

**Minutes of the Public Meeting  
United States Election Assistance Commission**

1225 New York Avenue, NW  
Suite 150  
Washington, DC 20005

The following are the Minutes of the Public Meeting of the United States Election Assistance Commission (“EAC”) held on Thursday, June 19, 2008. The meeting convened at 1 p.m., EDT. The meeting was adjourned at 5 p.m., EDT.

**PUBLIC MEETING**

**Call to Order:**

Chair Rosemary Rodriguez called the meeting to order at 1 p.m.

**Pledge of Allegiance:**

Chair Rodriguez led all present in the recitation of the Pledge of Allegiance.

**Roll Call:**

**EAC Commissioners:**

General Counsel Juliet Hodgkins called roll of the members of the Commission and found present: Chair Rosemary Rodriguez, Vice-Chair Caroline Hunter, Commissioner Donetta Davidson, and Commissioner Gracia Hillman. Four members were present for a quorum.

**Senior Staff:**

Executive Director Thomas Wilkey and General Counsel Juliette Hodgkins, Tamar Nedzar, Assistant General Counsel

**Also Present:**

Christopher Crider, Inspector General

**Presenters:**

Edgardo Cortes, Acting Division Director, HAVA Payments and Grants, and Election Administration Improvement Programs, U.S.

Election Assistance Commission; and, Laiza Otero, Election Research Specialist, U.S. Election Assistance Commission

### **Adoption of the Agenda**

Chair Rodriguez asked for a motion to adopt the agenda. Commissioner Hillman moved to adopt the agenda. Vice-Chair Hunter seconded the motion. Vice-Chair Hunter noted there would be a change in the agenda regarding the fact that she did not have a specific proposal to submit and would provide an explanation at the appropriate time. The motion passed unanimously.

### **Welcoming remarks**

Chair Rodriguez was pleased to acknowledge Vice-Chair Hunter's attendance, noting that she is still awaiting her appointment to the Federal Election Commission (FEC). Chair Rodriguez also extended her sincere appreciation to Commissioner Hillman and Maisha Leek for leading a very productive two-day meeting of the Board of Advisors that was held on July 17-18, 2008, in Washington.

### **Old Business**

#### **Approval of Minutes from the Previous Meeting**

Chair Rodriguez asked for a motion to adopt the minutes of the special Commission meeting held on April 30, 2008, as corrected. Commissioner Davidson moved to adopt the minutes. Commissioner Hillman seconded the motion. The motion carried unanimously.

Chair Rodriguez asked for a motion to adopt the minutes of the May 22, 2008, Commission meeting as corrected. Vice-Chair Hunter moved to adopt the minutes. Commissioner Hillman seconded the motion. The motion carried unanimously.

### **Report from the Executive Director**

Thomas Wilkey extended a welcome to everyone in attendance, pointing out that while the busy Presidential primary season is over, the focus is now on helping officials prepare for November's Election Day.

Mr. Wilkey reported that the following activities have taken place since the May 22, 2008, Commission meeting:

With respect to election administration, hundreds of Asian language glossaries of election terms, available in Spanish, Chinese, Japanese, Korean, Vietnamese and Tagalog, were mailed to election officials and nonprofit civic organizations throughout the country.

The Election Management Guidelines working group recently met to discuss ways to help election officials comply with language accessibility provisions of the Voting Rights Act, and the Language Assistance Working Group met to discuss tools, such as pictorial translations to aid voters who speak Alaskan Native and American Indian languages.

A Quick Start on Central Count Optical Scan Ballots was recently issued. Six additional Quick Starts on topics including conducting a recount, provisional ballots and canvassing, and certifying an election will be issued prior to the November Presidential election.

Eight new chapters in the Election Management Guidelines series are ready for issuance, which would be expounded on more fully at a later point during the meeting.

With regard to grants, Mr. Wilkey reported that Election Data Collection Grants were awarded to the States of Illinois, Minnesota, Ohio, Pennsylvania and Wisconsin. Winners of the Mock Election and College Poll Worker Grants were recently announced and are available for review on EAC's website.

