

**United States Election Assistance Commission
Public Meeting**

1225 New York Avenue, NW

Suite 150

Washington, DC 20005

Held on Friday, February 19, 2010

VERBATIM TRANSCRIPT

The following is the verbatim transcript of the public meeting of the United States Election Assistance Commission ("EAC") held on Friday, February 19, 2010. The meeting convened at 10:04 a.m., EDT. The meeting was adjourned at 12:27 p.m., EDT.

PUBLIC MEETING

CHAIR DAVIDSON:

This is the February 19th EAC public meeting and my name is Donetta Davidson. And you can see we have the other two Commissioners, Commissioner Beach and Commissioner Hillman, present along with our Executive Director Tom Wilkey and our Attorney Ms. Nedzar.

So, in starting the meeting, I'd like to thank everybody for being here today. And I would like to ask everybody if they would turn off their BlackBerries, they feed back into our system, sorry about that, and put your phones on silent. And if you would all stand with me, we'll do the Pledge of Allegiance.

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

CHAIR DAVIDSON:

The first thing I'd like to ask is if you would call roll, 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 Beach.

COMMISSIONER BEACH:

Present.

MS. NEDZAR:

Madam Chair, a quorum is present.

CHAIR DAVIDSON:

Thank you very much. First on the agenda is approval of our -- or is the adoption of our agenda for today. Is there any discussion on the agenda?

COMMISSIONER BEACH:

I have one question.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BEACH:

Will we be considering both policies today for a vote or just one or none or -- because I know it says consideration of policy?

CHAIR DAVIDSON:

I think -- I mean, it would be wonderful if we could do one, but as I reviewed them again this morning I don't know how we could get that done in two hours. So, I think it would be individual, you know, to really do each one of them and to vote on each one. So, it would be policies.

COMMISSIONER BEACH:

Okay, great, thank you.

COMMISSIONER HILLMAN:

Well, I wasn't going to speak to that at the time of the agenda, so I just want to go on the record in saying that I truly hope, Commissioners, we can work to put forth for public comment one policy. I think it is distracting and unfortunate that after two-and-a-half years, EAC is still in the position where the way we're working through this issue is to advance two policies. And, you know. I think we have the wherewithal, and it is my hope that we will agree on one policy that can go forward for public comment.

CHAIR DAVIDSON:

Today, are you talking about? Or...

COMMISSIONER HILLMAN:

Well, I was hoping that would be the purpose of the meeting.

CHAIR DAVIDSON:

That was my goal too. So, I mean, it's going to kind of -- I think we're going to know more as we go through the morning.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

So, is there a motion to approve the agenda?

COMMISSIONER HILLMAN:

So moved.

CHAIR DAVIDSON:

Second?

COMMISSIONER BEACH:

Second.

CHAIR DAVIDSON:

All those in favor say aye. Opposed?

[The motion carried unanimously.]

CHAIR DAVIDSON:

All right, moving forward, my opening remarks, I really would like to thank everybody for being here, and those that are not here, obviously, I hope they are watching on the webcast to be able to be present for this meeting, as we move forward.

But, as you know, Washington area was snowbound last week and there was so much publicity of how much money the Federal Government was losing, and I just wanted to say how much I appreciate our staff, because they continued working from home and their diligence in keeping our office, maintaining the momentum during this busy election year is very much appreciated. And I just want to say thank you to the EAC staff. I'm sure other Federal agencies did the same, but I really appreciate without being encouraged to do it, they did it on their own. Thank you very much.

And do my colleagues have any comments they'd like to make, Commissioner Hillman?

COMMISSIONER HILLMAN:

Not at this time, thank you.

CHAIR DAVIDSON:

Okay. Commissioner Beach?

COMMISSIONER BEACH:

None at this time.

CHAIR DAVIDSON:

All right, in Old Business, I would like for -- to take a minute to approve the minutes of the old -- I mean, of our last meeting of January 25, 2010.

COMMISSIONER HILLMAN:

So moved.

CHAIR DAVIDSON:

Second?

COMMISSIONER BEACH:

I second.

CHAIR DAVIDSON:

All those in favor say aye. Opposed?

[The motion carried unanimously.]

CHAIR DAVIDSON:

The motion carries, the minutes have been approved.

Now, I would like to turn to Executive Director Tom Wilkey for our Director's report.

EXECUTIVE DIRECTOR WILKEY:

Thank you, Madam Chair. I also would like to thank everyone for being here today. I'd also like to follow up on the remarks that the Chair made regarding our staff. While we were, as well as the rest of the Federal Government, closed down for over four days, staff continued to produce a great deal of work from home. I, myself, was monitoring that over my BlackBerry and can attest to the -- to what was going on, and we appreciated that very much. As you know, we were -- we were snowbound for a few days. Coming from upstate New York, I'm kind of used to that. But I certainly had never seen anything like this before. It was rare when we -- when

we closed down State government, but -- so this was something that I had never experienced before. And I think it was good in some respects that some of us got a lot of reading done and had a few little naps, so we're all refreshed and ready to go. And certainly, we are glad to see everybody return safely. We know that many people were snowbound. Some people are still having difficulty, right now, as they live out in the outlying areas. And so, we are glad that everybody returned safely and that their homes were safe.

I do have a few things to report, even though we did have a couple -- meeting not too long ago and we also were off several days. But under Grants, we are currently accepting applications for our Mock Election and College Poll Worker grants. We'll be holding a technical assistance call on February 23rd for the Mock Election grant, and one on March 10th for the College Poll Worker grant. And that's to answer any questions that folks may have. We strongly encourage everyone interested in applying for the grants to attend these calls. They can download the grant notices on our Web site for information about deadlines and application instructions. And as everyone knows, these are two of our very most successful programs that we've had since the very beginning. There's a lot of interest in them, and we know that we'll, again, this year, get some fantastic applications.

We've also posted information on HAVA Title III and minimum payment amount certifications. It explains how a State may use requirements payments to carry out activities to improve the administration of Federal elections outside of the activities listed

under Title III of HAVA. It also lists which States have certified that they comply with HAVA III requirements, and which States may expend up to the minimum payment amount to improve administration of Federal elections before complying with Title III.

Under Requirements Payments, we released our annual report to Congress on State spending of HAVA funds. As of September 2008, States had spent 76 percent of the funds they received. A majority of the funds were spent on voting system and voter registration systems. The full report is available on our Web site.

Since our last meeting, we disbursed six requirements payments: \$500,000 to Idaho, \$705,983 to New Mexico for 2008 and \$613,898 for 2009; \$2.1 to the State of Wisconsin for FY 2008 and \$1.8 million for 2009; \$4.2 to the State of Pennsylvania. This brings the total amount of HAVA payments disbursed to \$78.2 million for FY '08 and \$50.9 million for FY 2009.

Under Testing and Certification, the EAC Standards Board and Board of Advisors are currently commenting on Phase II of the Election Operations Assessment project on our Web site. Members of the public can download the document they are commenting on and view a variety of other materials that explain the project's objectives and deliverables.

Under Research, Policy and Programs, we expect to issue the National Voter Registration form translated into five Asian languages very shortly and will send a press release and letter to election officials informing them of the new forms.

We also will be issuing next week the designed versions of the previously released Election Management Guideline chapters. They are: Building Community Partnerships, Canvassing and Certifying an Election, Communicating with the Public, Conducting a Recount and Provisional Ballots.

Under Tally Votes, the Commission has certified six tally votes since our last meeting: Our EAC's FY 2011 Budget Request, our 2010 Mock Election Program, the Submission of Maintenance of Expenditure Proposed Policy "A" by Chair Davidson for Public Comment, the Submission of Maintenance of Expenditure, MOE, Proposed Policy "B" by Commissioner Bresso Beach, for Public Comment, and the 2010 EAC College Poll Worker Program. In addition, we approved, by tally vote, the EAC Citizen's Report for FY -- and that should be Commissioners 2009 instead of 2008, Summary of Performance and Financial Results.

In other news, we recently attended the winter conference of the National Association of Secretaries of State and the National Association of State Election Directors. Several EAC staff spoke at the event to share information about the MOVE Act implementation, HAVA grants and payments, and voting system testing and certification. Commissioner Beach has written a summary of her recent trip to Ohio to attend the Ohio Association of Election Officials' winter conference in Columbus. And that is also posted on our Web Site. And, finally, we posted our FY 2011 Budget Request and our 2009 Annual Report on our Web site. And that is my report, Commissioners.

CHAIR DAVIDSON:

Any questions for our Executive Director? Commissioner Hillman.

COMMISSIONER HILLMAN:

No.

COMMISSIONER BEACH:

I have one question.

CHAIR DAVIDSON:

Okay, go ahead Commissioner.

COMMISSIONER BEACH:

Under Testing and Certification, you talked about the EAC Standards Board and Board of Advisors commenting on Phase II. Does that close today or do you know when that...

EXECUTIVE DIRECTOR WILKEY:

Commissioner I'm not sure. I think it does.

COMMISSIONER HILLMAN:

I believe it's the 18th.

EXECUTIVE DIRECTOR WILKEY:

The 18th? Yes, it does.

COMMISSIONER BEACH:

Okay.

EXECUTIVE DIRECTOR WILKEY:

So they're closed.

COMMISSIONER BEACH:

Okay, great thank you.

COMMISSIONER HILLMAN:

Well they may not be closed yet. It might be closed...

EXECUTIVE DIRECTOR WILKEY:

End of the day?

COMMISSIONER BEACH:

End of the day?

EXECUTIVE DIRECTOR WILKEY:

End of the day, okay.

CHAIR DAVIDSON:

Isn't today the 19th?

MS. NEDZAR:

Today is the 19th.

COMMISSIONER HILLMAN:

Well then, I think it's today. I think it's today.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay, so it would be the 19th.

EXECUTIVE DIRECTOR WILKEY:

We'll check and announce it before the end of the meeting.

COMMISSIONER BEACH:

Okay great, thank you.

CHAIR DAVIDSON:

Okay. If there's no further questions, I'll move forward to the New Business. And basically, the main purpose of today's meeting is to discuss the two draft policies documented on the MOE efforts and expenditures, the MOE. So, whether we call it effort or expenditures on the maintenance of the effort, or expenditures, it's kind of one or the other and it means the same thing, but with the

goal of making that draft document formally available for public comment at the conclusion of this meeting. HAVA requires participating States to meet an annual MOE based on State expenditures for allowable activity. States are looking to us for guidance on how they can accurately meet these requirements. My goal for the MOE policy is to provide assistance and guidance to the States who voluntarily choose to participate, so they have the tools to necessarily -- to avoid unnecessary problems during an audit. Audits can cost States money, time and they cannot afford that type of a problem when we can assist them and helping them with that guidance.

As I stated in our last public meeting on MOE, the implementation for not having an adopted policy are significant. Ambiguity in the area means that States may not know if they have chosen -- what they have chosen to calculate MOE is sufficient for an audit purpose. In our inaction that may, in fact, create undue risk for States that are trying earnestly to follow all the rules in administering HAVA funds. Every year we wait to set the policy it becomes more difficult for States to have the appropriate documentation in place to form the basis for an MOE level and to provide how the MOE should be calculated in individual States. As concurring economic climates further continue to hurt States' budgets, it even becomes harder and harder for State election officials to maintain spending level and, thus, harder for them to meet MOE levels. State problems are compounded if they are unsure what the MOE level should be or how to calculate it. It is impossible for EAC to offer the HAVA mandated technical support

to States on this issue if we do not have clear policies and set procedures for the States to follow, as related in the establishment of a baseline MOE and meeting their annual MOE contributions.

Today I'd like to proceed, and as we kind of move forward, I intend to ask Commissioner Beach to describe her policy. And then, after that I'd like to ask Dr. Abbott, and he will join us after she goes through her policy, a couple of questions relating to the draft policy that was talked about at our last meeting. And then, from there we'll open it up for Commissioners' discussion as we move forward.

And so, I will turn it over to you Commissioner Beach for you to address it. And I'd also, either now or after Dr. Abbott talks, I'd like for you to discuss the differences between the two policies that you see.

COMMISSIONER BEACH:

Well, that's what I figured I would capture first, because if you look at both policies they are substantially similar. There are just a couple of nuances that I thought I would bring to your attention and the public's attention as well, if they're following along with it.

First, in my alternative policy we both agree, in ours, that MOE is a requirement on the States and on State expenditures. From mine, I look at State expenditures that are appropriated to a local jurisdiction for activities covered by Section 251 requirements payments and are included in determining the State's MOE baseline, which I believe yours does as well. With my policy, local government expenditures derived from local funds are not required by Federal law to be calculated in baseline MOE.

As far as the elements of MOE, my policy of the MOE applies only when a State receives -- when a State uses and spends requirements payments, whereas in Policy "A" it's unclear, there's not a -- it doesn't differentiate between the receipt and use of Federal funds. So there may be an MOE requirement if a State receives a requirement payment, but it may necessarily use it in that fiscal year.

Another point for my policy with baseline calculations, activities that are included are complying with Title III and possibly improvements to the administration of Federal elections, whereas Policy "A", it includes all activities like mine that are covered under Title III, but also includes all improvements to the administration of Federal elections, where I don't believe improvements to administration of Federal elections are necessarily covered under Title III.

Another differentiating point is Policy "A" requires an annual MOE on all -- annual MOE levels from all eligible jurisdictions and outlines a plan and timeline for collecting that information. And, also, Policy "A" requires an annual certification of either the State or local jurisdictions' MOE contribution. My policy does not have such a requirement of an annual certification. I don't believe there's a requirement of an annual certification in HAVA for MOE plans.

Also, in Policy "A", it talks about a role for the Executive Director in making determinations and concurring on an MOE plan. My policy, I don't believe the Executive Director has the authority under HAVA to make any sort of determination or concurrence on State plans, or anything of that matter, in HAVA, unless we, as a

Commission, has delegated that authority. And, in looking at the roles and responsibilities document, I don't believe we have delegated that sort of authority to the Executive Director. So, if there is any sort of determination or a concurrence, it should be done by the Commission.

Also, in looking at this, both policies discuss how we can assist States in developing their MOE plan. My policy doesn't address certain things that that your policy does. One I had discussed earlier is that certain certifications that I don't believe are required under HAVA, also the role of the Executive Director, and third, the role of contractors. I don't believe contractors, and particularly the naming of vendors, should be in policies. And in Policy "A", it discusses the contractor that is currently -- the EAC currently has onboard to deal with this type of stuff with MOE.

So, that's kind of the differences between the policies, and I'll certainly take any questions that you may have.

CHAIR DAVIDSON:

Okay, Dr. Abbott would you join us at the table? Good morning.

DR. ABBOTT:

Good morning Madam Chair, Commissioners.

CHAIR DAVIDSON:

First of all, could you walk us through, one more time, the process that States need to go through to establish the baseline?

