circular A102. So, in the definition, we took care to let them know that it's not only dollars that could be transferred, it could be equipment, as well, and they would be considered a

lower-tier entity by definition. It actually doesn't speak at all to the MOE policy.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

Okay?

COMMISSIONER BRESSO:

Um-hum.

CHAIR DAVIDSON:

Okay, after we come back from our break, we'll have lunch, so question 13 we have -- it sounds like we're in agreement on question 13. We want to do some refining of question...

COMMISSIONER BRESSO:

16.

CHAIR DAVIDSON:

...16, work on that language. And is that the only thing?

COMMISSIONER HILLMAN:

Madam Chair, who is working on the language?

CHAIR DAVIDSON:

I was going to say, Commissioner Bresso would you like to work with Dr. Abbott on that language on...

COMMISSIONER BRESSO:

Which one?

CHAIR DAVIDSON:

16, and taking into consideration the issues that Commissioner Hillman had?

COMMISSIONER BRESSO:

Sure. And was there another one that we were going to...

CHAIR DAVIDSON:

I think 16 was the only one I remember.

COMMISSIONER HILLMAN:

That's the only one I had.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

So basically, working on the one is what we've got.

COMMISSIONER BRESSO:

Okay, I believe -- that's the only one outstanding? Okay.

CHAIR DAVIDSON:

So, we're almost ready to consider MOE.

DR. ABBOTT:

I think Commissioner Hillman had some language issues on 16. I want to make sure we get her input. Tamar did you capture that?

MS. NEDZAR:

I captured the conversation. I could certainly help...

DR. ABBOTT:

Can you help draft the language?

MS. NEDZAR:

Um-hum.

COMMISSIONER BRESSO:

Yeah.

CHAIR DAVIDSON:

That's a good idea, thank you.

COMMISSIONER BRESSO:



Okay, because you have Commissioner Hillman's comments, I know my concerns, so, maybe we can meet. Okay.

CHAIR DAVIDSON:

Okay, we'll break. It is now 12:51. We have a hearing that we'll start just as soon as we get through with this, concludes, so we're going to start our hearing late, obviously. So, we'll be back at 1:00 without...

COMMISSIONER HILLMAN:

One...

CHAIR DAVIDSON:

Excuse me.

COMMISSIONER HILLMAN:

1:30?

COMMISSIONER BRESSO:

2:00, I thought, right. Oh, no, it's...

COMMISSIONER HILLMAN:

1:30.

COMMISSIONER BRESSO:

1:30.

CHAIR DAVIDSON:

Let's start at 1:30, and we can get started the, and then we can go right into our hearing.

COMMISSIONER HILLMAN:

So, do I understand that when we reconvene at 1:30, we're going to conclude with the discussion on the MOE...

CHAIR DAVIDSON:

That's correct.

COMMISSIONER HILLMAN:

...with a view toward taking a vote, and then we will pick back up on the agenda with a discussion of the...

COMMISSIONER BRESSO:

We have the NVRA first, correct? Or...

COMMISSIONER HILLMAN:

...consideration -- let me finish? May I finish?

CHAIR DAVIDSON:

Um-hum.

COMMISSIONER HILLMAN:

That we're going to pick up after we conclude MOE with a consideration of the National Voter Registration Act regulations, and then, go into the hearing. Is that the way we're going to go?

CHAIR DAVIDSON:

That's correct, um-hum.

COMMISSIONER HILLMAN:

Okay, thank you.

CHAIR DAVIDSON:

And I do want to say to the audience, thank you for hanging in here with us. We'll have a short break and be right back at 12:30 (sic).

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[The Commission recessed at 12:53 p.m. and reconvened at 1:38 p.m.]

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CHAIR DAVIDSON:

Can you believe that our audience is back and our Commissioners are back? We can start and we're only a couple of minutes late.

So, we will continue. I think that staff and Commissioner Bresso has worked on some amendments, and so, I'm going to have our Counsel, here, read what they had agreed upon. And I think that there's an option that they need to discuss with you, also, Commissioner Hillman. So, you can go ahead and start, and I think this is on question number 18.

MS. NEDZAR:

Do you want to start with 13?

CHAIR DAVIDSON:

13 would be fine.

MS. NEDZAR:

We'll start with 13, and then move to 16, and then 18.

CHAIR DAVIDSON:

Okay.

DR. ABBOTT:

Excuse me, Chair Davidson. I think we had a friendly amendment to question number five, and maybe, we could just go in order.

CHAIR DAVIDSON:

Okay.

DR. ABBOTT:

And that is, we used the term 'recipient' when we meant 'entity'. It's easy to overlook, but I think the change makes it clear -- more clear. So, I would propose that we change -- Tamar could you read it, as edited?

MS. NEDZAR:

Sure, as amended, it would -- the question reads, "What does the EAC mean by the term lower-tier entities and recipients?" And the

revised answer would be, “A lower-tier entity is a political subdivision of a State. Depending on the State, lower-tier,” cross off recipients,” include entities, may include, but are not limited to, counties, cities, townships and other jurisdictions. A lower-tier recipient is a lower-tier entity that receives Section 251 HAVA funds or equipment from the State.” So, we’re changing the word “recipients” in the second line of the answer, to “entities.”

CHAIR DAVIDSON:

Okay, everybody okay?

COMMISSIONER HILLMAN:

I’m fine with that, just a clarification. My version has “or equipment” struck out, but it’s supposed to stay in the answer to that question?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

Okay, thank you.

CHAIR DAVIDSON:

All right, next question.

MS. NEDZAR:

Question 13. The question previously read, “What are the reporting requirements associated with MOE once a State has an MOE plan on file with the EAC?” The proposal to amend question 13, the new question would read, “What are the recordkeeping requirements associated with MOE?” And the associated revised answer would be, “Pursuant to Section 902(a) of HAVA, each State is required to keep records consistent with sound accounting principles, which would include MOE. Appropriate documentation, including

documentation described in the State's MOE plan, must be kept on file by the State, and made available to EAC staff during site visits, auditors or other duly authorized representatives during an audit or investigation."

COMMISSIONER HILLMAN:

Please reread.

MS. NEDZAR:

Certainly, the question and answer or just the answer?

