



U.S. Election Assistance Commission
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M E M O R A N D U M

TO: EAC Commissioners Hovland, Palmer, Hicks, and McCormick
FROM: Camden Kelliher, EAC Acting General Counsel
DATE: August 28, 2024
RE: Use of HAVA Funds to Implement Federal Requirements

The purpose of this memorandum is to provide a legal analysis on the use of Help America Vote Act (HAVA) funds to implement Federal requirements for election administration activities under the EAC Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds. The memorandum analyzes the Policy, provides the question presented, decides on the applicability of the Policy to the question presented, provides an analysis of how the question presented may be resolved, and makes a recommendation to the Commission on the resolution of the question presented under the Policy.

EAC FUNDING DECISION POLICY

In 2015 the U.S. Election Assistance Commission (EAC) adopted the, “Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds” (Funding Decision Policy). The Funding Decision Policy replaced the Advisory Opinion Process originally adopted by the EAC on April 16, 2008. The Funding Decision Policy was adopted, “to provide a means for persons and entities to have legal or factual questions related to the implementation of HAVA considered by Commissioners outside of EAC’s audit resolution process.” The Funding Decision Policy is not intended to replace or disrupt the role of the Office of Grants Management (OGM), which is responsible for issuing guidance, support and, when appropriate, approval/denial of certain expenditure of Federal funds under HAVA and the relevant Office of Management and Budget (OMB) Circulars found in 2 C.F.R. Parts 220, 225, 215, and 230. The approval package of the Funding Decision Policy specifically maintains that OGM will respond to day-to-day and routine HAVA questions that do not have policy implications.

To distinguish what questions are outside of the “day-to-day and routine HAVA questions,” the policy explains that the Commissioners may consider any request related to questions of law and factual issues related to HAVA when:

- (1) The legal issue is novel, complex and pertains to an unsettled question of law or interpretation of the HAVA statute; or
- (2) The issue relates to an expenditure of HAVA funds that has not been previously addressed by OMB, the grant provisions or the EAC and for which it is determined to have significant policy implications for the implementation of HAVA; or

(3) There has been intervening legislation, rulemaking, or litigation since the EAC last considered the issue; or

(4) The request is contrary to or otherwise inconsistent with prior EAC matters dealing with the same issue.

The EAC Office of General Counsel, in consultation with the Commissioners, shall determine the eligibility of questions presented under these four categories.

QUESTION PRESENTED

The current question presented is the product of separate but related inquiries from state and territorial election offices (grantees). On July, 27 2023 the Commission adopted the Recommendation on the [Allocability of Election Security Measures](#). That Recommendation approved grantees to view allowable cybersecurity enhancements as direct costs and allow full allocability under subsection (F) of HAVA when the costs are reasonable and necessary and when the cost is incurred specifically for the purpose of benefitting election administration.

As a result of this policy, Colorado first asked if grantees could follow a similar structure for accessibility improvements when implementing Federal requirements under the Americans with Disabilities Act (ADA). Subsequently, American Samoa asked if permanent ramps installed on non-public buildings used as polling places could be fully allocated to HAVA.

For this policy question, the questions presented shall be interpreted as follows:

When a grantee is implementing Federal requirements for the administration of elections, such as the ADA, what are the allocation requirements under 2 CFR 200.405?

APPLICABILITY OF POLICY TO QUESTION PRESENTED

The question presented cleanly fits under two of four of the categories of the Funding Decision Policy and is therefore ripe for Commissioner review in accordance with the policy. The legal interpretation is novel, complex, and pertains to an unsettled question on the interpretation of HAVA. While questions from grantees on the allocation of costs are not novel, the specific question on allocation must be considered novel when considering the July 2023 decision on cybersecurity enhancements. The question presented requires a novel interpretation of HAVA 101(b)(1)(B) (subsection (B)) and also impacts HAVA 101(b)(1)(G) (subsection (G)).

Additionally, the requests could be considered inconsistent with prior EAC matters, as there was no previous Commission decision on specific allocation requirements.

ANALYSIS

Allocation Under Election Security Grants

To fully assess the question presented, it is necessary to review allowable costs under HAVA, and how the EAC currently requires grantees to allocate those costs.

HAVA Section 101 sets forth the allowable use of funds for a payment made to grantees under that section.¹ The allowable use of funds includes and is limited to: (A) Complying with the requirements under subchapter III [of HAVA]; (B) Improving the administration of elections for Federal office; (C) Educating voters concerning voting procedures, voting rights, and voting technology; (D) Training election officials, poll workers, and election volunteers; (E) Developing the State plan for requirements payments to be submitted under subpart 1 of part D of subchapter II [of HAVA]; (F) Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes; (G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language; (H) Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.²

Notably, the term “Federal” is only included in subsection (B). The legislative history of HAVA explains that Section 101 of the Act, “provides payments to States to improve the administration of federal elections, designates permitted uses of the funds, and sets the size of the payment at an amount based on the relative size of the voting-age population plus a minimum.”³ This explanatory statement can be interpreted to read that the Act provides payments for the administration of Federal elections and there are designated permitted uses that fall under that broader mandate. Alternatively, it can be interpreted to read that the payments are provided for the improvement of the administration of Federal elections and, in the alternative, other permitted uses of funds.