DR. ABBOTT:

Sure. And I'll just take a few moments to do that because we've talked about that before, but it bears repeating. The process is fairly simple and straightforward. States need to do an inventory of

how they -- what money they spent in the base year, which is the year prior to November 2000, on funds they spent that would be eligible for HAVA payment, if in fact, HAVA had been in existence at that time. So, there's a basket of items that are listed in Title III of HAVA, and in Section 251 of HAVA, where it talks about the State plan; that if you spent money in the base year for those activities, then that -- you would roll those funds up and that would become your MOE obligation, which is an annual obligation. Now, there has been a lot of talk about whether the local jurisdictions are included in that rollup or not. It's really not a matter of State versus local. It's a matter of where the State expended funds in '99. So, if the State appropriated funds to local entities to do activities that fall -- that would be allowable under Title III, then those costs would need to be calculated in the MOE.

Now, that does not, at all, say that those local entities are then on the hook every year for some sort of MOE obligation. The obligation is with the State. The State may choose to ask the local entities to participate in meeting that obligation. If local entities get an annual appropriation or sub grant or funds from HAVA, they may well put conditions on that fund that says, "You need to be meeting an MOE level of this, because you were spending money in that base year." Or they may not -- they may choose not to do that. It's entirely up to them how they want to capture the annual obligation of funds. In many cases you'll see as time has progressed and States have become more efficient and better at implementing HAVA, they have taken on certain responsibilities and they have other areas where they're spending State funds, which would count

towards their MOE obligation. They may not need to look to the locals to do that. But, in calculating the base year, you have to look everywhere State funds were appropriated.

CHAIR DAVIDSON:

Okay, thank you. Second, would you describe any significant differences to the draft that you talked about at our last meeting and you gave testimony on, to the one that was voted on, considered as being the one that I proposed? Would you talk about any differences between the two?

DR. ABBOTT:

I think we made a couple of changes based on conversations with the Commissioners and based on informal conversations with the States.

The first one is the language we talked about in terms of requiring that the States submit a plan, and we changed the language a little bit in question eight so that there -- to make it clear that it's voluntary. There is no need for us to require States to do anything that we've laid out here. The States do have the -- they are required to submit, as part of their State plan, how they intend to meet MOE. They are also required, on a yearly basis, to tell us how they have done on meeting MOE. It's just stark. They are required annually to submit a report that has to go -- walk through the entire plan saying how they've implemented each part of the plan. So, at that point in time they need to tell us how they're doing with their MOE. So, we've talked about that in question eight.

The second area where we made some changes that bear...

CHAIR DAVIDSON:

Can I ask one question?

DR. ABBOTT:

Yes.

CHAIR DAVIDSON:

That plan -- I mean, that report that we take from each one of the States on how they've expended the money, that goes on to the Hill, to Congress for them to review?

DR. ABBOTT:

It does and they're publicly available.

CHAIR DAVIDSON:

Okay.

DR. ABBOTT:

And the purpose of that report is for the States to tell us how they have implemented their plan for that year and provide analysis, including, you know, where they spent the money and challenges they had, et cetera.

CHAIR DAVIDSON:

Okay thank you, I'm sorry to interrupt.

DR. ABBOTT:

The second one has to do with something I just talked about and made clear when I talked through the process of collecting MOE and that is question 20, "Do States have to collect MOE information every year from eligible lower tier recipients?" What we did is made some subtle changes here, bearing in mind that it's the State's responsibility to meet MOE, not any local jurisdiction that happened to spend money in a given year. So, those local jurisdictions would not be on the hook, so to speak, yearly, for that. It's entirely up to

the State how they want to figure out how they're going to meet their annual MOE obligation. So, we made that change, just to make that more clear.

And then, in terms of, in question 10, "Our State plan" -- the question was, "Our State plan already acknowledges that we meet MOE requirements. Do we still need to submit the MOE plan discussed in this policy?" The answer is, no, you do not need to. We clarified a little bit here as to why you might want to do that. It's entirely in a State's interest to be as clear as they can about how they're planning to meet MOE. If they're not, they run significant risks in an audit of finding out that their plan really wasn't sufficient, that the basis for their MOE base year calculation is not -- does not meet a reasonable test, for example, or the auditors find that it is insufficient. So, rather than waiting until that point in time to find out whether or not they've been doing it right, we suggest, you know, that it would be -- it would be in their best interest to update their State plan or provide us some information on how they intend to do that, up front.

Now, it's not a requirement and we wouldn't be approving anything they send to us. You know, we are statutorily obligated to provide technical assistance. So, the only way we can provide technical assistance in this area, or in any area, is if we have something to look at, or if we understand what it is they're trying to do. So, if they send us something for us to review, we can kind of go through it and see if it has the required elements to see, you know. There is a judgment call that the State has to make. They have to make the call, "Is the basis for this MOE justifiable? Is it

reasonable? Does it -- does it reasonably capture everything that we did in '99?" Now we're not asking them to prove a negative which would be to go out and canvass everything that happened in '99 and see if it falls in there. That's not what we're asking. We're asking them to find a reasonable basis to make those determinations in terms of what was spent that was HAVA eligible in '99 and put that in here.

Now, like everything, it needs another eye, and every State I've talked to will agree -- has agreed with me on this. They value input from staff, folks that work with auditors on a daily basis, folks that work with the HAVA statute on a daily basis, that work with the Circulars on a daily basis. So, by them sending us what it is -- how they propose to do this, we can provide them good feedback. It's entirely up to them whether or not they accept that feedback. If they do accept the feedback and they get the plan as close as they can to what we've said to them, it's kind of like a vaccination. It's going to help them. It may not solve all of their problems. They may have problems implementing MOE, but it will certainly help them a great deal when it comes time for their audit around MOE issues.

CHAIR DAVIDSON:

Okay. Can you tell me -- you mentioned the States. Can you tell me what kind of effort that you have put out to other people to try -- before we have this draft policy that has been circulating or we've discussed at the last meeting, and then discussed at NASED, and a little bit at NASS?

DR. ABBOTT:

We had -- starting with the summer meetings last year in San Diego, I had informal conversations with a number of States that have been following the MOE issue carefully. So, we had conversations there. We convened a roundtable in June or July which brought stakeholders to Washington to discuss MOE and hear once again what their issues and interests were around this, and where they thought we could be most helpful. And then, from there, it's been a series of informal conversations with key stakeholders. And a stakeholder would be a State that's actually -- has an interest in providing some leadership in this area on behalf of the other States' interests. So, that group includes Kentucky and Michigan and a few other States that have been very active and engaged in helping us think through these issues.

CHAIR DAVIDSON:

Okay, I have one last one. What areas of the policy do you believe need most critical input during our public comment period?

DR. ABBOTT:

Right, it's a good question, because we need this -- because during this public comment period our work doesn't stop. So, the comments come in and we look at them and we try to either adjust the policy or -- what happens, inevitably, is there are scenarios that we haven't thought of. So, scenarios will come in and the questions will be the next -- the second and third order questions that are national extensions of what we've written, you know. "What happens in this scenario?" "What about this?" "How do we allow for that?" When we get those, we can look at them and adjust the policy accordingly.

I do think there are some areas where we need to continue working and being very active in soliciting input from our other stakeholders, which include OMB, the Inspector General, our Oversight Committee on the Hill -- Committees on the Hill. And that's in a couple of critical areas. First is, on the issue of capital expenditures in the base year. So, this may be an area where I think what we have written here is what we would like to see. I am not at all entirely convinced that the statute allows us to put it the way we have in this policy, so we'll use the next 30 days to investigate that further and make sure that we're on solid ground. I think no one wants to have a situation where we have an absurd outcome. So, a State that spent -- that got out in front of HAVA and had a system that -- HAVA compliant in the base year and spent \$4, \$5 or \$6 million to do that of their own money, but then having an MOE obligation of \$4, \$5 or \$6 million every single year, going out, was never the intention of the statute. But if the statute was written in such a way, in this very particular area, that we can't figure out an alternative without help, then we need to explore that over the next 30 days, and figure out other strategies, besides our policy, to address that issue.

A second area would be one that I want to continue looking at is related to the calculation of the base year, it's on expenditures. But going back to '99 and finding all your expenditures is challenging, so we have said in the policy that we'll look at other things like actual appropriations or budgets versus expenditures. I think that is a reasonable basis if you can't actually find all that expenditure documentation, but that is an area that we will want to

talk closely with the Inspector General on, so that we're in alignment as the policy comes out. It's in no one's interest to have a policy that comes out where we don't have alignment when we could, because otherwise those issues get settled later, down the road, in an audit resolution situation, when that's probably best avoided, if possible.

Those are the two main areas that I think that we have a fair amount of diligence left to do, prior to issuing a final policy.

CHAIR DAVIDSON:

And I think it's important to say that this is a working document. It's -- what we're doing today is only getting ready to put something out so we can receive comments from the public. And, you know, I want to make certain that everybody understands that, because it's very vital to this process. We're not making decisions today on a policy. We're talking about what we're going to put out to the public for their comments, and that will be a 30-day period. And obviously, we'll have people watch our Web site, once we get that up and ready to see when that actually is out, because we will put -- go through getting it up on our Web site and everything.

From that point then, I am going to open it up to the Commissioners for questions, and to any of us. And I guess, I also want to make sure that as we talk about this today, whether it's our attorney, or Dr. Abbott, we're not going to get into what their viewpoint is on what is the best -- whether it's one or the other. I want them to, you know, be here for technical assistance. But obviously, our own opinions -- I mean, I want us to go into this with a broad view, not have tunnel vision, and try to reach out and grab

what they think, because I think public comment is going to influence how we come down to a final decision. So, I don't want anybody to feel that anybody is making decisions on how the final product will look today. ..

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

.. is my main goal, is this is a working document that we need to keep an open mind, that as we move forward it will change.

Which -- who would like to be first? Anybody?

COMMISSIONER HILLMAN:

I have questions, but they might be clarified. If Commissioner Beach has questions for Dr. Abbott, my questions might get clarified from their dialogue.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BEACH:

Okay.

COMMISSIONER HILLMAN:

If not, then I have questions.

COMMISSIONER BEACH:

And most of my questions are just to clarify some of the language in Policy "A." So...

CHAIR DAVIDSON:

Sure, okay.

COMMISSIONER BEACH:

Okay. Okay, thank you, Dr. Abbott, for all your work. I know this draft has gone through -- is on the sixth revision now, and I appreciate you working with all of us to try to get something that has our consensus here moving forward. But, I still have some questions that remain that I would like to ask you about.

I guess, if we go to question three, "What does this MOE policy do?" When you talk about EAC's determination, do you mean determination in the EAC audit process? Or is this a determination being made at some other point? If you look at the last, it says, "Adherence to a State-developed MOE plan with which the EAC concurs will be the basis for EAC's determination that a State has met its MOE requirements in a given year." Is that for the audit process? Or are we making it for preapproval or what?

DR. ABBOTT:

So, probably in two areas, and kind of falling back to Madam Chair's comments, this is a working document. So, we do iterations in the language. Now, what we're talking about here, specifically, is, each year, when the State submits to us their annual plan -- their update, their report on their plan, they do that every year and we look through. We read those as staff, you know. We're responsible to see how they did. And in there, they'll tell us how they did their MOE. Now, whether or not -- the basis for whether or not we think they're doing okay on meeting their MOE, would be their MOE plan that they put forward. So, you know, we have kind of a fiduciary -- we do have a fiduciary responsibility to make sure that the stuff they send to us every year, annually telling us how they're progressing is in fact, you know, meeting HAVA, and meeting the

Circulars. So, we do review it. So, the basis for that review would be their plan.

Now, secondly, and it doesn't address it in this question, but you're absolutely right, the basis for an audit resolution situation would be in their plan, so -- their MOE plan, because we will have looked at it carefully. We will work with them to make sure that it covers -- that it's reasonable and it has a basis that's justifiable, the outcomes everyone can agree with, that makes sense. If we have that up front, and we've worked with them on that, then if there is an issue in the audit, we can refer to that document and see if, in fact, they're doing what they said they would do. If they're doing what they said they were going to do, and we've looked at that prior, and we believe that it's solid justification and a reasonable basis for calculating MOE and the base year, and then, annually meeting the obligation, that will influence how we deal with audit issues in the audit resolution process. Now...

CHAIR DAVIDSON:

Can you pull your mic a little bit closer...

DR. ABBOTT:

Yes.

CHAIR DAVIDSON:

...because I think they're having just a touch of difficulty hearing you. Yeah, you can just move it closer, thank you.

DR. ABBOTT:

Does that mean I get a "do over" on that?

CHAIR DAVIDSON:

Well, if they didn't get it on the CamCast, yes, I would say so. But they're okay.

DR. ABBOTT:

Commissioner, does that answer your question?

COMMISSIONER BEACH:

It...

DR. ABBOTT:

So, we do look at them...

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

...two times. We look at them, each year, as they submit their report to us to make sure that -- and that is to know whether or not the report is meeting the needs of MOE. We refer back to their MOE plan, because that's the only basis we would have.

CHAIR DAVIDSON:

And they do certify their report?

DR. ABBOTT:

It's technically, was it certified or not? They send it to us, and I think the assumption is, everything in there is accurate, and they're attesting to the veracity of their report. I don't think -- whether or not it's, actually, technically certified or not, I'm not sure.

CHAIR DAVIDSON:

So, this may be one area that we want to tweak the language, today.

DR. ABBOTT:

Sure.

COMMISSIONER BEACH:

Okay, you mentioned annual report. Where, in HAVA, are States required to give an annual MOE report?

DR. ABBOTT:

States are required to annually update us on the progress of their State plan. One piece of the State plan is the MOE and how they're going to meet it. So, it's not a stretch to say, "Okay, when you give us that plan update -- when you give us that report on your State plan, there has to be an update for MOE in there."

COMMISSIONER BEACH:

Right, but State plans -- there's no requirement that State plans be updated annually.

DR. ABBOTT:

There is, actually, a requirement within the guidelines of the State plan itself, that if you have a State plan intact, and you're getting new money each year, you have to tell us how you're doing with the current plan. It's item number seven, I believe, in the State -- in the list of things you have to do in your State plan. So, it's a Circular reference. It's inside what you have to do for your State plan, but it does require an annual update. Now, we use the annual report as that update rather than having them resubmit their State plan every year...

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

...which would be ridiculous, for many reasons, we can get into maybe later.

COMMISSIONER BEACH:

Okay, so you're referring to the annual report that they give us every year on the requirements payments they receive, how they're spending that MOE should be included in there every year...

DR. ABBOTT:

We...

COMMISSIONER BEACH:

...or requiring MOE.

DR. ABBOTT:

We use the annual report as proxy for the requirement that they every year update what they're doing with their State plan.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

I mean, coming from where I came from, that is a real benefit to States, because a State plan takes months to prepare.

COMMISSIONER BEACH:

Sure.

CHAIR DAVIDSON:

And then it's very costly.

COMMISSIONER BEACH:

Go out for comment and get your committees to...