A meeting of the Board of Advisors was held the previous two days, July 17-18. The discussions that took place on elections research, and other topics, will be carefully considered as EAC moves forward on new projects.

Mr. Wilkey next reported that the following items have been added and/or updated to the website: The Inspector General's audit report of New Mexico and a semi-annual report to Congress, requests for advisory opinions and a revised test plan for Premier Solution's Assure 1.2 system are now available on EAC's website. The Research, Resources and Reports section has been made easier to navigate. A webcast of the present meeting will be available for viewing the following evening and archived webcasts from meetings going back to April are also available.

Mr. Wilkey concluded his report by introducing and welcoming Emily Jones who will be joining EAC staff beginning July 7 as its staff coordinator.

**Questions and Answers:**

In response to questions by the EAC Commissioners:

Mr. Wilkey reported that the Commission took two tally votes since its May 22, 2008, meeting. The first vote that was conducted with regard to the Data Collection Grant program was held due to a statutory requirement. The tally vote with respect to the College Poll Worker Grant program was held for both expediency and efficiency purposes.

Commissioner Hillman was pleased to acknowledge the recognition that EAC's communication staff has received for both the transparency and amount of information that it has been putting into the website.

With respect to upcoming events, Mr. Wilkey noted that he would be testifying before Congress the following week on EAC's ballot design program. Additionally, over the next two months the Commissioners, along with staff, would be attending meetings of the National Association of State Election Directors (NASED), the International Association of Clerks, Recorders, Election Officials and Treasures (IACREOT) and the National Association of Secretaries of State (NASS). Chair Rodriguez noted that she would be attending an upcoming meeting of the California Clerks.

**Consideration and Vote to Modify Advisory Opinion 07-003-A Regarding Maintenance of Effort, Pursuant to HAVA Section 254(a)(7)**

Commissioner Hunter made a motion to remove from the table her proposal that would modify Advisory Opinion 07-003-A regarding Maintenance of Effort, Pursuant to HAVA Section 254(a)(7). Commissioner Davidson seconded the motion. The motion carried unanimously. The proposal was discussed during the public hearing portion of the EAC's May 22, 2008, meeting and was thereafter tabled.

Vice-Chair Hunter pointed out that to date her proposal has received approximately 80 public comments from both election officials and advocacy groups. Vice-Chair Hunter also reiterated her reason for presenting the proposal, noting that the applicable section of HAVA does not make any requirements of local and

county governments regarding the Maintenance of Effort (MOE) requirement and there is no legislative history with respect to this topic. Vice-Chair Hunter further pointed out that much research has been conducted with regard to the applicability of OMB Circular A-102 with respect to MOE, noting that an opinion rendered by Congressional Research Services on this topic would be brought out at a later point during the meeting.

Inspector General Chris Crider summarized the Department of Interior's opinion with respect to the Maintenance of Effort issue by reporting that they do not believe that MOE applies to the local jurisdictions based upon a literal reading of the statute. Mr. Crider pointed out the Department of Interior opined that it would be EAC's responsibility to assess Congress's intent regarding the statute and upon doing so, EAC may alter how it interprets the statute relating to MOE. Mr. Crider also pointed out that he did not feel comfortable interpreting the advisory opinion rendered by Congressional Research Services regarding MOE but rather this is something that should be left up to the Commission to interpret.

General Counsel Juliette Hodgkins summarized the responses provided by both the Department of Interior's letter to Mr. Crider and the opinion rendered by Congressional Research Services regarding the MOE requirement.

Chair Rodriguez advised Vice-Chair Hunter that although she was not ready to vote either for or against the proposal, this, by no means is an indication that she is looking for ways for anybody to supplant previously expended funds with Federal funds in any way, shape or form. Chair Rodriguez requested that Vice-Chair Hunter table her proposal. Vice-Chair Hunter agreed and made a motion to table the proposal to modify the relevant advisory opinion on the Maintenance of Effort issue as proposed. Commissioner Davidson seconded the motion. Commissioner Hillman voted in opposition. The motion passed on a vote of 3 in favor and 1 opposed.

