



**U.S. ELECTION ASSISTANCE  
COMMISSION  
OFFICE OF INSPECTOR GENERAL**

**FINAL REPORT:**

**ADMINISTRATION OF PAYMENTS RECEIVED  
UNDER THE HELP AMERICA VOTE ACT BY  
THE NEW HAMPSHIRE SECRETARY OF  
STATE**

**MAY 1, 2003 THROUGH SEPTEMBER 30, 2015**

**Report No.  
E-HP-NH-02-16  
August 2017**



U.S. ELECTION ASSISTANCE COMMISSION  
1335 EAST-WEST HIGHWAY, SUITE 4300  
SILVER SPRING, MD 20910  
OFFICE OF THE INSPECTOR GENERAL

**MEMORANDUM**

To: Brian Newby  
Executive Director

A handwritten signature in blue ink that reads "Patricia L. Layfield".

From: Patricia L. Layfield  
Inspector General

Date: August 25, 2017

Subject: Final Performance Audit Report - Administration of Payments Received  
Under the Help America Vote Act by the New Hampshire Secretary of State  
(Assignment Number E-HP-NH-02-16)

We contracted with the independent certified public accounting firm of McBride, Lock & Associates, LLC to audit the administration of payments received under the Help America Vote Act (HAVA) by the New Hampshire Secretary of State (NHSOS).

In its audit, McBride, Lock & Associates, LLC concluded that the Office generally accounted for and expended the HAVA funds in accordance with applicable requirements for the period from May 1, 2003, through September 30, 2015. However the following exceptions were identified:

1. The Office did not have established policies and procedures addressing award administration, financial reporting, allowable costs and cost principles and equipment management.
2. The Office's equipment management is inadequate in regards to the maintenance of property records and the performance of a physical observation of inventory.
3. The Office did not receive approval in advance by the awarding agency for capital expenditures for improvements to a building.
4. The Office did not adequately support all salaries and wages charged to the grant award.

In the report, McBride, Lock & Associates, LLC summarized the NHSOS response to the reported recommendations, as well as their comments on the responses after the recommendations.

The NHSOS office generally disagreed with the findings and recommendations. From the beginning of its receipt of payments of HAVA funds, the NHSOS has contended that the funds paid first by the General Services Administration (GSA) and then by EAC were not grants and were not subject to requirements applicable to grants set forth in Circulars issued by the Office of Management and Budget (OMB). The NHSOS response (Appendix A-1) explains the State's position and the basis for that position in detail.

The OIG disagrees with the NHSOS position and stands by its application of OMB guidance in determining requirements applicable to the HAVA funds during the audit.

The Government Accountability Office (GAO) opined in Comptroller's Decision B-328615 that "Payments made to states under the Help America Vote Act of 2002 (HAVA) are grants." GAO is the authoritative source for federal agencies on matters of Federal appropriations law and their conclusion is unequivocal. The OMB Circulars and the GSA Common Rule define their own applicability:

*OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments, Section A.3 states:*

a. These principles will be applied by all Federal agencies in determining costs incurred by governmental units under Federal awards (including subawards) except those with (1) publicly-financed educational institutions subject to OMB Circular A-21, "Cost Principles for Educational Institutions," and (2) programs administered by publicly-owned hospitals and other providers of medical care that are subject to requirements promulgated by the sponsoring Federal agencies...

*OMB Circular A-102, Grants and Cooperative Agreements with State and Local Governments, states:*

**4. Required Action.** Consistent with their legal obligations, all Federal agencies administering programs that involve grants and cooperative agreements with State, local and Indian tribal governments (grantees) shall follow the policies in this Circular. If the enabling legislation for a specific grant program prescribes policies or requirements that differ from those in this Circular, the provisions of the enabling legislation shall govern.

*GSA Common Rule, 41 CFR Part 105-71—Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments, 105-71.103, Applicability, states:*

(a) General. Sections 105-71.100 through 105-71.152 of this subpart apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §105-71.105.... [the guidance then lists numerous block grant and entitlement programs that are not subject to the Common Rule]

GSA applied the OMB Circulars and the Common Rule from the beginning. In a letter dated July 28, 2003, addressed to the Governor of New Hampshire, GSA's Director of Budget instructed the State that it would be required to conform to OMB Circulars A-87; Circular A-102; the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the "Common Rule"); OMB Circular A-133, *Audits of States, Local*

*Governments, and Non-Profit Organizations*; and, for Title I funds, the Cash Management Improvement Act. In managing the HAVA grant payments, EAC has applied OMB guidance and GSA's Common Rule to the HAVA payments made to all of the states. The EAC OIG has done the same in all of the audits it has conducted of HAVA funds.

In its response, the EAC indicated that it would work with the NHSOS to resolve the issues in the report. The NHSOS complete response is included as Appendix A-1 and the EAC's complete response is included as Appendix A-2.

We would appreciate being kept informed of the actions taken on our recommendations as we will track the status of their implementation. Please respond in writing to the findings and recommendations included in this report by October 20, 2017. Your response should include information on actions taken or planned, targeted completion dates, and titles of officials responsible for implementation.

To fulfill our responsibilities under *Government Auditing Standards*, the Office of Inspector General:

- Reviewed McBride, Lock & Associates, LLC's approach and planning of the audit;
- Evaluated the qualifications and independence of the auditors;
- Monitored the progress of the audit at key points;
- Reviewed the audit report, prepared by McBride, Lock & Associates, LLC to ensure compliance with *Government Auditing Standards*; and
- Coordinated issuance of the audit report.

McBride, Lock & Associates, LLC is responsible for the attached auditor's report and the conclusions expressed in the report. We do not express any opinion on the conclusions presented in McBride, Lock & Associates, LLC's audit report.

The legislation creating the Office of Inspector General requires that we report to Congress semiannually on all audit reports issued, actions taken to implement our recommendations, and recommendations that have not been implemented.

If you have any questions regarding this report, please call me at (301) 734-3104.

Attachment

cc: Director of Grants and Payments

# **Performance Audit Report**

**Administration of Payments Received Under the Help America Vote Act by  
the New Hampshire Secretary of State**

Prepared for

**The United States Election Assistance Commission (EAC)  
Office of Inspector General**

By

**McBride, Lock & Associates, LLC**

July 2017

**McBRIDE, LOCK & ASSOCIATES, LLC**

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CERTIFIED PUBLIC ACCOUNTANTS  
KANSAS CITY

**Performance Audit Report**  
**Administration of Payments Received Under the Help America Vote Act by**  
**the New Hampshire Secretary of State**

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**U.S. Election Assistance Commission  
Performance Audit Report  
Administration of Payments Received Under the Help America Vote Act by  
the New Hampshire Secretary of State**

**EXECUTIVE SUMMARY**

McBride, Lock & Associates, LLC was engaged by the United States Election Assistance Commission (EAC) Office of the Inspector General to conduct a performance audit of the New Hampshire Secretary of State's Office (Office) from inception on May 1, 2003 through September 30, 2015 to determine whether the Office used payments authorized by Sections 101, 102, and 251 of the Help America Vote Act of 2002 (the HAVA) in accordance with HAVA and applicable requirements; accurately and properly accounted for property purchased with HAVA payments and for program income; maintained state expenditures at a level not less than the level maintained in the fiscal year ending prior to November 2000; and met HAVA requirements for Section 251 funds for an election fund and for a matching contribution.

In addition, the Commission requires states to comply with certain financial management requirements, specifically:

- Comply with the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Government*, 41 CFR 105-71, (originally Office of Management and Budget Circular A-102, also known as the "Common Rule").
- Expend payments in accordance with cost principles set forth in *Cost Principles for State and Local Governments*, Office of Management and Budget Circular A-87, (now codified as 2 CFR 225) for establishing the allowability or unallowability of certain items of cost for federal participation.
- Follow the requirements of the Federal Cash Management and Improvement Act.
- Submit detailed annual financial reports on the use of Title I and Title II payments.
- Comply with the provisions of *Audits of States, Local Governments and Non-Profit Organizations* (Office of Management and Budget Circular A-133).

We conducted this performance audit in accordance with *Generally Accepted Government Auditing Standards*. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives.

Based on the audit procedures performed, except for the matters discussed below, we concluded that the Office generally accounted for and expended the Grant funds in accordance with the

requirements mentioned above for the period from May 1, 2003 through September 30, 2015. The exceptions are as follows:

1. The Office did not have established policies and procedures addressing award administration, financial reporting, allowable costs and cost principles and equipment management.
2. The Office's equipment management is inadequate in regards to the maintenance of property records and the performance of a physical observation of inventory.
3. The Office did not receive approval in advance by the awarding agency for capital expenditures for improvements to a building.
4. The Office did not adequately support all salaries and wages charged to the grant award.

We have included in this report as Appendix A, the Secretary of State's written response to the draft report. Such response has not been subjected to the audit procedures and, accordingly, we do not provide any form of assurance on the appropriateness of the response or the effectiveness of the corrective actions described therein.

## **BACKGROUND**

The Help America Vote Act of 2002 (HAVA) created the U.S. Election Assistance Commission (Commission) to assist States and insular areas (hereinafter referred to as States) with improving the administration of federal elections and to provide funds to States to help implement these improvements. The Commission administers payments to States authorized by HAVA under Titles I and II, as follows:

- Title I, Section 101 payments are for activities such as complying with HAVA requirements for uniform and nondiscriminatory election technology and administration requirements (Title III), improving the administration of elections for federal office, educating voters, training election officials and poll workers, and developing a State plan for requirements payments.
- Title I, Section 102 payments are available only for the replacement of punchcard and lever action voting systems.
- Title II, Section 251 requirements payments are for complying with Title III requirements for voting system equipment; and addressing provisional voting, voting information, Statewide voter registration lists, and voters who register by mail.

Title II also requires that states must:

- Have appropriated funds equal to five percent of the total amount to be spent for activities for which requirements payments are made.



- Maintain the expenditures of the State for activities funded by the requirements payment at a level that is not less than the expenditures maintained by the State for the fiscal year ending prior to November 2000.
- Establish an election fund for amounts appropriated by the State for carrying out activities for which requirements payments are made, for the Federal requirements payments received, for other amounts as may be appropriated under law and for interest earned on deposits of the fund.

### **The Awardee – The New Hampshire Secretary of State**

The HAVA funds were awarded to the New Hampshire Secretary of State. The New Hampshire Secretary of State is designated as the chief election officer for the State. The Secretary of State publishes an election procedures manual which provides guidance to local election officials regarding: voter qualification; voting system certification; what constitutes a vote; procedures for military or absentee ballots; tabulating and reporting election results.

### **Help America Vote Act State of New Hampshire State Plan**

The State of New Hampshire's HAVA State Plan committee consisted of 17 individuals representing a cross-section of election stakeholders. The committee was appointed by the chief State Election Official for New Hampshire, the Secretary of State.

The main objectives of the project funded by HAVA, as set forth in the state plan, were to establish a computerized statewide voter registration list, ensure accessibility of voter registration, voting systems, voting information and voting locations, prepare and distribute training resources to voters and election officials, enforce election law.

The New Hampshire Secretary of State's Office established and is maintaining an election fund for the exclusive purpose of carrying out activities of HAVA. The fund is non-lapsing and accrues interest earned. Additionally, the Office has managed all expenditures funded by HAVA and has not distributed any of the requirements payments to the local units of government.

## **AUDIT OBJECTIVES**

The objectives of our audit were to determine whether the Office:

1. Used payments authorized by Sections 101, 102, and 251 of the Grant in accordance with Grant and applicable requirements;
2. Accurately and properly accounted for property purchased with Grant payments and for program income;
3. Met HAVA requirements for Section 251 funds for creation of an election fund, providing required matching contributions, and meeting the requirements for maintenance of a base level of state outlays, commonly referred to as Maintenance of Expenditures (MOE).

In addition to accounting for Grant payments, the Grant requires states to maintain records that are consistent with sound accounting principles that fully disclose the amount and disposition of the payments, that identify the project costs financed with the payments and other sources, and that will facilitate an effective audit. The Commission requires states receiving Grant funds to comply with certain financial management requirements, specifically:

- Comply with the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Government*, 41 CFR 105-71, (originally Office of Management and Budget Circular A-102, also known as the “Common Rule”).
- Expend payments in accordance with cost principles set forth in *Cost Principles for State and Local Governments*, Office of Management and Budget Circular A-87, (now codified as 2 CFR 225) for establishing the allowability or unallowability of certain items of cost for federal participation.
- Follow the requirements of the Federal Cash Management and Improvement Act.
- Submit detailed annual financial reports on the use of Title I and Title II payments.
- Comply with the provisions of *Audits of States, Local Governments and Non-Profit Organizations* (Office of Management and Budget Circular A-133).

## **SCOPE AND METHODOLOGY**

We audited the Grant funds received and disbursed by the Office from May 1, 2003 through September 30, 2015 as shown in the following table:

Description	HAVA Section 101	HAVA Section 102	HAVA Section 251	Total
Funds Received from EAC	\$ 5,000,000	\$ -	\$ 13,021,803	\$ 18,021,803
State Matching Funds	-	-	820,945	820,945
Program Income	1,067,513	-	2,105,717	3,173,230
Total Funds	\$ 6,067,513	\$ -	\$ 15,948,465	\$ 22,015,978
Less Disbursements	(2,291,435)	-	(9,104,836)	(11,396,271)
Fund Balance	\$ 3,776,078	\$ -	\$ 6,843,629	\$ 10,619,707

## **AUDIT RESULTS**

We conducted this performance audit in accordance with *Generally Accepted Government Auditing Standards*. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives.

Based on the audit procedures performed, except for the matters discussed below, we concluded that the Office accounted for and expended the HAVA funds in accordance with the requirements mentioned above for the period from April 10, 2003 through September 30, 2015. The exceptions to applicable compliance requirements are described below.

### **Finding No. 1 – Documentation of Policies and Procedures**

The Office lacks complete, documented policies with respect to internal controls.

Federal regulations, specifically 41 CFR 105-71.120(b)(3) - *Post-Award Requirements/Financial Administration, Standards for Financial Management Systems, Internal Control*, require that:

- a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds, and
- b) Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets.

