



**U.S. Election Assistance Commission**  
**633 3rd St. NW, Suite 200**  
**Washington, DC 20001**

BEFORE THE ELECTION ASSISTANCE COMMISSION

In the Matter of: )  
)  
Adopting the Recommendation on the Allocability )  
of Election Security Measures Under EAC Policy )  
Regarding Authority to Issue Funding Decision )  
on Use of HAVA Funds )  
)

CERTIFICATION

I, Christy McCormick, Chairwoman of the Election Assistance Commission, do hereby certify that on July 27, 2023 the Commission decided by a vote of 4-0 the following action(s):

1.

The Commission has adopted the Recommendation on the Allocability of Election Security Measures Under EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds. This Decision becomes effective as of the date of this certification.

Commissioners McCormick, Hovland, Palmer, and Hicks approved the recommendation.

Attest:

7/27/2023

Date

Christy McCormick  
Chairwoman



**U.S. Election Assistance Commission**  
**633 3rd St. NW, Suite 200**  
**Washington, DC 20001**

**TALLY VOTE MATTER**

**DATE & TIME OF TRANSMITTAL:** Wednesday, July 26, 2023, at 11 AM

**BALLOT DEADLINE:** Friday, July 28, 2023, at 5 PM

**COMMISSIONERS:** McCormick, Hovland, Palmer, and Hicks

**SUBJECT:** Approving the Recommendation on the Allocability of Election Security Measures Under EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds

- I approve the recommendation.
- I disapprove the recommendation.
- I object to the recommendation.
- I am recused from voting.

**COMMENTS:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**DATE:** 7/26/2023

**SIGNATURE:** 

A definite vote is required. All ballots must be signed and dated. Please return **ONLY THE BALLOT** to the Office of General Counsel. Please return the ballot no later than date and time shown above.

From: Camden Kelliher, EAC Senior Associate Counsel



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## **MEMORANDUM**

**TO:** Commissioners McCormick, Hovland, Palmer, and Hicks  
**FROM:** Camden Kelliher, EAC Senior Associate Counsel  
**DATE:** July 26, 2023  
**RE:** Allocability of Election Security Measures Under EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds

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## **BACKGROUND**

In 2015 the Commission adopted the, “Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds” (Funding Decision Policy). The Funding Decision Policy replaced the Advisory Opinion Process originally adopted by the EAC on April 16, 2008. The Funding Decision Policy explains that the Commissioners may consider any request related to questions of law and factual issues related to HAVA when:

- (1) The legal issue is novel, complex and pertains to an unsettled question of law or interpretation of the HAVA statute; or
- (2) The issue relates to an expenditure of HAVA funds that has not been previously addressed by OMB, the grant provisions or the EAC and for which it is determined to have significant policy implications for the implementation of HAVA; or
- (3) There has been intervening legislation, rulemaking, or litigation since the EAC last considered the issue; or
- (4) The request is contrary to or otherwise inconsistent with prior EAC matters dealing with the same issue.

The EAC Office of General Counsel, in consultation with the Commissioners, shall determine the eligibility of questions presented under these four categories.

## **QUESTION PRESENTED**

The EAC Office of General Counsel has concluded that there is currently a question before the agency, appropriately presented by the state of Nebraska, that is ripe for review under the Funding Decision Policy. That question is summarized as follows:

When an expenditure for cybersecurity enhancements that is allowable under HAVA Subsection F impacts non-election systems, but is specifically undertaken for the benefit to election security, must a state allocate the ancillary benefit under 2 CFR 200.405?

## **RECOMMENDATION**

Under the Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds, the EAC Commissioners should consider whether a state may fully allocate the cost of a

cybersecurity enhancement, undertaken with the objective of improving voting technology. As documented in the supporting memorandum provided by the Office of General Counsel, there are important policy considerations involved in this determination. This is highlighted by the changing election administration landscape and the interrelationship of cybersecurity networks.