Commissioner Hillman reiterated that she continues to vote in opposition due to the fact that it is her belief that EAC should not be considering an outright policy that exempts counties and units of local government from MOE.

## **New Business**

### **Presentation of EAC Draft Chapters of the Election Management Guidelines Project**

Presenter: Laiza Otero, Election Research Specialist, U.S. Election Assistance Commission

Ms. Otero was pleased to announce that hardcopies of the central count optical scan ballot Quick Start Management Guides were received the previous day, she has already received one request to send some additional ones to a jurisdiction, and that copies were available for the audience's consideration.

Ms. Otero was also pleased to report that the eight chapters of the Election Management Guidelines to the Commission which cover absentee voting and vote by mail, acceptance testing, ballot building, uniformed and overseas voters, developing an audit trail, polling place and vote center management, contingency planning and change management, and pre-election and parallel testing were provided to the Boards for review and comment following the March 20, 2008, meeting in Denver. Ms. Otero pointed out that 16 Board members provided comments, which were incorporated either in whole or in part, and if approved will be distributed to over 5,200 election officials, would become available online for downloading and additional copies will be available upon a jurisdiction's request.

A recommendation was made that the EAC vote to adopt the Election Management Guidelines as presented. Commissioner Davidson moved to adopt the Election Management Guidelines as presented. Commissioner Hillman seconded the motion. The floor was open for discussion at which time Ms. Otero noted that the type of Board comments that were incorporated consisted of good suggestions/recommendations and also general observations, and that approximately 90 percent of the comments which were submitted were incorporated. The motion carried unanimously.

### **Draft of EAC Guidance to States Regarding Updates to the State Plans**

Presenter: Edgardo Cortes, Acting Division Director, HAVA Payments and Grants, and Election Administration Improvement Programs, U.S. Election Assistance Commission

Mr. Cortes presented the Commission with a document entitled "Guidelines on HAVA Section 254(a)(11): Material Changes in the Administration of HAVA State Plans," pointing out these guidelines take the general Federal guidelines for amending State plans as contained in Common Rule, OMB Circular A-102, and basically customizes it to the needs of the States under HAVA. The

guidelines were drafted in an attempt to provide clear guidance on what constitutes a material change to State plans.

Mr. Cortes outlined the following five circumstances under which a deviation from an established State plan would be substantial enough to constitute a material change:

1. New or revised Federal laws or regulations affecting HAVA implementation.
2. New or revised State law, organization, or policy affecting HAVA implementation.
3. A budget of 10 percent or more of the HAVA fiscal year's cumulative budget across budgeted programs, activities, functions or activities.
4. A revision in the scope or objective of the project.
5. An extension in the period of availability of HAVA funds.

A recommendation was made that the Commissioners post the draft guidelines for a 30-day public comment period to assist the Commissioners in their deliberations before adopting the draft guidelines.

Mr. Cortes reiterated what the impetus was for drafting the guidelines, which was prepared by EAC staff and thereafter provided to the subcommittee, wherein Commissioners Hillman and Davidson reviewed the document and provided feedback.

Commissioner Hillman stressed the importance of taking action on this matter, expeditiously, in order to assist those States that are prepared to request requirements payments that were appropriated by Congress for fiscal year 2008, and also after posting in the Federal Register the guidelines could be made available at the upcoming NASED meeting.

## **Questions and Answers**

In response to questions by the EAC Commissioners:

Mr. Cortes reported that States will only be mandated to file a new State plan when their budget change is greater than ten percent. EAC cannot require States to change their budgets.

Mr. Cortes further expounded on his reasoning for citing 41 C.F.R. Sections 105.71.111 and 105.71.130 in conjunction with the sentence contained in his attached memorandum which reads, "These two sections provide clear guidelines as to the instances

under which State plans would need to be revised.” The Commission discussed the matter at length.

The Commission recessed at 2:28 p.m. and reconvened at 2:46 p.m.