CHAIR DAVIDSON:

They have to publicly put it out and they have to go out for public input. It is very lengthy and very costly. And then, when we put it in the *Register*, that's an additional...

COMMISSIONER BEACH:

Expense, right

CHAIR DAVIDSON:

...expense.

COMMISSIONER BEACH:

Okay, I guess I'm still trying to figure out where the MOE plan requirement is one within Section 250 (8)(c), because I know you've referenced that before.

DR. ABBOTT:

So we -- right.

COMMISSIONER BEACH:

And it says, "An analysis and description of the activities funded under this part to meet the requirements of this Act." And when I read "activities funded," to me, that means the activities funded under Title III, which is separate -- requirement payments which are separate and apart from an MOE requirement.

DR. ABBOTT:

The MOE requirement is in the State plan, and within the State plan in number 12 of the requirements it's 26 -- sorry 254 (a)(12). "In the case of a State -- of a State with a State plan in effect under this subtitle, 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 plan for such previous year is required on an annual basis." Now, what we do -- we use the annual report to meet that requirement. So, when you do your annual report you need to tell us how you're implementing your State plan, and every State does do that.

COMMISSIONER BEACH:

Right, but it's not a requirement of the State to put their MOE plan in every year. We're saying it would be nice if they did.

DR. ABBOTT:

Well, absent doing it in their annual plan, then they would need to be updating their State plan every year to be in compliance with HAVA.

COMMISSIONER BEACH:

Well, I disagree with that -- with that interpretation but, you know, in the interest of time we can certainly work on that after because I don't see an MOE requirement in there. And maybe, when this is out for public comment, we can....

CHAIR HILLMAN:

May I ask if we can please finish on this point? Because what happens sometimes with us is we put stuff off for later, then we don't finish it today, and then another three weeks will go by. And so, it's an important enough point, the language is in HAVA, so I think it's worth slugging it out for a couple of minutes...

COMMISSIONER BEACH:

Okay, that's fine.

COMMISSIONER HILLMAN:

...if you don't mind, Commissioner Beach...

COMMISSIONER BEACH:

Not at all.

COMMISSIONER HILLMAN:

...so that everybody can be clear as to what HAVA says and doesn't say, and what the current reporting requirements are, what's in those reports, and how EAC uses them.

DR. ABBOTT:

So, I agree that in the section that requires a report, it doesn't say you have to tell us what you're doing with MOE, I think that's true. We have been normatively using, though, that annual report as proxy for this requirement in number 12. I don't think that we've ever asked every State, you know, in the last five years to go ahead and revise or provide an update to their State plan, just simply because of the burden that that would require.

COMMISSIONER BEACH:

Right.

DR. ABBOTT:

Right? So, what we can do is change the language in any draft that we're looking at to reflect the voluntary nature of that, if you like. It's kind of an onion, though. If we -- this policy is clarifying a lot of different things that have just been quiet, so this is probably one of those areas where we've just been operating under a set of implicit assumptions that this policy is calling one of those to light. I think it's in everyone's interest that we do ask them to tell us how they're doing on MOE. It's in their interest for sure, because one of the things that we've seen -- and this is somewhat of an aside, but it's actually -- I think it's an important point -- probably a third of the States I've talked to don't actually remember how they calculated their MOE base. Right? And they're not spending any time really seeing if they're doing it on an annual basis. Asking them to tell us yearly helps with continuity, so as staff changes, as new election directors come on, as things happen over time we have an

accurate description that's kept alive every year because every year they're checking to see if they did it or not.

COMMISSIONER BEACH:

No, and I agree what, you know, may be helpful and voluntary is one thing. A requirement of HAVA is certainly another and I don't -- I'm very mindful, and I'm sure my colleagues would agree with me, that we don't want to put -- unnecessarily put a requirement on a State that's not already in HAVA. Now, if they want to submit something to us and want our feedback or think that it will be helpful moving forward, particularly because with State elections, particularly directors at the State level they may change, Secretaries of State, you know, sometimes are term limited, and election directors change, and for continuity and to go back and look, absolutely. But, I don't want to necessarily put a requirement -- have a policy that places a requirement that I don't today see in HAVA.

DR. ABBOTT:

There is a requirement in HAVA that they tell us annually how they're meeting their plan. That's in Section 12 of the plan itself.

MS. NEDZAR:

Their State plan.

COMMISSIONER BEACH:

Their State plan?

DR. ABBOTT:

The State plan. Within the State plan...

COMMISSIONER BEACH:

Right.

DR. ABBOTT:

...is the MOE description of how they're meeting MOE. So, it is absolutely a requirement. We're not enforcing that requirement right now, because we don't ask for anything outside of the annual plan, which may or may not have all of the details of the State plan in it. So, I agree that we can make it voluntary, but I -- but we have to be careful about saying there is no requirement here for them to tell us how they're doing this, because there is, in fact, in Section 12 of the State plan.

COMMISSIONER HILLMAN:

May I ask a question here? Dr. Abbott, if HAVA requires an annual reporting of how they are implementing and meeting their State plan, I don't have the language right in front of me, so I don't know what the exact language is, and if a component of that report is MOE, because it is a component of the State plan...

DR. ABBOTT:

Um-hum.

COMMISSIONER HILLMAN:

...how can we make it voluntary? I mean, sometimes we want HAVA to tell us what to do and sometimes we want to make what HAVA says is voluntary.

DR. ABBOTT:

Right.

COMMISSIONER HILLMAN:

If you tell me I have to have a plan, and the plan has to be written, it has to have been posted, public comment, it has to be updated when certain things happen, and those things trigger a mandatory

change or update to the State plan, the State plan contains “X” number of items, so one would expect that an annual reporting of progress under the State plan would address each of those items even if the sentence is “no change from prior year”, but that each and every one of the components would be addressed. And if MOE is one of those components, then I’m getting confused about why we would start deciding which of those HAVA required components is mandatory and which are not.

DR. ABBOTT:

So, I think, all fair points, and we have been using the annual plan as proxy for the State plan update, implicitly. There’s just no -- we just did not have that conversation anywhere up until this point in time. But I think Commissioner Beach is correct when she says that the section that requires an annual plan doesn’t necessarily cover everything that’s in the State plan. I think it would be probably -- in terms of formalizing, making sure that they’re meeting that requirement in the State plan, Section 12 of the State plan, in the annual report I think we could probably do that. And I think this was written with that assumption in mind. And now, as we bring it out to light it’s clear that we shouldn’t assume, you know, we have to be intentional about it. So, asking the States, in their annual report to us, to include each of the elements of their State plan would seem like a reasonable compromise and probably one they would welcome given the potential alternative.

CHAIR DAVIDSON:

In my viewpoint, it would be definitely one we want to hear from them on as we move forward.

DR. ABBOTT:

It's a perfect example of the kind of thing that we should get feedback in the next 30 days on, yes.

COMMISSIONER BEACH:

I agree. I would like feedback on that point. I don't know, and I don't want to put our Counsel here on the spot, but do you have anything you'd like to say on this particular interpretation?

MS. NEDZAR:

My understanding from the conversations we've had to this date is that the intention of Policy "A" is to provide a means to demonstrate compliance with the MOE requirement in the State plan. It is not the only means, but it's a voluntary means. That doesn't mean that the requirement to meet the MOE -- and to demonstrate meeting MOE in the State plan in the annual report goes away, it's just one way to demonstrate that you've done that. That's -- that's my understanding of what...

COMMISSIONER BEACH:

Okay.

MS. NEDZAR:

...what this policy attempts to do. Is that accurate?

DR. ABBOTT:

I think that's accurate.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Thank you. Other questions?

COMMISSIONER BEACH

Um-hum, okay for question six you have, “Do States need to account for a lower tier, local spending during the base year in calculating MOE?” Just for clarification, are we saying there’s not a Federal requirement for MOE on the lower tier jurisdiction, it’s at the State’s discretion?

DR. ABBOTT:

There is only a Federal requirement for State expenditures.

COMMISSIONER BEACH:

Okay. And for question seven, “What types of expenditures must be used to calculate the MOE baseline?” And I know I touched on this when I was discussing my policy, is it your belief that improvements of the administration of elections for Federal office are Title III activities? Because you state that they are, and I’m not quite sure that they are. I mean, it’s part of 251 requirements payments, but I don’t know if they’re deemed Title III activities.

DR. ABBOTT:

So, we should strike the “Title III activities” language and insert, instead, Section -- the -- “all allowable costs under the requirements payments” because that is the reference to MOE in the State plan, and that would include improvements to the administration of Federal elections.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Any other questions?

COMMISSIONER BEACH:

Yes.

MS. NEDZAR:

A clarification Madam Chair, I'd like to maintain a copy that we can use when we edit the document, is it your intention here to have me -- to have you receive motions and have me update the document as we're going through it? Or do you want to do that at the end?

CHAIR DAVIDSON:

I think at the end.

MS. NEDZAR:

Okay.

CHAIR DAVIDSON:

I did ask her to write down any motions to change and I think under the discussion we'll just wait to the end when there's motions.

COMMISSIONER BEACH:

Okay. In question eight, "When would the EAC like to receive the voluntary State MOE plans and what is the process for submission?" And I know I discussed this earlier, too, and I want to know where -- or the reasoning behind having the Executive Director provide a determination or a concurrence. And I'm sorry, Tom, don't take anything personally.

EXECUTIVE DIRECTOR WILKEY:

No problem.

COMMISSIONER BEACH:

I'm just trying to find -- because in HAVA the only thing that talks about any determinations being made is by the Commission in Section 208, requiring a majority approval for any actions contained in the Act. So, I just want to know the reasoning behind that.

DR. ABBOTT:

So, the rationale behind it is that the Executive Director is responsible for management decisions and audits. So, they have the authority to resolve audits. The reason we're providing this technical assistance to States around MOE is so that they can be safe in audits, or safer in audits, or we can reduce risks for them in audits. If the Executive Director has first-hand knowledge of how they're proposing to meet their MOE and can make an independent determination -- or a determination in conjunction, maybe is a better way to put it, with the State, in terms of the basis and whether it's reasonable and justifiable and we do that up front, then at the back end after the audit is concluded and the Executive Director who has the responsibility and authority to resolve that audit set of findings can speak to their initial look at the plan. So, that's the reason it is written the way it is.

COMMISSIONER BEACH:

No, and I agree that, you know, EAC should certainly offer guidance, technical assistance to the extent that we can help the States, you know, through this process. But I just -- I don't believe that -- if there's any sort of determination being made it should be done by the Commission, as it would carry more weight, I think, or informing during -- for information and informing the audit process, because we're the final arbiters anyway, you know, for the audit resolution. And I think having the Commission do it would carry much more weight and would be more beneficial for States. And I just don't see where there is -- I disrespectfully disagree that there is authority for making determinations that States can rely on for that purpose.

DR. ABBOTT:

So, the term “determination” is one that can be struck or even...

COMMISSIONER BEACH:

“Concurrence.”

DR. ABBOTT:

...“concurrence” can be struck because, remember, what we are doing is providing technical assistance. And that is the spirit of that language and that is the goal that we’re trying to get to is provide high-quality technical assistance that reduces ambiguity...

COMMISSIONER BEACH:

Agreed.

DR. ABBOTT:

...and thus reduces risks for the States. It’s -- who provides that kind of look and support would be the staff that do this on a day-to-day basis. It is no different than the kind of support we provide in other areas for States that are trying to figure out or trying to navigate their way through the complex Circulars that we follow and navigate their way through a statute that they may pick up once in a great while, they call us and they ask. And that’s the intention behind that particular paragraph.

COMMISSIONER HILLMAN:

May I just ask a question here...

COMMISSIONER BEACH:

Sure.

COMMISSIONER HILLMAN:

...because it’s a follow-up to that point? The one area of the proposed policy that we discussed at our meeting last month and

had discussions about with NASED was the issue of any language that would suggest EAC was approving a State plan, maintenance of effort plan. And for me whether you're using the word "approve" or "concur" or, you know, they all sort of fall in the same basket, because I think in the spirit of HAVA, Congress wanted the States to accept responsibility for their plans of action to demonstrate that they were meeting the requirements of the Help America Vote Act. So, following up on this conversation, I will say that I believe the Executive Director has the authority to work with the State to determine that what they're doing is sufficient or contains critical components, or whatever descriptive language we might use. I personally am surprised that Commissioner Beach, you would even entertain that the Commissioners approve any plan that the State is coming up with. What I'm wondering Dr. Abbott, as we kind of dance around, what is the language that clearly articulates what EAC is trying to come up with? And I think the term "concurrence by the Executive Director" is used twice.

DR. ABBOTT:

Um-hum.

COMMISSIONER HILLMAN:

And it certainly is not a sticking point, but I do see this as staff responsibility to work with the States to make certain that they have in place the critical components in their MOE plan. And EAC doesn't want to accept the responsibility because we can make no guarantees. I mean, the Inspector General could go in and do an audit, and irrespective of the components of the MOE plan he could flag something that's absolutely valid. So, I certainly don't want

EAC to be in a position where a State comes back and says, "But you said." Okay? On the other hand, I really do believe that EAC can provide a lot of valuable assistance to help the chief State election officials and their staff get to where they need to be so that they have an MOE plan that works for them, works for their reporting responsibilities to the Federal Government and works for any auditor who goes in, whether it's a State auditor or a Federal auditor.

And so, as we struggle with the language, I just wanted to ask you now if what we're trying to say is that EAC would be working to provide technical assistance and technical supports to the States to reach something like reasonable certainty that the MOE strategy is -- and this is where I struggle with a word and leave it to you, because there's got to be a word that says the State's MOE strategy or plan, or whatever word we're going to use for that, will pass an audit. And even then for me that's too strong, because I don't know that we're talking about passing an audit, but at least prepare them to have all the critical components and the information they will need for an audit.

DR. ABBOTT:

Um-hum, several good points there that I could try to expand on, starting with the last one. You're right, nothing we do around these plans will guarantee anything in an audit. What we're hoping, at best, that this becomes the basis for the audit though. If it becomes the basis for the audit, then at least the -- and the auditors agree that this is a reasonable approach that the basis for determining your baseline is solid, that it will work, that there's nothing else we

need to scoop up, then at least if the State is working from that point, they have a very good likelihood if they do what they say they were going to do of passing muster on the MOE with the auditors.

Now, in terms of the language we use, other possible language -- and the reason it says "concur" is that we were trying to be as strong as we could around saying that we believe that this approach is correct, because we're signaling, we're telegraphing that we find this to be a reasonable approach with the right outcome that meets the intent of HAVA, et cetera, et cetera. If we signal strongly that, that helps set the basis for the audit. Now, I understand that there are challenges with that and we don't need to use that language because, remember, we say over and over again in the plan that each State has the ability to determine how it wants to meet its MOE obligation; it's their plan. So maybe, some other language we could say, to "try to reach consensus on the plan," would be one possibility or we could just -- we need -- possibly "consensus" is a good word, because it would show that the State - - we're in agreement that this would work.