A key aspect of maintaining an effective system of internal controls is the documentation of related policies and procedures to ensure these criteria are current, approved, communicated, incorporated into training materials, and updated when appropriate.

Key policies and procedures affecting award administration, financial reporting, allowable costs and cost principles, and equipment management have not been addressed in policy and procedure documentation. The Office relies heavily on electronic controls implemented in the accounting system and Administrative Rules established by the State. Due to the few personnel involved in award administration, accounting and financial reporting, policies and procedures have developed informally over the years.

Inadequate documented policies and procedures may result in a lack of awareness and compliance with management's directives, and could allow noncompliance with grant terms and conditions to occur and not be detected.

The Office has had minimal experience with federal awards including the processes associated with federal reporting and administration of significant contracts. Accordingly, the Office has relied on Administrative Rules established by the State. Further, as a small office, much of the training has occurred informally rather than the use of written documentation of policies and procedures.

### **Recommendation**

We recommend that the EAC require the Office to implement procedures to ensure that all significant accounting, financial management and grant administration policies and procedures are documented. Additionally, these procedures should be reviewed and updated on a regular basis.

### **Secretary of State Response:**

Both the finding and recommendation rely on the premise that the EAC has regulatory authority over states in implementing HAVA. On the contrary, 42 USC 15329 prohibits the EAC from issuing any rules, promulgating any regulations, or taking any other action which imposes any requirements on any State.

Further, PL 107-252 Section 253 Condition for Receipt of Funds [42 USC 15403] (c) Methods of compliance Left to Discretion of State.- provides that "The specific choices on the methods of complying with the elements of a State plan shall be left to the discretion of the State."

To further buttress this position, PL 107-252 Section 305 Methods of Implementation Left to Discretion of State [42 USC 15485] provides that "The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State."

This finding lacks any actual findings but has rather stipulated that something "may" happen or something "could" happen simply because processes and procedures chosen to be used by the SOS are not documented. Having documentation will not necessarily improve how the SOS operates as evidenced by the lack of any substantive findings within this entire audit report.

### **Auditor's Response:**

The response does not provide any additional information to refute the conditions that are cited in the finding. No modification is made to the finding as initially stated.

### **Finding No. 2 – Inadequate Equipment Management**

The Office's equipment management is inadequate in regards to the maintenance of property records and the performance of a physical observation of inventory.

*The Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments* 41 CFR § 105-71.132 (d) (The "Common Rule") section states that, (1) "Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds the title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property and (2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years."

The inventory listing as provided did not include the acquisition date, cost of property, location of equipment, percentage of federal participation or ultimate disposition data. The conduct of a physical inventory performed within the past two years was not documented.

The Office was not compliant with federal regulations regarding the maintenance of an inventory listing identifying all required data, and the conduct of a bi-annual physical inventory.

The Office does not have documented policies and procedures regarding the maintenance of inventory.

### **Recommendation**

We recommend that the EAC require the Office to create a documented set of policies and procedures which comply with federal regulations, the inventory listing be expanded to include all federally required fields, and a physical inventory be conducted and documented on at least a biannual basis.

### **Secretary of State Response:**

Refer to paragraphs 1 through 3 in our response to Finding No 1.

SOS completes an annual physical inventory with forms and fields prescribed by DAS. Although those fields do not include the specified source and amount of funding used to acquire the asset, the information is readily available in the database that SOS has created to track all costs expended from the Election Fund and was provided to the auditors prior to the start of the audit. SOS provided a subset of the complete inventory to the auditors as a majority of the assets on the

complete list provided to DAS were unassociated with HAVA. The list of HAVA inventory items that were provided to the auditors were also physically on-site, in one room, and readily available to be inspected. Those assets were inspected by the auditor and were all accounted for.

**Auditor’s Response:**

The response does not provide any additional information to refute the conditions that are cited in the finding. No modification is made to the finding as initially stated.

**Finding No. 3 – Preapproval of Capital Expenditure**

The Office did not receive approval in advance by the awarding agency for capital expenditures for improvements to a building.

Office of Management and Budget Circular No. A-87, Cost Principles for State, Local, and Indian Tribal Governments, Attachment B.15.a.(1) defines capital expenditures as “the acquisition cost of capital assets (equipment, buildings, land), or expenditures to make improvements to capital assets that materially increase their value or useful life.”

Further, OMB A-87 Attachment B.15.b.(3) states, “Capital expenditures for improvements to land, buildings or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior approval of the awarding agency.”

Chapter 240:1, X, Laws of 2003 included \$1 million in HAVA funds for a 4,145 square-foot HAVA facility on the second floor of the building. The Office, did not request federal pre-approval to use HAVA funds for the Capital Expenditure.

Without prior approval of the awarding agency, the \$1 million in HAVA funds for the HAVA facility is considered to be unallowable as a direct cost.

The Office contends that in its reading of the federal HAVA law, the Office is not required to comply with OMB A-87 Attachment B.15.b.(3).

**Recommendation**

We recommend that the EAC address and resolve the following recommendations that the Office:

- (a) Transfer into the election fund \$1 million in HAVA funds for the unallowable Capital Expenditure as cited above.
- (b) Seek approval for the \$1 million in HAVA funds spent on the HAVA facility.

## **Secretary of State Response:**

Refer to paragraphs 1 through 3 in our response to Finding No 1.

The SOS is unaware of any lawfully adopted regulation that required pre-approval of HAVA funds for a capital expense. Even assuming there was, and without waiving the right to challenge the lawfulness of any such requirement, the SOS has taken steps to obtain retroactive approval from the EAC. That request has been pending before the EAC since 2011. Thus, it has satisfied recommendation (b).

The auditor cites OMB A-87 for the proposition that the State was required to obtain pre-approval for the use of HAVA funds to construct a HAVA Facility. As discussed in detail in the accompanying letter and Attachments, the EAC is statutorily prohibited from adopting regulations or rules which impose any requirements on the states. OMB A-87 clearly falls within that category. OMB A-87 regulation requires the federal agency to explicitly adopt and issue regulations quickly. It has been over 13 years since the EAC held its first meeting. (See Attachment A - Timeline #3 & #9) On August 1, 2017, EAC staff made it clear in Funding Advisory Opinion FAO-08-07 that the EAC “had not yet published the Common Rule in the Code of Federal Regulations (CFR).”

While EAC staff generated FAQs in 2006 suggesting that pre-approval was required for expenditure of HAVA funds on capital expenses, there is no evidence that that requirement was lawfully adopted by the EAC. As a federal agency, the EAC is subject to the federal “The Government in the Sunshine Act”, the “Administrative Procedure Act”, and the “Freedom of Information Act”. The FAQs were (a) not adopted by the EAC Commissioners in a “Public” vote in FY 2004, (b) cannot be found in the Federal Register in association with the EAC, and (c) was not subject to public comment.

On June 11, 2004, the EAC voted in favor of “Application of OMB Circular Financial Management Controls to Title II Requirements.” Even if that vote was lawful, it only applied to Title II disbursements. The HAVA facility that is the subject of this audit finding was funded exclusively with Title I funds and thus would not be governed by that vote.

In a March 18, 2009 letter, the EAC Executive Director told the SOS that the GSA, the EAC predecessor funding agency, in a letter dated July 28, 2004, informed the Governor of New Hampshire that the Common Rule and the OMB circular A-87 applied to HAVA funds. The SOS has been unable to confirm this. However, the GSA’s Catalogue of Federal Domestic Assistance (CFDA) site mentions no such requirement and the SOS has found no such reference to a HAVA rulemaking process by GSA in the Federal Register. (See Attachment B - OMB Circulars).

Well before the EAC discussed the applications of the OMB Circulars, the SOS was immersed in planning for the implementation of HAVA. (See Attachment A – Timeline #11). A significant piece of that planning was how to train all of the election officials in the State: 300 town and ward moderators, 236 town and city clerks, 77 ward clerks, about 900 selectmen, approximately 900 supervisors of the checklist and registrars, and about 1,600 inspectors of elections fell on the SOS. (Among the 50 states, New Hampshire has by far the largest number of elected election officials, at about 2,400.) Without training facilities, achieving HAVA compliance would have been

extremely difficult, thus, the SOS included plans for such a facility in its initial plans. By using the HAVA Facility, the State has been able to provide hands-on election official computer training to 2,246 trainees in 141 days of training, as well as many other HAVA training and HAVA coordination events. The State expects to train another 350 election officials at the HAVA Facility before the end of 2017.

Spending funds to build the HAVA Facility was reasonable, practical, and justifiable. If there is any burden on the state to establish that the \$1 million capital expenditure for a HAVA training facility was allocable, allowable, and reasonable under PL 107-252, the SOS has supplied extensive justification that is more than adequate to explain its decisions. New Hampshire adopted a method of complying with HAVA statutes that, assuming a minimum of 40 years of useful life of the HAVA Facility, would cost 20% of what would have been spent if a rental option had been chosen. Adopting the rental option would have cost the Election Fund about \$5 million whereas the capital expenditure approach cost only \$1 million. This \$4 million savings is material when considering that Congress is unlikely to appropriate more than \$18 million in federal funds to New Hampshire for HAVA; and HAVA obligations are expensive and are expected to last indefinitely. Among the options available, the state has clearly selected the mechanism to provide meeting, office, storage, staging, and training facilities in the most prudent and cost effective manner available. (See Attachment C - Justification & Attachment D - Letter to EAC)

After it became clear that the EAC would assert that the OMB Circular A-87 applied, the SOS attempted to gain retroactive approval for the capital expenditure for the HAVA Facility in a cooperative manner. The following timeline demonstrates New Hampshire's good faith effort to address and resolve the matter.

- On February 17, 2009, the EAC sent a letter stating, "Concerning the failure to obtain preapproval for the building alternations, the EAC will consider retroactive approval if the Department submits the following information: (total costs, HAVA costs, HAVA funds source, justification, basis for allocation, etc.)" (See Attachment A - Timeline #31)
- On May 1, 2009, the Secretary of State's office sent a letter to the EAC initiating the approval process for the \$1 million capital expenditure and supplying justification. (See Attachment A - Timeline #35 & Attachment D - Letter to EAC)
- On August 10, 2010, the EAC Director of Grants (sic) asked about conducting a site visit prior to a potential "ratification." He mentioned his hope to "get the ratification in front of the Commissioners by early September." (See Attachment A - Timeline #39)
- On September 9, 2010, two EAC staffs conducted a site visit at the HAVA facility, interviewing 7 individuals familiar with the construction and use of the HAVA facility to address HAVA requirements. (See Attachment A - Timeline #40)
- On September 13, 2010, the State sent supporting information about the use of the HAVA Facility, as well as the uncharged use of the rest of the Archives Building for improving elections. The State included sample announcements of training conducted at the HAVA



facility since 2007. (See Attachment A - Timeline #41 & Attachment E - Unreimbursed Assistance)

- On January 4, 2011, the EAC Director of Grants (sic) replied, “EAC has not made a decision. I submitted my recommendation to allow the expense, but we lost our quorum before it went to a Commissioner vote... We’ll be in touch.” (See Attachment A – Timeline #43)
- On December 14, 2014, a quorum of EAC Commissioners was restored. No action was taken on ratifying New Hampshire’s HAVA Facility. (See Attachment A - Timeline #42)
- On July 21, 2017, the EAC Director of Grants (sic) advised the SOS that such EAC ratification process must wait until after the EAC IG audit is completed. (See Attachment A - Timeline #51)

A summary of the justification for HAVA Facility appears in Attachment C - Justification that allowability, reasonableness, and allocability - concepts appearing in Federal “guidance.”

The SOS has supported the \$1 million capital expenditures for the HAVA Facility in a May 1, 2009 letter to the EAC. (Attachment D - Letter to EAC & Attachment E - Unreimbursed Assistance)

With a great deal of information, a site visit, and a number of interviews already conducted, the next action, a ratification (retroactive approval) of the \$1 million capital expenditure, would appear to be in the EAC Commissioner’s hands. The SOS, under no obligation, is happy to answer any remaining questions that the EAC may have in order to obtain EAC ratification.

#### **Auditor’s Response:**

The Office’s response indicates that a request for an approval of the capital expenditure has been in place since 2011. Additional information has been provided relevant to the conditions cited in the finding. The EAC should consider the request made in 2011 as part of the corrective action needed to resolve the finding.

#### **Finding No. 4 – Inadequate Payroll Documentation**

The Office had four instances of not having adequate support of salaries and wages.

Office of Management and Budget Circulars and Guidance, Cost Principles for State, Local, and Indian Tribal Governments 2 CFR § 225, Appendix B.8.h.(3) states that “Where employees are expected to work solely on a single Federal award or cost objective, charges for their salaries and wages will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification. These certifications will be prepared at least semi-annually and will be signed by the employee or supervisory official having first-hand knowledge of the work performed by the employee.”

Appendix B.8.h.(4), states that “Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation which meets the standards in subsection (5)... Such documentary support will be required where employees work on... (b) A Federal award and a non Federal award”

Appendix B.8.h.(5), states that “Personnel activity reports or equivalent documentation must meet the following standards: (a) They must reflect an after the fact distribution of the actual activity of each employee, (b) They must account for the total activity for which each employee is compensated, (c) They must be prepared at least monthly and must coincide with one or more pay periods, (d) They must be signed by the employee, and (e) Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to Federal awards but maybe used for interim accounting purposes.”

14 employees were selected from 12 different payroll periods from award inception through September 30, 2015. There were two instances of the Office not maintaining a timesheet for an employee. There were two instances of the Office not maintaining an OMB Circular A-87 work effort certification. There was one instance of the timesheet not having a supervisor signature.

It was determined that payroll costs totaling \$2,446 were unsupported.

Semi-annual certifications are maintained for most employees. However, the timesheets did not provide an after-the-fact distribution for part-time employees. In some instances, approved timesheets were not maintained for some of the part-time employees.

### **Recommendation**

We recommend that EAC address and resolve the following recommendations that the New Hampshire Secretary of State’s Office:

- 1) Transfer into the election fund \$2,446 for the questioned payroll charges as cited above.
- 2) Implement written policies to ensure that all employees who expend efforts on Federal activities record their time in a manner consistent with federal regulations and that these records are maintained.