Commissioner Davidson moved to post the “Guidelines on HAVA Section 254(a)(11): Material Change in the Administration of HAVA State Plans” in the Federal Register: Commissioner Hillman seconded the motion. The floor was open for discussion at which time Vice-Chair Hunter requested that Mr. Cotes’ briefing memorandum dated June 17, 2008, be posted along with the guidelines in order to provide the public with the two specific citations to the Common Rule (41 C.F.R. Sections 105.71.111 and 105.71.130) and to also receive comments.

Commissioner Hillman made a motion to end discussion on the motion to post the draft guidelines. Commissioner Davidson seconded the motion. Vice-Chair Hunter voted in opposition. Chair Rodriguez abstained from voting. The motion failed for lack of a majority.

Discussion continued with regard to the posting of Mr. Cortes’ briefing memorandum. Vice-Chair Hunter suggested amending the language in the guidelines. Commissioner Hillman suggested tabling further discussion of this matter in order to allow Vice-Chair Hunter and Mr. Cortes time to draft an amendment to the draft guidelines. Commissioner Davidson moved to table the current motion to publish the guidance on State plans. Commissioner Hillman seconded the motion. The motion carried unanimously.

### **Consideration of Administrative Regulations**

General Counsel Juliette Hodgkins was pleased to present the Commissioners with the first of a three-part series of administrative regulations that were drafted based upon a commitment that the EAC made following a meeting with the House Administration Committee on August 2, 2007. Counsel Hodgkins pointed out that the first step being presented covers those administrative regulations that are required by law to have comments by the public, which include regulations under the Government and Sunshine Act, the Privacy Act and the Freedom of Information Act. Ms. Hodgkins said that the Office of General Counsel will be presenting the Commission with two other series of administrative regulations at a later date, the second of which will allow for third parties to request an expert witness or documents from the Federal government in a third-party litigation, and the third set will cover



non-discrimination on the basis of age, race, color, national origin and also regulations pertaining to grants.

Counsel Hodgkins emphasized to the Commissioners that the regulations that have been promulgated are for outside parties only. Counsel Hodgkins further explained that Ms. Tamar Nedzar who is with the Office of General Counsel was primarily responsible for the excellent work she put into the document and, therefore, would be the individual most capable of answering any questions that the Commissioners may have. Executive Director Wilkey acknowledged Ms. Nedzar's birthday. The Commissioners extended happy birthday wishes to Ms. Nedzar.

Counsel Hodgkins noted that the draft regulations track the regulations that other Federal government agencies have promulgated in the past and/or will promulgate in the future. Counsel Hodgkins was also pleased to point out that EAC will be breaking new ground in that it will be the first Federal government agency to post regulations that will encompass the Open Government Act changes to the Freedom of Information Act that were passed in 2007

A recommendation was made that the Commission adopt the draft regulations and that staff be directed to post a Notice of Proposed Rulemaking in the Federal Register for a 60-day public comment period, after which the Office of General Counsel will consider the comments and present the Commissioners with the final proposed rules.

Vice-Chair Hunter moved to post the administrative regulations in the Federal Register for a 60-day public comment period. Commissioner Hillman seconded the motion. The motion carried unanimously.

### **Draft of EAC Guidance to States Regarding Updates to the State Plans (Cont'd)**

Vice-Chair Hunter moved to take the proposal to submit "Guidelines on HAVA Section 254(a)(11)" off of the table. Commissioner Hillman seconded the motion. The motion carried unanimously.

Vice-Chair Hunter next moved to amend the second sentence in the "Guidelines on HAVA Section 254(a)(11): Material Changes in the Administration of HAVA State Plans" to read as follows: "These guidelines are based on the general Federal requirement for updating State plans and post-award changes contained in Office of Management and Budget Circular A-102. See 41 CFR Section

105.71.111 and Section 105-71.130.” Commissioner Hillman seconded the motion. The motion carried unanimously.

Chair Rodriguez called the question on the original motion made by Commissioner Davidson, seconded by Commissioner Hillman, to post the “Guidelines on HAVA Section 254(a)(11): Material Change in the Administration of HAVA State Plans” in the Federal Register as amended for a 30-day comment period. The motion carried unanimously.