Distinguishing between the two alternative interpretations of the section’s intended meaning requires further analysis. Congress specifically included “improving the administration of elections for Federal office” as a one of the permitted uses.⁴ If the congressional intent was that all listed permitted uses fall under the broader umbrella of improving the administration of Federal election administration, then this would likely not be included as a subsection alongside other permitted uses. Additionally, the title of Section 101 is “Payments to States for Activities to Improve Administration of Elections.”⁵ Again, if Congress intended that all activities under Section 101 be used specifically for Federal elections only, including the term “Federal” in the title would have been a simple way to make that intent clear. Finally, subsection (A) of Section 101(b)(1) cross-references Title III of HAVA, which contemplates “each voting system used in an election for *Federal* office.”⁶ Here, based on the canons of statutory construction, it would

¹ Help America Vote Act of 2002, 52 U.S.C. § 20901 (2022).

² 52 U.S.C. § 20901(b)(1)(a-h).

³ H.R. Rep. No. 107-730 (2002).

⁴ 52 U.S.C. § 20901(b)(1)(B).

⁵ 52 U.S.C. § 20901.

⁶ 52 U.S.C. § 21081 (emphasis added).

appear clear that Congress contemplated the term “Federal” and specifically included the term only in limited subsections.

If the conclusion in the preceding paragraph is taken as the final interpretation, this would mean that subsections (C) through (H) of HAVA 101(b)(1) are not limited to use on Federal election activities. More specifically, this conclusion would mean grantees could use the funds for a state or local election expenditure if that expenditure is one of the election activities laid out in subsections (C) through (H). This seems clearly contradictory to the purpose of HAVA, which is, “to establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.”⁷

While HAVA Sec. 101 does not use “Federal” in every subsection, Congress clearly intended HAVA to cover Federal elections. Therefore, to interpret that subsections (C) through (H) of HAVA 101(b)(1) may be used for state-specific activities with no benefit to Federal elections would be incorrect. Still, Congress specifically excluded the term “Federal” in these subsections. As a result, the EAC has held that the appropriate resolution to these conflicts of statutory interpretation may be found in the allowability and allocability of expenditures. *An expenditure would not be allowable if it does not contain a benefit to Federal elections.* The EAC determined that costs must be allocated between Federal and non-Federal activities under HAVA subsection (B), as the subsection specifically contains the term “Federal.” Under subsections (C-H), a cost is fully allocable to HAVA funding if it is allowable and intended for election activities. This is so even if there is state-specific election benefit. However, if an expenditure is allowable and confers a benefit to the grantee for a non-election related purpose, then the cost must be allocated based on the proportional benefit between the election and non-election related purposes. Per the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance)⁸, if the proportional benefit to two or more projects cannot be determined because of the interrelationship of the work involved, those costs may be allocated to benefitted projects on any reasonable basis.⁹ The EAC has discretion to determine if an allowable cost may be fully allocated to HAVA.

A cost must be allowable, reasonable, and necessary before getting to the question of allocability. A cost is considered reasonable if, by its nature and amount, it does not exceed what a prudent person would pay under the circumstances. This can be based on frequency of use, actual cost for the products, and other relevant factors.¹⁰ Generally, the necessity of a cost can be questioned when a less expensive but equally effective alternative is available for use.

Application of Question Presented

⁷ "Help America Vote Act of 2002," (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002).

⁸ 2 C.F.R. Part 200.

⁹ 2 C.F.R. § 200.405.

¹⁰ 2 C.F.R. 200.404

Grantees, including Colorado and American Samoa, have expressed difficulty in meeting and/or defining allocation requirements when implementing Federal requirements, such as the Americans with Disabilities Act (ADA). A specific example of this is where the election office is in a shared space with other local offices. Based on the current EAC guidance, a grantee would be required to allocate any accessibility improvements to the general office space amongst the different offices within that building. So, if there were four offices in a building and the election office wanted to build a ramp on that building, only a portion of that cost could be covered with HAVA funds based on current allocation guidance. This would be true even if the other offices present in the building did not request the ramp. Grantees have noted that this is cost-prohibitive and often results in local election offices being unable to implement the project based on the allocation requirement.

The ADA is not the only Federal requirement for grantees. Other requirements can be found, as examples, in the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act of 1984, and the National Voter Registration Act of 1993. HAVA itself requires at least one accessible voting system for persons with disabilities at each polling place and that the accessible voting system provides the same privacy and independence that other voters receive.¹¹

Improvements to accessibility requirements for election offices are *allowable* under HAVA subsection (B). Implementation of any other Federal requirement for the administration of elections are also *allowable* under HAVA subsection (B). Finally, improvements to the accessibility of polling places are certainly *allowable* under HAVA subsection (G).