### **Secretary of State Response:**

It is important to put this finding in context. This audit covers a period of 13 years, which equates to approximately 8,788 pay periods (13 years x 26 pay periods per year). In that context, this finding is *de minimis*. Moreover, the deficiencies all stem from the mid-to-late 2000’s—more than 10 years ago. The lack of any more recent deficiencies strongly suggests that the problems have been resolved.

Two of the records cited in this finding are related to missing a time sheet; one from 2005 and one from 2006. Since the payroll officer and supervisors of those employees are still employed by

SOS, both the payroll officer and supervisors are prepared to execute witnessed affidavits testifying to the valid nature of the payments.

One item is solely based on the name missing from the six-month affirmations for the second half of 2007. These affirmations are based on the unrecognized authority of the OMBs, but were created voluntarily to assist in an eventual audit. These documents can easily be amended to include the missing information.

One employee's timecard did not have a supervisor's signature for a pay period. Since the payroll officer and supervisors of that employee are still employed by SOS, the payroll officer and supervisors are prepared to execute witnessed affidavits testifying to the valid nature of the payments.

**Auditor's Response:**

The proposed corrective actions are relevant regarding the missing time sheets, affirmations and timecard signature and should be considered by the Commission in the resolution process.

We provided a draft of our report to the appropriate individuals of the Office of the New Hampshire Secretary of State. We considered any comments received prior to finalizing this report.

The Office responded to the report's findings and recommendations on August 18, 2017. The EAC responded on July 20, 2017 and stated they will work with the Secretary's Office to ensure appropriate corrective actions are taken. The Office's complete response is included as Appendix A-1 and the EAC's complete response as Appendix A-2.

McBride, Lock & Associates, LLC performed the related audit procedures between May 3, 2016 and July 17, 2017.

*(Original Signed by McBride, Lock & Associates, LLC)*

McBride, Lock & Associates, LLC  
July 17, 2017

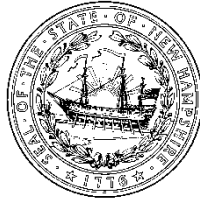
## **APPENDIX A-1**

### **Response of the New Hampshire Secretary of State to the Draft Report**

William M. Gardner  
*Secretary of State*

**NEW HAMPSHIRE  
DEPARTMENT OF STATE**

Robert P. Ambrose  
*Senior Deputy Secretary of  
State*



David M. Scanlan  
*Deputy Secretary of State*

August 18, 2017

Patricia L. Layfield, Inspector General  
U.S. Election Assistance Commission  
Office of the Inspector General  
1335 East-West Highway, Suite 4300  
Silver Springs, MD 20910

Dear Ms. Layfield,

The Office of the New Hampshire Secretary of State is pleased to have reviewed and provide the following comments on the draft report entitled *Performance Audit Report - Administration of Payments Received Under the Help America Vote Act by the New Hampshire Secretary of State*, dated July, 2017.

This Office is proud of its accomplishments in the implementation of the Help America Vote Act (ACT), and its furtherance of the goals underlying that ACT within the State of New Hampshire. In keeping with New Hampshire tradition, the Office has expended the federal funds frugally, in a fiscally sound manner, to ensure their most efficient use. While we disagree with the findings in the audit, we believe that the report, as a whole, reflects sound management of the funds.

The four findings and associated recommendations in the audit are all premised on the assumption that the US Election Assistance Commission (EAC) has the authority to obligate the states to the regulations beyond those set forth in the ACT itself; specifically regulations set forth in 41 CR 105-71, Office of Management and Budget (OMB) Circulars A-87, A-133, and A-102. The New Hampshire Department of State (SOS) has long objected to that premise, as outlined below and explained in detail in the attachments. Section 209 of HAVA states that the EAC "shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a))."

In response to that objection, the EAC has asserted that since it was yet to be formed when the first HAVA payment was released to the states by the General Services Administration (GSA), the promulgated rules of the GSA allow the OMB circulars to be used for at least Title I funds. (See Attachment B - OMB Circulars #6). However, while the GSA was statutorily obligated to issue the first payment, HAVA, section 902 states that that those first disbursements are to be considered

payments made by the EAC – which is statutorily prohibited from issuing any rule or promulgating any regulation.

OMB Circulars are not binding on the recipient of HAVA funds unless and until the EAC implements regulations incorporating those Circulars. Even then, if a statute passed by Congress prescribes policies or procedures that differ from those in the Circular, the provisions of the statute govern. (OMB Circular A-87 Section 1.4 - Relationship of Circular A-87 to Agency Regulations and Federal Statutes) ([https://www.dol.gov/oasam/boc/ASMB\\_C-10.pdf](https://www.dol.gov/oasam/boc/ASMB_C-10.pdf))

Despite that statutory prohibition, in 2004, the EAC purportedly voted to adopt the OMB Circulars as applicable to Title II funds. However, that vote was conducted in a “Tally” forum, rather than a “Public” form, in violation of the Freedom of Information Act, The Government in the Sunshine Act and the Administrative Procedure Act. It is unknown whether the EAC voted to adopt OMB Circulars as applicable to Title I funds. New Hampshire does not recognize such extra-legal action in opposition to 42 USC 15329. (See Attachment A - Timeline #11)

Two of the audit findings characterize the HAVA disbursements to New Hampshire as “grants” and refer to federal regulations governing the use and accounting for grant funds. The SOS disputes both that characterization and the application of those regulations. While HAVA contains provisions for both payments and grants, the disbursements made under Title I and Title II are consistently referred to as payments or requirements payments.

Indeed, on September 25, 2008, the GAO released Decision B-316915 which referred to Requirements Payments as “statutory formula payments.” The decision stated that if a state were to file a statement certifying it had met certain preconditions, the funds were required to be paid. Nowhere in the opinion was the word “grant” used in the discussion of funds that were to be paid or considered to be paid by the EAC.

In July, 2009, the National Association of Secretaries of State (NASS) adopted a resolution to request the EAC respect the letter and spirit of HAVA law, finding that 1) Under HAVA, a “payment” is not a “grant,” and a “grant” is not a “payment;” and 2) In effectuating its duties under HAVA, the EAC should create an accurate administrative record by using the term “payment” when the federal law means “payment”, and it should use the term “grant” when the federal law means “grant.” On July 16, 2014, NASS reaffirmed its position by reauthorizing and adopting this resolution. (See Attachment F - NASS Resolution)

This Office acknowledges that on May 9, 2017, the GAO released Decision B-328615 that HAVA Payments may be referred to as “grants.” While we disagree with the analysis and conclusion, it does not alter our position that the EAC’s application of federal regulations beyond those set forth in the ACT itself is unlawful with respect to the State’s use and accounting of HAVA funds.

SOS has fully complied with the requirements set forth in Section 902(a) of the ACT, which requires that it “keep such records with respect to the payment as are consistent with sound accounting principles, including records which fully disclose the amount and disposition by such recipient of funds, the total cost of the project or undertaking for which such funds are used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.” It has always spent HAVA funds with attention to allowability, applicability, and reasonableness. It has complied with applicable NH law in

respect to budgets, estimated revenues, appropriations, revenues received, and expenditures made. All transactions have been completed using state systems controlled by the Department of Administrative Services (DAS) and used by the NH State Comptroller to issue the consolidated annual financial report. At no time has DAS notified SOS that any transactions were submitted that reflected negatively on that report.

Since 1986, New Hampshire is one of a very few states that has not been sued by the federal Department of Justice for noncompliance with federal laws. The reason is clear; SOS takes HAVA law seriously, has historically operated in good faith in these matters, and has spent countless hours with minimal staff complying with the HAVA mandates all within the timeline prescribed by HAVA law. The balance in our election fund remains greater than fifty percent (50%) of the requirements payments and/or payments received.

We appreciate the courtesies that the auditors extended to my staff during their visit. If you have any questions about our response, please call me at (603) 271-3242.

Sincerely,

A handwritten signature in cursive script, appearing to read "William M. Gardner".

William M. Gardner, Secretary of State

**SOS Response to Finding No. 1 - Documentation of Policies and Procedures:**

Both the finding and recommendation rely on the premise that the EAC has regulatory authority over states in implementing HAVA. On the contrary, 42 USC 15329 prohibits the EAC from issuing any rules, promulgating any regulations, or taking any other action which imposes any requirements on any State.

Further, PL 107-252 Section 253 Condition for Receipt of Funds [42 USC 15403] (c) Methods of compliance Left to Discretion of State.- provides that “The specific choices on the methods of complying with the elements of a State plan shall be left to the discretion of the State.”

To further buttress this position, PL 107-252 Section 305 Methods of Implementation Left to Discretion of State [42 USC 15485] provides that “The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.”

This finding lacks any actual findings but has rather stipulated that something “may” happen or something “could” happen simply because processes and procedures chosen to be used by the SOS are not documented. Having documentation will not necessarily improve how the SOS operates as evidenced by the lack of any substantive findings within this entire audit report.

**SOS Response to Finding No 2 - Inadequate Equipment Management:**

Refer to paragraphs 1 through 3 in our response to Finding No 1.

SOS completes an annual physical inventory with forms and fields prescribed by DAS. Although those fields do not include the specified source and amount of funding used to acquire the asset, the information is readily available in the database that SOS has created to track all costs expended from the Election Fund and was provided to the auditors prior to the start of the audit. SOS provided a subset of the complete inventory to the auditors as a majority of the assets on the complete list provided to DAS were unassociated with HAVA. The list of HAVA inventory items that were provided to the auditors were also physically on-site, in one room, and readily available to be inspected. Those assets were inspected by the auditor and were all accounted for.

**SOS Response to Finding No 3 – Preapproval of Capital Expenditure:**

Refer to paragraphs 1 through 3 in our response to Finding No 1.

The SOS is unaware of any lawfully adopted regulation that required pre-approval of HAVA funds for a capital expense. Even assuming there was, and without waiving the right to challenge the lawfulness of any such requirement, the SOS has taken steps to obtain retroactive approval from the EAC. That request has been pending before the EAC since 2011. Thus, it has satisfied recommendation (b).

The auditor cites OMB A-87 for the proposition that the State was required to obtain pre-approval for the use of HAVA funds to construct a HAVA Facility. As discussed in detail in the accompanying letter and Attachments, the EAC is statutorily prohibited from adopting regulations



or rules which impose any requirements on the states. OMB A-87 clearly falls within that category. OMB A-87 regulation requires the federal agency to explicitly adopt and issue regulations quickly. It has been over 13 years since the EAC held its first meeting. (See Attachment A - Timeline #3 & #9) On August 1, 2017, EAC staff made it clear in Funding Advisory Opinion FAO-08-07 that the EAC “had not yet published the Common Rule in the Code of Federal Regulations (CFR).”

While EAC staff generated FAQs in 2006 suggesting that pre-approval was required for expenditure of HAVA funds on capital expenses, there is no evidence that that requirement was lawfully adopted by the EAC. As a federal agency, the EAC is subject to the federal “The Government in the Sunshine Act”, the “Administrative Procedure Act”, and the “Freedom of Information Act”. The FAQs were (a) not adopted by the EAC Commissioners in a “Public” vote in FY 2004, (b) cannot be found in the Federal Register in association with the EAC, and (c) was not subject to public comment.

On June 11, 2004, the EAC voted in favor of “Application of OMB Circular Financial Management Controls to Title II Requirements.” Even if that vote was lawful, it only applied to Title II disbursements. The HAVA facility that is the subject of this audit finding was funded exclusively with Title I funds and thus would not be governed by that vote.

In a March 18, 2009 letter, the EAC Executive Director told the SOS that the GSA, the EAC predecessor funding agency, in a letter dated July 28, 2004, informed the Governor of New Hampshire that the Common Rule and the OMB circular A-87 applied to HAVA funds. The SOS has been unable to confirm this. However, the GSA’s Catalogue of Federal Domestic Assistance (CFDA) site mentions no such requirement and the SOS has found no such reference to a HAVA rulemaking process by GSA in the Federal Register. (See Attachment B - OMB Circulars).

Well before the EAC discussed the applications of the OMB Circulars, the SOS was immersed in planning for the implementation of HAVA. (See Attachment A – Timeline #11). A significant piece of that planning was how to train all of the election officials in the State: 300 town and ward moderators, 236 town and city clerks, 77 ward clerks, about 900 selectmen, approximately 900 supervisors of the checklist and registrars, and about 1,600 inspectors of elections fell on the SOS. (Among the 50 states, New Hampshire has by far the largest number of elected election officials, at about 2,400.) Without training facilities, achieving HAVA compliance would have been extremely difficult, thus, the SOS included plans for such a facility in its initial plans. By using the HAVA Facility, the State has been able to provide hands-on election official computer training to 2,246 trainees in 141 days of training, as well as many other HAVA training and HAVA coordination events. The State expects to train another 350 election officials at the HAVA Facility before the end of 2017.

Spending funds to build the HAVA Facility was reasonable, practical, and justifiable. If there is any burden on the state to establish that the \$1 million capital expenditure for a HAVA training facility was allocable, allowable, and reasonable under PL 107-252, the SOS has supplied extensive justification that is more than adequate to explain its decisions. New Hampshire adopted a method of complying with HAVA statutes that, assuming a minimum of 40 years of useful life of the HAVA Facility, would cost 20% of what would have been spent if a rental option had been chosen. Adopting the rental option would have cost the Election Fund about \$5 million whereas the capital expenditure approach cost only \$1 million. This \$4 million savings is material when considering that Congress is unlikely to appropriate more than \$18 million in federal funds to New Hampshire

for HAVA; and HAVA obligations are expensive and are expected to last indefinitely. Among the options available, the state has clearly selected the mechanism to provide meeting, office, storage, staging, and training facilities in the most prudent and cost effective manner available. (See Attachment C - Justification & Attachment D - Letter to EAC)

After it became clear that the EAC would assert that the OMB Circular A-87 applied, the SOS attempted to gain retroactive approval for the capital expenditure for the HAVA Facility in a cooperative manner. The following timeline demonstrates New Hampshire's good faith effort to address and resolve the matter.