### **Briefing Regarding HAVA State Spending Report to Congress**

Presenter: Edgardo Cortes, Acting Division Director, HAVA Payments and Grants, and Election Administration Improvement Programs, U.S. Election Assistance Commission

Mr. Cortes presented the Commission with the “HAVA Financial Reports Review Update” (as of June 19, 2008), noting that the report would be ready for release in July and recommended that it be added to the July 21, 2008, meeting agenda at which time detailed numbers regarding spending would be presented to the Commission.

Mr. Cortes first highlighted the following items contained in the report: 115 letters were sent out during this year’s review process which consisted of 29 letters regarding Section 101 reports, 10 letters regarding Section 102 reports, 43 letters regarding Section 251 reports, 18 general information letters were sent which required no action on the part of States and 15 non-filer letters.

Mr. Cortes next discussed the amended reports pending, pointing out that there are currently six amended reports with the recent submission of New Jersey’s Section 251 report, and it is anticipated that all six States will have submitted their reports by the end of the week.

Guam and New Hampshire have not submitted either Section 101 or Section 251 reports. Neither received Section 102 funds.

Mr. Cortes next reviewed the summary of reporting issues which indicated the following: Many States had failed to report how much they had appropriated for their State match or the amount of interest earned on the State match, there are a number of concerns regarding the proper appropriation and deposit of the State match into the State election funds, there was a failure on the part of States to report how much interest they’ve earned cumulatively and

during the reporting period and a failure to add that to the amount of total Federal funds authorized.

In terms of recipient outlays, there has been a failure by States to report expenditures towards their five percent match. Some States had been reporting their Maintenance of Effort expenditures as recipient outlays which essentially inflated the amount that they showed for State match spending. Additionally, staff has identified some program income issues, for which an advisory was issued last year regarding program income.

Mr. Cortes acknowledged the excellent work by new staff members Julie Ruder and Julianna Milhofer, which resulted in the fastest and most thorough review of the State reports to date. In addition, this year States have improved in both the timely submission and accuracy of the reports.

## **Questions and Answers**

In response to questions by the EAC Commissioners:

Mr. Cortes noted that if a State had to get a letter on 101, 102 and 251 funding, they would have received three separate letters. Mr. Cortes reported that Guam and New Hampshire have delinquent reports not only for the current cycle but also from previous reporting cycles. The two options that are being considered to deal with these delinquencies are through a mini-audit, or the matter could be referred to the Office of Inspector General for a full audit. To date, neither have been scheduled for a regular audit by the IG.

Counsel Hodgkins reported that she would brief the Commissioners on whether EAC has the authority to require reporting of requirements payments by States on a regular basis.

Mr. Cortes indicated that if the matter is referred to the IG's office and a full audit is conducted, the audit report would become public and the information would be provided to Congress.

## **Consideration of Requests by Louisiana, Maryland and Michigan to Amend State Instructions to NVRA Form**

Presenter: Edgardo Cortes, Acting Division Director, HAVA Payments and Grants, and Election Administration Improvement Programs, U.S. Election Assistance Commission

Mr. Cortes reported that Maryland, Louisiana and Michigan have officially submitted requests for changes to the State-specific instructions of the National Mail Voter Registration Form to EAC. It was recommended that the requests from Louisiana and Michigan be deferred until the July 21, 2008, meeting pending receipt of additional information that was requested by staff.

Mr. Cortes presented the Commission with Maryland's request to change the State-specific instructions of the NVRA form as follows: "To register in Maryland you must: not have been convicted of a felony, or if you have you have completed serving a court-ordered sentence of imprisonment, including any term of parole or probation for the conviction."

Commissioner Davidson moved to adopt Maryland's change to the State-specific instructions of the NVRA form. Commissioner Hillman seconded the motion. The motion carried unanimously.

