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

MEMORANDUM

TO: Chair Rodriguez, Commissioner Davidson and Commissioner Hillman

FROM: Caroline C. Hunter
Vice Chair

DATE: April ~~30~~, 2008

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RE: Modification of EAC Advisory 07-003-A – Maintenance of Effort Funding

EAC Advisory 07-003-A, dated September 6, 2007, discusses Maintenance of Effort Funding and includes local and county governments in discussion of Maintenance of Effort Funding requirements. However, the applicable section of HAVA is unambiguous and does not make requirements of local and county governments. The applicable section reads:

“How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000.” Help America Vote Act of 2002 §254(a)(7), 42 U.S.C. 15404(a)(7) (2002).

The EAC does not have the authority to also make such a request of local and county governments, because Congress limited the language in the statute to only make a demand on the State. Sections 254(a)(2) and 254(a)(8) both include mention of “units of local government” to differentiate from the State. Had Congress intended those units of local government to maintain expenditure, it would have included the appropriate language in §254(a)(7). Any other interpretation would require the Commission to overreach its statutory authority.

RECOMMENDATION:

EAC Advisory 07-003-A, dated September 6, 2007, shall be amended to make it clear that HAVA does not require a state to include local and county government expenditures when determining the Maintenance of Effort baseline as required by HAVA §254(a)(7).

This modification of EAC Advisory 07-003-A does not preclude States from including county and/or local government expenditures when determining the Maintenance of Effort baseline. This inclusion will be at the State's discretion, and not because it is a requirement of Federal law.

EAC Advisory 07-003-A shall be suspended to the extent that it requires a state to include local and county government expenditures in its MOE baseline, until such time as an amended Advisory is approved. During the suspension, EAC Staff shall prepare an amended Advisory, which shall require a vote of the Commission before it can take effect.

Deleted: The Office of General Counsel has raised concerns about this modification with respect to OMB circular A-102. Therefore, this modification of EAC Advisory 07-003-A does not address the application of the circular to the Maintenance of Effort requirement. Commissioners hereby request the opportunity to examine HAVA and the relevant portions of circular A-102 in order to determine the proper application of the circular to the Maintenance of Effort requirement of §254(a)(7) of HAVA.¶