- On February 17, 2009, the EAC sent a letter stating, "Concerning the failure to obtain preapproval for the building alternations, the EAC will consider retroactive approval if the Department submits the following information: (total costs, HAVA costs, HAVA funds source, justification, basis for allocation, etc.)" (See Attachment A - Timeline #31)
- On May 1, 2009, the Secretary of State's office sent a letter to the EAC initiating the approval process for the \$1 million capital expenditure and supplying justification. (See Attachment A - Timeline #35 & Attachment D - Letter to EAC)
- On August 10, 2010, the EAC Director of Grants (sic) asked about conducting a site visit prior to a potential "ratification." He mentioned his hope to "get the ratification in front of the Commissioners by early September." (See Attachment A - Timeline #39)
- On September 9, 2010, two EAC staffs conducted a site visit at the HAVA facility, interviewing 7 individuals familiar with the construction and use of the HAVA facility to address HAVA requirements. (See Attachment A - Timeline #40)
- On September 13, 2010, the State sent supporting information about the use of the HAVA Facility, as well as the uncharged use of the rest of the Archives Building for improving elections. The State included sample announcements of training conducted at the HAVA facility since 2007. (See Attachment A - Timeline #41 & Attachment E - Unreimbursed Assistance)
- On January 4, 2011, the EAC Director of Grants (sic) replied, "EAC has not made a decision. I submitted my recommendation to allow the expense, but we lost our quorum before it went to a Commissioner vote... We'll be in touch." (See Attachment A - Timeline #43)
- On December 14, 2014, a quorum of EAC Commissioners was restored. No action was taken on ratifying New Hampshire's HAVA Facility. (See Attachment A - Timeline #42)
- On July 21, 2017, the EAC Director of Grants (sic) advised the SOS that such EAC ratification process must wait until after the EAC IG audit is completed. (See Attachment A - Timeline #51)

A summary of the justification for HAVA Facility appears in Attachment C - Justification that addresses allowability, reasonableness, and allocability - concepts appearing in Federal "guidance."

The SOS has supported the \$1 million capital expenditures for the HAVA Facility in a May 1, 2009 letter to the EAC. (Attachment D - Letter to EAC & Attachment E - Unreimbursed Assistance)

With a great deal of information, a site visit, and a number of interviews already conducted, the next action, a ratification (retroactive approval) of the \$1 million capital expenditure, would appear to be in the EAC Commissioner's hands. The SOS, under no obligation, is happy to answer any remaining questions that the EAC may have in order to obtain EAC ratification.

**SOS Response to Finding No 4 - Inadequate Payroll Documentation:**

It is important to put this finding in context. This audit covers a period of 13 years, which equates to approximately 8,788 pay periods (13 years x 26 pay periods per year). In that context, this finding is *de minimis*. Moreover, the deficiencies all stem from the mid-to-late 2000's—more than 10 years ago. The lack of any more recent deficiencies strongly suggests that the problems have been resolved.

Two of the records cited in this finding are related to missing a time sheet; one from 2005 and one from 2006. Since the payroll officer and supervisors of those employees are still employed by SOS, both the payroll officer and supervisors are prepared to execute witnessed affidavits testifying to the valid nature of the payments.

One item is solely based on the name missing from the six-month affirmations for the second half of 2007. These affirmations are based on the unrecognized authority of the OMBs, but were created voluntarily to assist in an eventual audit. These documents can easily be amended to include the missing information.

One employee's timecard did not have a supervisor's signature for a pay period. Since the payroll officer and supervisors of that employee are still employed by SOS, the payroll officer and supervisors are prepared to execute witnessed affidavits testifying to the valid nature of the payments.

**The following documents are attached and are part of our response:**

- Attachment A - Timeline
- Attachment B - OMB Circulars
- Attachment C - Justification
- Attachment D - Letter to EAC
- Attachment E - Unreimbursed Assistance
- Attachment F - NASS Resolution
- Attachment G - Administrative Procedure Act
- Attachment H - Sunshine Act

## Attachment A - Timeline

1. **Oct. 29, 2002** – Effective date of Help America Vote Act of 2002.
  - a. HAVA Section 203 - Appointments of the members of the Commission shall be made not later than 120 days after the date of the enactment of this Act, i.e. **February 26, 2003**.
  - b. Section 209: “Limitation on Rulemaking Authority”
  - c. Section 253(c): “The specific choices on the methods of complying with the elements of a State plan shall be left to the discretion of the State
  - d. Section 301: Required compliance: States must implement accessible voting system by Jan. 1, 2006.
  - e. Section 303: Required compliance: States must complete statewide voter registration system by January 1, 2004, unless they obtain a waiver (which extends the deadline to not later than January 1, 2006.
  - f. Section 305: “Methods of implementation Left to Discretion of States”.
  - g. Section 902: “Each recipient of the grant or other payment made under this Act shall keep such records with respect to the payment as are consistent with sound accounting principles, including records which fully disclose the amount and disposition by such recipient of funds, the total cost of the project or undertaking for which such funds are used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.”
2. **December 13 and 14, 2002** – At a Washington DC informational meeting for the states to discuss the recently-adopted HAVA legislation, Congressional staff from the House Administration Committee, which was responsible for drafting HAVA, advised the states to immediately set aside matching funds and to proceed with development of their HAVA State Plans, given the tight deadlines for compliance.
3. **February 26, 2003** – The HAVA deadline to establish the EAC. “The appointments of the members of the Commission shall be made not later than 120 days after the date of the enactment of (HAVA).” The EAC held its first meeting in March of 2004.
4. **April 29, 2003** – GSA target date for states to complete applications for Title I funds. See **Attachment B** from <http://www.federalgrantswire.com> , site referenced in GSA’s CFDA website.

## Attachment A - Timeline

5. **May 14, 2003** – Secretary of State received and deposited \$5 million in HAVA Title I funds.
6. **June 30, 2003** – Effective date of HB 25, New Hampshire’s two-year capital budget for fiscal years 2004-2005. This bill called for spending \$1 million in federal funds to create the HAVA facility as part of a \$2.5 million capital improvement to the Department of State’s Archives and Records Management building.
7. **July 15, 2003** - Effective date of HB 577, adopted by the 2003 Legislature with an effective date July 15, 2003, created the Election Fund (RSA 5:6-d.) This legislation states, “The secretary of state shall not expend any monies in the election fund unless the balance in the fund following such expenditures shall be at least 20 times the estimated annual cost of maintaining the programs established to comply with the Help America Vote Act of 2002.” This law placed constraints on spending which required very careful long term planning and budgeting aimed at keeping costs to a minimum.
8. **September 30, 2003** - The SOS submitted to the EAC its 2003 HAVA State Plan, which was later published in the Federal Register by the EAC. Under HAVA law, this enabled the State to receive the HAVA requirements payments.
9. **March 23, 2004** - The EAC held its initial organizational meeting and elected officers.
10. **March 25, 2004** – GSA’s Catalogue of Federal Domestic Assistance (“CFDA”) website indicated HAVA Title I funds constituted “**Direct Payments for Specified Use.**”

39.011 - Election Reform Payments

Page 1 of 5

**CFDA**  
The Catalog of Federal Domestic Assistance

[Home](#) | [FAQ](#) | [Privacy](#) | [Printer Friendly Version of 39.011](#)

39.011 Election Reform Payments

**FEDERAL AGENCY:**  
GENERAL SERVICES ADMINISTRATION

**AUTHORIZATION:**  
Public Law 107-252, October 29, 2002; 42 U.S.C. 15301

**OBJECTIVES:**  
The purpose of the Title 1, Section 101 of the Help America Vote Act of 2002, is to improve the administration of elections for Federal office. The purpose of Section 102 is to replace a punch card voting system or a lever voting system.

**TYPES OF ASSISTANCE:**  
Direct Payments for Specified Use.

- a. Under the title of “Regulations, Guidelines and Literature”, the CFDA states:

## Attachment A - Timeline

- i. “Title 1, Part 1 of Subtitle D of Title II (Sections 251-257), Title III of Public Law 107 – 252, the Help American Vote Act of 2002, Section 101, Section 103, Section 301 and Section 906.” There is no mention of a need to certify compliance with OMB Circulars.
  - b. Under the heading entitled “**Audits**”, the CFDA states as follows:
    - i. “Title IX, Section 902, states that with respect to any grant or payment made in accordance with this Act by GSA, the Election Assistance Commission must be regarded as the office making the grant or payment, for the purposes of audits. In accordance with the provisions of OMB Circular A-133 (Revised June 24, 1997), “Audits of State, Local Governments, and Nonprofit Organizations,” nonfederal entities that expend financial assistance of \$300,000 or more a year in Federal awards will have a single or a program-specific audit conducted for that year. Nonfederal entities that expend less than \$300,000 a year in Federal awards are exempt from Federal audit requirements for that year, except as noted in Circular Non A-133.”
- 11. June 11, 2004** – EAC Commissioners voted in a “tally vote” in favor of “Application of OMB Circular Financial Management Controls to Title II Requirements,” according to the EAC’s Fiscal Year 2004 Annual Report. This “voting forum” was not “Public”, according to the EAC’s 2004 Annual Report. The “tally vote” event, however, qualifies as a “meeting” in the federal Sunshine Act, which describes a meeting as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.” No meeting agenda or meeting minutes are available on the EAC website for this “tally vote.”

## Attachment A - Timeline

<b>U.S. EAC FISCAL YEAR 2004 VOTES</b>			
<b>Topic</b>	<b>Votes in Favor</b>	<b>Voting Forum</b>	<b>Date Certified</b>
1. Election of 2004 Officers	4	Public	03/23/04
2. Letters to State Chief Executives Regarding Statements of Certifications for HAVA Title II Requirements Payments	4	Tally	05/04/04
3. Procedures for Voting by Circulation	4	Tally	05/04/04
4. Recommended Process for Handling Certifications from the States (HAVA Sec.253)	4	Tally	06/08/04
5. Recommended Actions Regarding EAC June 3 Hearing in Chicago	4	Tally	06/08/04
6. Identification of Financial Disclosure Filers on Standards Board, Board of Advisors, and Technical Guidelines Development Committee	4	Tally	06/10/04
7. Approval of Recommended Joint Appointments to Technical Guidelines Development Committee; Letter Regarding Same to NIST Director	4	Tally	06/10/04
8. Application of OMB Circular Financial Management Controls to Title II Requirements Payments	4	Tally	06/11/04
9. Approval of Disbursement of HAVA Title II Requirements Payments to 21 States	4	Tally	06/14/04
10. Approval of FACA Charters for Standards Board and the Board of Advisors	4	Tally	06/16/04
11. Disbursements of HAVA Title II Requirements Payments to Four States	4	Tally	06/16/04

U.S. Election Assistance Commission Fiscal Year 2004 Annual Report

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12. **July 13, 2004** – In a letter dated March 18, 2009, the EAC stated that it had “informed the Governor and the Secretary of State of these OMB A-87 requirements in its Requirements Payments award letter dated July 13, 2004. In addition, the EAC established additional guidance for states on the management of HAVA funds in its Frequently Asked Questions Regarding Appropriate Use of HAVA Funds (FAQs), which reiterates the OMB Circular A-87 requirement for preapproval for capital expenditures.” The SOS cannot verify a letter was sent on July 13, 2004 by the EAC or received by the Governor or the SOS. Whether or not the letter was sent or received, the date of the letter was well after critical HAVA decisions had to be made.
  
13. **July 21, 2004** - The EAC released and the state received its Title II Section 251 requirements payment in the amount of \$11,596,803.
  
14. **September 30, 2004** – EAC’s Fiscal Year 2004 Annual Report text referred to Title I as “Election Reform Payments” and Title II as “Requirements Payments”, always distinguishing between Title I and Title II funds as “payments” and other categories as “grants,” in a manner consistent with HAVA text.

## Attachment A - Timeline

15. **December 27, 2004** – NH Attorney General approves Secretary of State’s execution of competitively bid contract with Covansys to implement statewide voter registration system.
16. **April 6, 2005** – Secretary of State signed competitively-bid contract for “design-build” of Archives addition, including HAVA space.
  - a. Vital Records addition had to be built anyway, since the Division had to be moved out of the Department of Health and Human Services Building
  - b. Adding a second floor for HAVA offices and specialized computer training lab would save money in the long run
17. **January – June, 2005** – Secretary of State, Covansys and supervisors of the checklist and clerks convene to write specifications for statewide voter registration system.
18. **June 30, 2005** – Effective date of Capital Budget adopted by 2005 legislature approving an additional \$1.2 million in State General Funds for Archives addition, including HAVA space.
19. **December 16, 2005** – NH Attorney General approves Secretary of State’s execution of competitively bid contract with IVS of Kentucky to implement accessible voting system.
20. **January – May, 2006** – No training room available in Concord for about 1000 system users. Training sessions on Regional Drive to introduce clerks and supervisors of the checklist to statewide voter registration system. For each training session, it required one half day for two information technology staff to set up and one half day for two information technology staff to break down – a high cost approach not contemplated in New Hampshire’s State Plan.
21. **July 1, 2006** – Deadline for compliance with HAVA Sections 301 (accessible voting system), 302 (provisional ballots), and 303 (statewide voter registration system), in advance of the 2006 election cycle.
22. **January, 2007** – HAVA staff moved into Archives building, taking over HAVA Addition space, including training area, somewhat later.
23. **June 5, 2007** – OIG issues audit report on Maryland expenditure of HAVA funds, stating, “Our audit cites the Uniform Administrative Requirements for Grants and Cooperative Agreements promulgated by the U.S., General Services Administration (GSA) in Section 41 of the Code of Federal Regulations (CFR), Part 105-71. We use this citation because GSA disbursed the HAVA funds on



## Attachment A - Timeline

behalf of EAC and because the EAC was not authorized to issue regulations.” HAVA Section 902 states that “With respect to any grant or payment made under this Act by the Administrator of General Services, the Election Assistance Commission shall be deemed to be the office making the grant or payment for purposes of this section.”

- 24. March 20, 2008** - In addressing financial accounting issues, the Deputy Secretary of State for California testified before the Election Assistance Commission (EAC) on March 20, 2008: “Quite simply I believe EAC guidance on their website is wrong. Further, much of the guidance comes from EAC staff without any endorsement of the Commissioners. A regulatory scheme has developed which is troubling for a commission that specifically was not given rule making authority. (Emphasis supplied.) I am not suggesting that EAC should never answer our questions or adopt voluntary guidance positions. I did suggest that EAC should review the Frequently Asked Questions (FAQ) on their website under HAVA Funds Management and decide whether some of the answers need to be issued more formally as Voluntary Guidance and some the answers need to be revisited and removed from their website... I will note that (EAC) Commissioner Hunter at the meeting indicated that she has put her legal skills to work on analyzing the circulars. She is coming up with somewhat different conclusions than what the FAQs express.”