Because HAVA specifically contemplates the improvement of voting technology, I recommend that the Commission consider allowable cybersecurity enhancements direct costs and allow full allocability under Subsection F of HAVA when the costs are reasonable and necessary and when the cost is incurred specifically for the purpose of benefitting election administration. The EAC Office of Grants Administration, in consultation with the Office of General Counsel, shall provide guidance on how states may attest and document that expenditures qualify as direct costs for the purpose of allocation.

Attachment.



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## **M E M O R A N D U M**

**TO:** EAC Commissioners McCormick, Hovland, Palmer, and Hicks  
**CC:** Steven Frid, Executive Director  
**FROM:** Camden Kelliher, EAC Senior Associate Counsel  
**DATE:** July 25, 2023  
**RE:** Question on Allocability of Election Security Measures Under EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds

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The purpose of this memorandum is to provide a legal analysis of a question presented by the state of Nebraska under the EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds. The memorandum analyzes the Policy, provides background on the question presented, decides on the applicability of the Policy to the question presented, and makes a recommendation to the Commission on the resolution of the question presented under the Policy.

### **EAC FUNDING DECISION POLICY**

In 2015 the Commission adopted the, “Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds” (Funding Decision Policy). The Funding Decision Policy replaced the Advisory Opinion Process originally adopted by the EAC on April 16, 2008. The Funding Decision Policy was adopted, “to provide a means for persons and entities to have legal or factual questions related to the implementation of HAVA considered by Commissioners outside of EAC's audit resolution process.” The Funding Decision Policy is not intended to replace or disrupt the role of the Office of Grants Management (OGM), which is responsible for issuing guidance, support and, when appropriate, approval/denial of certain expenditure of Federal funds under the Help America Vote Act (HAVA) and the relevant Office of Management and Budget (OMB) Circulars found in 2 C.F.R. Parts 220, 225, 215, and 230. The approval package of the Funding Decision Policy specifically maintains that OGM will respond to day-to-day and routine HAVA questions that do not have policy implications.

To distinguish what questions are outside of the “day-to-day and routine HAVA questions,” the policy explains that the Commissioners may consider any request related to questions of law and factual issues related to HAVA when:

- (1) The legal issue is novel, complex and pertains to an unsettled question of law or interpretation of the HAVA statute; or
- (2) The issue relates to an expenditure of HAVA funds that has not been previously addressed by OMB, the grant provisions or the EAC and for which it is determined to have significant policy implications for the implementation of HAVA; or



(3) There has been intervening legislation, rulemaking, or litigation since the EAC last considered the issue; or

(4) The request is contrary to or otherwise inconsistent with prior EAC matters dealing with the same issue.

The EAC Office of General Counsel, in consultation with the Commissioners, shall determine the eligibility of questions presented under these four categories.

## **QUESTION PRESENTED**

The current question presented is the product of an ongoing, joint inquiry from the state of Nebraska and the National Association of State Election Directors (NASED). On August 30, 2022 the EAC Office of Grants Administration (OGM) requested guidance from the EAC Office of General Counsel (OGC). OGM specifically requested a determination as to the allocability of costs for cybersecurity enhancements. In the responsive guidance piece, OGC informed OGM that the EAC could reasonably consider improvements to cybersecurity as allowable under HAVA Section 101(b)(1)(F) (Subsection F). Subsection F makes allowable costs for, “improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.”<sup>1</sup> Although cybersecurity is not specifically contemplated in HAVA or Subsection F, OGC relied on guidance from the Government Accountability Office (GAO) in concluding that cybersecurity improvements are allowable expenditures under the Subsection. Specifically, GAO has held:

“[w]here a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency. This, in the first instance, is a matter of agency discretion. When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.”<sup>2</sup>

GAO noted previous decisions which held that where an agency received appropriations to provide for “enhancement” of certain facilities, determining whether a particular expense actually resulted in an enhancement required the exercise of discretion by the responsible agency. Determining whether a particular expense provides an “improvement,” similar to determining whether an expense provides an “enhancement,” requires the responsible agency to exercise judgment.<sup>3</sup> Though the bounds of EAC’s discretion are not limitless, the statute’s use of the expansive term “improve” suggests that Congress vested EAC with greater discretion than what Congress sometimes affords when it uses a more specific word or phrase.<sup>4</sup> OGC concluded that

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<sup>1</sup> 52 U.S.C. § 20901(b)(1)(F).

