



**TESTIMONY FOR JANUARY 27, 2005 PUBLIC MEETING
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I. OTHER AUDIT AUTHORITY

Section 902 of HAVA sets forth the entire audit authority over funds disbursed under its provisions. The previous presenter discussed the regular audit of federal funds, which is contemplated in Section 902(b)(1). However, HAVA also provides for two other means of extraordinary audit power. First, HAVA establishes that the funds shall be subject at least once during the term of the program to an audit by the Comptroller General. The second extraordinary audit authority lies with EAC. Section 902(b)(6) of HAVA allows EAC to conduct a “special audit” or “special examination” of the funds which are subject to regular audit under Section 902(b)(1). This covers every program under HAVA including funds distributed under Section 101, 102, Title II, and programs administered by the Department of Health and Human Services. HAVA reserves to the Comptroller General the authority to recoup funds on behalf of the United States when the Comptroller finds that the recipient is out of compliance with the requirements of the program under which the funds are provided or when an excessive payment has been made to the recipient. Beyond the establishment of this special audit authority, HAVA offers no guidelines under which a special audit should be conducted.

In order to establish a policy for the implementation of a special audit program, first one must understand the concept of a special audit. In its most simple terms, a special audit is an audit conducted at a time other than that of the “regular audit.” A special audit can take on the form of one of three general types of audits: a financial audit, a compliance audit, or an audit on agreed-upon terms. The Generally Accepted Government Audit Standards contain standards for conducting compliance, financial and agreed-upon terms audits. Prior to conducting audit, there must be a process for instituting a special audit.

EAC is in the process of obtaining the services of an Inspector General. The functions of that office are multiple, but fall generally into two categories: audits (both internal and external) and investigations of alleged improprieties (internal and external). Review of the single audits as well as conduct of any special audit programs will be a part of the IG’s duties and responsibilities. EAC is currently negotiating with several other federal government agencies regarding the possibility of contracting for the services of an Inspector General. EAC has targeted agencies that have programs that cover all 50 states and 5 territories, as does the HAVA Requirements Payments process.

Until an IG office is established within EAC, it is incumbent on the members of the Commission to act in its absence. Thus, I recommend adopting the following policy and procedure for special audits:



- 1) Regular reviews of single audits and reports filed by states must be conducted to ensure the proper usage of HAVA funds.
- 2) If the single audit, report filed by the state or other credible information provided to EAC reveals a discrepancy or potential lack of compliance on the part of the recipient, the Commission should analyze the risk to the HAVA funds and to the programs and principles of HAVA. That analysis should identify the source of any threat as well as the severity of the threat. Once the threat has been identified, a decision should be made as to whether additional review is necessary to fully comprehend the discrepancies or lack of compliance. If additional review is necessary, then a special audit should be instituted. If the discrepancies are evident and are sufficiently identified by the existing information and evidence, then EAC should act to refer the discrepancy to the appropriate enforcement agency, whether that is the Department of Justice, the Comptroller General or any other appropriate state or federal enforcement agency.
- 3) When a decision is made to conduct a special audit, then the scope and type of audit should be defined. The audit may take on one or more of the three types of audits: financial, compliance, agreed-upon terms. The scope of the audit should include the term of the audit (e.g., from the time of receipt to present, a particular fiscal year, or other term established by the Commission) and the funds that will be audited (Section 101, Section 102, Title II, HHS grant funding).
- 4) A plan for the audit must be established, including developing either a scope of work for the IG, a contractor, or another federal government agency who is conducting the audit on behalf of EAC. The scope of work should then be distributed to various potential sources for these services to identify a contractor or agency who will conduct the audit.
- 5) Upon completion of the audit and report, if the findings suggest that the recipient is out of compliance with the requirements of the HAVA program(s), then EAC should refer the audit and the recipient to the Comptroller General with a request to take action to recoup funds on behalf of the United States. If potential voting rights, civil rights, or criminal violations are identified by the special audit report, EAC should refer the audit and recipient to the Department of Justice or the appropriate state or federal law enforcement agency.