On March 20, 2008, the Chair of the EAC Board of Advisors and Michigan Election Director stated in testimony before the EAC in Denver, Colorado, “There is no necessity for EAC to create such an expansive regulatory scheme, especially when EAC specifically is not granted rule making authority.” He further recommended that the EAC, “Review and revise the FAQs that do not conform to HAVA. The FAQs are not formal advisory guidance issued by EAC.” Given that the EAC has not formally adopted the Frequently Asked Questions regarding Appropriate Use of Help America Vote Act Funds on the EAC’s own website, we are unable to confirm that the auditor has a sound basis for their reading of federal law.

- 25. September 18, 2008** – In an EAC Commissioners meeting, the transcript reveals that the EAC had asked the Office of Management and Budget some questions to which they set up a joint telephone call. After the telephone call, the EAC Counsel reported, “I don’t recall there being a discussion of the enforceability of the circulars against the states.” The question of enforceability remained unresolved by the EAC Commissioners at that time.

## Attachment A - Timeline

26. **Sept. 25, 2008** - GAO issued Decision B-316915: “EAC has no evaluative role... Whether the State will certify is the only uncertainty and only affects EAC payment and state’s receipt of its formula amount... Here, by operation of law, the state may fulfill the preconditions and be entitled to receipt of the funds through no actions on the part of the agency.”
- a. “..., the EAC must pay states statutory formula payments if they file a statement certifying that have met certain pre-conditions. We conclude that these HAVA funds are amounts “required to be paid”...” It is noteworthy that the GAO uses the term “statutory formula payments” to describe HAVA Title II Requirements Payments.
  - b. “EAC is to make the requirements payment to the state only if the state certifies it has met certain preconditions including a state plan, an administrative complaint procedure, and matching requirements.”
  - c. In footnote #4, the GAO states, “As has been its practice, the EAC did not enter into grant agreements with states in order to obligate or issue the requirements payments.”
27. **2008** - General Services Administration published its Annual Catalogue of Federal Domestic Assistance (CFDA) Report to Congress, pursuant to Public Law 98-169, this is “the basic reference source of Federal Programs.” The CFDA describes HAVA Section 251 payments as follows:

### ELECTIONS ASSISTANCE COMMISSION

#### U.S. ELECTION ASSISTANCE COMMISSION (90.400-90.402)

About the U.S. Election Assistance Commission. The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA). Central to its role, the Commission serves as a national clearinghouse and resource for information and review of procedures with respect to the administration of Federal elections. HAVA requires the EAC to: Develop technical guidance on the administration of federal elections. Produce voluntary voting systems guidelines. Research and report on matters that affect the administration of federal elections. Provide information and guidance with respect to laws, procedures, and technologies affecting the administration of Federal elections. **Administer payments to States to meet HAVA requirements.** Provide grants for election technology development and for pilot programs to test election technology. Manage funds targeted to certain programs designed to encourage youth participation in elections. Develop a national program for the testing, certification, and decertification of voting systems. Maintain the national mail voter registration form that was developed in accordance with the National Voter Registration Act of 1993 (NVRA), report to Congress every two years on the impact of the NVRA on the administration of federal elections, and provide information to States on their responsibilities under that law. Audit persons who received federal funds authorized by HAVA from the General Services Administration or the Election Assistance Commission. Submit an annual report to Congress describing EAC activities for the previous fiscal year. For additional information, visit the U.S. Election Assistance Commission online at [www.eac.gov](http://www.eac.gov).

## Attachment A - Timeline

### Information Related to the Election Assistance Commission

The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA). Central to its role, the Commission serves as a national clearinghouse and resource for information and review of procedures with respect to the administration of Federal elections. According to the text of HAVA, the law was enacted 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. Excerpt from The Help America Vote Act of 2002 The Help America Vote Act of 2002 (HAVA) requires the Election Assistance Commission (EAC) to: Generate technical guidance on the administration of federal elections. Produce voluntary voting systems guidelines. Research and report on matters that affect the administration of federal elections. Otherwise provide information and guidance with respect to laws, procedures, and technologies affecting the administration of Federal elections. **Administer payments to States to meet HAVA requirements.** Provide grants for election technology development and for pilot programs to test election technology. Manage funds targeted to certain programs designed to encourage youth participation in elections. Develop a national program for the testing, certification, and decertification of voting systems. Maintain the national mail voter registration form that was developed in accordance with the National Voter Registration Act of 1993 (NVRA), report to Congress every two years on the impact of the NVRA on the administration of federal elections, and provide information to States on their responsibilities under that law. Audit persons who received federal funds authorized by HAVA from the General Services Administration or the Election Assistance Commission. Submit an annual report to Congress describing EAC activities for the previous fiscal year.

28. **July 27, 2008** - National Association of Secretaries of State (including many lawyers) adopted a resolution stressing HAVA law:
  - a. Section 209, “The (EAC) shall not issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State...”
  - b. Section 253(c) “The specific choices on the methods of complying with the elements of a state plan shall be left to the discretion of the states.”
  - c. Section 305: “The specific choices on the methods of complying with the requirements of this title (HAVA, Title III) shall be left to the discretion of the states.”
  
29. **July 28, 2008** - NH Assistant Attorney General James Kennedy sends letter to the New Hampshire Secretary of State indicating the OMB circulars are unenforceable. “Under HAVA, the EAC cannot comply with the APA (Administrative Procedures Act) because it does not have the authority to promulgate rules. In adopting OMB Circular A-87 to its audit review, the EAC has stepped outside its statutory mandate. ...Therefore, the EAC cannot,

## Attachment A - Timeline

pursuant to OMB Circular A-87, require that States request pre-approval for capital expenditures over \$5,000...”

- 30. September 25, 2008** – GAO issues Decision B-316915 which refers to HAVA Requirements Payments as “statutory formula payments.” On Page 3, Footnote #4 states, “As has been its practice, the EAC did not enter into grant agreements with states in order to obligate or issue the requirements payments. EAC OGC Memorandum.” “... States must simply file a statement that the governor, or chief executive officer of the state, “hereby certifies that it is in compliance with the requirements” under HAVA. 42 U.S.C. #15403(a) Whether a state will so certify is the only uncertainty and only affects EAC payment and the state’s receipt of its formula amount.”

There is no mention of the states’ need to agree to abide by OMB Circulars or other regulations. Contrary to the EAC Executive Director’s statement on Page 2 of his March 18, 2009 letter, the GAO does not affirm the EAC’s determination that HAVA’s Section 251 payments are grants.”

- 31. February 17, 2009** – Letter from EAC Staff stating, “Concerning the failure to obtain preapproval for the building alternations, the EAC will consider retroactive approval if the Department submits the following information: (total costs, HAVA costs, HAVA funds source, justification, basis for allocation, etc.)”
- 32. March 18, 2009** – Letter from the EAC Executive Director to the New Hampshire HAVA Coordinator states, “...GAO affirmed the EAC’s determination that HAVA’s Section 251 payments are grants.” Contrary to EAC Executive Director’s statement on Page 2 of his March 18, 2009 letter, the GAO does not affirm the EAC’s determination that HAVA’s Section 251 payments are grants.

The letter further states, “The General Services Administration, the EAC’s predecessor funding agency, informed the Governor of New Hampshire that the Uniform Grants and Cooperative Agreements with State and Local Governments and the OMB Circular A-87 applied to HAVA funds on July 28, 2004. The EAC also informed the Governor and the Secretary of State of these requirements in its Requirements Payments award letter dated July 13, 2004. In addition, the EAC established additional guidance for states on the management of HAVA funds in its Frequently Asked Questions Regarding the Appropriate Use of HAVA Funds (FAQs) which reiterates the OMB Circular A-87 requirement for preapproval of capital expenditures. The FAQs were posted on the EAC website in 2006.”

## Attachment A - Timeline

33. **March 27, 2009** – NH Secretary of State certified compliance with Title III of HAVA (Accessible voting systems and statewide voter registration system available in all towns).
34. **March 30, 2009** – Letter from SOS Assistant Secretary of State to EAC Executive Director regarding audit findings by the NH Legislative Budget Assistant for the 10 months ending April 30, 2007.
35. **May 1, 2009** – Letter from SOS to EAC Executive Director initiating approval process for the \$1 million capital expenditure for the HAVA Facility and explaining the economic basis for the decision to build the HAVA Addition.
36. **July 19, 2009** – National Association of Secretaries of State (including many lawyers) adopted resolution distinguishing between the terms “grants” and “payments” used in HAVA. “Payments,” as used in HAVA Sections 101, 251 and 261 are explicitly not subject to federal regulations, rules or requirements.
37. **Sept. 2, 2009** – NH Assistant Attorney General appeared before the EAC Commissioners in Washington, DC to explain why the EAC should not be imposing federal regulations on the States by requiring States’ compliance with OMB Circulars (not permitted under HAVA Section 209).
38. **April 28, 2010** – GAO issued B-318831: “EAC violated the purpose statute, 31 U.S.C. #1301(a) when it obligated certain grant programs to its fiscal year 2004 requirements payment appropriation. EAC used its requirements payments appropriation because of language in a conference report and the Office of Management and Budget apportionment. The plan language of the appropriation, however, was clear that the appropriation was legally available only for requirements payments. To correct its purpose violation, EAC should adjust its accounts and charge its grant obligations to its salaries and expenses appropriation...”
  - a. In its administrative spending, the EAC had inappropriately conflated “grants” with “requirements payments.” A footnote cited *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993): “there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there.”)
39. **August 10, 2010** - The EAC Director of Grants (sic) asked about conducting a site visit prior to a potential “ratification.” He mentioned his hope to “get the ratification in front of the commissioners by early September.”

## Attachment A - Timeline

40. **September 9, 2010** - Two EAC staffs conducted a site visit at the HAVA facility, interviewing 7 individuals familiar with the construction and use of the HAVA facility to address HAVA requirements.
41. **September 13, 2010** - The SOS sent supporting information about the use of the HAVA addition, as well as the uncharged use of the rest of the Archives Building for improving elections. The State included sample announcements of training conducted on the HAVA facility since 2007.
42. **2011 through Dec. 14, 2014** – EAC lacked a quorum of commissioners.
43. **Jan. 4, 2011** – EAC Director of Grants (sic) announced she has recommended to the EAC that they allow a \$1 million federal HAVA payment toward construction of an addition to the Archives and Records Building for HAVA training, storage and staff.
44. **Nov. 4, 2011** – SOS formally protested need to comply with OMB Circulars in order to receive HAVA funds, arguing OMB circulars have CSR numbers and are federal regulations.
45. **Nov. 18, 2011** – SOS received and deposited an additional \$1,425,000 in Title II HAVA funds, following protest.
46. **July 16, 2014** – NASS re-authorized 2009 resolution distinguishing between the terms “grants” and “payments” used in HAVA, preventing applications of federal regulations to HAVA Sections 101, 251 and 261.
47. **May 10, 2016** – The EAC Inspector General submitted question to EAC Commissioners regarding applicability of OMB circulars as criteria for federal audits of New Hampshire spending under HAVA Section 251.
48. **Sept. 12, 2016** – EAC Inspector General’s contract accountants submitted amended “Prepared by Client” (PBC) list of materials needed for New Hampshire audit, requesting information based on **state financial standards**, reversing earlier request for information format set forth in OMB circulars.
49. **May 9, 2017** – Government Accountability Office (GAO) issued Decision B-328615, consistently referring to regulations in OMB circulars as “guidance.” It decided HAVA Title I and II payments were “grants,” which is in contrast to the term “statutory formula payments” that the GAO used to describe HAVA Title II Requirements Payments in Decision B-316915 issued September 25, 2008.
50. **July 21, 2017** - EAC Director of Grants (sic) advised the SOS that such EAC ratification process must wait until after the OIG audit is completed.

## Attachment A - Timeline

- 51. August 1, 2017** - EAC acknowledges it “has not yet published the Common Rule in the Code of Federal Regulations (CFR).” A footnote to the EAC’s Funding Advisory Opinion FAO-08-07 states, “The General Services Administration and the Election Assistance Commission informed States upon the award of Help America Vote Act funds that the funds were subject to the requirements contained in the “Common Rule.” The Common Rule contains the uniform administrative requirements for grants and cooperative agreements with states and local governments. As EAC has not yet published the Common Rule in the Code of Federal Regulations (CFR), it refers states to 41 CFR Part 105-71, which contains GSA’s publication of the Common Rule. The document is referred to as the Common Rule because all Federal agencies use the same, or common, administrative requirements that were contained in OMB Circular A-102. “
- a. HAVA Section 902 states that “With respect to any grant or payment made under this Act by the Administrator of General Services, the Election Assistance Commission shall be deemed to be the office making the grant or payment for purposes of this section.” Hence, it appears that the GSA may not adopt rules that are applicable to HAVA funds.
- 52. August 5, 2017** - The Federal General Services Administration refers to Section 251 Requirements Payments as “Direct Payments for a Specified Purpose” – not “Grants” (one of the options). Hence, the term payments are placed in a category of “payments”.