<sup>2</sup> U.S. Gov’t Accountability Off., B-333826, Election Assistance Commission—Use of Grant Funds for Security Services 4 (April 27, 2022) (citing B-223608, Dec. 19, 1988 (internal citations omitted)).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

the EAC is within its discretion to determine that cybersecurity enhancement activities “improve” voting systems and technology under Subsection F.

In its guidance, OGC also provided an analysis on the allocation of expenditures for cybersecurity enhancement activities. EAC grants implement the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal” (Uniform Guidance).<sup>5</sup> Under the Uniform Guidance, to be allowable under a grant, costs must be necessary, reasonable and allocable to the grant.<sup>6</sup> A cost is allocable to the grant if the goods or services involved are chargeable or assignable to the award in accordance with relative benefits received.<sup>7</sup>

OGC determined that the direct cost allocation principles described in the Uniform Guidance apply when OGM determines that cybersecurity enhancements are allowable under Section 101(b)(1)(F). OGC explained that cybersecurity enhancements with specific benefits to more than just voting systems and technology would need to be appropriately allocated. In short, OGC determined that expenditures for cybersecurity enhancements should be allocated based on the benefit to elections purposes and non-election purposes. As an example, if a State spends \$1 million on cybersecurity enhancements for statewide systems, the cost must be allocated to the projects based on the proportional benefit. So, if 50% of the benefit of cybersecurity enhancements is for voting systems and technology, then that 50% may be fully allocated to HAVA under Section 101(b)(1)(F). However, the remaining \$500,000 of the expenditure that does not benefit voting systems or technology may not be paid for with HAVA funds.

In response to a question on a “day-to-day and routine HAVA question,” OGM provided the state of Nebraska with OGC’s analysis on the allowability and allocability of cybersecurity enhancements. On March 9, 2023 Nebraska notified the EAC that it was concerned that this guidance may conflict with the State’s Albert Sensor program. To further consideration of this concern, Nebraska raised this issue with NASED. NASED is a nonpartisan professional organization that disseminates election administration best practices and information across the states.<sup>8</sup> Both Nebraska and NASED noted that in 2018, the EAC OGM “blanket pre-approval . . . for all Albert monitors across all fifty-five of the states/territories that . . . received 2018 HAVA funds.”

To conclude this clarification, Nebraska formally submitted a request to the EAC on July 21, 2023. That request, representing the current question presented, is as follows:

“The EAC has previously determined that Albert Sensors were allowable under the EAC HAVA Grant Program. However, during discussions with EAC staff on other projects we were considering funding, we were concerned that funds spent on Albert Sensors would need to be allocated based on the proportional benefit to non-election purposes. Our office would like clarification that the use of Albert Sensors deployed at the county level

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<sup>5</sup> 2 C.F.R. Part 200.

<sup>6</sup> US EAC, Allowable Use Of Funds: Physical Security Services And Social Media Threat Monitoring (2022), [https://www.eac.gov/sites/default/files/paymentgrants/Allowable Use of Funds Physical Security Services and Social Media Threat Monitoring EAC.pdf](https://www.eac.gov/sites/default/files/paymentgrants/Allowable%20Use%20of%20Funds%20Physical%20Security%20Services%20and%20Social%20Media%20Threat%20Monitoring%20EAC.pdf).

<sup>7</sup> 2 CFR § 200.405.

<sup>8</sup> NASED, “About” (2023), <https://www.nased.org/about-nased>.

continues to be an allowable expenditure. If it was previously determined that it was not, then Nebraska respectfully requests the EAC to reconsider the allocation requirement for these sensors under 2 CFR 200.405.”