Questions.

II. CALIFORNIA AUDIT

California received \$180,594,462 in Federal funds made available under HAVA. That amount includes \$27,340,830 in Section 101 funds, \$57,322,707 in Section 102 funds, \$94,559,169 in Title II funds, and \$1,371,756 in funding distributed by HHS. Through



the Budget Act of 2004, the state appropriated \$266.1 million in HAVA funds to the Secretary of State's office. This amount includes the amounts set forth above in addition to the anticipated \$169.6 million in requirements payments for which the State of California would be eligible to receive under HAVA for Federal Fiscal Year 2004. In order to access those funds, the Secretary of State's office must submit a detailed spending plan to the Department of Finance for approval. In Federal Fiscal Year 2004, the Department of Finance authorized the spending of \$81.2 million.

Reports in 2004 began to call into question the uses of HAVA funds. In August 2004, the Secretary of State submitted a spending plan to the Department of Finance for the use of \$15.2 million for activities related to the November 2004 election. The Department of Finance refused to approve the spending plan. In addition, on August 26, 2004, the Joint Legislative Audit Committee of the California Legislature requested that the State Auditor conduct a review of the Secretary of State's use of HAVA funds. Specifically, the JLAC requested the State Auditor "to review and evaluate relevant laws, rules and regulations to determine whether the office used HAVA funds only for allowable purposes and in accordance with Section 28 of the Budget Act of 2003; and to determine whether the office implemented HAVA in compliance with federal requirements." In order to accomplish that effort, the Auditor "selected a sample of expenditure transactions paid for with HAVA funds and evaluated whether the activities and costs were allowable under HAVA, the state plan, and Section 28 of the Budget Act of 2003." Those samples included 10 personal services, 25 operating and five grant payment transactions in California Fiscal Year 2003-04 and several state fiscal year 2004-05 charges to HAVA funds. Interviews of management, employees and consultants were conducted. In addition, the Auditor spoke with officials from EAC regarding provisions of HAVA. These tested transactions represented approximately 12.5% of the dollar amount of the Section 101 funds expended and nearly 65% of the funding expended by the Secretary of State under Section 102.

The State Auditor issued her report on December 16, 2004. In that report, the Auditor found:

- The office of the Secretary of State did not use sound management practices that would ensure the successful implementation of the federal Help America Vote Act. Specifically, the Auditor found that the Secretary of State did not designate anyone to be responsible for overseeing the overall implementation of HAVA, nor did it designate individuals responsible for implementing each HAVA activity. Further, the Auditor found that the Secretary of State did not have in place adequate management principles and procedures to ensure successful results.
 - The Auditor found that the office's lack of planning is delaying its implementation of HAVA requirements and that the office may not fully implement a computerized statewide voter registration list by January 1, 2006.



- The Auditor found that the US Department of Justice reported numerous instances of noncompliance with HAVA requirements in California polling places during the March 2004 election.
- The Auditor found that although the Secretary of State took various steps in an effort to ensure local elections officials complied with the requirements that were to take effect on January 1, 2004, most occurred too late to be of assistance.
- The Auditor found that in August 2003, the Secretary of State received authority to spend \$4.4 million to train local poll workers and elections officials in meeting HAVA's requirements, but as of September 23, 2004 had not provided those funds to counties.
- The Auditor found that the Secretary of State's Office has not used all of the HAVA funds that it was authorized to spend.
- The Auditor found that the Secretary of State's office did not develop detailed plans for implementing the projects it proposed in its August 2003 HAVA state plan and has not made significant progress in implementing the plan.
- The Auditor found that neither the Secretary of State's conflicts of interest code nor its statement of incompatible activities specifically prohibits office employees or its consultants from participating or appearing to participate in partisan activities.
- The Auditor found that when contracts were let some contained neither a conflicts of interest provision nor an incompatible activities provision; some contained one or the other; and some contained both. The Secretary of State was inconsistent in the application of these standards to its contractors.
- The Auditor found that the Secretary of State's office did not provide job descriptions to employees working on HAVA activities. Without job descriptions that explain employee roles and responsibilities, the office cannot be sure that employees adequately perform those activities and comply with HAVA and other legal requirements.
- The Auditor found that the Secretary of State's poor administration of HAVA led to questioned costs.
 - The Auditor found that the Executive Office of the Secretary of State's office did not follow many established control processes in its administration of the HAVA program.
 - The Auditor found that many of the requests for contracts came directly from the executive office and as such many of the established processes and controls for entering contracts were bypassed.
 - The Auditor found that the Secretary of State's office could not support its allocation of personnel cost to HAVA since in 2004 no time sheets or



supporting statements were used to identify the amount of time each employee spent on HAVA activities.

- The Auditor found that the Office's poor oversight of HAVA consultants also resulted in questionable uses of HAVA funds.
 - The Auditor found that of the 169 activity reports, 62 list one or more activities which had no relationship to HAVA requirements. For example, some of the consultants reported attending events such as fundraisers and a state delegation meeting for the Democratic National Convention, representing the Secretary of State in partisan activities.
 - The Auditor found that the Office of the Secretary of State compensated a law firm for preparing speeches that had little or nothing to do with HAVA.
 - The Auditor found that the oversight of consultant contracts resulted in payments to at least one contractor that exceeded the terms of the contract for allowable billing.
- The Auditor found that the Office of the Secretary of State used questionable practices to procure goods and services related to HAVA. Specifically, the Auditor found that the Office improperly split purchase orders to avoid CMAS procurement limits. Further, the Auditor suggested that the Office misused a no-bid exemption which it received based on an urgency to comply with HAVA requirements prior to January 1, 2004. Many of the no-bid contracts were let after the March 2004 federal primary. Further, the Auditor found that the Office failed to follow General Services' policies for the use of CMAS contracts.
- The Auditor found that the Office of the Secretary of State spent HAVA funds on activities for which it had not obtained spending authority from the Legislature.
- The Auditor found that the Secretary of State's Office unnecessarily delayed payments to counties for the procurement of voting equipment.

The Office of the Secretary of State provided a response to the State Auditor's report. Generally, the Secretary responded to the recommendations made by the State Auditor and stated that the office had either already implemented the required change or was in the process of doing so. In addition, the following clarifications were added by the Secretary of State:

1. *The audit report states that the Secretary of State failed to provide funding or guidance to train poll workers or elections officials.*

Actually, the Secretary of State, in consultation with the President of the California Association of Clerks and Elections Officials (CACEO), developed a program to provide counties with \$9.9 million in funding for voter education and poll-worker training. The program was approved by the Legislature and the Department of Finance on September 7, 2004.



2. *The audit report states the Secretary of State could have been more proactive in assisting counties with implementing such things as provisional voting procedures and a free access system by January 1, 2004, indicating that the office did not provide guidelines until January 21, 2004.*

Actually, the Secretary of State provided written guidelines on August 12, 2003, in addition to frequent follow-up verbal advice and a memorandum on January 21, 2004, as noted later in the audit on page 3 of Table A.1.

3. *The audit report states that the Secretary of State's office appears to have split purchase orders to avoid CMAS procurement limits and competitive bidding requirements for information technology services.*

Actually, the contracts for information technology services on voting systems were to address needs from related but completely separate purposes that quickly arose from emergencies that could not have been predicted – emergencies with the potential of compromising the public's confidence in equipment used to cast and count ballots. At the time these separate contracts for information technology services relating to voting systems were initiated, our intent was only to address a series of serious problems as they emerged – and not to avoid CMAS procurement procedures.

4. *The audit report states that Renne & Holtzman Public Law Group, LLP over-charged the state pursuant to its contract.*

Actually, we believe that the audit report finding was based on contract language superseded by an amended contract designed to reflect the original intent of the contract. We do not believe that the law firm over-charged the state for the critical legal services it provided. However, if it is determined that the law firm did over-charge the state, an appropriate offset will be made with respect to amounts invoiced but not yet paid.