#### **Consideration and Vote of Proposed Replacement Advisory Opinion 07-003-B Regarding Maintenance of Effort**

Commissioner Hillman presented her proposed Advisory Opinion 07-003-B, which would supercede and replace Vice-Chair Hunter's proposed Advisory Opinion 07-003-A pertaining to MOE, noting that although she would not be asking the Commissioners to vote on this due to the earlier discussion and action taken with regard to Vice-Chair Hunter's advisory opinion she would be reserving her right to keep the issue on the table for discussion at the July meeting.

Commissioner Hillman urged the formation of a well-devised working group between EAC staff and State election officials for the purpose of taking up the MOE issue and encouraged the Commission to move expeditiously on this matter.

#### **Consideration of Draft Policy for Notice and Public Comment**

Commissioner Hillman presented the Commissioners with a document entitled "Proposed Notice and Public Comment Period," pointing out the purpose of such policy is to provide effective notice for a period of public comment on all policies being considered for adoption by the EAC, which are not subject to notice and comment under any Federal statute.

Commissioner Hillman noted that the Federal Register reviewed and edited the document, providing some examples of where they weighed in, and which resulted in a delay of several days.

In order to expedite this matter, a recommendation was made that the Commission to post the policy on its website only, to notify the various stakeholders of the posting and to only post the policy in the Federal Register after it has been adopted. Counsel Hodgkins confirmed that there is no legal requirement to post this policy in the Federal Register prior to its final adoption.

Vice-Chair Hunter made a motion to post the proposed “Notice and Public Comment Policy” on the EAC website for 30 days to receive comment on the policy and to place it on the September meeting agenda for consideration. Commissioner Davidson seconded the motion. The motion carried unanimously.

The Commission recessed at 4:39 p.m. and reconvened at 4:41 p.m.

#### **Consideration of Draft Policy for Joint Partnership Task Force of EAC and State Election Officials Regarding Spending of HAVA Funds**

Commissioner Hillman reported that she did not complete her preparation of a policy regarding a joint Federal task force due to the fact that she was getting mixed signals from the Commission as to whether this is something that should be pursued.

Commissioner Hillman noted that this is not a replacement for the policy that is currently in place when individuals seek advisories on specific questions regarding the spending of money, but covers general issues only. Commissioner Hillman further pointed out it is her belief that this would be a useful tool for the EAC to use.

Vice-Chair Hunter, Commissioner Davidson and Chair Rodriguez provided input and recommendations regarding the possible composition of the task force and the benefits that would be derived.

Counsel Hodgkins agreed to work with Commissioner Hillman in preparing a briefing on what the Federal Advisory Committee Act (FACA) rules are and how they would or would not apply to a task force. Attempts will be made to schedule a special briefing of this topic to the Commission within the next two weeks.

#### **Consideration of Draft Policy regarding Allocable Cost Principles for HAVA Funding**

Vice-Chair Hunter announced that she would be deferring the presentation of her draft policy regarding allocable cost principles for HAVA funding, noting that she would be working with and seeking additional input from the Commissioners and staff before it is presented to the public.

### **Announcement of July 21, 2008, Public Meeting Agenda Items**

Chair Rodriguez noted that the next meeting of the EAC would be held on July 21, 2008, in Arizona at the International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT). The agenda will include the following items: A contingency planning workshop, consideration of EAC's Laboratory Accreditation Program Manual, an update on the HAVA spending report by Mr. Cortes, which the Commissioners may take a tally vote on before the July meeting, consideration of Vice-Chair Hunter's advisory opinion 07-003-A and Commissioner Hillman's replacement advisory opinion 07-003-B, an update on Commissioner Hillman's "Proposed Notice and Public Comment Policy," and possibly Vice-Chair Hunter's draft policy on allocable costs.

Executive Director Wilkey advised the Commissioners he was informed by Mr. Cortes that the last reports filed by Guam and New Hampshire were received in 2005 covering the 2004 reporting period for both Section 101 and 251 funds.

### **Adjournment**

Vice Chair Hunter moved to adjourn the meeting. Commissioner Davidson seconded the motion. The motion carried unanimously.

**Meeting was adjourned at 5 p.m.**