

**EAC Grants Office responses to comments received during open comment period
for the Maintenance of Expenditure policy under consideration by the EAC
June 10, 2010**

NASED

1. The Policy correctly places the requirement to compute and apply MOE with the State government.

No Change Necessary.

2. If recordkeeping is not available to substantiate the baseline MOE, EAC will consider alternative measures for computing the baseline spending.

No Change Necessary.

3. Each year States may vary the amount of spending attributed to each HAVA category stated in Question #8 as long as the aggregate MOE figure is equal to or greater than the baseline MOE. This clearly avoids any rigid requirement to spend State money on a category that no longer requires attention.

No Change Necessary.

4. The proposed policy avoids the nonsensical result in those States where large capital expenditures were made in the base year. It is untenable to require those States to make the same capital expenditures every year or expenditures equaling that amount. Question #19 provides a reasonable opportunity for States facing this situation to calculate a baseline MOE.

HAVA requires that the baseline be calculated as the fiscal year ending prior to November 2000. As such, EAC is withholding the language proposed in the draft policy on this issue from the final policy pending further conversations with Congress and OMB, and appointment of a new General Counsel to the EAC.

5. Question #24 should be adjusted to request draft plans by December 1, 2010

In response to this comment EAC has amended the suggested date to receive State MOE plans to be one year from when the policy is adopted.

Secretary of State of California

1. California agrees with the decision to clarify that the MOE requirement shall only apply to state expenditures in the proposed policy.

No Change Necessary.

2. By clarifying the six categories of expenditures that fall within the MOE, this proposed policy is consistent with the language of Section 254(a)(7), which specifies that States “will maintain the expenditures of the State *for activities funded by the payment...*” (Emphasis added). This clarification also helps States identify which specific expenditures must be included in the MOE baseline.

No Change Necessary.

3. The option for states to voluntarily submit MOE compliance plans for EAC review and acceptance is a welcome use of the authority and responsibility granted to the EAC under Section 202(4).

Agreed. EAC has amended Question #24 to offer optional technical assistance to states that submit an MOE plan to ensure that the plan provides for a reasonable, well documented basis for the MOE baseline and annual MOE obligations.

4. In response to Question #21 of the proposed policy, the EAC recommends that any subgrantee agreements between a State and a local jurisdiction should be modified to contain an MOE requirement. If a State finds, through the MOE planning process allowed for under answers to Questions #3, #11, and #24 that subgrantees did not receive State funding in the base year for qualified activities, are subgrantee agreements required to contain an MOE clause?

Question #21 asks how states might capture MOE at the local level. This policy contains no requirement to modify subgrantee agreements or capture MOE at the local level.

5. California would appreciate additional clarification of the term “improvement of the administration of elections for federal office.”

The purpose of the current policy is to provide States with guidance on how to comply with the MOE requirement in Section 254(a)(7) of HAVA. EAC will consider future guidance and policies outside of this policy and pursuant to its statutory authority in Section 202(4) to assist States in complying with the requirements for HAVA funds.

6. Are States allowed the same flexibility provided to local jurisdictions under the response to Question #18 to document the base year spending for MOE?

HAVA requires that the baseline include all HAVA eligible expenditures in fiscal year ending prior to November 2000. Because of this statutory requirement EAC has amended the answer to Question #18 and is not able to offer either States or lower-tier entities the flexibility of an alternative calculation of capital expenditures in the base year at this time

Maryland State Board of Elections

1. Extend the deadlines for the MOE plans: "a deadline of March 2011 for voluntary State MOE plans with a target date April or May 2011 for MOE plans to be in place seems reasonable"

See response to NASED question number 5.

2. A practical consequence of allowing States to determine whether county expenditures allowable under Section 251 of HAVA is that the State could remove all State funding of expenditures allowable under 251 and rely exclusively on the counties to meet the MOE requirement...this would seem to violate Congress' intent when it included an MOE requirement.

According to the Government Accountability Office (GAO), “[u]nder a maintenance of effort provision, the grantee is required, as a condition of eligibility for federal funding, to maintain its financial contribution to the program...” (GAO Redbook 10-102). So long as funding for the election categories enumerated in Question #8 remains above the level equal to that in the base year, EAC believes that this policy is consistent with Congressional intent.

3. The proposed policy would require lower-tier entities to substantiate their MOE contributions, [which] adds reporting requirements on the counties...it is unclear that these counties will also be directly incorporated into an audit of the State’s HAVA funds.

The policy allows MOE at the local level to be included at the States’ discretion, which would add to a local entity’s reporting requirements. Any local entity that receives federal funds is already subject to the same audit requirements as the State.

4. The nexus between spending and the MOE requirement should also apply to counties; that is, a State may only use county expenditures allowable under § 251 funds to meet its MOE requirement if the county spends federal funds in that fiscal year. If a county did not spend federal funds in that fiscal year, its spending should not be used to meet the State’s MOE—an MOE requirement and the accompanying reporting and auditing requirements to a county that did not spend and may not have received federal funding seems unfair.