5. *The report suggests in many locations that this agency was not proactive in communicating with county elections officials*

For the record: There are nearly 25,000 precincts and 100,000 poll workers in a California election. The state's role is to provide guidance to county elections officials regarding implementation of HAVA requirements. Evidence that we took this charge seriously is demonstrated by the following: Between January 2003 and mid-October 2004, Elections Division staff:

- **Attended at least nine HAVA-related meetings and participated in sub-committee meetings with county elections officials relating to implementation of HAVA, statewide voter registration database, provisional voting, identification requirements for first-time mail registrants, and free access to determine if one's provisional ballot was counted;**
- **Participated in discussions on HAVA implementation at the December 2002 and December 2003 annual new law workshops hosted by the California Association of County Elections Officials (CACEO);**
- **Visited three other states to study their statewide voter registration database systems;**
- **Mailed a dozen county election official memos (known as CC/ROV's) on topics related to HAVA, including collecting ID requirements, provisional ballots, HAVA's posting**



requirements for information at the polls, and driver's license/voter rolls interface;• Conducted five public hearings throughout the state to develop, with county elections officials' input, California's State Plan;• Adopted regulations relating to the ID requirements for specified first-time, mail-registrant voters;• Created a web site with FAQ's for county elections officials and voters to use to obtain information about free access programs, ID requirements, provisional voting, military and overseas voting, and links to other resources and laws;• Developed the driver's license validator system for interface with the CalVoter registration database; and• Disseminated guidelines for implementing provisional voting.

6. The audit report states that the office spent HAVA funds on activities for which it had no spending authority.

Actually, the office had no intention of avoiding any obligation to obtain spending authority from the Department of Finance and the Legislature before expending HAVA funds. The Budget Act of 2004 appropriates \$1.7 million to the Secretary of State's office from the Federal Trust Fund for "operational costs" associated with implementation of HAVA. Based on this language, and discussions which occurred when the language was inserted into the Budget Act of 2004, the office believed "operational costs" to include any activity authorized by HAVA and contracted accordingly, but recognized that there was an aggregate cap of \$1.7 million for 2004-05. If it is determined that "operational costs" should be more narrowly construed to mean "administrative costs," the office will do so.



In addition to the information made available through the Auditor's report, I obtained additional information by attending a hearing conducted by the California Joint Legislative Audit Committee on January 10, 2005 on behalf of the Commission. I have provided a summary of that meeting for your review. Three persons testified at that hearing: Doug Chapin with Electionline.org, the State Auditor's office, and Tony Miller of the Secretary of State's office. The information that was provided to the JLAC was background information on HAVA, the protocols and findings of the Audit conducted by the State Auditor, and responses by the Secretary of State's office. The information that was elicited at the hearing was similar to that contained in the Auditor's report and the Secretary's response thereto. Additional testimony identifying witnesses and responsible employees was offered by the Secretary of State. In addition, information regarding "week ahead" reports was elicited from the Secretary of State's representative during the hearing. This hearing confirmed the same information that was made a part of the Auditor's report and further bolstered its conclusions.

While the Auditor's finding with regard to the disbursement of Section 102 funds to counties is disturbing, this delay does not represent a threat to the proper use and expenditure of HAVA funds. However, the numerous findings with regard to apparent uses of Section 101 funds for activities not permitted by HAVA, the apparent lack of documentation of HAVA expenditures, and the apparent failure to adhere to state procedures in purchasing goods and services using HAVA funds identifies a significant threat to the Federal funds distributed under Section 101 of HAVA.

After reviewing the Auditor's report, it is apparent that a large percentage of the Section 101 funds were not subjected to testing by the Auditor. Thus, the possibility exists that while the findings of the state Auditor were significant that they are incomplete in terms of identifying all potential misspending of HAVA funds. The testing of transactions involving the Section 102 funds was much more complete. I believe that it is only the Section 101 funds that are at risk without further investigation. Thus, I recommend that a special audit be instituted to further investigate the potential misuses of HAVA funds.

Questions.