# Attachment A - Timeline

**CATALOG of FEDERAL DOMESTIC ASSISTANCE** E-GOV USA.gov

Home Programs **Agencies** Regional Agency Offices General Info Privacy

**U.S. Election Assistance Commission** Accessibility User Guide

RETURN TO AGENCIES RETURN TO LIST (AGENCIES)

Programs Profile Offices Regional Agency Offices

Programs Advanced Search Historical Index

Keywords:  [More Search Fields](#)

[Save Checkmarked Items To Excel](#) Items 1-4 of 4

<input type="checkbox"/>	#	Program Title	Agency/Office	Types of Assistance
<input type="checkbox"/>	90.400	Help America Vote College Program	U.S. Election Assistance Commission	B - PROJECT GRANTS
<input type="checkbox"/>	90.401	Help America Vote Act Requirements Payments	U.S. Election Assistance Commission	C - DIRECT PAYMENTS FOR A SPECIFIED USE
<input type="checkbox"/>	90.402	Help America Vote Mock Election Program	U.S. Election Assistance Commission	B - PROJECT GRANTS
<input type="checkbox"/>	90.403	U.S. Election Assistance Commission Research Grants	U.S. Election Assistance Commission	B - Cooperative Agreements (Discretionary Grants), B - Project Grants

Items 1-4 of 4

[User Guide](#) [For Help: Federal Service Desk](#) [Accessibility](#)



## Applicability and Enforceability

**1. EAC refers often to the GSA being their “predecessor funding agency” relying on faulty assumptions regarding the GSA’s authority to promulgate rules.**

- a. PL 107-252 Section 902 Audits and Repayment of Funds. [42 USC 15542] (b) Audits and Examinations.- (4) Special Rule for payments by General Services Administration.- “With respect to any grant or payment made under this Act by the Administrator of General Services, the Election Assistance Commission shall be deemed to be the office making the grant or payment for purposes of this section.”

**2. If a statute passed by Congress prescribes policies or procedures that differ from those in the Circular, the provisions of the statute govern.**

- a. ASMB C-10 Implementation Guide for OMB Circular A-87: Section 1.4 Relationship of Circular A-87 to Agency Regulations and Federal Statutes: OMB Circular A-87 is a directive to the heads of Federal executive departments and agencies instructing them concerning the cost principles to be applied in cost-based awards to state, local, and Indian tribal governments. The Circular directs agencies to issue implementing regulations. ... However, if a statute passed by Congress prescribes policies or procedures that differ from those in the Circular, the provisions of the statute govern.
  - I. PL 107-252 Section 209 Limitation of Rulemaking Authority. [42 USC 15329] The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a)).
  - II. This is not a cost-based award but rather a disbursement based on formulas
- b. Rules and Regulation – Federal Register Vol 72 No 14 Tuesday, January 23, 2007
- c. Thursday, December 26, 2013, OMB released the “Supercircular” or “Omniscircular” called the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Grants. This streamlines OMB Circulars A-21, A-87, A-110, A-122, A-89, A-133, and A-50.
- d. [§ 200.110](#) Effective/applicability date. (a) The standards set forth in this Part which affect administration of Federal awards issued by Federal agencies

## Attachment B – OMB Circulars

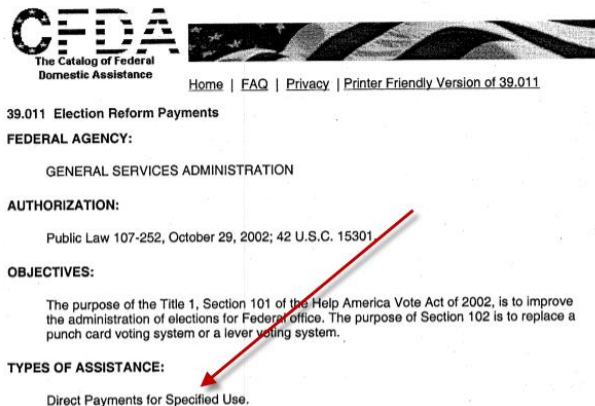
become effective once implemented by Federal agencies or when any future amendment to this Part becomes final. Federal agencies must implement the policies and procedures applicable to Federal awards by promulgating a regulation to be effective by December 26, 2014 unless different provisions are required by statute or approved by OMB.

- 3. The New Hampshire SOS has been unable to find references to the GSA's formal adoption of HAVA requirements in the form of OMB circulars or to determine whether or not there was due process and public disclosure pursuant to the Federal Administrative Procedure Act or the Sunshine in Government Act. The GSA has referenced A-133 as it applies to the single audit, but has not stated the need to follow other OMB Circulars in its formal publication, the Catalogue of Federal Domestic Assistance (CFDA). The GSA categorizes these HAVA payments as "Direct Payments for a Specified Use," not "Grants."**

If regulations existed, and particularly if the GSA had formally adopted such regulations, the GSA should have included them in the applicable CFDA entry for # 39.011 (Title I payments applicable to the HAVA Facility) and #90.401 (Title II payments). See Timeline #4, #10, #27, and #52. Also, an announcement of forthcoming meetings to adopt such OMB circulars as they applied to HAVA should have been posted in the Federal Register to achieve compliance (e.g. with the A-133), the Federal "Sunshine in the Government Act" and "Administrative Procedures Act." The SOS can find no such announcements or records.

39.011 - Election Reform Payments

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**CFDA**  
The Catalog of Federal Domestic Assistance

[Home](#) | [FAQ](#) | [Privacy](#) | [Printer Friendly Version of 39.011](#)

**39.011 Election Reform Payments**

**FEDERAL AGENCY:**  
GENERAL SERVICES ADMINISTRATION

**AUTHORIZATION:**  
Public Law 107-252, October 29, 2002; 42 U.S.C. 15301

**OBJECTIVES:**  
The purpose of the Title 1, Section 101 of the Help America Vote Act of 2002, is to improve the administration of elections for Federal office. The purpose of Section 102 is to replace a punch card voting system or a lever voting system.

**TYPES OF ASSISTANCE:**  
Direct Payments for Specified Use.

The GSA's Catalogue of Federal Domestic Assistance refers users to the Federal Grants Wire for further information:

# Attachment B – OMB Circulars



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- ABOUT US
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- DIRECTORY

Home > General Services Administration > Election Reform Payments

## Election Reform Payments

- 1. 2017 Grant Applications | New Funding Released All the Time. Deadlines Approaching. Apply Now [newusafunding.com](#)
- 2. New Rule in New Hampshire | New Hampshire Drivers with no tickets in 3 years should read this now [comparisons.org](#)
- 3. Gov't Grants - Free Money | Receive Grants To Pay Bills, Start A Business or Get Education! [resourcefinder.info](#)
- 4. \$37-\$47/hr Working Online - 2017 Most Rated Job | Start making \$37-\$47/hr working online, from your home. Apply here, start today [marketscross.com](#)

The purpose of the Title 1, Section 101 of the Help America Vote Act of 2002, is to improve the administration of elections for Federal office. The purpose of Section 102 is to replace a punch card voting system or a lever voting system.

### General information about this opportunity

#### Last Known Status

Deleted 05/26/2005 (This appropriation was for FY 2003)

#### Program Number

39.011

#### Federal Agency/Office

GENERAL SERVICES ADMINISTRATION

#### Type(s) of Assistance Offered

Direct Payments for Specified Use.



## Attachment B – OMB Circulars

### What is the process for applying and being award this assistance?

#### Pre-Application Procedure

None. This program is excluded from coverage under E.O. 12372.

#### Application Procedure

GSA, Office of Financial Management Systems, will develop a website for applying for payments under the Act. The website will establish a 7-step process that allows States to submit their information to receive and report on funding:

Step One - Registration. The State will enter contact information including name, address and email address. Once the information has been verified, GSA will establish and issue a user ID and password to access the web site. The user ID and password will be emailed to the States. The Web site address is <http://www.finance.gsa.gov/helpamericavote>.

Step Two - EFT Setup. The State will use the user ID and password, issued in step one, to access the web site. Banking information required for an Electronic Funds Transfer (EFT) will be submitted. All funds will be disbursed via EFT.

Step Three - Certification. The request must provide certification that the State will use funds in accordance with current law and guidelines stated in Sections 301 (if applicable) and 906. States may not receive funding unless they adhere to those stated guidelines. If a State is requesting reimbursement, it must also submit certification that its current voting machines are consistent with the guidelines stated in Sections 301 and 906. During this step the State will submit information about the number of qualifying precincts. States may elect to make an initial application for Section 101 funding only and later amend their application to request Section 102 funding, as long as they do so by April 29, 2003.

Step Four - Minimum disbursements. After steps one, two, and three are completed and approved, the minimum payment amount under Section 103 will be issued, \$5 million for each State and \$1 million for each territory. When processed, the funding will be disbursed by the Department of Treasury, via Electronic Funds Transfer (EFT), and deposited directly into the bank account specified in step two. States are encouraged to establish the Election Fund described in Section 254(b)(1) of the Act, and to deposit funding received under Title I into this account. Section 104(d) of the Act requires that when a State has established an election fund described in Section 254(b), the State shall ensure that any funds provided to the State under this title are deposited and maintained in such fund.

Step Five - Final disbursement calculations. After all applications are received, the calculations under Sections 101 and 102 will be performed. This step will occur after the April 29, 2003, application cutoff.

Step Six - Final disbursements. A second payment will be issued to States qualifying for more than the minimum payment. This step will occur by May 31, 2003. The funding will be disbursed by the Department of Treasury, via Electronic Funds Transfer (EFT), and deposited directly into the bank account specified in step two.

Step Seven - Reporting. Each funding recipient will be required to submit verification of actual purchases. Information regarding actual funds expended will be reconciled against funding provided. This information will be provided to the Election Assistance Commission once they become operational. Although exact reporting requirements have not been established, States are advised to track spending by Sections 101 and 102 categories.

## Attachment B – OMB Circulars

### How may assistance be used?

Section 101 requires States to use the payment to carry out one or more of the activities listed: Complying with the requirements of Title III of the Act; Improving the administration of elections for Federal office; Educating voters concerning voting procedures, voting rights, and voting technology; Training election officials, poll workers, and election volunteers; Developing the State plan for requirements payments to be submitted under Part 1 of Subtitle D of Title II (Sections 251-257) of the Act; Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for the casting and counting of votes; Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing non-visual 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; and/or Establishing a toll-free telephone hotline 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, specified polling place locations, and other relevant information. Section 102 requires States to use the funding (either directly or as a reimbursement for costs incurred on or after January 1, 2001) to replace punch card voting systems or lever voting systems in precincts within that State that used such systems in the November 2000 election qualifying precincts. A State that receives funding for this program must ensure that all of the punch card voting systems or lever systems in the qualifying precincts within that State will be replaced in time for the regularly scheduled general election for Federal office to be held in November 2004 (unless a waiver is obtained under Section 102(a)(3)(B)). A State is eligible to receive a payment under this program if it submits to the Administrator by April 29, 2003, an application that contains the following: Certifications that the State will use the payment to replace punch card voting systems or lever voting systems in the qualifying precincts within the State by January 1, 2004; Certifications that the State will continue to comply with current voting laws stated in Section 906; Certifications that the replacement voting systems will meet the requirements of Title III, Section 301; The number of qualifying precincts in the State; and other information and certifications as the Administrator may require which are necessary for the administration of the program.

### Auditing

Title IX, Section 902, states that with respect to any grant or payment made in accordance with this Act by GSA, the Election Assistance Commission must be regarded as the office making the grant or payment, for the purposes of audits. In accordance with the provisions of OMB Circular No. A-133 (Revised, June 24, 1997), "Audits of States, Local Governments, and Nonprofit Organizations," nonfederal entities that expend financial assistance of \$300,000 or more a year in Federal awards will have a single or a program-specific audit conducted for that year. Nonfederal entities that expend less than \$300,000 a year in Federal awards are exempt from Federal audit requirements for that year, except as noted in Circular No. A-133.

### Regulations, Guidelines and Literature

Title 1, Part 1 of Subtitle D of Title II (Sections 251-257), Title III of Public Law 107- 252, the Help America Vote Act of 2002, Section 101, Section 102, Section 103, Section 301, and Section 906.

This website references A-133 for auditing, citing HAVA Section 902, but makes no mention of other OMB circulars. A-133 states as follows:

6. Required Action. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in the Attachment to this Circular. Federal agencies making awards to non-Federal entities, either directly or indirectly, shall adopt the language in the Circular in codified regulations as provided in Section 10 (below), unless different provisions are required by Federal statute or are approved by the Office of Management and Budget (OMB).

## Attachment B – OMB Circulars

7. OMB Responsibilities. OMB will review Federal agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to ensure uniform, effective and efficient implementation.

The SOS can find no evidence of compliance with the above A-133 requirements #6 and #7 by either the GSA or the EAC.

#### **4. There was never an official process to ensure the OMB Circulars were applicable to Title I and Title II funds or enforceable.**

The SOS has found no available evidence that the EAC Commissioners determined that Title I funds were subject to OMB Circulars. There is no clear record in 2004 of such a vote, and if there were, it would have been in a “Tally” voting forum executed contrary to the “Government in the Sunshine Act” and the Federal “Administrative Procedures Act”. (See Attachment G - Administrative Procedure Act & Attachment H - Sunshine Act)

On June 11, 2004, the EAC Commissioners decided in a “Tally” voting forum that OMB Circulars applied to Title II funds. This was contrary to the federal “Government in the Sunshine Act” and the “Administrative Procedures Act”. Later in 2006, EAC staff issued FAQs citing the OMB circulars. However, none of this was conducted in an official manner.

On July 28, 2008, the New Hampshire Attorney General sent a letter to the SOS stating that the OMB circulars were unenforceable. “Under HAVA, the EAC cannot comply with the APA (Administrative Procedures Act) because it does not have the authority to promulgate rules... Therefore, the EAC cannot, pursuant to OMB Circular A-87, request pre-approval for capital expenditures over \$5,000.”

According to a September 1, 2008 EAC Commissioners meeting transcript, the EAC Commissioners did not know whether the OMB circulars were enforceable. In the transcript, the EAC General Counsel acknowledged that they had not received any response in writing to a written question to the Office of Management and Budget (OMB) asking whether the OMB circulars were enforceable.

On July 19, 2009, the National Association of Secretaries of State (including many lawyers) adopted a resolution distinguishing between the terms “grants” and “payments” used in HAVA. “Payments,” as used in HAVA Sections 101, 251 and 261, are explicitly not subject to federal regulations, rules or requirements.

On Sept. 2, 2009, a NH Assistant Attorney General appeared before the EAC Commissioners in Washington, DC to explain why the EAC should not be imposing federal regulations on the States by requiring States’ compliance with OMB Circulars (not permitted under HAVA Section 209).

## Attachment B – OMB Circulars

On April 28, 2010, the GAO issued B-318831: “EAC violated the purpose statute, 31 U.S.C. #1301(a) when it obligated certain grant programs to its fiscal year 2004 requirements payment appropriation. EAC used its requirements payments appropriation because of language in a conference report and the Office of Management and Budget apportionment. The plain language of the appropriation, however, was clear that the appropriation was legally available only for requirements payments. To correct its purpose violation, EAC should adjust its accounts and charge its grant obligations to its salaries and expenses appropriation...”