COMMISSIONER BEACH:

What about language "sufficient justification that the baseline has been met?"

DR. ABBOTT:

The EAC finds -- will work with the State until the EAC finds that there is sufficient justification that -- yes, something like that would be totally -- I think it meets our interest and it definitely meets the State's interest, which would be to have -- to reduce the ambiguity and reduce the risk around the unknowns associated with MOE.

COMMISSIONER BEACH:

I just want to respond to something you said Commissioner Hillman. I don't agree and I, you know, want to make sure it's clear if there was confusion that -- or believe that EAC should be approving State plans. What I was saying is if the EAC is going to make the determination, or the Executive Director, or somebody was going to make a determination on an MOE baseline, the determination of that particular portion, maybe, could be done by the Commission, because it may carry more weight for the audit moving forward. Now obviously, that's something that would have to be discussed with the IG, because I don't even know if he would agree with that when he's going through the audit process. But if the desire was to have a determination to make sure the States have weight behind anything that they've come up with in their plan, that was my reasoning behind it, but under no circumstances do I believe the EAC should be approving State plans or making determinations on State plans as a whole or in general.

COMMISSIONER HILLMAN:

For me, any language, "approve," "concur" "reach consensus" what was that other language about "determine that the minimal baseline has been met," that's all putting EAC in a position, irrespective of who makes the decision, of taking a fair amount of responsibility for something we don't know. And so, in helping the State plans -- helping the States come up with a plan that as best can be determined contains what it should contain -- and States have been through this enough now that they'll be able to know what they have and what they don't have and how they should add to the plan

based on conversation with the staff -- I just think that Commissioner approval of this takes it to a level where it then opens up a whole different discussion as to what we do, what EAC takes on by establishing that. Yes, we set policy and then that policy is used as a benchmark, but in this case we can't set the State plan. And I think any approval action by the Commission sends a signal. I mean, for me, if I was State that would be the one sure way I wouldn't seek your assistance, you know. If working with you meant this had to result in a process that went through and Commissioners had to approve it, I mean, you know, how much of EAC do States want in their business and when. I mean, that's what I keep hearing. And so, we can't, you know -- you can't be a little bit pregnant. You're either going to be in this or we're going to be respectful of the State's authority to develop its plan and seek assistance from EAC -- the experts within EAC, as to whether or not they are properly interpreting and capturing the requirements of all the Federal Government Circulars, and so on and so forth.

DR. ABBOTT:

So, could I make a suggestion, then, based on those two kind of perspectives? Maybe we should just follow the pattern we used for the State plan, in general, and that is the State plans are submitted by the States, we review them just to make sure they have all the required components. Because the State wouldn't want to put up a plan that was missing something. If we follow the exact same protocols and policies around submitting of your State plans as we do with the MOE plan, it seems to me we would be on safe ground. And we have a precedent. The States are accustomed to asking

us for help with their State plans informally, and they do. Anytime they're going through the process of reviewing it, they will pick up the phone and call us. We could just do the same here. So, you know, I think that in the end if they submit one that is missing key components, we will have done our job and our -- under HAVA, which is to provide them technical assistance. If they choose not to use it, or choose to ignore wise counsel, usually wise counsel, that's at their own peril. And to the extent that happens is the extent they just take a little bit more risk on for themselves than they might otherwise. But we do not have to formalize, you know, a stamp on these plans, in the same way we don't do anything around that with the State plans. We do have a checklist that we go through just to make sure that everyone is, you know, on the same page in terms of the required elements, but that's it. That -- we could work something like, again, with the main interest being reducing risk for the States and setting a basis that the auditors can be use. We would accomplish both those goals.

COMMISSIONER HILLMAN:

The major difference being that these plans that address MOE are not published for public comment. We don't have a responsibility to publish them for public comment.

DR. ABBOTT:

No, we don't, but what we would do with them is put them in their official file, because the file is the first thing that's reviewed by the auditors. They come and they pull the financial reports, they pull other things they want to see. If they pull this, it becomes a starting point for how they're going to address it.

COMMISSIONER HILLMAN:

Do the States still have the latitude to determine how much or how little about their MOE plan they would put in their master State plan?

DR. ABBOTT:

Yes, and both policies make that clear. We have a question on that. Most States have said we were endeavoring to meet our MOE, or we will meet our MOE, and that's all they say in their State plan. That's fine. They can update that with more robust language, or they can just simply do nothing. Or they can submit to us something for their file that is a little more detail in terms of how they'd come up with their basis. It's really their discretion. Our counsel will be, the more detailed you can be, the better justification you can have up front, the better you will do in an audit situation.

COMMISSIONER HILLMAN:

Thank you.

CHAIR DAVIDSON:

I just want to warn everybody we only have about 48 minutes left. So if you would continue.

COMMISSIONER BEACH:

Sure, okay. Question nine states, "Does this policy include a set of uniform requirements that States must comply with to establish a baseline MOE and meet annual MOE requirements?" Can you -- I know we touched on this earlier -- can you, I guess, elaborate a little bit on what you mean by "annual MOE requirement" and if you believe States do have an annual MOE requirement?

DR. ABBOTT:

So, the statute says that in 254(a)(7), "The State has to maintain expenditures for activities funded by the payment at a level that is not less than the level obtained by the State for the fiscal year ending." Okay so that's kind of -- they have this responsibility on a year-to-year basis to meet whatever baseline they set.

COMMISSIONER BEACH:

Even if they're not using the payment in that year? Because there are States, from what I understand that have received requirements payments, but may be waiting to the following year because it's a Federal election year to use those.

DR. ABBOTT:

Right.

COMMISSIONER BEACH:

And I guess am interpreting "using" as spending, not using as meaning receipt of funds.

DR. ABBOTT:

If you...

COMMISSIONER BEACH:

So, there may be a year where they may not have an MOE.

DR. ABBOTT:

If you have a State that expends no HAVA funds in any given year, then they would probably not have an obligation to meet an MOE in that year.

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

I actually don't think that is the case, though. By a review of the FFRs, it's fairly clear that all our States are spending requirements payments...

COMMISSIONER BEACH:

At the same -- in the same fiscal year that they're receiving them?

DR. ABBOTT:

Well, we don't make a distinction between the fiscal year or the money and when it's spent. It's all -- once it's disbursed, it goes into the election account, and it could be '04 money, or '08 money. At that point it doesn't matter because it's theirs until it's spent.

COMMISSIONER BEACH:

Okay.

MS. NEDZAR:

I just -- I wanted to add something, if I could, to help clarify.

COMMISSIONER BEACH:

Sure.

MS. NEDZAR:

The requirement to include what is listed in 254(a)(7) remains in a State plan whether or not a State uses money in any fiscal year, that doesn't mean that they must meet MOE in a fiscal year when they don't expend funds. That just means they need to include that portion of 254 in their State or the update.

COMMISSIONER BEACH:

But they don't have that -- they don't have to meet that, then, if they don't expend the funds.

MS. NEDZAR:

Correct, they don't have to spend, but they have to meet the requirement to tell us how they would.

COMMISSIONER BEACH:

If they were using the funds?

MS. NEDZAR:

Correct, yes.

COMMISSIONER BEACH:

Okay, maybe that's where it needed clarified. Okay, question ten says, "Our State plan already acknowledges that we will meet the MOE requirements. Do we still need to submit the MOE plan discussed in this policy?" If we can't hold the State plan against a State, how could EAC then hold an MOE plan against a State?

DR. ABBOTT:

I think we've established here today that we're not holding MOE plans.

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

They are voluntary. They will -- they can put together their plan.

They can choose to follow it or not follow it. It's entirely up to them.

COMMISSIONER BEACH:

Okay, I just wanted clarification for that.

DR. ABBOTT:

You know, I don't think question ten actually says -- if it does, it's not the intention for it to say that they have to do this. And so, if there's language there that we should strike we should, or change.

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

Again, these are voluntary. This is kind of a carrot approach. The States' interests are such that it's almost unimaginable that they won't take us up on this, but some States may choose not to.

COMMISSIONER BEACH:

No, I think, you know, we should offer technical guidance as we are required to and, you know, if States want it they should certainly seek it.

Okay...

COMMISSIONER HILLMAN:

Just on that point, I guess I was looking for the mandatory language in number ten. And I'm not sure I could capture the point you were making under number ten, Commissioner Beach. Because the last sentence says, "Submission of the MOE plan described in this document is, however, voluntary and may not be the only means of satisfying Section 254(a)." Everything else was sort of explanatory. So, I'm not sure I'm getting your -- the concern you raised.

CHAIR DAVIDSON:

In other words, it already definitely says it's voluntary.

COMMISSIONER BEACH:

Right.

DR. ABBOTT:

Question ten is one of the ones we've been working on.

COMMISSIONER HILLMAN:

Say that again.

DR. ABBOTT:

Question ten is one of the questions we've been working on, and so draft 4.0 probably had language that was more along the lines of "you need to do this." Once we moved to the version that I gave testimony on last time...

COMMISSIONER BEACH:

That has "voluntary" in there.

DR. ABBOTT:

...we added a section based on Tamar's language around, it's not the only way you can meet it.

CHAIR DAVIDSON:

I was going to say the "voluntary may not be" was added.

COMMISSIONER BEACH:

Was added then?

CHAIR DAVIDSON:

Um-hum. That was one of the words that was added to this one.

COMMISSIONER BEACH:

That was not in draft 5.0.

COMMISSIONER HILLMAN:

Well can I just ask the draft...

DR. ABBOTT:

That was in 5.0. That was in 5.0.

COMMISSIONER HILLMAN:

...the draft that's in the booklet before us is the same document that was attached to the tally vote?

DR. ABBOTT:

Yes.

COMMISSIONER BEACH:

Correct.

COMMISSIONER HILLMAN:

Yes, so -- okay.

COMMISSIONER BEACH:

That's what we're working off of.

COMMISSIONER HILLMAN:

So this is exactly what we saw when the tally vote went out?

DR. ABBOTT:

That is correct.

CHAIR DAVIDSON:

That's correct.

COMMISSIONER HILLMAN:

All right, thank you.

COMMISSIONER BEACH:

Okay. Moving to question 18, "What happens if our State fails to meet its MOE?" Is it -- is it your intention that IG audits and potential comptroller general audits be guided by a State's MOE plan?

DR. ABBOTT:

Yes.

COMMISSIONER BEACH:

Okay. Moving to question 19, "How can States establish a baseline MOE for lower tier recipients where those jurisdictions lack the records or detailed accounting needed to determine the level of spending on elections in the base year?" I was just wondering if you can provide me an example of when a State may handle this when they do not have the records from the base year.

DR. ABBOTT:

I can, I won't name the State, but we have one State that happened, in '99, to give out grants to provisional voting. And so, every county got "X" amount of dollars to change how they do provisional voting. As it turns out, what they proposed meets squarely with what HAVA came up with, you know, a few years later. Now, do we need to go down and show how those counties spent that money, or can we look at the obligation from the Secretary of State's Office where they used the appropriated money and obligated it for that purpose? Preference is to find the documentation on how much they spent and calculate the baseline on that. But going back ten years to a county and seeing if they have those records is dubious, you know, even for the best county's record keeper. It's much easier to take what they appropriated and then grant it as the baseline. And they would need to tell us that in their plan that that's why they're doing that and they're doing that because they couldn't find the records and then, you know, we would work to make sure that that is a reasonable basis for establishing that particular segment of the MOE. That would be an example.

COMMISSIONER BEACH:

Okay and I just have one last question, going back to question 11, "What should a State include in its MOE plan?" You describe six different things. Would you envision that a State would have to include all six things, or some of the six, or just suggestions for...

DR. ABBOTT:

This falls under the realm of technical assistance, and it's all voluntary.

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

The best that we could see, if you could do these six things you should be in pretty good shape. If you skip on them, it's at your own peril.

COMMISSIONER BEACH:

Okay those are my -- I'm done with my questions.

CHAIR DAVIDSON:

Okay, Commissioner Hillman?

COMMISSIONER HILLMAN:

Okay. So, to go back to -- I jotted down a few of the points that Commissioner Beach indicated were differences between the draft proposed policy she submitted and the one that has been on the table. And I know that a couple of these were addressed, but I need to ask you, Dr. Abbott, to go back and see if you can recapture what the dialogue here said.

The issue of local expenditures being not included in the State MOE responsibility.

DR. ABBOTT:

So, there is, in all likelihood, a basket of local expenditures that will need to be included in the base year -- in the calculation of the base year, and that would be funds that the State appropriated. It probably went to an agency, probably the Secretary of State's Office, and then made its way down to the county level and was

used for specific purposes that we would find allowable under HAVA. We have to find those and we have to make every effort to find those monies, because that is State expenditure of funds that got -- it was paid for at the local level, but the State expended the money for those activities. Once we've captured them and we have that number, it's up to the State to determine how they want to meet that annual number every year. They may have four or five other ways they can meet that, in any given year, based on other expenditures. In other words, MOE is not tied to an activity or to an entity. The only entity that it's tied to is the State. So, you get the number from those local level expenditures that were State funds and then you establish your base. Once you have that, it's up to the State to determine how they want to meet it. A State could, like they do with match, require a county to meet part of the MOE obligation, if they actually have a fiduciary relationship with that county. A grant agreement, for example, that allows them to get HAVA funds through a sub grant. You could condition that grant such that they would have to meet an MOE requirement. That's up to the State to determine that.

COMMISSIONER HILLMAN:

So, I know that this item was discussed in the working group and was discussed at the presentation most recently made at the National Association of State Election Directors, and I know that some States have offered comments along the way. My -- I sat in on the presentation and discussion at NASED. My -- what I walked away with was an impression that the States get this and they're comfortable with this because it's their responsibility to figure it out.

We'll help them figure it out, but it's their responsibility to figure it out and then determine how they want to account for it. Is that correct?

DR. ABBOTT:

I think that's a fairly accurate assessment. There may be outliers, but where the States are now versus where they were when I met them in June is they have moved -- they have moved much closer to where we want to be. And, in fact, we have taken time to -- we have made every effort possible to make sure that we're doing what the statute intended, and so, we're being very precise in our language around State expenditures and also precise in our description of it. And that has allowed us to have what I would characterize as consensus around this issue. That's not to say that it still won't be hard for some States to figure this out, it is still going to be difficult to calculate the base year.

COMMISSIONER HILLMAN:

That's probably the only other -- that was probably the only outstanding question I had.

CHAIR DAVIDSON:

I think that, you know, the questions I asked up front was some of the areas that I was concerned with. And I also agree that I think we have to be very careful when we put any responsibility, or say that we're going to prove any portion, whether it's the plan or whether it's the baseline or anything from the agency, wherever, whether it's Commissioners or the staff. I feel like the more we can have this be an assistance, like the law requires us to do, the better off we are, is my viewpoint there.