To appropriately assess the question presented, OGC followed up with Nebraska. In that conversation, Nebraska noted that the purpose of expenditures on Albert Sensors is to monitor cybersecurity to ensure that election infrastructure is secure. This distinguishes the cost from general statewide cybersecurity enhancements in that general cybersecurity enhancements equally benefit all statewide functions whereas Albert Sensors monitor statewide networks in order to specifically benefit the election cybersecurity. Specifically, Nebraska noted that the Albert Sensor monitors statewide networks to ensure that malicious actors cannot access any of the election-related networks through vulnerabilities in any statewide network. Nebraska also explained the State interprets the current guidance from the EAC on allocation is contrary to past guidance on the allowability of Albert Sensors, as past guidance from the EAC did not determine that expenditures for Albert Sensors needed to be allocated based on the benefit to non-elections technologies.

The question from Nebraska specifically addresses Albert Sensors, but ultimately is a question of allocability of expenditures under Subsection F when the benefit is specifically to election security. Therefore, to address the specific question from Nebraska, the question presented is interpreted as follows:

When an expenditure for cybersecurity enhancements that is allowable under HAVA Subsection F impacts non-election systems, but is specifically undertaken for the benefit to election security, must a state allocate the ancillary benefit under 2 CFR 200.405?

## **APPLICABILITY OF POLICY TO QUESTION PRESENTED**

The question presented cleanly fits under two of four of the categories of the Funding Decision Policy and is therefore ripe for Commissioner review in accordance with the policy.

First, and most notable, the question would have “significant policy implications for the implementation of HAVA.” The Congressional Research Service (CRS) has highlighted that the election administration landscape has change significantly since the passage of HAVA in 2002.<sup>9</sup> CRS also noted that foreign efforts to interfere with the 2016 election highlighted security as a primary consideration for elections policymaking.<sup>10</sup> Additionally, Congress has highlighted election security in recent appropriations language when allocating funds for Election Security Grants. Specifically, Congress authorized the EAC, “to make payments to States for activities to improve the administration of elections for Federal office, *including to enhance election technology and make election security improvements*, as authorized by sections 101, 103, and 104 of such Act.”<sup>11</sup> The explanatory statements accompanying the bills listed the following

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<sup>9</sup> Congressional Research Service, “The Help America Vote Act of 2002 (HAVA): Overview and Ongoing Role in Election Administration Policy” (R46949, May 8, 2023).

<sup>10</sup> *Id.* at 20.

<sup>11</sup> Consolidated Appropriations Act of 2018, Public Law 115-141; Consolidated Appropriations Act of 2020, Public Law 116-93; Consolidated Appropriations Act of 2022, Public Law 117-103 (emphasis added).

election security-specific purposes as potential uses of the funds: upgrading election-related computer systems to address cyber vulnerabilities identified through DHS or similar scans or assessments of existing election systems, facilitating cybersecurity training for the state chief election official's office and local election officials, implementing established cybersecurity best practices for election systems, and funding other activities that will improve the security of elections for federal office.<sup>12</sup> This added language shows a clear Congressional intent to include election security in the preexisting authorized categories of expenditures under section 101. Therefore, a determination on how cybersecurity expenditures are analyzed under Subsection F has clear policy implication on the modern election administration landscape.

The question from Nebraska is also, "inconsistent with prior EAC matters dealing with the same issue." Because the EAC previously determined that Albert Sensors were allowable without offering an analysis on allocability, a determination on the allocation of such expenditures would be inconsistent with prior EAC matters.

Therefore, the question of how cybersecurity enhancements for elections purposes must be allocated is well within the discretion of the Commissioners to take up under the Funding Decision Policy, as it has significant policy implications and deals with inconsistencies in prior EAC matters.

## ANALYSIS

It is important to reiterate that the current question presented is how states must allocate cybersecurity enhancement costs for allowable expenditures under Subsection F in accordance with 2 CFR 200.405 when the costs are incurred specifically for the benefit of election administration.

The direct cost allocation principles contained within the Uniform Guidance state that, "if a cost benefits two or more projects or activities in proportions that can be determined without undue effort or cost, the cost must be allocated to the projects based on the proportional benefit. If a cost benefits two or more projects or activities in proportions that cannot be determined because of the interrelationship of the work involved, then ... the costs may be allocated or transferred to benefitted projects on any reasonable documented basis."<sup>13</sup> A state recipient must determine the proportions, that may be approximated, using reasonable methods to determine the benefit to the allowable purpose.<sup>14</sup>

Further guidance from the Office of Management and Budget (OMB) explains that a cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.<sup>15</sup> All activities

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<sup>12</sup> Rep. Rodney Frelinghuysen, "Explanatory Statement Submitted by Mr. Frelinghuysen, Chairman of the House Committee on Appropriations, Regarding the House Amendment to Senate Amendment on H.R. 1625," explanatory statement, Congressional Record, daily edition, vol. 164, part 50 (March 22, 2018), p. H2519.

<sup>13</sup> *Id.*

<sup>14</sup> US EAC, Allowable Use Of Funds: Physical Security Services And Social Media Threat Monitoring (2022), [https://www.eac.gov/sites/default/files/paymentgrants/Allowable\\_Use\\_of\\_Funds\\_Physical\\_Security\\_Services\\_and\\_Social\\_Media\\_Threat\\_Monitoring\\_EAC.pdf](https://www.eac.gov/sites/default/files/paymentgrants/Allowable_Use_of_Funds_Physical_Security_Services_and_Social_Media_Threat_Monitoring_EAC.pdf).

<sup>15</sup> 2 CFR Part 225.

which benefit from the governmental unit's indirect cost, including unallowable activities and services donated to the governmental unit by third parties, will receive an appropriate allocation of indirect costs.

Direct costs are those costs that can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy. Costs incurred for the same purpose in like circumstances must be treated consistently as either direct or indirect (F&A) costs.<sup>16</sup>

Under the allocation principles described by OMB, cybersecurity enhancements undertaken for the sole purpose of improving the administration of elections may reasonably be considered direct costs. As discussed above, HAVA specifically contemplates the improvement of voting technology, and the EAC has defined heightened cybersecurity as an improvement. This is supported by the language included in appropriations language for HAVA grants. Therefore, cybersecurity enhancements for election security can be identified specifically with a particular final cost objective and should be considered direct costs.

As direct costs, the EAC must consider the direct cost allocation principles of 2 CFR 200.405. The nature of cybersecurity enhancements are such that any benefit to two or more projects or activities typically cannot be determined because of the interrelationship of the work involved. Therefore, the costs may be allocated or transferred to benefitted projects on any reasonable documented basis under the Uniform Guidance. When such a cost is incurred specifically for elections purposes, it would be reasonable to consider that the relative benefits received are entirely election related. Thus, as a direct cost, the cost of cybersecurity enhancements may be fully allocated to HAVA grants when the reasonable documented basis is that it is incurred specifically to enhance election administration. Therefore, these costs would be allowable and fully allocable when also reasonable and necessary.

## **RECOMMENDATION**

Under the Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds, the EAC Commissioners should consider whether a state may fully allocate the cost of a cybersecurity enhancement, undertaken with the objective of improving voting technology. As documented in this memorandum, there are important policy considerations involved in this determination. This is highlighted by the changing election administration landscape and the interrelationship of cybersecurity networks.

Because HAVA specifically contemplates the improvement of voting technology, I recommend that the Commission consider cybersecurity enhancements direct costs and allow full allocability under Subsection F of HAVA when the costs are reasonable and necessary and when the cost is incurred for the purpose of benefitting election administration.

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<sup>16</sup> 2 CFR § 200.413.

Sincerely,

*Camden Kelliher*

Camden Kelliher

EAC Senior Associate Counsel