Current EAC allocation guidance on *allocability* may run contrary to the intent of HAVA funding. HAVA funding is meant to improve the administration of Federal elections. Federal requirements, like the ADA, are put in place by Congress to ensure the effective operations of government functions, including elections. Therefore, it would be logical to assume that the implementation of a Federal requirement impacting the administration of elections is an improvement to the administration of elections for Federal office. Additionally, the Government Accountability Office (GAO) issued guidance that held the EAC has the authority to determine whether a grant expenditure helps “improv[e] the administrations of elections for Federal office” and that the EAC has discretion in interpreting and administering HAVA.¹² GAO further found that the EAC is responsible for determining the reasonableness of any costs incurred and must determine the proper method of cost allocation, which could vary depending on various circumstances and from one grantee to another.¹³ As such, the EAC can determine the proper method of cost allocation under subsection (B).

Under the allocation principles described by OMB, implementation of Federal requirements in furtherance of the administration of elections may reasonably be considered direct costs. As discussed above, HAVA specifically contemplates both accessibility and the general

¹¹ 52 U.S. Code § 21081

¹² 2 U.S. Gov’t Accountability Off., B-333826, Election Assistance Commission—Use of Grant Funds for Security Services 5-6 (April 27, 2022).

¹³ *Id.* at 6.

improvement of the administration of elections for Federal office. Therefore, costs to implement Federal requirements on election administration can be identified specifically with a particular final cost objective and should be considered direct costs.

As direct costs, the EAC must consider the direct cost allocation principles of 2 CFR § 200.405. Costs may be allocated or transferred to benefitted projects on any reasonable documented basis under the Uniform Guidance. When such a cost is incurred specifically to implement Federal requirements on election administration, it would be reasonable to consider that the relative benefits received are entirely election related. Thus, as a direct cost, the cost of implementing Federal requirements for election administration may be fully allocated to HAVA grants when the reasonable documented basis is that it is incurred to enhance election administration through the implementation of Federal requirements. Therefore, these costs would be considered allowable and fully allocable when also reasonable and necessary under this proposed interpretation of HAVA subsection (B).

It is important to note that capital expenditures for general purpose equipment, buildings, and land still require pre-approval from the EAC to be considered direct costs.¹⁴ Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life also require pre-approval from the EAC.¹⁵ Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost above the threshold similarly have the prior written approval of EAC.¹⁶

Although an activity may achieve the end goal of improving the administration of Federal elections, the necessity for that activity could be questioned when a less expensive but equally effective activity is available for use. An expense would likely not be considered reasonable if a less expensive but equally effective alternative was available. Grantees must document how they determined that their implementation is the most reasonable solution. A cost is considered reasonable if, by its nature and amount, it does not exceed what a prudent person would pay under the circumstances. This can be based on frequency of use, actual cost for the products, and other relevant factors. Expenditure towards the implementation of Federal requirements would be analyzed similarly to other expenditures for reasonableness.¹⁷

To demonstrate the results of this policy consideration, the following examples are provided: Under HAVA subsection (B), a local election office would be permitted to allocate the full cost of a ramp or other accessibility improvement to the election office space when implementing ADA requirements so long as those costs are reasonable and necessary. A state would also be permitted to allocate the full cost of implementing NVRA registration requirements under HAVA subsection (B) so long as those costs are reasonable and necessary.

The question from American Samoa, on the use of HAVA funds for improvements on non-public buildings used as polling places, yields a similar but more meticulous answer when applying the

¹⁴ 2 C.F.R. § 200.439.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See* 2 C.F.R. § 200.404.

implementation of Federal requirements as a direct cost under subsection (B). Accessibility improvements to polling places are also an allowable cost under HAVA subsection (G). Implementing those improvements, when pre-approved, would also now be considered fully allocable direct costs under this policy interpretation of subsection (B). However, physical improvements to a non-public building, or even a publicly owned building such as a school that is infrequently used for election administration purposes, would require a more nuanced analysis under the reasonable and necessary standards. As an example, it is likely not reasonable that a temporary polling place would require the installation of a permanent ramp when a less costly solution to implement Federal requirements is available, such as a temporary ramp. EAC OGM would consider the reasonableness of each request on an individual basis.

In sum, the EAC may consider the implementation of Federal requirements for the administration of elections as a direct cost, thus allowing full allocation to HAVA. However, grantees would still need to adhere to general principles of the Uniform Guidance, including, but not limited to, pre-approval for capital expenditures and the requirement that the costs be reasonable and necessary.

RECOMMENDATION

Under the Policy Regarding Authority to Issue Funding Decision on Use of HAVA Funds, the EAC Commissioners should consider whether grantees may consider the cost to implement Federal requirements on the administration of elections as direct costs under HAVA subsection (B). If these expenditures are considered direct costs, it would enable grantees to fully allocate the cost to HAVA funds. As documented in this memorandum, there are important policy considerations involved in this determination, including accessibility improvements that may otherwise be unachievable.

Because HAVA specifically contemplates the overall improvement of the administration of Federal elections, I recommend that the Commission consider the cost to implement Federal requirements pertaining to the administration of elections as direct costs when the costs are determined to be reasonable and necessary.

Sincerely,

Camden Kelliher

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U.S. Election Assistance Commission