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As a Federal agency, the U.S. Election Assistance Commission (EAC) must implement specific regulations, policies and procedures. For purposes of today's testimony, I will divide the needed regulations, policies and procedures into three categories:

- Those that require public comment
- Those that must be published
- Those that are internal and need not be published.

In addition to these three categories, several Federal statutes require agencies to take actions other than publishing regulations. For example, some statutes require the EAC to file reports or maintain specific records.

My testimony today provides a macro view of the laws that govern regulations, policies and procedures in a Federal agency. I also will talk about the steps the EAC is currently taking to address its regulatory needs. The topics I discuss are not exhaustive, but represent those regulations and internal policies adopted by a majority of other government agencies. Additional information regarding needed regulations, policies and procedures will be available through a report of the Inspector General; and information provided by the responsible staff members for each program area.

REGULATIONS REQUIRING NOTICE AND COMMENT

The Administrative Procedures Act,¹ or APA, provides a broad framework for government operation and procedure. The provisions of the APA ensure uniformity and public involvement in agency actions. Through amendments, it includes provisions commonly known by other titles. For example, the APA encompasses, among other laws, the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act.

¹ 5 U.S.C. 500 et seq.

The rule making provisions of the APA apply when notice and comment are required by statute, with two exceptions. First, notice and comment are not required for interpretive rules, general statements of policy, or rules of agency organization, procedure or practice. As an example, under this exception, public notice and comment are not required before a Federal government agency adopts an internal policy governing work hours and office operation procedures. The reason for exempting these sorts of actions is that internal policies do not generally affect the public.

In addition, notice and comment are not required when the agency for good cause finds (and incorporates the findings and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. A situation where public notice and comment are not required because it would be contrary to the public interest would be where a national security agency promulgates rules governing when a person suspected of wrongdoing can be further investigated. It would be contrary to the public interest to make such criteria openly available.

Rule making requires specific statutory authority. This can come from an agency's governing statute or from a general authorization in a statute governing a particular administrative process. The only example of rulemaking authority granted to the EAC by a governing statute is section 802 of HAVA, which transfers to the EAC functions previously performed by the Federal Election Commission. One of those functions previously required the FEC, and now requires the EAC, to promulgate regulations concerning the National Voter Registration Form.

All other rulemaking authority the EAC may exercise comes from statutes granting general authorization for particular administrative processes.

An example of a law that grants general authorization for particular administrative processes is the Freedom of Information Act, or FOIA. FOIA, among other things, requires the EAC to make available and provide a means for dissemination of public information. Another example is the Government in the Sunshine Act, which requires public notice of and access to official acts of a Federal agency. Both FOIA and the Government in the Sunshine Act specifically set forth the authority for Federal agencies to promulgate regulations and the procedures for publishing and receiving comment.

Another example of a statute that grants general authorization for particular administrative processes is the Paperwork Reduction Act, or PRA. Under the PRA, Federal agencies must, prior to engaging in information collections meeting prescribed thresholds, publish in the

Federal Register the contemplated information collection and provide a means for commenting on the information collection.

REGULATIONS REQUIRING PUBLIC NOTICE

In addition to regulations requiring public notice and comment, some statutes require Federal agencies to publish regulations merely for the purpose of notifying the public, without comment. In general, the categories of regulations that require public notice but not comment include interpretive rules, general statements of policy, and rules of agency organization, policy or procedure that impact the general public. The purpose of publishing these categories of regulations is to inform the public of the processes and procedures a Federal agency uses in conducting its business.

Section 552(a)(1)(D) of the APA requires only public notice for substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. For EAC's purposes, this would include documents such as the EAC Voting System Testing and Certification Program Manual and EAC Laboratory Accreditation Manual. These documents are statements of general policy adopted by the agency. They provide a description of how to participate in EAC programs and the processes one wishing to participate must follow. As such, they require only public notice. In the past, EAC has exceeded this requirement by actually publishing these types of manuals for notice **and** comment.

Another example of policies that may require publication because of their impact on the public is procurement or contracting policies. Publishing such regulations allows parties interested in performing services for the EAC to navigate the process the EAC uses in selecting vendors. It provides a degree of transparency, and puts competitors on an even playing field.

One type of policy or regulation that would **not** fall into any of the categories requiring public notice is interpretive rules regarding HAVA. Section 312 of HAVA specifies a means of publishing and adopting such guidance. Where two statutes conflict, the more specific and the more recent governs. Accordingly, the procedures outlined in the specific statute, HAVA, govern over the more general and older procedures in the APA.

The Privacy Act is another example where public notice, but not public comment is required. Pursuant to the Privacy Act, the EAC must publish a description of the Privacy Act protected records that are maintained by the agency and the common uses of those documents. The purpose of

publishing these regulations is to provide notice to affected parties of what the EAC considers private and how the EAC uses private information. Such a regulation would be applicable to applicants of the certification program, as an example.

There are also portions of FOIA that require only public notice, but no comment. Under FOIA, the EAC must publish procedures for requesting public documents, including where forms are located and where the public may access information subject to FOIA. The EAC must also publish a description of its offices and substantive rules of general applicability.

INTERNAL POLICIES

Unlike regulations, internal policies do not impact the public. Accordingly, they do not require publication for either public notice or comment. These policies include things like personnel policies, travel policies, and financial policies. These policies are necessary to effectively manage a government agency, but they do not apply to public entities; and are therefore not subject to a notice or comment process.

CURRENT ACTIONS

The EAC is taking substantial steps to issue regulations, policies and procedures in compliance with applicable law. EAC staff has gathered information about establishing a Code of Federal Regulations site to house its regulations, policies and procedures that are either subject to public notice and comment or just public notice. The Federal Register requires the EAC to appoint personnel to specific positions for purposes of publishing regulations, policies and procedures in the Code of Federal Regulations. The EAC has identified personnel to serve in each position and has made a formal request of the Federal Register to designate a site for the EAC's regulations, policies and procedures.

The EAC has also identified its duties under administrative law and contracted with third parties to assist the agency in drafting regulations, policies and procedures; and navigate the regulatory process. These third parties have extensive expertise in drafting regulations for a variety of Federal agencies and the EAC looks forward to working closely with these parties to provide timely and well-drafted regulations, policies and procedures.

As for internal policies and procedures, the Inspector General is in the process of performing a full review of the EAC's programs. The results of this report will provide a basis for determining what internal policies are needed and what program area is responsible for forming each policy.

CONCLUSION

The EAC is aware of its duties as a Federal agency and working diligently to comply with all applicable administrative laws. Although the EAC currently complies, and in many cases exceeds, its requirements under administrative law, it must also take steps to improve the notice that it provides to the public regarding these activities by publishing needed regulations and developing needed policies. We have made significant progress in that regard and will continue to work to complete these administrative tasks.