### **5. In formal testimony before the EAC, the states witnessed that the EAC’s Frequently Asked Questions (FAQs) had been issued by staff and not by the EAC Commissioners.**

In addressing financial accounting issues, the Deputy Secretary of State for California testified before the Election Assistance Commission (EAC) on March 20, 2008: “Quite simply I believe EAC guidance on their website is wrong. Further, much of the guidance comes from EAC staff without any endorsement of the Commissioners. A regulatory scheme has developed which is troubling for a commission that specifically was not given rule making authority. (Emphasis supplied.) I am not suggesting that EAC should never answer our questions or adopt voluntary guidance positions. I did suggest that EAC should review the Frequently Asked Questions (FAQ) on their website under HAVA Funds Management and decide whether some of the answers need to be issued more formally as Voluntary Guidance and some the answers need to be revisited and removed from their website... I will note that (EAC) Commissioner Hunter at the meeting indicated that she has put her legal skills to work on analyzing the circulars. She is coming up with somewhat different conclusions than what the FAQs express.”

On March 20, 2008, the Chair of the EAC Board of Advisors and Michigan Election Director stated in testimony before the EAC in Denver, Colorado, “There is no necessity for EAC to create such an expansive regulatory scheme, especially when EAC specifically is not granted rule making authority.” He further recommended that the EAC, “Review and revise the FAQs that do not conform to HAVA. The FAQs are not formal advisory guidance issued by EAC.” Given that the EAC has not formally adopted the Frequently Asked Questions regarding Appropriate Use of Help America Vote Act Funds on the EAC’s own website, we are unable to confirm that the auditor has a sound basis for their reading of federal law.

### **6. The EAC IG has agreed that the EAC was not allowed to issue regulations, but relied on the GSA to do so.**

On June 5, 2007, the EAC IG issued an audit report on the administration of HAVA funds by the Maryland State Board of Elections, stating in a footnote on Page 4, “Our audit cites the Uniform Administrative Requirements for Grants and Cooperative Agreements promulgated by the U.S., General Services Administration (GSA) in Section 41 of the Code of Federal Regulations (CFR), Part 105-71. We

## Attachment B – OMB Circulars

use this citation because GSA disbursed the HAVA funds on behalf of EAC and because the EAC was not authorized to issue regulations.”

However, the GSA’s adoption of the OMB circulars (regulations) is contrary to HAVA Section 902, which states:

“With respect to any grant or payment made under this Act by the Administrator of General Services, the Election Assistance Commission shall be deemed to be the office making the grant or payment for purposes of this section.”

A plain reading of the law leads to the conclusion that the GSA could not take an action with respect to HAVA that the EAC could not take.

- 7. During a critical HAVA execution period of October, 2002 through May, 2004, the SOS worked with the facts set forth in Attachment A - Timeline #1 through #10. This was before the EAC Commissioners discussed the application of OMB Circulars. (See Attachment A - Timeline #11) There was no basis for the SOS to conclude that it was obligated to comply with OMB circulars that had not been formally adopted in compliance with the Government in the Sunshine Act or the Federal Administrative Procedure Act. (See Attachment G - Administrative Procedure Act & Attachment H - Sunshine Act)**

To enable due process, federal agencies are required to follow procedures set forth by the Federal Administrative Procedures Act (APA). These generally include the following steps:

- Publication of notice of proposed rulemaking
- Agencies must accept comments from the public regarding the proposed rule, usually for a period of at least thirty days.
- Agencies are required to respond to all public comments, and sufficient public opposition to or criticism of a proposed rule may result in modifications or re-drafting.

In addition, Government in the Sunshine Act defines the term “meeting”, and requires notice of all public meetings and minutes of public meetings. A “notational” procedure is not prohibited by the Sunshine Act. However, good cause such as personnel related discussions and decisions is needed for a private proceeding.

The National Association of Secretaries of State has passed two resolutions commenting on the EAC’s authority to treat payments as grants. So clearly, there has been a strong expression of interest on the part of NASS to comment on any proposed action that would treat HAVA payments as grants and by extension, to the federal government’s adoption of rules, regulations, and requirements relating to HAVA. (See Attachment A - Timeline #28, #36, and #46.)



## Attachment B – OMB Circulars

If the Federal Administrative Procedure Act was not followed, what was omitted is not enforceable. 5 USC §552(a)(1)(E) states, “Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”

**8. After it became clear that the EAC would assert that the OMB Circular A-87 applied, the SOS attempted to gain approval for the capital expenditure for the HAVA Facility in a cooperative manner. The following timeline demonstrates New Hampshire’s good faith effort to address and resolve the matter.**

- On February 17, 2009, the EAC sent the SOS a letter stating, “Concerning the failure to obtain preapproval for the building alternations, the EAC will consider retroactive approval if the Department submits the following information: (total costs, HAVA costs, HAVA funds source, justification, basis for allocation, etc.)” (Timeline #31.)
- On May 1, 2009, the SOS sent a letter to the EAC initiating the approval process for the \$1 million capital expenditure for the HAVA Facility and providing extensive justification for it.
- On August 10, 2010, the EAC Director of Grants (sic) asked the SOS about conducting a site visit prior to a potential “ratification.” He mentioned his hope to “get the ratification in front of the commissioners by early September.”
- On September 9, 2010, two EAC staffs conducted a site visit at the HAVA facility, interviewing 7 individuals familiar with the construction and use of the HAVA facility to address HAVA requirements.
- On September 13, 2010, the SOS sent supporting information about the use of the HAVA Facility, as well as the unreimbursed assistance from the Division of Vital Records and the Archives for improving the administration of elections. The SOS included sample announcements of training conducted on the HAVA facility since 2007.
- On January 4, 2011, the EAC’s Director of Grants (sic) replied, “EAC has not made a decision. I submitted my recommendation to allow the expense, but we lost our quorum before it went to a Commissioner vote... We’ll be in touch.”
- A quorum of EAC Commissioners was restored on December 14, 2014. No action was taken on approving the HAVA Facility.

## Attachment B – OMB Circulars

- On July 21, 2017, EAC Director of Grants (sic) advised the SOS that such EAC approval process must wait until after the EAC IG audit is completed.

A summary of the justification for HAVA Facility appears in Attachment C - Justification that addresses allowability, reasonableness, and allocability - concepts appearing in Federal "guidance." The SOS has supported the \$1 million capital expenditures for the HAVA Facility in a May 1, 2009 letter to the EAC. (Attachment D - Letter to EAC & Attachment E - Unreimbursed Assistance)

With a great deal of information, a site visit, and a number of interviews already conducted, the next action, a ratification (retroactive approval) of the \$1 million capital expenditure, would appear to be in the EAC Commissioner's hands. The SOS, under no obligation, is happy to answer any remaining questions that the EAC may have in order to obtain EAC ratification.

## Attachment C - Justification

### **Allowable, Reasonable, and Allocable**

**(Refer to May 1, 2009 SOS letter to the EAC's Executive Director, Attachment D)**

The HAVA Facility is **allowable** because it complies with State and Federal law regarding use of HAVA funds. The use of the capital improvement is necessary for the efficient and effective performance and administration of the federally sponsored HAVA programs. This cost falls specifically within the identified uses of HAVA funds in Title I.

The construction of the HAVA Facility enables the State to efficiently and effectively satisfy the activities set forth in section HAVA Section 101(b)(1).

The HAVA Facility is necessary to enable the State to support and manage the implementation of HAVA requirements. This space is used for office space and election official training facilities for accessible voting machines and the statewide voter registration system. This facility is used to support activities focused on election improvement.

House Bill 25, New Hampshire's 2003 Capital Budget, was enacted on July 8, 2003. (The Legislature adopts a 2-year capital budget in odd-numbered years.) This called for spending \$1 million in federal funds to create the HAVA Facility as part of a capital improvement to the Department of State's Archives' building. This 2003 bill also incorporated the allocation of \$1,549,330 in non-HAVA state funds for other modifications to the Archives building, for a total project appropriation of \$2,549,330. House Bill 25, the 2005 Capital Budget bill that became effective July 1, 2005 appropriated an additional \$1,150,000 in non-HAVA state funds, raising non-HAVA state funding to \$2,699,330 and the total project appropriation to \$3,699,330.

The HAVA Facility is **reasonable** because the cost does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. This real estate cost is ordinary and necessary for the operation of the Department of State and the performance of its HAVA responsibilities.

The cost is **reasonable** based on an analysis of the alternative to lease comparable space from a commercial owner. The lease alternative as set forth below considers 20 and 40-year lease horizons, without inflation adjustments.

We evaluated an alternative to constructing the HAVA Facility in which the state would expend HAVA funds on lease payments at market rates for equivalent space. Relying on New Hampshire Department of Administrative Services' commercial market data and other sources, Class A space comparable to the HAVA Facility was offered in a range of \$15.50 per square foot to \$21.00 per square foot per annum. We calculated the average of this Class A range at a lease rate of \$18.25 per square foot per annum for the first 10.5 years.

## Attachment C - Justification

If we were paying applicable local market rates of \$18.25 per square foot (triple net) over 10.5 years, the rental costs would have totaled \$794,285. (Multiply \$18.25 per square foot per annum X 4145 square feet X 10.5 years.)

HAVA funds do not pay for the cost of utilities, insurance, repairs, maintenance, roads and grounds, and janitorial services. In the 10.5 years that the facility has been used, security, roads and grounds, insurance, repairs and maintenance and utility (provided at no charge to the HAVA fund) have been estimated at a minimum of \$261,135. This relies on a cost of \$5 per square foot (the lowest rate in the national range) X 4,145 sq. ft. = 20,725 X 10.5 = \$261,135. Based on industry studies (BOMA), this figure is expected to rise over the lifetime of the building, such that the state's subsidy - repair and maintenance, utilities, security, roads and grounds, and cleaning - eventually exceed the total of administrative, design and construction costs.

Rental cost at market rates of \$18.25 for 10.5 years	\$794,285
Imputed cost of utilities, insurance, repairs, maintenance, roads and grounds, and janitorial services	<u>\$261,135</u>
Total market cost for 10.5 years	\$1,055,420

If one relies on the above market rates and estimated savings, the value from the HAVA facility has yielded a total of about \$1,055,420 in comparable market value to the HAVA projects since HAVA staff moved in January, 2007:

The cost of rents and other services would be expected to rise to reflect inflation after each lease period ends. However, if the next thirty years remained roughly the same, the 40-year cost to HAVA would exceed \$4 million. In addition, the State subsidy of security, roads and grounds, utilities, repair and maintenance and cleaning will amount to well over \$1 million during the 40-year period. As it stands, the 40-year all-in real estate cost for the HAVA addition will not exceed \$1 million in HAVA funds, resulting in at least an 80% savings when compared with comparable market figures.

In addition, there are many other election improvement uses provided by the Archives Building. (See Attachment E - Uncharged Uses) Since Archives indefinitely retains the marked checklists, another use includes accessing these checklists to check the accuracy of data entry into the statewide voter registration system (HAVA Section 303).

The use of HAVA funds for this facility constitutes the most effective use of HAVA funds to achieve the goals described in the HAVA State Plan. The long term cost savings resulting from this investment should help satisfy the Election Assistance Commission goal identified in your letter dated March 18, 2009 "to ensure that Federal funds are used efficiently and effectively..."

The HAVA Facility has been completed, a certificate of occupancy has been issued, and over 1014 election officials have been trained to date in 79 training sessions held at

## Attachment C - Justification

the HAVA Facility, with 350 more planned in 2017. The Secretary of State, the State's chief election official, has certified that New Hampshire has implemented the requirements of Title III of the Help America Vote Act. EAC staff have visited the HAVA Facility and interviewed seven individuals who have been familiar with the use of the building since HAVA staff moved in. There is abundant evidence that the HAVA Facility has been an efficient and effective staging area for the achievement of HAVA goals.

We have relied primarily on many decades of state policy aimed at state building ownership, maintenance, repair, insurance and roads and grounds. Secondly, we have checked the general guidance offered by OMB Circular A-87. The A-87 describes **reasonable** costs as follows: "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost...In considering reasonableness of a given cost, consideration shall be given to: "The restraints or requirements imposed by such factors as: sound business practices..."

Given that the savings resulting from this course of action will represent at least 5 times the cost of the expenditure within the minimum expected useful lifetime of the HAVA addition, it would appear that this approach would be the single most compliant approach with the spirit of both state policy and federal guidance.

The \$1 million cost is **allocable** under the purposes set forth in Title I, Section 101: meeting HAVA Title III requirements; improving election administration; educating voters; training election officials, poll workers and volunteers; developing the HAVA State Plan; improving, acquiring, leasing, modifying and replacing voting systems; improving elections accessibility; and establishing toll free hot lines for elections. The HAVA Facility is 100% designated to support HAVA requirements. The HAVA Facility is used to support the performance goals in the State Plan and effectuate the activities set forth in section 101(b)(1) of HAVA. See attached State Plan pages 39-41.

NEW HAMPSHIRE  
DEPARTMENT OF STATE

William M. Gardner  
*Secretary of State*



Robert P. Ambrose  
*Senior Deputy Secretary of State*

David M. Scanlan  
*Deputy Secretary of State*

May 1, 2009

Mr. Thomas R. Wilkey  
Office of the Executive Director  
Election Assistance Commission  
1225 New York Avenue, Suite 1100  
Washington, DC 20005

Re: Approval for \$1 million capital improvement for HAVA Facility

Dear Mr. Wilkey:

This letter follows a letter from Edgardo Cortés dated February 17, 2009, requesting that the State of New Hampshire seek retroactive approval for a capital improvement project for the construction of a Help America Vote Act of 2002 (HAVA) facility, built with Title I HAVA funds, located at 71 S. Fruit Street, Concord, New Hampshire (the "HAVA facility"). This construction project involved attaching an addition to New Hampshire's Archives and Records building to serve as the HAVA Facility. Other construction modifications were made to the Archives Building using non-HAVA state funds.

On May 14, 2003, the State of New Hampshire deposited the \$5,000,000 Title I HAVA payment into the State's Election Fund. The State commenced the above project on July 9, 2003, prior to the date of the first presidential appointment to the Election Assistance Commission.

In a letter dated March 30, 2009, I advised that in the interest of full disclosure and cooperation, we would comply with the request. Nevertheless, as I expressed in my March 30, 2009 letter, it is our position that such approval is not mandated by HAVA. Accordingly, and without waiving our position that such approval is not required, please find herewith the information you have requested.

State House, Room 204, 107 N. Main St., Concord, NH 03301  
Phone: 603-271-8238 Fax: 603-271-8242  
TDD Access: Relay NH 1-800-735-2964  
[www.sos.nh.gov](http://www.sos.nh.gov) email: [NHVotes@sos.nh.gov](mailto:NHVotes@sos.nh.gov)

Following the outline Edgardo Cortés provided us in his February 17, 2009 letter, we hereby submit the information requested with respect to the HAVA Facility constructed with Title I HAVA funds:

**(a) Total budgeted cost of modifications to the Archives and Records Building, including the HAVA Facility: \$3,699,330.**

**(b) Total budgeted cost financed with HAVA funds for the HAVA Facility: \$1,000,000.**

**(c) The source of HAVA funds is entirely HAVA Title I (Section 101). These funds have all been expended for the stated purpose.**

**(d) The justification is based on the following assessment that it is both allowable and reasonable:**

The HAVA Facility is allowable because it complies with State and Federal law regarding use of HAVA funds. The use of the capital improvement is necessary for the efficient and effective performance and administration of the federally sponsored HAVA programs. This cost falls specifically within the identified uses of HAVA funds in Title I.

The Title I ground rules are flexible relative to how the payments are to be used, as long as the payments are not used for the reasons set forth in HAVA Section 101(b)(2). The construction of the HAVA Facility enables the State to efficiently and effectively satisfy the activities set forth in HAVA Section 101(b)(1).

The HAVA Facility is necessary to enable the State to support and manage the implementation of HAVA requirements. This space is used for office space and serves as a training facility for election officials. Training includes, but is not limited to the operation and implementation of accessible voting machines and use of the statewide voter registration system. This facility is used to support activities focused on election improvement.

House Bill 25, New Hampshire's 2003 Capital Budget, was enacted on July 8, 2003. (The Legislature adopts a 2-year capital budget in odd-numbered years.) This called for spending \$1 million in HAVA funds to create the HAVA Facility as part of a capital improvement to the Department of State's Archives' building. This 2003 bill also incorporated the allocation of \$1,549,330 in non-HAVA state funds for other modifications to the Archives building, for a total project appropriation of \$2,549,330. House Bill 25, the 2005 Capital Budget bill that became effective July 1, 2005, appropriated an additional \$1,150,000 in non-HAVA state funds, raising non-HAVA state funding to \$2,699,330 and the total project appropriation to \$3,699,330.

The HAVA Facility is reasonable because the cost does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. This real estate cost is ordinary and necessary for the operation of the Department of State and the performance of its HAVA responsibilities.

The cost is reasonable based on an analysis of the alternative to lease comparable space from a commercial owner. The lease alternative as set forth below considers 20 and 40-year lease horizons, without inflation adjustments.

We evaluated an alternative to constructing the HAVA Facility in which the State would expend HAVA funds on lease payments at market rates for equivalent space. Relying on the New Hampshire Department of Administrative Services' commercial market data and other sources, Class A space comparable to the HAVA Facility was offered in a range of \$15.50 per square foot to \$21.00 per square foot per annum. We calculated the average of this Class A range at a lease rate of \$18.25 per square foot per annum.

On a 20-year horizon, paying a market lease rate of \$18.25 per square foot per annum and assuming no inflation, total costs would amount to \$1,512,925. (Multiply \$18.25 per square foot per annum X 4145 square feet X 20 years.)

On a 40-year horizon, paying a market lease rate of \$18.25 per square foot per annum and assuming no inflation, total costs would amount to \$3,025,850. (Multiply \$18.25 per square foot per annum X 4145 square feet X 40 years.)

The State's comparable imputed lease costs for the HAVA Facility, calculated on the same basis (after building-related taxes, insurance and maintenance costs), are far lower than \$18.25 per square foot per annum, depending on the term of the horizon.

Based on a 20-year horizon, without inflation risk, the HAVA Facility's comparable imputed lease charge is \$12.07 per square foot per annum. (Multiply \$12.0628 per square foot per annum X 4145 square feet X 20 years = \$1,000,006.)

Based on a 40-year horizon, without inflation risk, the HAVA Facility's comparable imputed lease charge is \$6.03 per square foot per annum. (Multiply \$6.0314 per square foot per annum X 4145 square feet X 40 years = \$1,000,006.)

We believe that using a 40-year horizon is the most appropriate method, given that HAVA requirements endure indefinitely and the Government Accounting Standards Board Statement No. 34 calls for depreciation of new buildings on a straight-line basis over 40 years. Imputing lease costs, using a 40-year horizon, without inflation risk, the HAVA Facility costs about one third of the market lease rate at the time HAVA staff occupied the HAVA Facility.



Mr. Thomas R. Wilkey

Page 4

HAVA funds do not pay for the cost of utilities and other maintenance services for the Facility. Over a 40-year period, these Election Fund savings amount to approximately \$942,710, based on data on comparable services charged to other state agencies obtained from the New Hampshire Department of Administrative Services.

The use of HAVA funds for this Facility constitutes the most effective use of HAVA funds to achieve the goals described in the HAVA State Plan. The long term cost savings resulting from this investment satisfies the Election Assistance Commission goal identified in your letter dated March 18, 2009 "to ensure that Federal funds are used efficiently and effectively..."

The HAVA Facility has been completed, a certificate of occupancy has been issued, and over 1014 election officials have been trained to date in 79 training sessions held at the HAVA Facility. The Secretary of State, the State's chief election official, has certified that New Hampshire has implemented the requirements of Title III of the Help America Vote Act. Hence, it is facially evident that the HAVA Facility has been an efficient and effective staging area for the achievement of HAVA goals.

**(e) The basis for allocating costs is as follows:**

The \$1 million cost is allocable under Title I, Section 101.

The HAVA Facility is specifically designated to support HAVA requirements. The HAVA Facility is used to support the performance goals in the State Plan and effectuate the activities set forth in section 101(b)(1) of HAVA. See attached State Plan pages 39-41.

If you have any questions, please contact me and I will be happy to supply additional information concerning the HAVA Facility.

Sincerely yours,



Anthony Stevens  
Assistant Secretary of State  
HAVA Coordinator

cc: Edgardo Cortés

Enclosure: State Plan, pages 39-41



## Section 10: How Title I payments will be spent

### Effect of Title I Payments

If the State received any payment under title I, a description of how such payment will affect the activities proposed to be carried out under the plan, including the amount of funds available for such activities. -- HAVA Section 254 (a) (10)

### Section 101. Payments to States for activities to improve administration of elections.

New Hampshire is eligible for and has received \$5 million under Section 101. These funds will be used for implementation and maintenance for activities to meet the following requirements:

301: Accessible voting machines,	\$1,210,000
303: Statewide centralized database system	2,910,000
254(3), 301, 302, 303: Voter education, election official training	290,000
402: Administrative complaint procedure	280,000
Physical accessibility of polling places	20,000
<u>Program management</u>	<u>290,000</u>
Total	\$5,000,000

Any activities carried out under the Plan will be aimed at improving the administration of elections for Federal office, and the election process as a whole. Subsequently, all activities undertaken by the Division with Title I monies will comply with the requirements under Title III.

Upon receipt of Title I monies, it is the intent of the Secretary of State to use the funds for one or more of the following:

**A. Section 301: Improving, acquiring, leasing, modifying or replacing voting systems and technology and methods for casting and counting votes. Establishing voting system standards.**



- Establish management staff to plan, implement and manage the programs required for HAVA compliance.
- The Department of State will undertake studies and analysis and hire consultants as required to prepare a Request for Proposal for the purchase of voting systems accessible to the disabled for each polling place in the State and integrated with existing voting systems.
- The State will induce vendors to develop test sites to permit evaluation.
- Purchase accessible voting machines.
- Educate voters concerning voting procedures, voting rights, and voting technology.
- Train election officials, poll workers, and election volunteers.
- Develop improved training systems with the goals of training more election officials and poll workers close to the election.
- Establish voting system standards consistent with HAVA Section 301.

**B. Section 303: Planning, designing the statewide centralized database system**

- Conduct studies and analysis, hire consultants as required to prepare for Request for Proposal for statewide centralized database system.
- Establish management staff to plan, implement and manage the programs required for HAVA compliance.
- Engage town and city clerks or supervisors of the checklist to enter and upload data as required for the new system. The process and personnel to be used for data entry will be designed to ensure the accuracy and reliability of the statewide database and will recognize the authority of the supervisors of the checklist to make all final determinations as to entering or deleting any person from the checklist.
- Acquire and implement centralized database system.
- Educate voters concerning voting procedures, voting rights, and voting technology. A preliminary investment is needed to increase voter outreach through voter education, public service announcements. Modifications of the Department of State forms, web site, free-access system and training materials used by voters are necessary to comply with the Act.



- Develop improved training systems with the goals of training more election officials and poll workers close to the election about changes in election law, registration requirements, etc.
- Train election officials, poll workers, and election volunteers

**C. Section 402: Begin planning process and engage legal staff to establish administrative complaint procedures.**

- Administrative rules will be drafted to implement an administrative complaint procedure that is compliant with HAVA.
- The draft will be reviewed by the HAVA State Plan Committee.
- The rules will be submitted to the Joint Legislative Committee on Administrative Rules (JLCAR) for revision and approval.
- Upon receipt of JLCAR approval, the administrative rules will be adopted and published.

## **Unreimbursed Assistance from other State Agencies Flowing from the location of the HAVA Facility Adjacent to State Archives and the Division of Vital Records**

### **Improvements to Election Administration Since 2000**

- A. Support from the Department of Administrative Services, without expectation of reimbursement from (HAVA) Election Fund:
  - a. Department of Administrative Services covers the cost of building insurance, maintenance, repairs, utilities, roads and grounds, housekeeping, and other expenses. Unlike private sector leases, real estate taxes are not assessed.
  
- B. Support from Division of Archives and Records, without expectation of reimbursement from (HAVA) Election Fund:
  - a. Storage of boxes containing ballots. Fully allocated costs are estimated by Archives around \$10 per box per annum. Periodic potential increase in boxes for early recounts due to MOVE Act. Boxes must be retained for 22 months.
  - b. Van, vehicles, staging area and parking spaces needed for HAVA and MOVE Act training throughout the state. These services require available staff to maintain logs, allocate vehicles, gas up and maintain the vehicles.
  - c. Improvements in ballot Chain of Custody, an election administration improvement trend driven by the 2000 General Election and effects of HAVA. This renders the use of the Research Library at 71 S. Fruit St. to recount ballots. Proximity of secure storage in Archives vaults is useful for ballot security.
  - d. Use of Archives Research Library (large room not funded by HAVA) for large meetings of election officials. The Secretary of State is able to clear the room and use it for HAVA meeting purposes, on short notice if necessary. The last meeting involved a group of 150 invited election officials.

## Attachment E - Unreimbursed Assistance

- e. Access to historical record of marked checklists supplied by cities and towns from general elections and presidential primaries. This is a critical resource in investigating the accuracy of registration, absentee voter, affidavits, and voter history records in the statewide voter registration system (HAVA Section 303) and following up on investigations.
  - f. Access to necessary additional storage space and staging area for accessible voting system.
- C. Support from the Division of Vital Records, without expectation of reimbursement from (HAVA) Election Fund:
- a. Death information
  - b. Supply, maintenance and upgrades of personal computers and PC software for all towns and cities, including Internet access to these towns (many of which required a great deal of effort to achieve this.) HAVA required PCs and Internet access to be in place, but HAVA funds were not used to purchase or maintain PCs at the town and cities that were used for the statewide voter registration system.

## Attachment F - NASS Resolution



# NASS

National Association  
of Secretaries of State

### **NASS Resolution on Help America Vote Act of 2002 (HAVA) Grant and Payment Distinction**

Approved July 19, 2009

WHEREAS, the Help America Vote Act of 2002 ("HAVA") established the Election Assistance Commission (EAC) to assist in the administration of federal elections and charged the EAC with distributing payments to states under its authorized funding programs (Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002); 42 U.S.C. sections 15301-15545. See HAVA Sections 101, 251 and 261); and

WHEREAS, the Help America Vote Act of 2002 ("HAVA") also charged the EAC with distributing grants to other entities under its authorized funding programs (See HAVA Sections 271 and 295); and

WHEREAS, HAVA authorizes the EAC in making a grant or payment to audit or examine the recipient of such a grant or payment made under HAVA, and in so doing makes an express categorical distinction between "grant" and "payment" (See HAVA Section 902); and

WHEREAS, in conducting audits of grants and payments, the EAC has no rule-making authority, and therefore, in performing its functions must act in accordance with the express statutory provisions of HAVA (See HAVA Section 209); and

WHEREAS, in enacting HAVA, Congress expressly used the terms "payments" and "requirements payments" in Sections 101, 251, and 261 of the Act; and

WHEREAS, Congress also used the terms "grants" and authorized the EAC to award "grants" in Sections 271 and 295 of the Act; and

WHEREAS, Congress does not interchange the use of the term "payments" and/or "requirements payments" in Section 101, 251, and 261, with the use of the term "grant" in Sections 271 and 295; and

NOW THEREFORE BE IT RESOLVED that the National Association of Secretaries of State finds that:

1. Under HAVA, a "payment" is not a "grant," and a "grant" is not a "payment;" and
2. In effectuating its duties under HAVA, the EAC should create an accurate administrative record by using the term "payment" when the federal law means "payment", and it should use the term "grant" when the federal law means "grant."

Adopted the 19th day of July 2009  
in Minneapolis, MN

EXPIRES: Summer 2014

## Attachment F - NASS Resolution



# NASS

National Association  
of Secretaries of State

### **NASS Resolution on Help America Vote Act of 2002 (HAVA) Grant and Payment Distinction**

Approved July 2009; