Statement of Vice Chair Caroline C. Hunter
Regarding the Proposed Policy Clarification on the Allowable Uses of Help America Vote Act Funds Authorized Under Titles I and II

March 20, 2008

The Help America Vote Act of 2002 (HAVA) ushered in a new role for the federal government with respect to the administration of federal elections. HAVA provided federal funds, for the first time in American history, to states to accomplish the purposes of HAVA, including – the improvement of the administration of federal elections; the replacement of punch card or lever voting machines; and the use of funds to meet the requirements of Title III, such as requirements for voting systems, provisional voting, statewide voter registration databases. 42 U.S.C. §§ 15301, 15302, 15401.

While HAVA marked the inception of a federal role in many areas of election administration, HAVA clearly respects the American tradition of allowing state and local governments to maintain control over the administration of federal elections. HAVA does mandate certain requirements, *i.e.* requirements for voting systems, the requirement to provide a provisional ballot, and identification requirements for first-time voters who register by mail. Yet, HAVA specifically leaves discretion to implement these requirements to the states, "(t)he specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State." 42 U.S.C. § 15485. HAVA created the Election Assistance Commission (EAC) but was clear about the extent of its authority, "[t]he Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993." 42 U.S.C. §15329. The guidance issued by the EAC is voluntary guidance as are the voluntary voting system guidelines. See 42 U.S.C. §§ 15501, 15322(1).

The EAC must consider the statutory framework of HAVA when making decisions regarding the use of funds. The EAC must follow both the letter and spirit of HAVA, which leaves decisions regarding the implementation of HAVA to the states. The statutory framework of HAVA does not give the EAC the authority to make decisions for states that Congress explicitly left to the discretion of the states. I believe a state's decision to purchase voting machines with federal funds, provided the state meets the requirements of HAVA, is reasonable even if such funds are used to replace machines purchased with federal funds. Therefore, I will vote in favor of the proposed policy clarification on the allowable uses of HAVA funds proposed by Chair Rosemary Rodriguez. [1] I agree with Chair Rodriguez that "[t]he EAC does not mandate, endorse or recommend one system over another. It is the spirit and intent of HAVA that the states make voting systems decisions based upon what will best serve the individual state."

[1] The issue is before us because of a January 23, 2008 letter written to Chair Rosemary Rodriguez by the Subcommittee on Financial Services and General Government Accountability requesting that the staff's opinion on Florida's use of HAVA funds be reversed.

Additionally, I believe the policy decisions of the EAC should be made by the EAC Commissioners in a transparent manner with input from the public. I will propose a policy regarding the use of HAVA funds that will further these important goals at the April 16, 2008 public meeting in Minneapolis, Minnesota, if not before.

Reasonableness and OMB Circular A-87

The EAC voted to accept OMB Circular A-87 (Cost Principles for State, Local, and Indian Tribal Governments) on June 11, 2004. The relevant portion of Circular A-87 for this matter outlines the factors one should consider when determining whether a cost is reasonable.[2] Circular A-87 is part of the "common rules," which are "cross-cutting requirements that are common to most assistance programs" in order to "establish consistency and uniformity among federal agencies in the management of grants." U.S. General Accounting Office, Federal Assistance: Grants and Cooperative Agreements 10-47, 10-50 (2006). While Circular A-87 provides uniformity among federal agencies, agencies may provide "agency-specific additions, exceptions, or clarifications." Id at 10-51. In my opinion, the language of Circular A-87 is not instructive for states attempting to determine whether a purchase of machines with HAVA funds to replace machines purchased with HAVA funds is reasonable. The EAC should adopt regulations and/or a grant agreement to properly inform states when the circulars are not clear or instructive.

In early 2007, the State of Florida requested an opinion from the EAC regarding the State's desire to use funding distributed under HAVA for the following purposes: 1) to replace touch screen voting equipment- previously funded in part with HAVA funds- with optical scan voting equipment; 2) to retrofit accessible voting units with voter verified paper audit trails; and 3) to fund the replacement of touch screen voting systems use in early voting with ballot demand systems. On May 1, 2007, the EAC Commissioners heard testimony from Florida Secretary of State Kurt Browning regarding his requested opinion. Following the Secretary's testimony, the Office of General Counsel (OGC) issued an opinion. The OGC concluded that it was not reasonable for a state to purchase a HAVA compliant voting system with HAVA funds and then replace the system using HAVA funds. The OGC's decision was based on OMB Circular A-87,

[2] Reasonable costs. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally- funded. In determining reasonableness of a given cost, consideration shall be given to:
a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.
b. The restraints or requirements imposed by such factors as: sound business practices; arms length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.
c. Market prices for comparable goods or services.
d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.
e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

specifically reasonableness.[3] Pursuant to the practice of the EAC, the decision was a staff decision that would come before the Commissioners only on appeal. Florida probably did not appeal the OGC decision because it was allowed to fund the portion of the replacement cost that had not been previously funded or reimbursed using HAVA funds.

