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

MEMORANDUM

TO: Chair Rodriguez, Commissioner Davidson and Commissioner Hillman

FROM: Caroline C. Hunter
Vice Chair

DATE: April 9, 2008

RE: Policy Regarding Use of HAVA Funds

The Election Assistance Commission (“EAC”) does not have a written policy on the handling of decisions other than for audits, voting system certifications, and laboratory accreditations. It has been the practice of the EAC for the staff to make determinations that are applications of existing law or regulation and for the Commissioners to weigh in on issues of policy or discretionary interpretations of HAVA. The current practice does not involve the Commissioners sufficiently in important agency decisions. Regardless of whether a matter is categorized as policy, legal, or regulatory, the Commissioners should be involved. Moreover, there is not always a clear distinction between matters of policy and the law. Interpretations of OMB circulars, like the Florida opinion, have far reaching policy considerations.

Section 208 of the HAVA requires that “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.” Sections 311 and 312 of HAVA, which require the EAC to provide voluntary guidance, require the EAC to receive public comment and this voluntary guidance must be voted on by the Commissioners. Unlike the Section 311 guidance, EAC decisions regarding the use of HAVA funds are not voluntary. Therefore, it is even more crucial that HAVA funding decisions require public notice and comment and a vote of the Commission.

The EAC must adopt a written policy concerning the use of HAVA funds. The policy must involve a vote of the Commission and public notice and comment. The public has a right to know what the process is in order to adequately communicate its input to the Commission.

The policy was modeled after the FEC advisory opinion regulations at 11 C.F.R. §112 and the current practice at the FEC.

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RECOMMENDATION:

I recommend voting to adopt the following policy at the EAC public meeting on April 16, 2008 in Minneapolis, Minnesota:

All opinions, determinations, decisions, and clarifications by the Election Assistance Commission ("EAC") regarding the use of HAVA funds, including the publication and adoption of program manuals and frequently asked questions, issued subsequent to the adoption of this policy shall be made in accordance with the following procedure.

Any federal or state government official, any local election official, provided the local jurisdiction received or anticipates receiving HAVA funds or any member of the staff of the Election Assistance Commission ("EAC") may request¹ in writing an advisory opinion concerning the use of HAVA funds. The written advisory opinion request shall set forth a specific transaction or activity that the requestor plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation or posing a hypothetical situation or are the activities of third parties do not qualify as advisory opinion requests. Advisory opinion requests shall include a complete description of all relevant facts.

The Election Administration Support Division (EASD) shall review all requests for advisory opinions. If the EASD determines that the request is incomplete or is otherwise not qualified under this policy, it shall notify the requestor within 10 calendar days. Upon the EASD's determination that the request is valid, advisory opinion requests shall be posted on the EAC's website by the end of the following business day. EAC shall notify the relevant chief state election official (if the request was not submitted by the chief state election official) of the request.

Any interested person may submit written comments to the EAC concerning advisory opinion requests. The written comments shall be submitted within 10 calendar days following the date the request is posted on the EAC website. If the 10th day falls on a weekend or Federal holiday, the 10 day period ends at the close of business the following day. The EAC shall consider all comments submitted within the 10 day comment period. Additional time for submission of written comments may be granted by EASD upon written request for an extension by the person who wishes to submit comments or may be granted by a vote of the Commission without an extension request.

The EASD shall draft the advisory opinion after receiving input from all Commissioners or their staff. Additionally, any Commissioner may write an advisory opinion. All advisory opinions will be voted on by the Commissioners. Within 60 days of receiving a request, the EAC shall issue to the requestor a

¹ To the extent a request requires the EAC to issue voluntary guidance involving Sections 301, 302 and/or 303, the procedure for adopting such voluntary guidance pursuant to Section 312 shall be followed.

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written opinion. If the EAC is unable to approve the opinion by the required affirmative vote of three Commissioners, a written response stating so will be sent to the requestor.

The 60 day calendar period is reduced to 20 calendar days for an advisory opinion request deemed to be of an urgent nature by either the Executive Director or the EASD.

All advisory opinion requests and comments should be submitted to the Election Assistance Commission, Election Administration Support Division, 1225 New York Avenue, N.W., Suite 1100, Washington, DC 20005 or via electronic submission at [e-mail address TBD].