The MOE policy gives States the flexibility to craft an MOE approach that works for their unique circumstances. A State may determine that annual MOE record keeping by sub recipients is part of the requirements for receiving HAVA funds, even if funds are not received each year.

5. The term “lower-tier recipient” is defined; additional language in the definition would be helpful. Since the term “recipient” implies that the jurisdiction receives something, the definition should include what the jurisdiction receives.

Question #5 has been amended to define “lower-tier” entities and recipients.

6. During the EAC’s January meeting, Mr. Abbott gave an example relating to when the county expenditures are used to calculate the baseline MOE for fiscal year 2000. The example related to a State forwarding a portion of sales tax revenue to a county which used the funds to pay for election expenditures allowable under § 251 of HAVA. This example of indirect State funds was useful, and I encourage the Commissioners to consider including it in the appropriate place in the policy.

The example, in hindsight, was too general to be helpful in articulating the policy as intended by EAC. EAC believes that the general distribution of taxes or fees collected by the State and disbursed to the counties does not constitute a State appropriation that would be eligible for calculation in the baseline MOE, even if the county spent the funds on a Section 251 HAVA allowable activity. If the county did expend funds on a HAVA Section 251 allowable activity, it would be a county discretionary expenditure, not a State expenditure and, thus, not eligible to be included in the MOE baseline. A better example would be a State appropriation in the base year to support changes to how counties manage provisional ballots.

7. During EAC’s February meeting, there was a discussion about the need for the proposed policy to reflect the agency’s responsibility to provide technical assistance and guidance and to avoid terms and phrases that gave the EAC authority to approve State MOE plan and provide guarantees about future audits. While the most recent version of the proposed policy generally reflects the discussion, the response to #22 suggests that the EAC “accepts” (and therefore could reject) a State’s MOE plan. Since the EAC does not have the authority to accept or reject MOE plans, I would suggest replacing “accepted” with “received” or a similar verb.

EAC guidance on MOE is voluntary. EAC provide an assessment of every voluntary plan submitted—see Question 10. EAC is however offering technical assistance to those States that choose to submit an MOE plan. EAC’s assessment of a plan and any ensuing technical assistance has no binding effect on audits by EAC’s Inspector General, the Government Accountability Office or any other entity. However, the assessment of any given States MOE plan will be a significant factor in how EAC resolves any questioned costs or policies related to MOE arising from an audit.

Commonwealth of Pennsylvania

1, Question #8: The Commonwealth of Pennsylvania has a concern with this particular point because we use lower-tier expenditures for MOE and they are not derived from a State appropriation. The Commonwealth of Pennsylvania would like to use expenditures of county funds to maintain MOE if they are not derived from a State appropriation. If this is not the case, the Commonwealth of Pennsylvania will need to create a new plan for meeting the MOE requirements moving forward.

Under current proposed policy, The Commonwealth of Pennsylvania can submit its current MOE methodology to the EAC for review.

2. Questions #8 & 17: Currently, the Department of State maintains a record of the amounts that are committed from each county’s HAVA plans on an annual basis. However, the Commonwealth does not have a breakdown of what activities are included. We have worked in conjunction with each of the counties to develop their plans by using the total number of their expenditures for election and voter registration related expenses for the 1999 and 2000 fiscal years. At this point, it may be difficult for the Commonwealth of Pennsylvania to go back and have the counties establish new baseline MOE and breakdowns by activity for the 1999/2000 fiscal years.

HAVA Section 254(a)(7) establishes the base year and sets out the activities that must be included in MOE. The response to Question # 8 summarizes the related activities that must be used in calculating the base year. As stated in the response to Question #15 it is left for the State to determine how the baseline is met. EAC encourages the Commonwealth to submit their funding methodology to EAC and take advantage of the technical assistance being offered to ensure that the current methodology is consistent with an audit standard.

Washington Secretary of State

1. We greatly appreciate the time and effort that has been expended on MOE over the past two years. The proposed policy meets the spirit of HAVA while allowing a flexible and reasonable approach for lower-tier recipients to manage the challenges outlined in the policy.

No response necessary.

State of Wisconsin\Government Accountability Board

1. In Question #8, we wish to emphasize that MOE should only include expenditures to “improve” the administration of federal elections, not simply “maintain” them. We are concerned that a broad reading of this language would overstate the amount a State spent in the base year by sweeping up the necessary expenses for administration of the entire election instead of just those expenses directly linked to the improvement of the administration of elections for Federal office.

Pursuant to Section 254(a)(7) of HAVA, in calculating the base year, States must include in their baseline calculation all spending on all allowable uses under Section 251. These expenses include the items set-out in Title III of HAVA and for improvements to the administration of Federal elections. The response to Question #8 lays out the categories of spending should be used in calculating the baseline.

2. In Question #24, we were somewhat confused by the language, “Once your plan is received, EAC’s grant department will work with your State to develop your MOE plan.” Is the MOE plan that a State submits by December 1, 2010 intended only as a draft plan? Wisconsin looks forward to further details on this process and what technical assistance may be offered this summer.

See modifications to Question #24 for changes in the due date and for clarification on EAC’s role in reviewing plans submitted by States.