The OGC determined that Florida's requested use of HAVA funds was not reasonable, "[w]hile it is reasonable to fund the purchase of reimbursement of HAVA compliant voting equipment one time, EAC has determined that it is not reasonable to fund that expense twice." Letter from Juliet T. Hodgkins, General Counsel, EAC, to Kurt Browning, Secretary of State of the State of Florida at 6 (May 2, 2007) (on file with the EAC).

"Allowable costs are determined on the basis of the relevant program legislation, regulations, including OMB circulars and the common rules, and the terms of the grant agreement. First and foremost, of course, is the program statute." U.S. General Accounting Office, Federal Assistance: Grants and Cooperative Agreements 10-111 (2006). Subtitle D, Part 1 of HAVA, the program statute, provides the states with broad discretion to implement the requirements of HAVA and provides a process for states to follow in order to receive requirements payments. Section 251 of HAVA allows states to use the payments to meet the requirements of Title III or, if certain conditions are followed, to use the payments to "improve the administration of federal elections." The only limitation in HAVA for requirements payments is the state may not use payments for costs associated with litigation, except in very limited circumstances or for the payment of any judgment. See 42 U.S.C. § 15401(f). HAVA requires a state to implement a "state plan" to explain how the state will use the requirements payments to meet the applicable sections of HAVA. The states are required to consult with local election officials[4], to publish the state plan for public notice and comment, to include the state's proposed budget for activities funded, and to update the plan if the state makes a "material change in the administration of the plan." 42 U.S.C. §§15404-15405. The EAC's role is to publish the state plan in the Federal Register and receive an annual report from states, which shall include "an analysis and description of how such activities conform to the State plan." 42 U.S.C. § 15408.

The determination of whether a cost is reasonable must be made considering both the statutory framework of HAVA as well as the federal purpose of the grant. HAVA leaves all decisions regarding implementation of HAVA to the states. Further, the purchase of voting machines was indisputably a major purpose of HAVA. If a state's decision to purchase voting machines is done with the proper consultation of local election officials, is properly noticed, provides an opportunity for public comment and is consistent with all requirements of HAVA, the state's decision is reasonable.

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[3] See OMB Circular A-87, Attachment AC.2.

[4] HAVA requires the chief State election official to consult with "individuals, including the chief election officials of the two most populous jurisdictions within the States, other local election officials, stake holders (including representatives of groups of individuals with disabilities), and other citizens", as deemed appropriate by the chief State election official to craft the state plan. 42 U.S.C. § 15405.

EAC Commissioner Involvement and HAVA Funding Policy

According to the OGC, there is no written policy on the handling of decisions other than for audits, voting system certifications, and laboratory accreditations. It has been the practice of the EAC for the staff to make determinations that are applications of existing law or regulation and for the Commissioners to weigh in on issues of policy or discretionary interpretations of HAVA. The current practice does not involve the Commissioners sufficiently in important agency decisions. Regardless of whether a matter is categorized as policy, legal, or regulatory, the Commissioners should be involved. Moreover, there is not always a clear distinction between matters of policy and the law. Interpretations of OMB circulars, like the Florida opinion, have far reaching policy considerations. For example, several states including Kentucky,[5] California,[6] Iowa, [7] and Tennessee[8] have requested similar opinions on the use of HAVA funds.

Section 208 of the HAVA requires that "any action which the Commission is authorized to carry out under this Act may be carried out only with the approval of at least three of its members." Sections 311 and 312 of HAVA, which require the EAC to provide voluntary guidance, require the EAC to receive public comment and this voluntary guidance must be voted on by the Commissioners. Unlike the Section 311 guidance, EAC decisions regarding the use of HAVA funds are not voluntary. Therefore, it is even more crucial that HAVA funding decisions require public notice and comment and a vote of the Commission.

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

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[5] The state of Kentucky requested an opinion from the EAC as to whether it was required to deduct the amounts reimbursed to counties for an upgrade of the Danaher 1242 DRE of $382 per unit from the $4000 per precinct to be reimbursed for the purchase of new voting systems. The EAC staff concluded that the reimbursement to counties for new voting systems to replace outdated voting systems is allowable, allocable, and reasonable under HAVA. The EAC staff determined that it was not necessary to subtract the amounts from the purchase of the previous upgrade of the Danaher 1242 DRE to purchase new HAVA compliant voting systems.

[6] The state of California has requested an opinion from the EAC on how the EAC's Florida opinion might affect California's ability to defray the costs of compliance with the California Secretary of State's decertification and recertification orders. The EAC has not yet issued an opinion.

[7] The state of Iowa has requested an opinion from the EAC on whether they can use HAVA funds to replace DRE machines with ballot marking devices. The EAC has not yet issued an opinion.

[8] The state of Tennessee has requested an opinion similar to Florida. The Tennessee General Assembly has introduced a bill that would mandate that all voting systems use paper ballots that can be used in post-election hand counted audits. Tennessee has requested an opinion on whether it may use HAVA funds to comply with the new state legislation if it updates its State plan. The EAC has requested additional information and has not yet issued an opinion. However, the EAC did make clear that to the extent Tennessee used HAVA funds to purchase HAVA compliant equipment in 2006, it may not fund the replacement of those machines with HAVA funds, if those machines are still functioning.

The Federal Election Commission (FEC), the agency which was previously tasked with several EAC functions, involves their Commissioners in both policy decisions and applications of existing law or regulation. For example, the FEC Commissioners review all complaints[9] regarding possible violations of the Federal Election Campaign Act (Act). While the OGC rates the enforcement matters using a set of internal factors that were created and approved by the Commissioners to determine whether the case warrants use of the FEC's resources, the Commissioners are the ones who ultimately decide whether to dismiss the matter or if it should be assigned to an attorney for further action. If the matter is assigned to an attorney, the OGC reports to the Commission and recommends whether or not there is "reason to believe" the respondent has committed or is about to commit a violation of the Act. The Commissioners then make the final decision by voting for or against the OGC's recommendation. The Commissioners may also modify the recommendation. If the Commission finds there is reason to believe, an investigation is opened. After the investigation is completed, the OGC submits a brief to the Commissioners with factual and legal analysis and recommends whether the Commission should find "probable cause to believe." By law, the Commission is required to attempt to negotiate a pre-probable cause conciliation agreement. The Commissioners must approve any proposed conciliation agreement negotiated by the OGC and the respondent. If a conciliation agreement is not reached and the Commissioners vote for a probable cause finding, the Commission may file suit in federal court to enforce.

Another example of the FEC Commissioner involvement is demonstrated in their advisory opinion[10] (AO) process. The advisory opinion request (AOR) is first submitted to the OGC by anyone who has been affected by the Act. The OGC reviews the request to ensure it has been properly submitted and then the AOR is made public. The public has ten days to comment on the AOR. During this time the OGC drafts an AO for consideration by the Commissioners. An AO is issued only when it has been approved by at least four Commissioners. If the Commission is unable to approve an AO, a written response is issued explaining that the Commission was unable to approve the AO by the required affirmative vote of four Commissioners.

The EAC should enact similar procedures. I plan to propose the following policy (or a modified version with input from my fellow Commissioners, EAC staff and the public) at the next EAC public meeting, if not before. I will ask the EAC to post this policy on the EAC website in order to receive public comment on the policy. The policy was modeled after the FEC advisory opinion regulations at 11 C.F.R. §112 and the current practice at the FEC:

> Any federal or state government official, any local election official, provided the local jurisdiction received or anticipates receiving HAVA funds, or the Inspector General of the EAC may request in writing an advisory opinion concerning the

[9] Any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred or is about it occur may file a complaint in writing to the General Counsel, Federal Election Commission. 11 CFR § 111.4.

[10] An advisory opinion is an official Commission response to a question relating to the application of the Federal campaign finance law to a specific, factual situation. 11 C.F.R. § 112.

use of HAVA funds. The written advisory opinion request shall set forth a specific transaction or activity that the requestor plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation or posing a hypothetical situation or are the activities of third parties do not qualify as advisory opinion requests. Advisory opinion requests shall include a complete description of all relevant facts.

The Office of General Counsel (OGC) shall review all requests for advisory opinions. If the OGC determines that the request is incomplete or is otherwise not qualified under this policy, it shall notify the requestor within 10 calendar days. Advisory opinion requests shall be posted on the Election Assistance Commission's ("EAC") website within 24 hours of the OGC determining that the request is valid. EAC shall notify the relevant chief state election official (if the request was not submitted by the chief state election official) of the request.

Any interested person may submit written comments to the EAC concerning advisory opinion requests. The written comments shall be submitted within 10 calendar days following the date the request is posted on the EAC website. If the 10^{th} day falls on a weekend or Federal holiday, the 10 day period ends at the close of business the following day. The EAC shall consider all comments submitted within the 10 day comment period.

The OGC shall draft the advisory opinion after receiving input from all Commissioners or their staff. Additionally, any Commissioner may write an advisory opinion. All advisory opinions will be voted on by the Commissioners. Within 60 days of receiving a request, the EAC shall issue to the requestor a written opinion. If the EAC is unable to approve the opinion by the required affirmative vote of three Commissioners, a written response stating so will be sent to the requestor.

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

All advisory opinion requests and comments should be submitted to the Election Assistance Commission, Office of General Counsel, 1225 New York Avenue, N.W., Suite 1100, Washington, DC 20005.