COMMISSIONER HILLMAN:

The whole thing, um-hum.

MS. NEDZAR:

Question 13 would read, "What are the recordkeeping requirements associated with MOE?" And the answer would be, "Pursuant to Section 902(a) of HAVA, each State is required to keep records consistent with sound accounting principles, which would include MOE. Appropriate documentation, including documentation described in the State's MOE plan, must be kept on file by the State and made available to EAC staff during site visits, auditors or other duly authorized representatives during an audit or investigation."

COMMISSIONER HILLMAN:

So, we are replacing question 13 in its entirety?

MS. NEDZAR:

Yes. Would you like me to do 16?

CHAIR DAVIDSON:

Go ahead and continue with question number 16, I believe it is.

MS. NEDZAR:

Okay. Question 16 reads, "What happens if our State fails to meet its MOE?" The revised response would be, "Any audit findings related to a State not meeting its MOE requirement will be addressed through EAC's audit resolution process. The State's MOE plan, and EAC's assessment of it, will be a factor in how EAC resolves any questioned costs or policies related to MOE arising from Inspector General or single State audits." And then, the rest of the answer in the proposed policy would be stricken. So, the two changes are in the third line of the current answer, instead of "major factors", we would insert "a factor." and after the fourth line, the period after "State audits" the rest would be stricken.

COMMISSIONER HILLMAN:

I guess, in the end, I don't have a problem with that. I do wish EAC will find a way to communicate what the consequences can be, not necessarily will be, but could be, if a State fails to meet its MOE rather than people to find that out when it happens.

MS. NEDZAR:

Commissioner Hillman, we did come up with a proposed alternative to incorporate that. So -- and if you'd like to consider that, I'll read that, as well.

COMMISSIONER HILLMAN:

No, no, no I'm not going to belabor the point. I'm just going to be on the record saying, I think it's EAC's responsibility to communicate, clearly, to States, what could happen if a State fails to meet its MOE. And, however we do that, I just think we need to do that in conjunction with the policy and not put a State in a

position where there's an audit finding, and then it finds out what the consequences could be.

DR. ABBOTT:

So, the grants office will work with the Inspector General, once the policy is promulgated, to develop some communication around this area, which will be basically a new area of audit responsibility since it's been postponed for some time now, so that we can clarify what possible remedies would be going forward, in addition to what they'll be looking for in this area when they go out to do the audits.

COMMISSIONER HILLMAN:

Thank you.

CHAIR DAVIDSON:

Okay.

MS. NEDZAR:

Question 18. "Do States have to collect MOE information every year from lower-tier entities?" The amended answer would read, "It would depend on how a State determines how it wants to meet its MOE obligation. Once the baseline is established by the State by identifying all covered expenditures," striking "appropriations" and including "covered" before "expenditures," with State funds in the base year that would have been allowable costs under HAVA, the State will need to determine how it would like to meet that MOE obligation on an annual basis." And the balance of the answer would remain the same line. So, in the second line striking the word "appropriations" and instead including the word "covered."

CHAIR DAVIDSON:

That's what I have down for the questions that were remaining. Do the Commissioners have anything else?

COMMISSIONER BRESSO:

I believe everything else was covered. There was, I guess, and this will be incorporated, Tamar, when we struck "redistribution" from question eight, all that other prior -- in our prior session discussions?

MS. NEDZAR:

Sure, would you like me to read that, so that I got that correctly?

COMMISSIONER BRESSO:

If you want to read...

MS. NEDZAR:

Just so you know when you vote.

CHAIR DAVIDSON:

That's correct that would be -- if you would, please.

MS. NEDZAR:

Okay, sure. So, question eight, "What types of expenditures must be used to calculate the MOE baseline amount and are eligible to count towards our annual MOE contribution?" The amended answer, "States must use all election expenditures that are allowable under Section 251 of HAVA and that were funded directly by the State, or for a State appropriation to a lower-tier entity in the base year to calculate the baseline MOE. EAC does not consider funds distributed from States to lower-tier entities, where the lower-tier entities have discretion on how the funds are spent to be an eligible State expenditure that would require inclusion in the baseline MOE calculation." And the final sentence remains the



same. So, the change is striking in the third line from “the redistribution of State revenue from States to lower-tier entities” and replacing it with “funds distributed from States to lower-tier entities.”

COMMISSIONER HILLMAN:

That’s in the fourth line, right?

MS. NEDZAR:

It starts on the third and goes on the fourth, yes.

COMMISSIONER HILLMAN:

So, read the new language, again.

MS. NEDZAR:

So, the second sentence, which starts on the third line, would read, “EAC does not consider funds distributed from States to lower-tier entities, where the lower entities have discretion on how the funds are spent, to be an eligible State expenditure that would require inclusion in the baseline MOE calculation.”

CHAIR DAVIDSON:

All right, I think that we’re ready for a motion. I think that the motion -- I had Counsel working on some language, thank you. If I could have a motion that we would adopt the EAC Maintenance of Expenditure Policy document that’s dated June 14, 2010, as amended during this meeting. So, if I could have a motion to that effect.

COMMISSIONER HILLMAN:

I’m confused about the language, “as amended”, because we didn’t have a policy on the table to amend. I mean, we’re replacing a policy, are we not?

DR. ABBOTT:

It's amending the February 22<sup>nd</sup> document that the Commission approved for public input.

CHAIR DAVIDSON:

Okay, a motion that we adopt the EAC Maintenance of Expenditure Policy document...

MS. NEDZAR:

Dated February 22<sup>nd</sup>.

CHAIR DAVIDSON:

...dated February 22<sup>nd</sup> that was amended during the meeting of June...

MS. NEDZAR:

28<sup>th</sup>.

CHAIR DAVIDSON:

...28, 2010.

DR. ABBOTT:

Tamar, can you address the point that the old policy from 2007 may be in suspension or abeyance, but may still be the official policy? And, do we have to override that with this one?

MS. NEDZAR:

I would recommend that if the Commission votes to adopt this policy, we include a clear statement, in the policy itself, that it supersedes and replaces any previous policies on MOE, if that's the Commission's wish.

CHAIR DAVIDSON:

Okay.

DR. ABBOTT:

So, could you read that sentence for that record, which would be the first line in the current policy?

MS. NEDZAR:

It would read, "This policy supersedes and replaces any previous MOE policies adopted by the EAC." And we would provide an effective date on the policy, itself.

CHAIR DAVIDSON:

So, it should be two motions or one that incorporates that?

MS. NEDZAR:

The motion can be to adopt the policy with all of the amendments we discussed today, which would incorporate the language that I just read.

CHAIR DAVIDSON:

Okay, so do you want to read the motion, so that I can ask for somebody to move it, then, Tamar, for us to make sure we capture all of the points?

MS. NEDZAR:

I think the motion would be move to adopt the MOE policy, as amended -- the MOE policy posted for comment on February 22<sup>nd</sup> as amended during this meeting. Is that...

COMMISSIONER HILLMAN:

Um-hum.

CHAIR DAVIDSON:

That's fine, that's what I have down. Is there a motion?

COMMISSIONER BRESSO:

Wait, can I just ask one question of the Counsel? If we adopt this policy, the amendments that we had made there's nothing -- there's

no new requirements on State or local election officials with any of the amendments that we made to this policy, correct?

MS. NEDZAR:

That's my understanding, yes.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

Can I have a motion that has been read, somebody make the motion?

COMMISSIONER BRESSO:

I'll make the motion.

CHAIR DAVIDSON:

Second?

COMMISSIONER HILLMAN:

Second.

CHAIR DAVIDSON:

All those in favor say aye.

[The motion carried unanimously.]

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CHAIR DAVIDSON:

And now, we do have a motion to take out the -- of course...

MS. NEDZAR:

The language superseding will be part of the amended policy that you just voted on.

CHAIR DAVIDSON:

Okay, so we're okay.

MS. NEDZAR:

And what I will do is, I will include all the changes and submit it to you to make sure that I captured everything correctly, and then, you can finalize it on our website.

CHAIR DAVIDSON:

So, if you didn't hear Counsel, once we go back to the office and make sure that we have all of the amendments and we can check with, obviously, our official documentation from the minutes of this meeting and have those all incorporated, then we will post this amendment on our website -- I mean, post this policy on our website that has been adopted. So, it's Hallelujah, we now have an MOE. And we will proceed with the rest of our meeting. So, I know everybody is thrilled to death that we have this done. So, thank you.

MR. THOMAS:

I thank the Commission very much for taking this action, we appreciate it.

CHAIR DAVIDSON:

Thank you, we appreciate you being here, definitely. It helps to have the help from our States.

Okay, moving forward, we have our NVRA discussion coming up, and I'm not sure I have any of my notes left in order here. While you're getting kind of situated, the Help America Vote transferred statutory responsibility of the National Voter Registration Act from the Federal FEC, which is the Federal Election Commission, to the EAC, the Election Assistance Commission. The EAC has the authority to issue regulations to develop a National Mail Voter Registration Form. We have two

people here today, Karen Lynn-Dyson, who is the Director of the Policy, and then, we have Bill Boehm, who will probably do most of the presentation here today. But we look forward to your comments and a little bit of a history, so that the audience understand and people seeing our website will also understand that we can capture the history, so people really understand what we're trying to accomplish here I think it would be very helpful. So, I'll turn it over to you, however you want to go ahead. I don't know, Karen, if you want to say hello and...

MS. LYNN-DYSON:

Just hello, and I'm glad we're here to begin this process for reissuing these regulations. And as you mentioned Madam Chair, the Research, Policy and Programs Division took over this work just about a year ago, when we worked with the FEC on the transfer of these regulations. And I'll just share with the public, Bill Boehm began with us back in November of 2009, as our Deputy Director of Policy. And he's been hard at work on this project, as well as some of our policy work that in the upcoming year or so related to provisional voting, guidance and the updating of our statewide voter registration database guidance he'll be working on. So, he's going to walk you through the first steps in this process. And we look forward to completing this work later on this year, this calendar year and, at the most, probably on into the first part of next year. So with that...

CHAIR DAVIDSON:

Before Bill starts, I want to assure the audience and those that are watching this webcast that definitely this does not affect the forms

that are out there for this election. It will not affect any portion of your election this year. We know it's late and it could be confusing, and so, we'll probably repeat that several times, because we don't want people to fear that it's going to interfere with the process of elections this year.

So, I've said it once and I know we'll get it said another couple, three times during the meeting. You can continue on.

MR. BOEHM:

Thank you, Madam Chair, Commissioners, Mr. Wilkey, and Counsel Nedzar. Today, what I'll present for the Commission's consideration is staff recommendations for the text of a proposed rule that incorporates changes into EAC regulations applicable to the National Voter Registration Act of 1993, and that are consistent with the Help America Vote Act of 2002. I will present information on the process by which the EAC can expeditiously update the NVRA regulations. And let me underscore the fact, as Madam Chair has suggested, none of these changes that the staff is proposing here today will be in effect for the November 2010 election. There will be no changes to the National Mail Voter Registration Application form until after the November election.

As you know, the purpose of the National Voter Registration Act was to expand access to voter registration for all American citizens. In order to achieve this goal, the statute requires States to provide voter registration at motor vehicle agencies, State public assistance offices and other State and local offices and through the mail. The Federal Election Commission, or FEC, had original responsibility for the NVRA and issued the first regulations for the

NVRA on June 23<sup>rd</sup> of 1994. The regulations have not been updated since that time.

In 2002, the Help America Vote Act transferred statutory responsibility for administering the NVRA from the FEC to the EAC, including authority under Section 9(a) of the NVRA to issue regulations for developing a national mail voter registration form. The FEC incorporated the HAVA requirements into the national form in 2003 and the EAC in consultation with the States updated the State instructions to reflect HAVA requirements in 2006 that became effective that year. However, until the regulations were formally transferred from the FEC to the EAC, the EAC could not properly -- I'm sorry -- could not propose any changes to the regulations. A lack of a Commissioner quorum, at the FEC, delayed the transfer of regulations until 2009. Both Commissions published a notice in the *Federal Register* announcing the transfer on July 29<sup>th</sup>, 2009. And the transfer became effective August the 28<sup>th</sup> of that year.

According to the NVRA, as amended by HAVA, EAC is charged with three responsibilities. First, with providing information to the States with regard to their responsibilities under the Act. Second, for developing a national mail voter registration form. And three, for submitting a biennial report to Congress regarding the impact of the NVRA. The NVRA limits EAC's regulatory authority to prescribing only those regulations as are necessary to design the national mail voter registration form and to submit the report to Congress.



It's against this backdrop that EAC staff recommends issuing a Notice of Proposed Rulemaking to incorporate changes into the NVRA regulations that are consistent with the Help America Vote Act. This notice includes proposals to amend the regulations consistent with HAVA and builds on EAC's NVRA's work to date. In anticipation of EAC's role related to updating the NVRA regulations EAC, as you know, has had several public meetings, and a public hearing on the issues of implementing the requirements of the NVRA.

EAC staff recommends that the Commission adopt a Notice of Proposed Rulemaking and authorize staff to place the notice in the *Federal Register* as soon as possible. A comment period for the proposed rules commences upon the publication of the notice in the *Federal Register*. Staff recommends a lengthy public comment period of 90 days. This recommendation is based on the testimony received by the Commission at its NVRA public hearing in 2007. If the Commission agrees to issue the notice and accepts the staff recommendation, it would begin a 90-day comment period during which the EAC would invite input from chief State election officials, local election administrators, advocacy groups and the public.

During the public comment period, EAC would accept comments via regulations.gov, electronic mail and postal mail. All submissions must include the agency's name and the regulation title, which is the National Voter Registration Act, for this information and collection recordkeeping requirement. All comments received will be publicly posted, including any personal information provided. The EAC would post comments without

change unless the comment contains profanity or material that is prohibited from disclosure by law.

Also, EAC can conduct hearings during that 90-day comment period, at which the Commission can receive input from the public. The details of each meeting would be made available on the EAC's website as they become available.

Once this comment period closes, all the comments and testimonies that EAC has received will be reviewed and considered as the Commission moves into the next phase of the process, which will end with the issuance of the Final Rule. Staff would expect that this Final Rule would be issued in December, or close to the end of the year.

After publishing the Final Rule, the Commission, based on public comments and available evidence, may consider alterations to the design of the national mail voter registration form. The Commission would consult with chief State election officials on any redesign of the Federal form as required by statute.

The public comments and testimony received during the public comment period would also assist the EAC in determining what type of guidance that EAC would provide to States regarding their responsibilities under the NVRA.

Finally, let me address the content of the Notice of the Proposed Rulemaking. The NPRM includes several proposed changes to the NVRA regulations. The proposed changes are within the scope of authority granted to EAC and address HAVA related requirements. To be clear, the proposed modifications to

the regulations reflect changes to the Federal form that the EAC made in 2003 to reflect HAVA's requirements.

The primary objective of EAC staff was to modify the NVRA regulations to make them consistent with HAVA requirements and the HAVA changes already made to the Federal form. The proposed changes to the regulations fall into the following three categories: HAVA requirements, HAVA related requirements and technical amendments. The secondary objective was to ask for public comment on other issues of interest to the EAC related to the Federal form.

Specifically, the HAVA requirements are (a): the inclusion of questions and checkboxes asking applicants to indicate whether or not they are U.S. citizens and 18 years of age in accordance with Section 303(b)(4)(A)(i).

(b) inclusion of a statement advising applicants that if they check "no" in response to either of those questions, they should not complete the form; and (c), addition of a statement informing applicants that if they are registering for the first time, the required voter identification information should be submitted with the national mail voter registration form to avoid the additional identification requirements upon voting for the first time. All of the foregoing are required by the Help America Vote Act.

But, in addition to the statutory HAVA requirements, there are procedures which result from other HAVA requirements that staff proposes to include in the regulations. These HAVA related requirements are three.

First of all, authorizing in the regulations the statement now appearing under the question and checkbox pertaining to age. This statement appears on the form to alert applicants that their State might allow individuals under the age of 18 to vote in primaries that precede the general election or in those States that allow under-age 18 pre-registration.

Secondly. We would require a change in the format to the Federal form as prescribed by the regulations. The current regulations prescribe a format for the form that makes it impossible for voters to submit the HAVA required identification documents via the mail. Staff proposes modifying the regulation to allow the form to be printed on paper stock and mailed in an envelope to the appropriate address. The regulations currently require the form be on cardstock with one side sealed, not all sides. This proposal would give voters the option of avoiding additional identification requirements upon voting for the first time by allowing them to mail identification with the completed mail voter registration form, which is consistent with HAVA.

And finally, clarification of the State-specific instructions regarding State voter identification requirements. HAVA exempts voter registration applicants who will be voting for the first time and registering by mail from enclosing identification documents under certain conditions that could vary from State to State, and this would be clarified in their State-specific instructions.

EAC staff is also proposing several technical amendments to update the regulations. These include ensuring that there are no existing references to the FEC in the regulations and that the

address information for the EAC is correct, adding references to HAVA where a requirement is contained in both the NVRA and HAVA, eliminating internal references to dates that no longer have any relevance such as the beginning date for States to certify the information for the first biennial report to Congress, and adding an amendment that requires a Privacy Act notice on the national mail voter registration form.

Finally, there are other possible issues which could be addressed in the regulations but are not required or addressed by the Help America Vote Act. But because they are not required by HAVA, staff recommends that they not be included in the proposed regulation but that EAC asks for public comment on them and not propose them as amendments to the regulations in the Notice of Proposed Rulemaking.

These issues include asking for public comments on the use of an electronic web-based form, a proposal to add additional information on the form such as the applicant's e-mail address, whether that applicant might be interested in serving as a poll worker and boxes for the applicant to check to indicate whether they are an overseas citizen or military voter covered by the Uniformed and Overseas Citizen Voting Right Act, and changing the deadlines for States to certify information to the EAC for the NVRA report to Congress from March 31 to 90 days after the date of each regularly scheduled general election for Federal office. 90 days after the Federal election is the deadline required by UOCAVA for the certification of UOCAVA information and is obtained by EAC

through the same survey instrument that is used to obtain the NVRA information.

Let me just underscore the fact that the last issues I talked about are not included in the actual proposed reg, but EAC would be just asking for the public comment on that to enable EAC to make those determinations when the final regulations are made.

I'd be happy to answer any questions that any of you might have. Thank you.

CHAIR DAVIDSON:

Okay, thank you. The final draft, I think that you put into -- that's been put into our briefing books we got late the 24<sup>th</sup>, the afternoon of the 24<sup>th</sup>.

MR. BOEHM:

Yeah.

CHAIR DAVIDSON:

Okay, so that has been dated -- the draft has been dated as of the 24<sup>th</sup>

I'll turn to the Commissioners for questions that they might have on your testimony, because I'm not sure how many has really read deeply the draft and I don't -- they may ask you to give you areas that you have changed. Commissioner Hillman?

COMMISSIONER HILLMAN:

Sure, thank you very much for your presentation. Going to the first page of your written testimony, and it would be the one, two, three, fourth paragraph in the last sentence, "NVRA limits EAC's regulatory authority to prescribing only those to design the national and submit the report to Congress." Could you say what is meant

by design? Because some of what you referenced later included verbiage or language of questions that go more to something other than just the design of the form. So is design a broad definition?

MR. BOEHM:

What I mean by that is, if over the next 90 days or so we receive a lot of public comment and there is comments saying that, let's say the public favors putting an e-mail address on the form, right now the current design of the form, let's say, I don't know the specific number, but it might have ten data elements that are on the form; name, address, optional telephone number, things like that. If EAC decides that they want to add other data elements on the form, then we may have to redesign the form so that it's user friendly. We may want to design the form to have a less number of pages, whatever. But it's basically talking about reevaluating how the form looks, what we may want to do to it, and then take it from there based on that public comment.

COMMISSIONER HILLMAN:

Well, you said -- and I'm getting to this for a purpose -- you said the NVRA limits EAC's regulatory authority just to prescribing only those regulations as are necessary to design. Adding elements is more than a design. So, does NVRA permit or not, EAC to add elements to the form which would necessitate...

MR. BOEHM:

Yeah.

COMMISSIONER HILLMAN:

...a redesign?

MR. BOEHM:

Yeah, let me just read to you the statutory provision out of the NVRA. It's Section 9 of the NVRA which is U.S.C. Section 973(g)(g)-7. It provides this and the title of the section is Federal Coordination of the Regulations. "In general, the Election Assistance Commission (1) in consultation with the chief election officials of the States shall prescribe such regulations as are necessary to carry out paragraphs two and three." What paragraph two says, "Is in consultation with the chief elections officers of the States shall develop a mail voter registration application form for elections for Federal office." Number three deals with the biennial report. And then number four deals with providing information to the States.

Number two is the appropriate section. It gives the EAC authority to develop a mail voter registration application form for elections. When the FEC went through their hearings back in 1993, one of the questions they had to answer was what was this form going to look like. They had extensive hearings all across the United States, I attended many of them, and what they did was come up with regulations that developed both the content and the format of the form based on all the testimony they received. They determined at that time the specific data elements that were going to be on that form based on this particular provision.

So, my response, and of course, the Counsel can weigh in on this, is that that section gives now the EAC the authority to further dictate the content of that form if they deem it's necessary.

COMMISSIONER HILLMAN:



Okay, so, I don't know if Counsel has a response right away or we need to get information later.

MS. NEDZAR:

No, I think Mr. Boehm's characterization is accurate.

COMMISSIONER HILLMAN:

Okay, moving to page three you have a one, two, three -- items one, two and three. I'm trying to visualize, and if there's language in the draft regs that address number one could you please point that to me because I think I missed it, but it says that putting language on the form informing people that some States may allow them to register and, in fact, vote in primaries if they're not yet 18. It sounds like a lot of language and I'm just trying to visualize.

MR. BOEHM:

I don't have the exact -- yes I do have it. Right now, on the form underneath the box where the question is for age, and there's a box related to citizenship and a box related to age 18 and it's a "yes" or "no," there's then the statement required by HAVA that says, "If you check "no" in response to either of these questions do not complete the form." Underneath that, there is an instruction that says, "Please see State-specific instructions for instructions for rules regarding eligibility to register prior to age 18." The FEC put that on there because there are many States that allow folks in their States to register under the age of 18 or register for a November election and vote in the preceding primary if they're only 17. There are other States that allow 16 year olds to pre-register. I think we're looking at approximately half the States that have that kind of process. That's why the FEC put that on there. The problem is

that in all the cases where the FEC and the EAC updated this form, the regulations have not been modified accordingly and that's what we're trying to do with these regulations. So in this specific instance what we have done is to draft a regulation that permits this question to be placed on the form or that requires it.

COMMISSIONER HILLMAN:

And just, please, again point to me where, if you could, in the regs that...

MR. BOEHM:

The discussion? If you can just give me a minute here.

MS. NEDZAR:

Mr. Boehm, I think it's on page nine of the draft NPRN.

MR. BOEHM:

Yes it is. It's page nine. I think it starts at the very top of the page, if you have the same version I do, it starts, one, with the inclusion of the question. And there's a paragraph that basically says what I just said. And then the second paragraph draws attention to the fact that because of the differences we're proposing that that be on there.

COMMISSIONER HILLMAN:

Okay. And I guess the only thing that's confusing me is it's already on the form, but the regulations say we're proposing that it be put on the form. So, it makes -- I guess I'm trying to clarify whether this is just...

MR. BOEHM:

Keep in mind that back in '03 the Federal law was in effect and the FEC felt obligated to develop all these new parts HAVA required

and put them on the form. There was one section of HAVA that went into effect because of the waiver provision. Section 303 went into effect in 2006 and as a result of that EAC also had to modify the form.

COMMISSIONER HILLMAN:

Right.

MR. BOEHM:

Right now, what we're trying to do here is play catch-up and to require -- put these things into the regulations so that the form is not, you know, in violation of the regulation. The best example of that is that the...

COMMISSIONER HILLMAN:

No, just to stay on this one, I just want to clarify that even though the regulations talk about EAC will do this, the fact is it's already been done.

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

Okay. That's...

MR. BOEHM:

And what we want -- I know it's confusing. We're trying to get the regulations to mirror the law and what's on the form now.

COMMISSIONER HILLMAN:

And actual practice.

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

Not just the law, but actual -- what's actually happening right now.

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

Okay. And then, item number three in that same section. Same thing, same situation?

MR. BOEHM:

Same situation, yeah.

COMMISSIONER HILLMAN:

Okay. So, there are things we -- item number three only codifies what is current practice, what we are already doing.

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

Okay, and then, my last question for the moment goes to the items that would not be in the regulations, but you are proposing be put out for public comment.

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

Is there proposed language that you have that would go out for public comment? And would that be recommended as a separate Commissioner action for approval to post? If you want both things posted at the same time, then I think we've got one more piece of business to do, which is for the Commissioners to see the actual language and then vote to approve. You're saying what you'd like

to ask, but I didn't see the language of how it would be worded in the public notice.

MR. BOEHM:

Commissioner, it's on page 11 of the notice. And the way we constructed this was to try -- we restricted the modification of the existing reg. What we did there was we incorporated all the HAVA requirements and the HAVA related requirements and the technical amendments into the proposed regulation. To be consistent with that, we didn't make recommendations, you know, to incorporate any other issues that might be of interest. So what we did in the Notice of Proposed Rulemaking was to say we'd also like to get public comment on these other issues. And then if we get those public comments we can make a decision down the road after the public comment period as to how we want to proceed and we can alter the regulations when we do the Final Rule. So we didn't want to be inconsistent and incorporate those kinds of things into a regulation. We just wanted to get what the public sentiment was on those particular issues.

CHAIR DAVIDSON:

Can I ask an extension on that?

MR. BOEHM:

Madam Chair?

CHAIR DAVIDSON:

Would that require another public notice and register notice and put it back out for comment, by doing it that way?

MR. BOEHM:

The Counsel can correct me if I'm wrong, but once we close the public comment period for this notice, we will review the comments, we will redraft the regs into the Final Rule and there is a 30-day notice -- a 30-day public comment period for those Final Rules. And you could also issue -- well you could issue them as an interim Final Rule and take public comment.

MS. NEDZAR:

Yes. Also, you could handle the additional comments in one of two ways. If you got comments back and someone said, "I have a really good idea for how to incorporate this issue" and you thought that was a great idea and you wanted to include it in your final rulemaking, you could do that if someone provided explicit language that you wanted to adopt. You could also just take the body of ideas themselves and draft language for another Notice of Proposed Rulemaking on those topics.

CHAIR DAVIDSON

Okay, thank you. Continue, I'm sorry.

COMMISSIONER HILLMAN:

No, that's all right, because I'm not sure -- I mean, even as I looked at this, it wasn't clear to me. And I understand what we have before us is the Notice of Proposed Rulemaking and it includes a lot more than what the language of the regs would be. But these side issues are sort of the middle of this because immediately following that is an item that would in fact be a part of the regulation and that's the stock question, the cardstock versus paper. So we've got these sets of issues that would be part of the proposed regs and then we've got these other things that are not yet

proposed for the regs but they're sandwiched in between. So I'm not so sure that the person from the public is necessarily going to know that these things called "other recommendations" on page 11 are not in fact being recommended to be part of the proposed regs.

MR. BOEHM:

They are placed in that particular area because that section deals with content. And so those are things -- those other questions that we're proposing be included relate to content as opposed to format.

COMMISSIONER HILLMAN:

I understand, but if what we want is the public to understand what we're asking them to do, I'm just flagging that I think that may not be the best placement. Because, even as I flip through it, I could not discern what EAC was putting out as proposed regs versus other issues...

MR. BOEHM:

Right.

COMMISSIONER HILLMAN:

...for the public to use this opportunity to comment on.

Thank you.

CHAIR DAVIDSON:

Commissioner Bresso?

COMMISSIONER BRESSO:

Okay. You may have answered this earlier in your testimony, but can you just describe briefly what -- the functions exercised by the FEC under Section 9 of NVRA? Was it just the HAVA requirements that they did to update the form or did they ask other questions related but not part of the regulations?

MR. BOEHM:

It's my understanding, and I certainly can't be considered an expert on the FEC, but it's my understanding that what they didn't do in '03 was to revise the form. They did not issue any proposed rulemaking at that time so -- which is why we're here -- I'm here today. So they amended the form. I do believe -- I think they had a public comment period. But what's that they did. They -- because they were under the Help America Vote Act, the form had to be modified.

COMMISSIONER BRESSO:

Okay. And these, I guess, other examples that you read on page 11 of "other recommendations" that we're seeking comment on, are there any other States that you're aware of that have anything like a box for a poll worker -- for individuals or voters that may be interested in becoming a poll worker or a space on their State form for e-mail addresses?

MR. BOEHM:

I don't know the answer to that. I know that some States were considering it. Mr. Wilkey is shaking his head so maybe he knows the answer.

MR. WILKEY:

Yeah, I know a number of them that have, at least, the poll worker question, and I believe there are a couple that now have the space for the e-mail address also. But a good number of them have adopted the poll worker question because it's a real help to them in following up.

COMMISSIONER BRESSO:



Um-hum, sure. And I guess -- and to follow that, when I look at the NVRA regs, it says under (b)(1), I guess the title is the, "Mail voter registration form developed under subsection (a)(2) of this section." Number one says, "May require only such identifying information including the signature of the applicant and other information including data relating to previous registration by the applicant as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." And I guess my question is are these examples -- do they fall under the necessary to enable the appropriate State election official to assess the eligibility of an applicant? Because it seems like these questions may be outside the scope of the regs.

MR. BOEHM:

Right, that was the regulation you were reading?

COMMISSIONER BRESSO:

Yes.

MR. BOEHM:

And that's the section that dictates all the content of the form.

COMMISSIONER BRESSO:

Right.

MR. BOEHM:

Yeah I don't -- I think that's a decision that the Commission has to make. Just to clarify that some of these ideas, the poll worker idea, the placement of the e-mail address on the form have been around for awhile. I believe in the early '90s when the -- I think the FEC may have considered the e-mail situation or maybe it was -- it might

have been in '03 when they were trying to address the Help America Vote Act, but at that point in time the use of e-mail was not that widespread and so they decided that it may be inappropriate. But they did consider it. So the question is whether it's ripe for consideration now, whether it falls within the purview of what you just read.

So, I understand your concern, and that's something that the EAC would have to decide. Staff just felt that it was something that maybe we should put out there for comment to see what the public concerns might be.

COMMISSIONER BRESSO:

Okay. And I guess, where I'm coming from is, you know, HAVA was passed in 2002, and, of course, there wasn't a quorum at the FEC so we didn't get the reg transferred until August of 2009, you know. As a Commissioner here, my first priority for the voters is to get the form with the HAVA requirements out the door as soon as possible and then maybe tackle these other things if the Commission deems appropriate. And certainly, I am open and want to hear, you know, suggestions and comments from the public because some of these, you know, do seem like good ideas. I just don't know if that's something we can, and certainly that's open for discussion. But I don't want anything in here to hold up actually getting the form out the door. So for expediency I would hope that we could focus more on the HAVA requirements first and get that done so we have a form for 2012 and deal with these others perhaps after or in a separate rulemaking or dispose of these. Maybe, as the General Counsel alluded, you said there was a

process where even if we take all the comments we can do one first and then deal with these other comments afterwards if we elect to do so.

MS. NEDZAR:

If you -- oh I'm sorry.

CHAIR DAVIDSON:

Go ahead and answer, and then I've got a question to follow-up on that.

MS. NEDZAR:

If the Commission wanted to, the Commission could say we're going to take comments and we anticipate issuing a Final Rule on these five elements, the required elements, in our next rulemaking activity. In addition, though, this notice seeks general comments for language changes or just what do you want us to do with the form and we will handle that in an additional rulemaking, whether that's -- the Commission can choose any number of processes to pursue that additional rulemaking, but you can bifurcate the process if you'd like.

COMMISSIONER BRESSO:

Okay. And that's also if the Commission agrees that we do have the authority to do that under this section? Because there's a question whether or not we can add these other items when they're not dealing with eligibility.

CHAIR DAVIDSON:

I think that -- there's a couple things. One I would -- I think there's some confusion, and maybe it's me, but my understanding is the

form already meets the HAVA requirements. So the form itself is meeting the HAVA requirements. Our job is to bring...

COMMISSIONER BRESSO:

The regs into...

CHAIR DAVIDSON:

...the regs up to date to what the form is...

COMMISSIONER BRESSO:

Um-hum.

CHAIR DAVIDSON:

...because FEC already -- because HAVA was there and there was no agency, they felt like the form had to be brought up to date.

COMMISSIONER BRESSO:

Okay.

CHAIR DAVIDSON:

But they didn't do the regulations along with it. Now that's our job. But I may be wrong. If I'm wrong, please correct me.

COMMISSIONER BRESSO:

No, I think that's accurate.

CHAIR DAVIDSON:

Okay. So then, on top of that bringing it up to date, I think we have to consider other sections of the law, maybe not what's in HAVA, but to meet other sections of the law. And we can discuss that later of questions that might be -- that we're trying to address here may be addressed in some other sections. For instance we in one area were suggesting -- the suggestion is being made for comments whether or not there's a box that they can check that they're registering a UOCAVA voter or a military overseas voter. That's

not something that's required by law to register but it definitely would help us give better numbers to Congress, which we're mandated to do.

COMMISSIONER BRESSO:

Sure.

CHAIR DAVIDSON:

So, that's why I'm saying there's other sections of law sometimes that we have to do requirements that we could get a lot better job done if we changed our form somehow or another. I mean that's just -- I'm throwing it out as an example.

COMMISSIONER BRESSO:

Sure.

CHAIR DAVIDSON:

So, I think we have to consider things like that as we move forward.

COMMISSIONER BRESSO:

I just want to make sure that if we do elect to do that we can because, and this is just my brief reading because I know we got this on the 24<sup>th</sup>, but I'm not sure if those recommendations -- or I guess I need an explanation on how they are necessary under (b)(1). And maybe they are and that's fine, and I'd love to hear a comment on that, too. But I want to make sure that we do what we're supposed to do getting the regulations up to date with the new HAVA requirements first and foremost and not have anything else that would slow down that process.

COMMISSIONER HILLMAN:

Commissioner Beach (sic) I just want to go back, to go back to something, and I know it's been clarified, but you said we should do

now what we need to do to get the form HAVA compliant and out the door. And as long as we're all speaking the same thing the HAVA form...

COMMISSIONER BRESSO:

Right.

COMMISSIONER HILLMAN:

I mean the...

COMMISSIONER BRESSO:

I believe, I misspoke. I meant to say regulations instead of forms.

COMMISSIONER HILLMAN:

Okay, okay, all right.

COMMISSIONER BRESSO:

So, if you could strike that.

CHAIR DAVIDSON:

Okay.

COMMISSIONER HILLMAN:

I do want to follow-up on something, and that is, I hear you, Mr. Boehm, that it's the Commission's decision, but staff is making a recommendation for the Commission to consider. And I guess what I would ask you is if the recommendation to consider other items was done in the context of the NVRA language, I believe that's NVRA language you were referring to?

COMMISSIONER BRESSO:

Yes, I'm reading NVRA language.

COMMISSIONER HILLMAN:

If your recommendation was made in that context, saying this is what the law says, but there are these other things that have

happened with technology or other since then, and our interpretation of the law is that it would be permissible to ask things that are not particularly germane to eligibility.

MR. BOEHM:

I think the -- and again, I'd have to probably defer to Counsel -- but I think that in terms of the design of the form as to what the data elements are, EAC has fairly, I don't want to say broad authority, but they clearly have the responsibility and the obligation to decide what goes on the national voter registration form. I may not look that old, but I was at those hearings in 1993. I was -- at that point in time I was...

COMMISSIONER HILLMAN:

That was your high school internship project, right?

MR. BOEHM:

Yeah, that was my high school internship.

COMMISSIONER HILLMAN:

Okay.

MR. BOEHM:

I was in the Pennsylvania State Department, at the time, and we -- I remember the discussions over what was going to go on that form and I had a lot of disagreements with the folks at the FEC about that. But clearly they decided and had the authority to identify what those data elements were going to be. And I think the language in the regulation is not a mirror of what's in the statute. It's part of the reg. In other words they said, "This is what served as the guiding factor and our determination as to what were going to be the data elements on the form," that was the preamble you read to that

question, "because these are the things that we feel are necessary." That's why phone number is optional, I believe, on the form or an e-mail could be an optional thing, too. But with the widespread use of e-mails, I mean some folks don't even have regular telephones anymore, they use their e-mail or cell phones. So it's just an additional way -- it's actually for local administrators to get into contact with folks if their applications are, you know, deficient in one way or the other.

So, my response is, I do think that EAC has that authority. It's not my decision to make. As far as the questions on military and overseas voting, that grew out of the MOVE Act in an effort to be able to for States to more easily identify individuals that fall under those categories. So it's my opinion that the EAC would have that authority but, of course, it's not my decision or authority to exercise it.

COMMISSIONER BRESSO:

And certainly, you know, I'm not saying that, you know, I'm opposed to any of these recommendations. I just want to make sure that we are following the law. And that just made me -- my legal training...

MR. BOEHM:

Right, no, I understand.

COMMISSIONER BRESSO:

...that I have, you know, I pay special attention to that. But, you know, in reading everything in conjunction, I want to make sure we're doing -- we're staying within our bounds.

CHAIR DAVIDSON:



Is there any other comments or discussion? I think that we've come to the, it sounds like, and correct me Commissioners if I'm speaking out of turn here, but it sounds almost like we need to go back and really digest now the actual draft proposal that will be going out for comments to make some changes to possibly and then we'll have to do a tally vote. Is that kind of the procedure that - - or is there something else that the Commissioners would like to do? Commissioner Hillman.

COMMISSIONER HILLMAN:

Well, if I could take a temperature reading from us about the section of the Notice of Rulemaking that includes "other recommendations," it's section I guess 1(c) on page 11, if we are all in agreement that sandwiching that section in here will -- could lead to confusion as to whether or not these would become a part of the regulations and could best be served by being, if not a separate announcement issued the same day or somehow tagged to the very end or something despite where it fits in the flow and what the subject is, then I would like to see a proposed revised Notice of Rulemaking so that we could see how it would look. The content is one thing, but how it is put there -- I don't know that we've necessarily discussed anything that would change the content of the proposed rulemaking that's before us. But because there is important language in here that's sort of a part of it, I just would like to see how it's differentiated so that we don't get a lot of traffic which could be not necessary if it's very, very clear what the purpose of this inclusion is.

And your explanation and testimony, Mr. Boehm, is very clear, but reading this it's not very clear. And when I ask questions, not necessarily because I can't figure out how to connect the dots and what I'm seeing, but I just want it to be on the record and very clear from you as to what the intent was. And the intent I hear is not necessarily reflected in the presentation. And I'm not taking issue with language right now, I'm just taking issue with the presentation and how it will appear.

So, I would just ask if we couldn't -- if we are in agreement with that, could, at least, ask staff now to come back with a redesign, if you will, as to how the rulemaking proposed notice might go out and how this section called "other recommendations" would be treated.

COMMISSIONER BRESSO:

Okay. And I certainly agree with that but, you know, I would like some more time just to visit the issue on whether or not these are things we can do. And certainly -- and I agree with Commissioner Hillman that there definitely needs to be a redesign because it is confusing that this could be part and parcel of the actual rulemaking. But you know -- so I definitely agree with that. But I would like more time because this is...

COMMISSIONER HILLMAN:

Could we ask now to -- if we could get Counsel to give us an opinion on that? Because there is other language in the law that could lend to that, and I think we just need an opinion from Counsel. And I guess the other language, and depending on how you read it is, it includes language that says "and to administer

voter registration in other parts of the election process.” And in today’s age, an e-mail address is almost as important as a postal address. And so that could fairly be considered and the UOCAVA question could also be fairly considered part of the election process or to administer voter registration. So that we don’t drag this on too long, maybe we could just ask Counsel to give us an opinion on whether or not considering these other elements fits within the NVRA law.

CHAIR DAVIDSON:

Obviously, we...

COMMISSIONER HILLMAN:

Not right now. I meant that you could give it to us.

CHAIR DAVIDSON:

Not today.

COMMISSIONER BRESSO:

Yeah, no, that would be sufficient, sure.

COMMISSIONER HILLMAN:

No, no, no not right now.

COMMISSIONER BRESSO:

Yeah.

COMMISSIONER HILLMAN:

But that we don’t -- you know sometimes when we leave and we’re going to consider and two, three weeks goes by...

COMMISSIONER BRESSO:

No, and the last thing I want to do is drag this out.

COMMISSIONER HILLMAN:

Right.

COMMISSIONER BRESSO:

I want to get this going. So...

COMMISSIONER HILLMAN:

Right, so that if we could ask Counsel, today, to give us an opinion that would help expedite the review, and simultaneously if staff from the Policy Division could reformat it to say -- to make it very clear this is how we're doing the regs so that all we're doing is supporting what we are already doing and these are the other things EAC would like to consider for the future. By the way, what are your thoughts about this? And that's my layman's language and that's the way I like to break it down because when you get all bogged up in this stuff that's why I'm saying it could get very confusing for everybody involved.

COMMISSIONER BRESSO:

Right.

CHAIR DAVIDSON:

I think we've given the staff direction both through our Counsel and through your Department moving forward -- how we'd like to see some things move forward. And we'll try to get this out as soon as possible.

I will -- because we did want to have some -- start our hearings obviously as soon as possible -- we will be doing three hearings is what we'd like to do. And we have an August meeting so if we could get this done and in place so we can have a hearing in August. And then we would also -- we're having trouble setting a date in September, everybody is really busy, but we'll get a September date to have a hearing and either early October or two

of them in September. We're looking at having three hearings is what we'd like to do.

So, with that I think we've given direction and we won't have any decisions being made today. Thank you very much staff.

MR. BOEHM:

Thank you.

COMMISSIONER BRESSO:

Thank you.

CHAIR DAVIDSON:

Thanks for your presentation. All right, do I have a motion to adjourn our public meeting so that we can start our public hearing?

So is there a motion to adjourn?

COMMISSIONER BRESSO:

Motion to adjourn.

COMMISSIONER HILLMAN:

Second.

CHAIR DAVIDSON:

The motion has been made and seconded to adjourn. So we will now adjourn.

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[The public meeting of the EAC adjourned at 2:42 p.m.]