But as we move forward, is there any, then, motions to be made? And I did check to see if we could go a little later, and we can -- and unless we have problems, are you okay? So, we're okay with until 12:30, if we need to do that. It's now 25 after 11. I keep trying to be the clock watcher and make sure we stay on point, so we can get finished.

COMMISSIONER HILLMAN:

Well, the first thing I'd like to clarify is what document we're going to be working from. I'm going to find it very, very difficult to go back and forth in terms of any adjustments, edits, amendments, strikes or whatever. So, are we working from the document that was discussed last month? Is that the one we're working from?

CHAIR DAVIDSON:

You know, I think there's a lot more guidance in here. If there's motions to move some of your document into this one, might be the easiest way to proceed, and then, if there's things that we want to delete from this one, we can.

COMMISSIONER BEACH:

May I ask a question?

CHAIR DAVIDSON:

Sure.

COMMISSIONER BEACH:

What is the objection to having both documents out for comment?

CHAIR DAVIDSON:

Mine was simplification for the States. If they knew that there was a document they could work from and get an idea once -- because they'll see the comments and be able to work that through their

mind, if they have one document, it would be easier for the States and anybody from the public that is making comments. That was my main objective is to try to simplify the process.

COMMISSIONER HILLMAN:

And I would agree with that. I think it's our responsibility as Commissioners to do our work to come up with one proposed policy. And there may be deal breakers in here for you, Commissioner Beach. I don't know if that was the question, I was going to ask, but I thought I'd wait and see as we go through the document. I think that EAC has not been moving as efficiently and quickly as we could have in recent months, and so, to get things out in a timely fashion. I think putting two different policies out for comment by the public is not going to stop this process from having to happen. We're going to have to come back and work these things out. I would hope we would find a way to put together one document that we can all agree would be the document that would go out for public comment.

COMMISSIONER BEACH:

Well, there's certainly, as I addressed, I guess, through the questions/answers earlier, that there are components that I don't necessarily agree with the way it's worded or, you know, conceptual/legal interpretations. However, you know, I am willing to work off of one document but, you know, let it be known that I don't necessarily agree with what goes out, and if I get a commitment from both of you to work with me to, you know, make sure we get something in the end that is of consensus.

CHAIR DAVIDSON:

I think that's the goal of our meeting here today is to try to -- I mean, obviously my goal is to get something out today. We've had it out for tally votes and they failed, so we have to move forward. I mean, we're only -- I think it's our responsibility that we move forward. And everything that's in the document, whether it's part of yours or part here...

COMMISSIONER BEACH:

Um-hum.

CHAIR DAVIDSON:

...I may not totally agree with everything.

COMMISSIONER BEACH:

Right.

CHAIR DAVIDSON:

But I think it's important to get it out for comment, you know. So, I think it's doable that we take portions that you want to of yours and move it into one document.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

So, I think that that's definitely a possibility that we can reach. We've got an hour to accomplish that in making motions and moving things into the one document. I mean, obviously it's a document from the Commission at that point.

COMMISSIONER BEACH:

I know our Counsel here has -- you've kept a tally of what we -- because I know when Dr. Abbott was up here we discussed some

consensus language or striking these things out. Do you have a compilation of all that that you've...

MS. NEDZAR:

From today?

COMMISSIONER BEACH:

Yeah, from...

MS. NEDZAR:

There were two items today when Dr. Abbott mentioned the possibility of alternative language.

COMMISSIONER BEACH:

Um-hum.

MS. NEDZAR:

And I've noted those.

COMMISSIONER BEACH:

Okay.

COMMISSIONER HILLMAN:

Perhaps, Chair Davidson, rather than doing individual amendments, because I think after the fifth or sixth amendment we're going to forget where we were, if I might suggest that we use the document that is currently identified as Proposal "A", and that we make adjustments to this, and then look to adopting/approving it one time, rather than doing individual motions, because I think individual motions are going to get confusing, because we'll be debating individual motions. I think if we can just use this document and make the edits to this document, whether it's moving things in, moving things out, whatever it is we're doing.

CHAIR DAVIDSON:

And that's what I was...

COMMISSIONER HILLMAN:

Right.

CHAIR DAVIDSON:

Thank you for clarifying, because that's what I was trying to say.

COMMISSIONER HILLMAN:

Okay.

CHAIR DAVIDSON:

So, if we move in something from your document...

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

...and I think from now on it would just be Maintenance of Effort, not a Proposal "A", or by -- submitted by any individual Commissioner, because what we're working for, the goal, is one from the Commission.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay, if somebody would like to start. The first area -- if you would give us the first area that Dr. Abbott talked about and that way maybe we can change that and then...

COMMISSIONER HILLMAN:

Can we just maybe go through it one by one?

CHAIR DAVIDSON:

Okay, all right.

COMMISSIONER HILLMAN:

Just start at the beginning and go through it and just see where we are.

CHAIR DAVIDSON:

All right, number one is the overview -- the policy overview statement. Is that sufficient with everybody to...

COMMISSIONER BEACH:

I'm fine with that.

DR. ABBOTT:

I have actually one friendly amendment to the overview. I would ask that we strike the last half of the sentence starting with "lower tier jurisdictions may also have to establish an MOE baseline or report annual spending contributions to the State as part of the State's aggregate MOE contribution." I suggest striking that sentence.

CHAIR DAVIDSON:

Okay.

COMMISSIONER BEACH:

I'm fine with that.

CHAIR DAVIDSON:

Okay. Commissioner Hillman are you okay?

COMMISSIONER HILLMAN:

Um-hum.

CHAIR DAVIDSON:

All right, continue. Number one, "What is the purpose of the maintenance of expenditures, MOE, requirements mandated by HAVA?" Is everybody okay with that?

COMMISSIONER BEACH:

I'm okay.

CHAIR DAVIDSON:

Okay, I won't take time to read it, I will just go by one, two, because everybody has got copies of them. So number two. Okay?

COMMISSIONER BEACH:

I'm fine with number two.

CHAIR DAVIDSON:

Number three?

COMMISSIONER HILLMAN:

I think this is the area where, at least for me, I would like to remove the language "concur." And I don't know if Ms. Nedzar has -- or Dr. Abbott, if you have the language that we could substitute there. I mean, I think the spirit is there. I have heard us all agree as to what the goal is, which is to provide technical assistance to help the States develop a plan that meets critical components and prepares them as best as possible for their audit.

CHAIR DAVIDSON:

That's pretty well spoken.

DR. ABBOTT:

So, we could strike the last sentence entirely.

COMMISSIONER HILLMAN:

Starting with "adherence"?

DR. ABBOTT:

"Adherence," yes.

COMMISSIONER BEACH:

Um-hum.

DR. ABBOTT:

And then, we could add the sentence, "The plans would become the basis for audits" -- or, actually, let's just strike the sentence because we talk about audits later. So, if we strike the sentence, we may not need to insert anything there.

CHAIR DAVIDSON:

Okay.

DR. ABBOTT:

The purpose -- remember the policy does two things, right. It sets out a set of procedures that a State could follow to reduce their risk around MOE. And then, it sets a series of kind of policy calls that you have made. So, that probably is -- what we're doing here is the whole vehicle is this plan that they develop, so we could just leave it at that.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay, everybody all right?

COMMISSIONER BEACH:

Yes.

COMMISSIONER HILLMAN:

I would just ask -- the word "instructions -- this policy provides instructions," is it -- I mean...

DR. ABBOTT:

I would have used the term "guidance," but that has...

COMMISSIONER HILLMAN:

Right.

DR. ABBOTT:

...other connotations that we may or may not intend. I think we're open to another word there.

MS. NEDZAR:

Guidelines?

COMMISSIONER HILLMAN:

Guidelines and assistance?

DR. ABBOTT:

Guidelines or assistance. Guidelines...

COMMISSIONER HILLMAN:

Guidelines and assistance.

DR. ABBOTT:

...and assistance, um-hum.

COMMISSIONER BEACH:

Yes.

CHAIR DAVIDSON:

All right, number four.

MS. NEDZAR:

Madam Chair?

CHAIR DAVIDSON:

Yes.

MS. NEDZAR:

I just want to make sure that I have concurrence from all three of you. "Guidelines and assistance", instead of "instructions" in the first underlined sentence and striking the last sentence?

CHAIR DAVIDSON:

I think we heard okay from both of the Commissioners.

COMMISSIONER HILLMAN:

Um-hum.

COMMISSIONER BEACH:

Yes.

MS. NEDZAR:

Okay.

CHAIR DAVIDSON:

Moving forward, that was my concurrence.

MS. NEDZAR:

Okay.

CHAIR DAVIDSON:

Sorry.

MS. NEDZAR:

That's okay.

CHAIR DAVIDSON:

Number four.

COMMISSIONER BEACH:

I'm fine with number four.

CHAIR DAVIDSON:

Commissioner Hillman?

COMMISSIONER HILLMAN:

Yes.

CHAIR DAVIDSON:

Number five.

COMMISSIONER BEACH:

Number five is fine.

COMMISSIONER HILLMAN:

Yes.

CHAIR DAVIDSON:

Number six.

COMMISSIONER HILLMAN:

I think this says what we previously talked about, but I must admit I would rely on Dr. Abbott and Ms. Nedzar to see if this captures what we agreed was the sentiment of our guidelines.

MS. NEDZAR:

Commissioner Hillman, as I read this, this captures both State expenditures, that is money that the States spends and gets a product for, and State appropriations, which a local unit uses to purchase goods or services. Is that also your reading, Dr. Abbott?

DR. ABBOTT:

Yes, I think we're okay. This one could use some work, but I think the essence is there and we have 30 days to fine tune the language.

COMMISSIONER BEACH:

Right and you had indicated earlier that it's not a Federal requirement for lower tier. So...

DR. ABBOTT:

Right and we could -- that is made clear in other questions.

COMMISSIONER BEACH:

Right.

DR. ABBOTT:

But for now I think it's okay.

CHAIR DAVIDSON:

Okay, all right moving forward then. Number seven.

COMMISSIONER BEACH:

I believe Dr. Abbott made a suggestion to change the language, because number six, the improvement of the administration of elections for Federal office, is not part of Title III, but may be included in the baseline.

DR. ABBOTT:

So, we could say, "This means that allowable costs under Section 251 of HAVA, including."

COMMISSIONER BEACH:

Or "may include." If they -- if a State didn't have an improvement -- didn't use funds -- State funds to improve the administration of Federal elections in the base year, then they won't have an MOE for that.

DR. ABBOTT:

That would be the case with every single one of these.

COMMISSIONER BEACH:

Right.

EXECUTIVE DIRECTOR WILKEY:

And that's going to be the case for many of our States.

CHAIR DAVIDSON:

That's right.

EXECUTIVE DIRECTOR WILKEY:

That was pointed out to me during a little break I took, I had a call from one of our States that's been actively involved in this, who pointed out that most of the money given to the lower tier, or whatever you want to call them, jurisdictions, was done after the baseline was established, after 2004, really, when they began getting their funding. So, that baseline is going to be very low

anywhere if you talk about 1999. So that's important to establish that.

CHAIR DAVIDSON:

And I think that's why Congress used that year, it was a non-election year.

EXECUTIVE DIRECTOR WIKEY:

Yeah.

DR. ABBOTT:

So, we should not leave the impression that they can pick and choose of these. It has to be all of these, but if they spent no money on them, then it would obviously be excluded. So, that's where we run into the problem with "may."

COMMISSIONER HILLMAN:

So, can you please repeat the language?

DR. ABBOTT:

So, I would suggest, "This means that all allowable activities under Section 251..."

COMMISSIONER BEACH:

251.

DR. ABBOTT:

...of HAVA including," and then...

COMMISSIONER BEACH:

Right and then, they make that determination, because we don't have a definition of what an improvement to the administration, right.

DR. ABBOTT:

That is their determination to make...

COMMISSIONER BEACH:

Exactly.

DR. ABBOTT:

...actually. That is our policy.

CHAIR DAVIDSON:

That's up to the States.

COMMISSIONER BEACH:

Okay.

COMMISSIONER HILLMAN:

Okay, I'm just a little slow today, hard to hear three things at one time. Could I just make a technical suggestion that the sentence might begin with the word "all" and not "this means that"?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

So, if we started it, "All allowable activities."

DR. ABBOTT:

"Under Section 251 of HAVA, including."

COMMISSIONER HILLMAN:

"Including."

DR. ABBOTT:

And then, the colon and everything that follows. This is question seven.

COMMISSIONER HILLMAN:

So, what are we striking?

DR. ABBOTT:

"This means that all Title III activities" are struck.

CHAIR DAVIDSON:

Until the very end taking out the whole, you know, listing them.

COMMISSIONER HILLMAN:

Okay. How about then, if you read for me the sentence as you would.

DR. ABBOTT:

I would leave in the iteration of all of the things under 251 because it's helpful.

COMMISSIONER HILLMAN:

Okay, just read...

DR. ABBOTT:

Tamar could you read the sentence?

MS. NEDZAR:

I was having a little bit of difficulty too, I apologize.

DR. ABBOTT:

I'm sorry, it's clearly me.

COMMISSIONER HILLMAN:

I know it's...

DR. ABBOTT:

Let me try it again.

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

You suggested starting the sentence with?

COMMISSIONER HILLMAN:

"All allowable."

COMMISSIONER BEACH:

“All allowable.”

DR. ABBOTT:

“All allowable costs under Section 251 of HAVA, including:” and then everything that follows.

COMMISSIONER BEACH:

The “Title III activities, including”?

DR. ABBOTT:

“Title III” should be out.

COMMISSIONER BEACH:

Right that’s what I’m saying, okay.

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

But what about this “and that were funded directly by the State or through,” that’s staying in?

DR. ABBOTT:

Yes, because this is about the base year only.

COMMISSIONER HILLMAN:

I understand.

COMMISSIONER BEACH:

Right.

DR. ABBOTT:

So the base year...

COMMISSIONER HILLMAN:

It’s just that you keep jumping to the middle of the paragraph and I...

DR. ABBOTT:

I just assumed everything up until MOE, the first sentence, is okay.

COMMISSIONER BEACH:

Right.

COMMISSIONER HILLMAN:

I never make assumptions. So it's, "All allowable costs under Section 251 of HAVA, including."

COMMISSIONER BEACH:

Um-hum.

COMMISSIONER HILLMAN:

And what comes after "including"?

DR. ABBOTT:

Everything you see there.

COMMISSIONER HILLMAN:

"Including and that were funded directly"? I think that's...

DR. ABBOTT:

I'm sorry we're starting at a different spot.

COMMISSIONER HILLMAN:

Yeah.

EXECUTIVE DIRECTOR WILKEY:

Yes.

MS. NEDZAR:

I think I have it.

DR. ABBOTT:

You've got it? I apologize I wasn't reading the first sentence.

COMMISSIONER HILLMAN:

Okay, all right.

MS. NEDZAR:

What I believe we're attempting to do here is respond to number seven by saying, "States must use all election expenditures that are allowable under Section 251 of HAVA, and that were funded directly by the State, or through State appropriation to a lower tier entity in the base year, to calculate the baseline MOE. All allowable costs under Section 251 of HAVA, including" and then the enumerated items, "should be included in the baseline MOE and tracked on an annual basis." Does that reflect what...

COMMISSIONER BEACH:

Well, I still have an issue with the "annual basis" thing, but I will for -
- just to move forward, we can discuss -- deal with that later.

COMMISSIONER HILLMAN:

Well, when we say "deal with it later," do you mean...

COMMISSIONER BEACH:

I have a different interpretation of the "annual."

COMMISSIONER HILLMAN:

...you have a concern with it, but moving it later under the 30-day comment period, or moving it later that would hold this up?

COMMISSIONER BEACH:

Moving it to the 30-day comment period....

DR. ABBOTT:

Although I...

COMMISSIONER BEACH:

...because if we have a disagreement on the legal interpretation, I don't believe we're going to resolve it today. And I'm hoping through the comment period maybe we'll get some guidance on that.

COMMISSIONER HILLMAN:

Okay, so you're not saying that it would hold up the 30-day comment period?

COMMISSIONER BEACH:

No.

COMMISSIONER HILLMAN:

Okay.

DR. ABBOTT:

Well, just in the interest of moving though, the last part of that clause "and tracked on an annual basis" can be struck from this question, because this question deals primarily with how to calculate the base.

COMMISSIONER BEACH:

Okay, I feel more comfortable with that.

COMMISSIONER HILLMAN:

Okay, so...

MS. NEDZAR:

So, the sentence would end with...

DR. ABBOTT:

"Baseline MOE."

MS. NEDZAR:

"In the baseline MOE."

COMMISSIONER BEACH:

Right, period.

MS. NEDZAR:

And striking "and tracked on an annual basis."

COMMISSIONER HILLMAN:

Okay. And so, read it one more time, please, from start to finish.

MS. NEDZAR:

Certainly. "States must use all election expenditures that are allowable under Section 251 of HAVA, and that were funded directly by the State, or through a State appropriation to a lower tier entity in the base year, to calculate the baseline MOE. All allowable costs under Section 251 of HAVA, including: 1) purchase of voting equipment; 2) development and operation of a Statewide voter registration list; 3) development and implementation of provisional voting for Federal elections; 4) provision of information to voters at the polling place on Election Day; 5) verification of information provided by persons seeking to register to vote; and 6) improvement of the administration of elections for Federal office should be included in the baseline MOE."

COMMISSIONER BEACH:

That's fine.

COMMISSIONER HILLMAN:

Hallelujah.

MS. NEDZAR:

Can I make one quick? Instead of saying "All allowable costs," can I recommend that you say, "All allowable uses of the funds under Section 251 of HAVA"?

CHAIR DAVIDSON:

I don't have a problem.

COMMISSIONER BEACH:

No, I don't have a problem with that.

MS. NEDZAR:

Okay. Are you okay with that Dr. Abbott?

DR. ABBOTT:

Yeah.

CHAIR DAVIDSON:

Okay. Moving forward, number eight, this again is one that needs to be changed.

COMMISSIONER BEACH:

Right, if we can strike the EAC's Executive Director concurrence language. And I believe there was alternate language that was suggested, or something.

MS. NEDZAR:

You suggested using the term "sufficient justification that MOE has been met."

COMMISSIONER BEACH:

Um-hum.

DR. ABBOTT:

Could I suggest alternative language...

COMMISSIONER BEACH:

Sure.

DR. ABBOTT:

...so that we get back to the spirit of providing technical assistance is what we talked about here? We say, "EAC would like to receive MOE plans that can be submitted outside the State plan by December 1, 2010. EAC's grants department will work with your State to develop your plan."

COMMISSIONER BEACH:

Okay, that's perfect.

DR. ABBOTT:

All right.

CHAIR DAVIDSON:

Okay, did you get that down?

COMMISSIONER HILLMAN:

So, it says "will work with your State..."

COMMISSIONER BEACH:

"In developing"...

DR. ABBOTT:

"To develop your MOE plan."

CHAIR DAVIDSON:

All right, moving forward, number nine.

COMMISSIONER BEACH:

I just have one question on eight and I guess -- I know that there are dates in here. I mean, if a State can't comply with these dates, is there flexibility for them to submit the plan?

DR. ABBOTT:

I think we need to hear back from folks during the comment period and then establish dates based on those feedback. And, of course, all dates, you know...

COMMISSIONER BEACH:

They're not set in stone.

DR. ABBOTT:

Dispensation can be granted to any particular State, but it would be a mistake not to have dates.

COMMISSIONER BEACH:

Okay, thank you.

CHAIR DAVIDSON:

Moving forward, number nine, is everybody okay? I didn't hear, I don't believe, any discussion on that.

MS. NEDZAR:

May I go back to number eight for a moment, Madam Chair?

CHAIR DAVIDSON:

Um-hum.

MS. NEDZAR:

Is it your intention to keep the last sentence that discusses the dates then, and get comment, or to leave it out and get comment?

DR. ABBOTT:

Leave it in and get comment...

MS. NEDZAR:

Okay.

CHAIR DAVIDSON:

Right, leave it in and get comments.

MS. NEDZAR:

Okay.

DR. ABBOTT:

...so they're responding to a set of parameters.

MS. NEDZAR:

Okay.

COMMISSIONER HILLMAN:

So...

MS. NEDZAR:

Would you like me to read that back?

COMMISSIONER HILLMAN:

Please.

MS. NEDZAR:

Okay, the response to number eight would read, "EAC would like to receive MOE plans that can be submitted outside of the State plan by December 1, 2010. Once your plan is received, EAC's grant department will work with your State to develop your MOE plan. EAC's hope is to have MOE plans developed by each State that chooses to participate in the process in place by January 31, 2011. EAC will provide technical assistance, including easy to use templates and checklists for developing State MOE plans, by early summer 2010."

COMMISSIONER HILLMAN:

This surely can wait for the 30-day public comment period.

COMMISSIONER BEACH:

Yes.

COMMISSIONER HILLMAN:

But I don't believe a policy should contain a word like "hope," EAC hopes it will do something. I think we need to be a little more...

DR. ABBOTT:

Well, maybe we can strike it.

COMMISSIONER BEACH:

Yeah.

COMMISSIONER HILLMAN:

We can strengthen that word.

COMMISSIONER BEACH:

Intends?

CHAIR DAVIDSON:

Okay, moving forward then.

DR. ABBOTT:

Intends.

CHAIR DAVIDSON:

You're going to change it now?

COMMISSIONER BEACH:

I'm saying if you want to change it now you can strike "hope" and put...

COMMISSIONER HILLMAN:

No I just think we can, you know...

COMMISSIONER BEACH:

Work on it after?

COMMISSIONER HILLMAN:

Yeah.

COMMISSIONER BEACH:

Okay.

COMMISSIONER HILLMAN:

It's just...

DR. ABBOTT:

That's why it says draft.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Number nine. And this is the one I said I didn't believe there was any...

COMMISSIONER BEACH:

Right.

COMMISSIONER HILLMAN:

Um-hum.

CHAIR DAVIDSON:

...discussion on. Ten, there was discussion on that one. Is there something that...

COMMISSIONER BEACH:

There was. That one -- that one is taken care of because the voluntary language is in there.

CHAIR DAVIDSON:

Okay, all right. 11, I didn't hear any discussion on, I don't believe, on 11.

COMMISSIONER BEACH:

Well, I think 11 also I talked about earlier was the whole distinction whether or not there's an annual MOE met or not, and I think we've discussed that earlier. So...

DR. ABBOTT:

So, I would propose that we strike the last sentence of number six, strike, "Note that both States and eligible lower tier recipients will need to do an annual certification of their annual MOE contribution." We can strike that sentence for this document, because I don't think it's needed.

COMMISSIONER BEACH:

Okay.

COMMISSIONER HILLMAN:

What is the implication of that, though? Is a certification required?

DR. ABBOTT:

I do not believe so, except for the fact that when someone sends us a report they're certifying to its voracity and accuracy by virtue of sending it to us. I don't think we need to make it explicit here. I think a best practice for the States that have other lower tier entities contributing, that they do require a certification of that level, because that will be part of their documentation they will need to show in an audit. But we can leave that for technical assistance. It doesn't have to be as part of the policy. So, we can leave the instructions to have your lower tier entities certify to the State that they're meeting their contributions. We can leave that to the technical assistance we provide. It's very important...

COMMISSIONER HILLMAN:

But if we're providing them guidelines, how will they know that? I mean, one of the things I've learned about government is if I don't know the right question to ask I'll never get the information I really should have. So, how are they going to know that if we don't put somewhere...

DR. ABBOTT:

One of the things that we're going to be providing are a series of sample agreements around MOE, so these would be provisions that a State would give to a lower tier entity as a condition of receiving HAVA funds that would require an annual certification of meeting MOE. Because like us, it's very -- it would be impossible for us to validate every single one of these plans by going and seeing that it's in place. So, we do need some kind of certification saying, yes, we believe this is accurate. The States absolutely need that for all of their lower tier entities that would be

participating. But we can provide that in the documents we talked about in here, in terms of the templates and the technical assistance and the support we provide them. So, I don't think it needs to be part of the policy.

COMMISSIONER HILLMAN:

So, you're saying it's something that would prompt them that if it pertains to them?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

Because if I see a document and I look at things and I don't know what that means and you're not telling me I have to do this, I might go right past it when I should have paid attention to it.

DR. ABBOTT:

It's an area we will be highlighting, because it's very important for their documentation and back-up documentation that they have those certifications.

COMMISSIONER HILLMAN:

Is it anywhere else in here?

DR. ABBOTT:

No.

COMMISSIONER HILLMAN:

If it's very important then, I want to know why it's not going to be in our policy.

DR. ABBOTT:

Because I don't think we need to require it. Remember the plans are the State's plans. How they want to choose to implement them

is up to the States. What we're saying is that this is a good practice for you to do.

COMMISSIONER HILLMAN:

Okay.

CHAIR DAVIDSON:

Does it stay or take it out? Do we leave it in and get comments?

COMMISSIONER HILLMAN:

Well, if it's use of the term "annual certification," I guess, the only thing I'm concerned about is that we start this policy and we refer to this as "guidelines and assistance" and you are telling me that it is very important for the States to capture that information, even if they don't have to annually certify it to us. So, if it's critical information, if it's auditable...

DR. ABBOTT:

So, we could change it to "should do an annual certification of their MOE contributions."

COMMISSIONER BEACH:

Rather than...

DR. ABBOTT:

That's the best practice. Rather than requiring them to do it, they should do this.

COMMISSIONER HILLMAN:

Right.

DR. ABBOTT:

That would also work.

COMMISSIONER HILLMAN:

So instead of "will need to do,"...

DR. ABBOTT:

“Should do.”

COMMISSIONER HILLMAN:

...“should do”?

COMMISSIONER BEACH:

Or may want to do or may choose to do or...

DR. ABBOTT:

May choose to do. I think “should” is actually probably more what we want to say.

COMMISSIONER HILLMAN:

It’s important and they should do it.

DR. ABBOTT:

You may have a...

COMMISSIONER BEACH:

But they’re not required to do it under Federal law.

DR. ABBOTT:

Right, that’s right.

MS. NEDZAR:

Striking “will need to” and including “should.”

CHAIR DAVIDSON:

Um-hum, okay number 12 any comments?

COMMISSIONER BEACH:

I’m fine with 12.

CHAIR DAVIDSON:

13?

COMMISSIONER BEACH:

I’m fine with 13.

CHAIR DAVIDSON:

14?

COMMISSIONER BEACH:

I'm fine with 14.

CHAIR DAVIDSON:

15?

COMMISSIONER BEACH:

15, and I think this was something that Dr. Abbott and I discussed. And I think he pointed to a section of HAVA which was not 258(3), that it's pointing me to a section that was number 12. Was it 254 (12) of HAVA, you believe?

DR. ABBOTT:

It's within the State plan, description of the State plan.

COMMISSIONER BEACH:

So, I think we should strike the first sentence, because it's not Section 258(3).

MS. NEDZAR:

The annual report itself is required by 258(3).

COMMISSIONER BEACH:

Right, for requirements payments, but not for MOE baseline. Dr. Abbott is saying that the MOE requirement he believes is under 254(12).

COMMISSIONER HILLMAN:

Well rather than striking it, shouldn't we insert the appropriate reference points if this isn't clear?

CHAIR DAVIDSON:

And get some comments?

DR. ABBOTT:

I would propose we strike Section 258(3) and put the section under the State plan that's relevant, which would be...

CHAIR DAVIDSON:

254...

COMMISSIONER BEACH:

254(12)...

CHAIR DAVIDSON:

...(12).

COMMISSIONER BEACH:

...was that what it was? (a)(12), 254(a)(12).

DR. ABBOTT:

(a)(12).

CHAIR DAVIDSON:

Yeah it is (a)(12). Okay, moving to 16.

COMMISSIONER HILLMAN:

I want to make sure we capture what we were supposed to capture.

MS. NEDZAR:

The requirement to submit an annual report does not derive from 254(a)(12).

COMMISSIONER HILLMAN:

But it says as a part of its annual report. It says required to submit as part of its annual report, not required to submit an annual report.

COMMISSIONER BEACH:

That was my whole issue with that provision.

COMMISSIONER HILLMAN:

So, maybe we just move the section to a different place.

CHAIR DAVIDSON:

Can you make a suggestion then?

MS. NEDZAR:

Can you give me just a second to...

DR. ABBOTT:

Maybe we can continue on and let Tamar look at that look one.

COMMISSIONER HILLMAN:

Yeah.

COMMISSIONER BEACH:

And we'll come back to 15.

DR. ABBOTT:

And if there are...

CHAIR DAVIDSON:

All right, 16.

COMMISSIONER BEACH:

I'm fine with 16.

CHAIR DAVIDSON:

17?

COMMISSIONER BEACH:

17 is fine for me. I don't -- I mean...

CHAIR DAVIDSON:

Speak up Commissioner Hillman if you have any problems.

COMMISSIONER HILLMAN:

Um-hum.

CHAIR DAVIDSON:

18?

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

19?

COMMISSIONER HILLMAN:

Can I just go back to 18 for a minute?

CHAIR DAVIDSON:

Sure.

COMMISSIONER HILLMAN:

Dr. Abbott, is it possible that an audit finding related to a State not meeting MOE can be resolved by the State with the auditor before it gets to the resolution process?

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

So, do we -- is it advisable to say that here? Because it makes it look like that's the only time that a State can deal with its...

DR. ABBOTT:

Well, it wouldn't be a finding at that point. So anything that's not dealt with between the State and the auditor we will...

COMMISSIONER HILLMAN:

Okay.

DR. ABBOTT:

...we will know about in draft form but we'll never see it formally.

COMMISSIONER HILLMAN:

Okay.

DR. ABBOTT:

So this only accounts when, in fact, they were not able to reach agreement and it's where we're left deciding how we want to handle the situation as an agency.

COMMISSIONER HILLMAN:

So we're using the technical term here "finding" meaning...

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

...in the final report?

DR. ABBOTT:

That's correct.

MS. NEDZAR:

Do you want to add "formal"?

COMMISSIONER HILLMAN:

Well I just want to clarify...

DR. ABBOTT:

"Finding" is a term of art.

COMMISSIONER HILLMAN:

Right and you know what I like about Federal bureaucratic terms of art. Plain language is always helpful for everybody, so there's no confusion what we mean here.

CHAIR DAVIDSON:

And our States are always crying for plain language.

DR. ABBOTT:

So, maybe we can insert "any formal audit findings."

COMMISSIONER HILLMAN:

Well what is the final audit called?

DR. ABBOTT:

The final management report.

COMMISSIONER HILLMAN:

Any findings in the final whatever.

DR. ABBOTT:

Well, we would -- we would use that report to make a decision about the issue, so it would be in the draft. Any findings in the draft report.

COMMISSIONER HILLMAN:

But that's not what you just said to me.

DR. ABBOTT:

Well, the final, final report is where we take care of the issue.

COMMISSIONER HILLMAN:

But anything in the draft wouldn't get to audit resolution. It could presumably be worked out before.

DR. ABBOTT:

Well, it would -- so I will take back what I said. It will be in the draft right, because that's the only way they would know there's an issue.

COMMISSIONER HILLMAN:

Right.

DR. ABBOTT:

But it's possible for the State and the Inspector General to work something out that's in the draft, and in often case that is in fact the case.

COMMISSIONER HILLMAN:

So, I'm going to go back...

DR. ABBOTT:

I'm going to go back to saying I like it the way it is.

COMMISSIONER HILLMAN:

All right, it works for you, but is it going to work for the States? I appreciate it works for the inside...

DR. ABBOTT:

The reason I'm hesitating...

COMMISSIONER HILLMAN:

The folks who play the inside game.

DR. ABBOTT:

I will say the reason I'm hesitating here is that we're actively working to tweak a bit of the audit process. And so, I would like to leave it as is and with the notion that after 30 days we'll have more clarity to exactly how we're going to be handling these, if that's okay.

COMMISSIONER HILLMAN:

It will be an interesting 30 days, okay.

DR. ABBOTT:

Well we only have one thing we're leaving for the 30 days, right, so far?

CHAIR DAVIDSON:

Well, you know, the one thing that I really like, this is being CamCast, and as the States make their comments they I'm sure will go back to this and review our comments during this process.

COMMISSIONER BEACH:

Yeah.

COMMISSIONER HILLMAN:

We can hope.

CHAIR DAVIDSON:

Number 19? Number 20?

COMMISSIONER BEACH:

20 we can strike as we have before “annual basis” in the first sentence. So, it will end “the State will need to determine how it will meet its -- meet the MOE obligation.”

CHAIR DAVIDSON:

It’s on the second sentence?

COMMISSIONER BEACH:

Yeah, we could take out the last four words of the first sentence.

COMMISSIONER HILLMAN:

But they have to do it every year. They have to in their State plan report every year, even if it’s nothing.

DR. ABBOTT:

This sentence, actually, is in reference to how they meet the actual obligation. So, once you’ve established the baseline, how you meet it in any given year is entirely up to the State, and it does not have to track to the baseline expenditures. You establish your base of \$1 million through A, B and C. You may meet it through E, F and G activities, because you moved on and you’re no longer doing those earlier activities. It’s the expenditure that we’re tracking, not the activity. And that’s what this sentence gets at. So, I would suggest we leave this one, it’s important.

CHAIR DAVIDSON:

21?

COMMISSIONER BEACH:

I'm fine with 21.

CHAIR DAVIDSON:

22? 23?

COMMISSIONER BEACH:

Let me see. Why are we suggesting to States how to go after their lower tier fund recipients?

DR. ABBOTT:

Because the question asks us.

COMMISSIONER BEACH:

What?

DR. ABBOTT:

Because the question asks us that.

COMMISSIONER BEACH:

Right, but I asked why do we have this question.

DR. ABBOTT:

The questions are derived from our conversations we had with stakeholders.

COMMISSIONER BEACH:

Okay, so the States are asking us for...

DR. ABBOTT:

These are by and large the questions that came up during the...

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

...meetings we've had. So this was one of the things that -- and they're kind of in order of precedence -- of importance as well.

COMMISSIONER BEACH:

Okay, so the States then asked us, you know, how would we be able to enforce it on lower tier, if we decided to make a...

DR. ABBOTT:

Right, um-hum.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

24?

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay, now...

COMMISSIONER BEACH:

There's two more.

COMMISSIONER HILLMAN:

25 -- there are two more.

CHAIR DAVIDSON:

Oh, that's right. Sorry about that. 25?

COMMISSIONER BEACH:

25, if we can do like we did earlier and strike the "concurrence" from the EAC's Executive Director from there.

CHAIR DAVIDSON:

Right.

COMMISSIONER BEACH:

And I would also suggest we...

DR. ABBOTT:

We could just say “with a technical assistance provider to develop tools and templates.” So strike the name of the organization and change “its” to “a.” So the sentence reads, “In addition, the EAC plans to use a technical assistance provider to develop tools and templates to help capture and track MOE.”

COMMISSIONER BEACH:

Would this be a suggestion though that EAC would always have a contractor, a technical assistance provider indefinitely?

DR. ABBOTT:

So, I think that you raise a good point, and it’s a good time to make a distinction here. I suspect when we get through the 30 days and we rewrite the stuff that’s in here to reflect the input that we’ve gotten, we will end up with a document that is a policy document with a series of Q & A’s attached to it. Q & A’s you absolutely have to have. Without them, it’s almost impossible to do that.

COMMISSIONER BEACH:

No, I think these Q & A’s are very helpful.

DR. ABBOTT:

So, we’ll have those, but it doesn’t have to be a formal part of the policy, and we can make that determination as to which questions actually speak to policy versus which ones speak to a procedure or a resource or something like that that we would add as ancillary information to the final policy.

COMMISSIONER HILLMAN:

But a technical assistance provider doesn’t have to be a contractor, it could be a staff person, it could be a software package.

DR. ABBOTT:

That's correct.

COMMISSIONER HILLMAN:

It could be, you know, I mean, we could have somebody on staff who has the capacity to do that.

DR. ABBOTT:

We could say, "In addition, the EAC plans to..."

EXECUTIVE DIRECTOR WILKEY:

"Provide."

DR. ABBOTT:

...provide technical assistance to develop tools and templates."

CHAIR DAVIDSON:

Let's do that.

COMMISSIONER BEACH:

I would be more comfortable with that.

COMMISSIONER HILLMAN:

What are we doing with the first sentence?

COMMISSIONER BEACH:

I asked that we use the same language we used before. Didn't we have something in one of the earlier questions where we dealt with "concurrence from"?

CHAIR DAVIDSON:

A technical...

DR. ABBOTT:

Can we just strike it -- stop the sentence at, "EAC grants staff..."

COMMISSIONER HILLMAN:

"Will be"?

DR. ABBOTT:

“Will” -- actually there’s a typo there anyway -- “will be available to provide guidance to States on their MOE plans.” Then strike the remainder of the sentence.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay? 26.

COMMISSIONER HILLMAN:

Did you get that Tamar? Do you want to read it back, please? If you don’t mind, she can read it back.

MS. NEDZAR:

Response to number 25, “EAC grants staff will be available to provide guidance to States on their MOE plans. In addition, EAC plans to provide technical assistance to develop tools and templates to help capture and track MOE. EAC will also publish sample MOE plans from States willing to share their work and with others as a best practice guideline.”

COMMISSIONER BEACH:

I’m fine.

CHAIR DAVIDSON:

Okay, 26. Okay?

COMMISSIONER BEACH:

Wait. Okay.

CHAIR DAVIDSON:

Okay. All right, now...

COMMISSIONER BEACH:

There was one more that we -- I’m sorry, I didn’t mean to interrupt.

COMMISSIONER HILLMAN:

Yes, number 15.

CHAIR DAVIDSON:

Okay. Oh, that's right.

MS. NEDZAR:

Before we go to number 15, if I could Madam Chair, I'd like to make a recommendation on number 12. I just looked back at it and if I didn't know about this discussion, I might think that the use of the term "non-Federal spending", instead of "State spending", or some other term might include local spending. Do you want to make a distinction there? Do you think it's necessary?

CHAIR DAVIDSON:

State spending is the only thing that we're really talking about, so...

COMMISSIONER BEACH:

So, you're suggesting rather than "non-Federal spending" change that to "State spending"?

MS. NEDZAR:

I think that would capture what we've discussed.

CHAIR DAVIDSON:

It would be clearer to the -- I mean I think that would clarify to the States.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

They're used to that, they're not used to the "non-Federal."

COMMISSIONER HILLMAN:

Dr. Abbott?

DR. ABBOTT:

I think that's -- yes, yes, that's a good catch.

CHAIR DAVIDSON:

Okay, back to 15 then.

MS. NEDZAR:

So, in that response to number 12...

CHAIR DAVIDSON:

There's a couple places.

MS. NEDZAR:

...every time it says "non-Federal"...

CHAIR DAVIDSON:

Right.

MS. NEDZAR:

...I'll replace it with "State."

CHAIR DAVIDSON:

Um-hum.

COMMISSIONER BEACH:

Okay.

MS. NEDZAR:

On number 15 the question itself asks about the reporting requirements, and because the reporting requirements derive from 258, I still maintain that 258(3) should be cited in this response. Now, what is in the report comes from partially what goes into the State plan, because States have to report to us what they've done pursuant to their State plan. So, if it's okay with you, I'd like to refer to both sections because the reporting requirement itself derives

from 258(3), but the portion that deals with the update is in 254(a)(12).

COMMISSIONER BEACH:

But aren't they two separate reporting requirements?

MS. NEDZAR:

The reporting requirement itself, and please feel free to jump in, derives from 258. 258...

COMMISSIONER BEACH:

Right, which deals with requirements payments only, and then the MOE baseline calculation update requirement or how you're going to meet your MOE comes from the State plan, which is derived from 12.

CHAIR DAVIDSON:

But I think what she's saying is...

COMMISSIONER BEACH:

Is that what we're saying?

CHAIR DAVIDSON:

...is that the report needs to include everything that was in your State plan, and because MOE is required under the State plan that's where we're getting...

MS. NEDZAR:

It's incorporated in the report itself.

CHAIR DAVIDSON:

And it takes away then their need to update their State plan every year, is what we've said. So by having this and making it where they can include it in their report, then they're not required to update a State plan, yearly, if they get money.

COMMISSIONER BEACH:

Right, because States every year have to tell us how they're meeting their MOE.

CHAIR DAVIDSON:

That's right.

COMMISSIONER BEACH:

But I guess, we could work on both, because I don't derive that direct point from subsection 3.

COMMISSIONER HILLMAN:

Do you have language that you want to suggest? So, maybe if we listen to her suggested language, we can see what she's trying to accomplish for us.

MS. NEDZAR:

This may be too lawyerly, so feel free to -- "Pursuant to...

COMMISSIONER BEACH:

I have no problem with that.

MS. NEDZAR:

"Pursuant to Sections 258(3) and 254(a)(12) of HAVA, each State is required to submit as part of its annual report a description and analysis of how it has met or exceeded its baseline MOE for the preceding fiscal year." And then, the second sentence would remain the same. So, all it does is refer to both sections to derive...

COMMISSIONER BEACH:

So you're reading both sections together?

MS. NEDZAR:

Um-hum.

CHAIR DAVIDSON:

And I think that's important that we get comments on that type of...

COMMISSIONER BEACH:

Yeah.

CHAIR DAVIDSON:

...language, so that the States...

COMMISSIONER BEACH:

No, we can get comments on it. I still -- and that's something, you know, within the 30 days, I would like to hear comments from, because I'm still not quite clear on it, but I'm willing to put that language in there as Ms. Nedzar recommended.

CHAIR DAVIDSON:

Okay.

COMMISSIONER HILLMAN:

Could you re-read that, please?

MS. NEDZAR:

Sure. "Pursuant to Section 254(a)(12) and 258(3) of HAVA, each State is required to submit, as part of its annual report, a description and analysis of how it has met or exceeded its baseline MOE for the preceding fiscal year."

CHAIR DAVIDSON:

Okay, now, in taking Proposal "B" and what should be inserted into Proposal "A."

COMMISSIONER BEACH:

Under calculation -- I guess, under the second page, would you be amenable to including the hypothetical that I put in for Section 251 requirements payments? "For example, State "X" appropriates 10

million for election activities” just so the public understands how we’re dealing with the MOE -- the aggregate MOE calculation?

CHAIR DAVIDSON:

You mean, insert it. Is there a particular place that it fits better?

COMMISSIONER BEACH:

Let me go back and look at the -- when we talk about...

MS. NEDZAR:

Number seven, perhaps.

CHAIR DAVIDSON:

I was going to say...

COMMISSIONER BEACH:

Yeah, where it talks about baseline calculation.

CHAIR DAVIDSON:

And it would just fall underneath that?

COMMISSIONER BEACH:

Um-hum.

CHAIR DAVIDSON:

Put that...

MS. NEDZAR:

So Commissioner Beach, starting in your policy from “for example” to “November 2002” we’ll follow what we had discussed as a response to number seven. Is that what you’re intending?

COMMISSIONER BEACH:

Where do you see -- what are you talking about November?

MS. NEDZAR:

In yours...

COMMISSIONER BEACH:

Um-hum.

MS. NEDZAR:

...the third paragraph under "baseline calculation."

COMMISSIONER BEACH:

Oh okay, we're looking at two different ones, but okay. I was looking at the one on the top.

COMMISSIONER HILLMAN:

She's looking at this right here.

MS. NEDZAR:

Oh I apologize.

COMMISSIONER BEACH:

But I was going to ask for the other one, too, so if you want to deal with that one.

CHAIR DAVIDSON:

So, for example -- I mean, I put number one right underneath number seven and I started, "For example, State "X" appropriated 10 million," and inserted it under number one. I mean, I just called it one and referred to it one here so I could follow -- track it later.

COMMISSIONER HILLMAN:

Could I ask, Dr. Abbott, what is the implication, if any, of using the example or any example?

DR. ABBOTT:

The challenge with any example is that the devil's in the detail. So, we don't know what activities that the 2 million supported. So, we would be assuming that all activities counted, which may be fine, but a State might not want to do that. They might want to look a lot more carefully to make sure that, in fact, those would be activities

that we would have supported, knowing what they know now about HAVA. So, that would be the only caveat I have is that this is a very kind of cut and dry example, and I don't think it's going to be cut and dry for the States in determining what counts at the local level for inclusion.

COMMISSIONER BEACH:

Right, and my intention was to make it general, just to try to understand conceptually how it would work in calculating the aggregate if State expenditures did flow to a lower tier jurisdiction.

DR. ABBOTT:

Well, could I suggest changing the activity to a HAVA-compliant voting system? Because that is much less ambiguous in trying to parse whether or not the material that they provided would count under HAVA.

COMMISSIONER BEACH:

What do you want? You want to change which one?

DR. ABBOTT:

Am I looking at the wrong paragraph?

COMMISSIONER BEACH:

Yeah.

CHAIR DAVIDSON:

"If State "X" appropriated 10 million for...

COMMISSIONER BEACH:

Look at the top of...

DR. ABBOTT:

Right, for election activities eligible...

CHAIR DAVIDSON:

Instead of election activity, he's saying election voting equipment, making it more specific.

DR. ABBOTT:

Well, I think the 10 million is fine, but the 2 million of the 10 million...

COMMISSIONER BEACH:

"Money was appropriated countywide to provide information to voters at a polling place on Election Day"?

DR. ABBOTT:

Right, so...

COMMISSIONER BEACH:

But that's one of the Title III requirements.

DR. ABBOTT:

In this example, it may or may not -- all that material may or may not be eligible for -- allowable under HAVA. It's an example that invites questions. An easier example would be one where there's no ambiguity.

COMMISSIONER BEACH:

So, you're saying you prefer an example that you know is cut and dry that can't -- that does not have any costs that are not allowable?

DR. ABBOTT:

Right.

COMMISSIONER BEACH:

So, instead of "countywide provide information to voters at a polling place," you prefer to...

DR. ABBOTT:

It's not that I prefer or not. I'm just raising -- I'm just responding to
Commissioner Hillman's question...

COMMISSIONER BEACH:

Something that you suggest would be...

DR. ABBOTT:

...which is are there any complications with this.

COMMISSIONER BEACH:

"\$2 million to purchase HAVA-compliant voting equipment"?

DR. ABBOTT:

The challenge there is that runs us right into the capital expenditure
issue, which we may not want to use. So...

COMMISSIONER BEACH:

How about "for provisional voting"?

DR. ABBOTT:

That might -- that might be a little bit more straightforward.

CHAIR DAVIDSON:

That would be...

MS. NEDZAR:

"Federal provisional voting."

COMMISSIONER BEACH:

"Federal provisional voting"?

DR. ABBOTT:

"Federal provisional voting," sure.

COMMISSIONER BEACH:

Okay.

CHAIR DAVIDSON:

Okay, and then the other one, the other example.

COMMISSIONER BEACH:

Yes, I think our Counsel had a suggestion on where to put it.

MS. NEDZAR:

I just want to be clear that we're going to place this example with the amendment from Policy "B" underneath the current response to number seven in Policy "A"?

CHAIR DAVIDSON:

That's...

COMMISSIONER BEACH:

Um-hum.

CHAIR DAVIDSON:

...my understanding, if that's correct.

COMMISSIONER BEACH:

Right, because it discusses the types of expenditures used to calculate the MOE baseline and then you could talk about -- okay.

The other one, and this is also a baseline calculation, this talks about how you don't have to use the same amount; that if they use \$2 million for Federal provisional voting it doesn't necessarily mean that \$2 million has to be spent every year for that specific purpose, it just has to be for something that was under Title III. So, it can -- the amounts aren't -- the aggregate amount is the same, but the amount that was -- for that specific activity you may have 1 million for Federal provisional voting and then 1 million for something else in the future.

CHAIR DAVIDSON:

In other words...

COMMISSIONER BEACH:

That was -- that falls under Title III.

CHAIR DAVIDSON:

Yes, they've in the base...

COMMISSIONER HILLMAN:

I'm sorry, if you could, for my trying to keep pace with this, please tell me the exact wording on your page there, and then, what it is that you wanted to accomplish with this, and then where you wanted to put it into "A" please.

COMMISSIONER BEACH:

Sure, if you go to the third paragraph under "baseline calculation"...

COMMISSIONER HILLMAN:

Um-hum.

COMMISSIONER BEACH:

...it says, "In meeting the MOE baseline of spending, it is left to the State to determine how that baseline is met, as an aggregate," which is covered in Policy A. "For example, a State spent HAVA 251 funds in 2008. In that fiscal year, that State may have chosen to expend more of its non-federal funds on its voter registration database and less of its non-federal funds on providing information to voters at the polls than it did in the fiscal year ending prior to November 2000. As long as a total baseline MOE is met by adding up all the categories, as an aggregate, individual spending for a single category does not have to equal the exact amount spent on that category in fiscal year ending prior to November 2000."

COMMISSIONER HILLMAN:

And you are suggesting that that language would be placed where in "A"?

COMMISSIONER BEACH:

I am looking for that right now exactly where it should be placed.

COMMISSIONER HILLMAN:

Okay. So, using the term “non-federal”, going back to the other edit we made, are we talking about state?

COMMISSIONER BEACH:

Yes, so we can change “non-federal” to “state.”

COMMISSIONER HILLMAN:

And my question for Dr. Abbott is in the calculation, is this accurate and compliant with whichever of the Circulars would govern?

MS. NEDZAR:

Commissioner Beach, it may fall under number 17.

DR. ABBOTT:

Yes.

COMMISSIONER BEACH:

Yes.

DR. ABBOTT:

It's in fact a restatement of question 17. So, it could go there if it helps clarify the question.

COMMISSIONER HILLMAN:

By adding it to 17 does it create any complexity?

DR. ABBOTT:

No, it does not.

COMMISSIONER HILLMAN:

Okay.

COMMISSIONER BEACH:

Okay, one other thing I may suggest. Under "Assistance to States," number four, I also provide I guess, a more detailed description on the back-up documentation that may be used to determine the baseline MOE. I don't know if you necessarily agree with what I have in there, but...

COMMISSIONER HILLMAN:

Where are you?

COMMISSIONER BEACH:

...I'd like -- number -- "Assistance to States" number four.

MS. NEDZAR:

In which...

COMMISSIONER HILLMAN:

Number four in "A" or number four in your...

COMMISSIONER BEACH:

Number -- okay in my policy, Policy "B"...

COMMISSIONER HILLMAN:

Um-hum.

COMMISSIONER BEACH:

...if you go to "Assistance to States" under Roman numeral three...

COMMISSIONER HILLMAN:

Okay.

COMMISSIONER BEACH:

...go to number four.

COMMISSIONER HILLMAN:

Okay.

COMMISSIONER BEACH:

Yeah, I believe this comports with what we have in the description in Policy "A," but I'll leave that to Dr. Abbott to whether he agrees.

CHAIR DAVIDSON:

And that's on page...

COMMISSIONER BEACH:

I'm turning to Policy "A." I have to look to see where to place that.

COMMISSIONER HILLMAN:

Can I just ask you a question Commissioner Beach?

COMMISSIONER BEACH:

Sure.

COMMISSIONER HILLMAN:

In providing this level of detail, as a part of our assistance to States, is there a particular reason why you're looking to provide this much detail on this issue versus any of the other topics that are covered?

COMMISSIONER BEACH:

No, I just think that a lot of feedback that I've talked to personally from States is that if they don't have the back-up documentation from 1999 how are we supposed to comply? What can we do? What means are there? And my thought was putting this level of detail, maybe, we can get some additional feedback that would jog some thoughts of them on how they can then comply if they have to provide that detail to us later on. So, I want to just get their feedback on it, if this something that would work.

DR. ABBOTT:

I think the question that is addressed in question 19 on Policy "A", I'm not seeing a lot of additional information that would be added by incorporating it, if there's anything specific that's not captured there.

COMMISSIONER BEACH:

Well, I talk about percentage increases, that I know you don't; that if a State does not have any records, but if there's a pattern where their spending has gone up 2 percent every year, they may be able to then demonstrate that in 1999 their level of spending was 2 percent lower than it may be in 2000, to help establish and substantiate their documentation.

CHAIR DAVIDSON:

So, you're talking mainly about the last sentence...

COMMISSIONER BEACH:

Yes, um-hum.

CHAIR DAVIDSON:

...of paragraph four?

COMMISSIONER BEACH:

It was just...

CHAIR DAVIDSON:

"For example, a State may establish a baseline by showing the level of spending over several years and establishing the percentage increase over those years." That sentence is what you're referring to?

COMMISSIONER BEACH:

Yes, I wanted to get feedback from the States on that. That is something that may be useful in helping determining their baseline if they don't have that documentation.

CHAIR DAVIDSON:

Anybody have a problem?

COMMISSIONER HILLMAN:

I'm just trying to get a little feedback as to whether or not -- when we get -- my only concern is when we get into a level of detail, whether we are on sound footing that providing this direction to the State isn't going to be contrary with something else that may override it, and then the States say, "But you told us."

COMMISSIONER BEACH:

That we can...

COMMISSIONER HILLMAN:

Sometimes providing this orally through technical assistance rather than incorporating it...

COMMISSIONER BEACH:

In the policy.

COMMISSIONER HILLMAN:

...in the policy gives us more...

COMMISSIONER BEACH:

Latitude.

DR. ABBOTT:

The other difference is we use the word "might", and yours, Commissioner Beach, uses the term "may."

COMMISSIONER BEACH:

Okay.

DR. ABBOTT:

I want to be very careful about giving permission for them to do anything, because we don't want to do that up front. If they can't get to the actuals, then there are a series of things that we can -- that they might be able to do. But we've got to see it in writing and we've got to work with them to make sure that it's a reasonable

basis for establishing it. If we say they can do it or they may do that and we find that it's not reasonable, then we've boxed ourselves in a little bit. So, if you want to add the notion of a percentage over time just to clarify the sentence we have here, which says, "States might also estimate spending based on traditional spending levels over time," you could say, "based on percentage increases over time." And then, that gets at the more detail you provided within the...

COMMISSIONER BEACH:

But the concept is out there.

DR. ABBOTT:

...within the language that we provided. So, the sentence would read, "States might also estimate spending based on average increases over time, but must provide." And then, it goes on.

CHAIR DAVIDSON:

That's okay?

COMMISSIONER BEACH:

I'm fine with that.

CHAIR DAVIDSON:

Did you get that down?

MS. NEDZAR:

Um-hum.

CHAIR DAVIDSON:

Commissioner Hillman?

COMMISSIONER HILLMAN:

So, I just want to make sure if she could read back -- we're only editing one sentence?

DR. ABBOTT:

One word -- two words, yeah.

COMMISSIONER HILLMAN:

Well, one -- but it's only in one sentence...

DR. ABBOTT:

Yes.

COMMISSIONER HILLMAN:

...and is the last sentence of that paragraph number 19.

MS. NEDZAR:

So, the last sentence in response to question 19 would read,
"States might also estimate spending based on average increases
over time, but must provide adequate justification and
documentation to support the estimate."

COMMISSIONER BEACH:

I'm fine with that.

CHAIR DAVIDSON:

Okay, anything else?

COMMISSIONER BEACH:

That's all. I think Policy "A" incorporates the majority of the other
concepts that I have, maybe worded slightly differently but...

CHAIR DAVIDSON:

Sure.

COMMISSIONER BEACH:

...has it just a bit.

CHAIR DAVIDSON:

Absolutely. Then I will entertain a motion to move this forward to public comment stage, to get it out for a 30-day public comment, if I might ask if somebody is willing to make that motion. Pardon?

COMMISSIONER HILLMAN:

It can be in the motion.

MS. NEDZAR:

Yes.

COMMISSIONER HILLMAN:

Right, okay, so I move that we publish the amended document currently labeled Policy Proposal "A" on Maintenance of Effort/Expenditures and post it for a 30-day public comment period.

CHAIR DAVIDSON:

Okay. Is there a second?

COMMISSIONER BEACH:

I second it.

CHAIR DAVIDSON:

All those in favor -- and do you want me to repeat the motion? If so, I'd...

COMMISSIONER HILLMAN:

Can he read it -- can you do it or can he read it -- do you want him to read it back?

MS. NEDZAR:

I think I have it, but I just want to make sure.

COMMISSIONER HILLMAN:

Okay.

CHAIR DAVIDSON:

Okay.

MS. NEDZAR:

So, the motion was to publish the amended document currently titled Maintenance of Effort/Expenditure Policy Proposal "A", to be published for a public comment period of 30 days.

COMMISSIONER HILLMAN:

It sounded like you said -- I don't want to wordsmith over here. The intent of the motion is that we approve the amended Proposal Policy "A" for publication for a 30-day public comment period.

CHAIR DAVIDSON:

Any problem?

COMMISSIONER HILLMAN:

And I believe we would be retitling it, but I wasn't going to put the retitle in the motion.

CHAIR DAVIDSON:

Right, right. All those in favor say aye. Opposed?

[The motion carried unanimously.]

CHAIR DAVIDSON:

Hallelujah. And it is 25 after and we have permission to go until 12:30, so we've pretty well called that one a close one. Thank you very much Commissioners. I appreciate this effort. Thank you, Dr. Abbott, Tamar -- or excuse me, Ms. Nedzar, sorry.

MS. NEDZAR:

That's okay.

CHAIR DAVIDSON:

And I started to say Tom and I -- Mr. Wilkey. So, I thank everybody for their attendance today. And obviously, now, everybody that is

CamCasting this, we look forward to your public comments.

Definitely as we move forward that's very vital.

And do I have any further comments from the
Commissioners?

EXECUTIVE DIRECTOR WILKEY:

Madam Chair?

CHAIR DAVIDSON:

Yes.

EXECUTIVE DIRECTOR WILKEY:

I was reminded from the discussion we had earlier, and just, if any
of the members of the Boards are watching the webcast today, that
the session closes tonight at 9 o'clock for their comments...

CHAIR DAVIDSON:

Oh.

EXECUTIVE DIRECTOR WILKEY:

...on the -- on that project, so they may want to take a look at that.

CHAIR DAVIDSON:

Very good, thank you.

COMMISSIONER BEACH:

On Phase II.

EXECUTIVE DIRECTOR WILKEY:

On Phase II of the Election Operations Assessment.

CHAIR DAVIDSON:

Very good, thank you for that. Any comments by the
Commissioners? Closing?

COMMISSIONER HILLMAN:

No.

COMMISSIONER BEACH:

No.

CHAIR DAVIDSON:

Closing?

COMMISSIONER HILLMAN:

No.

COMMISSIONER BEACH:

No.

CHAIR DAVIDSON:

Again, thank you everybody. This was a big step. So, is there a motion to adjourn?

COMMISSIONER BEACH:

I move to adjourn.

COMMISSIONER HILLMAN:

Second.

[The motion carried unanimously.]

CHAIR DAVIDSON:

All right, the meeting is adjourned.

[The public meeting of the U.S. Election Assistance Commission adjourned at 12:27 p.m. EDT.]

add/bw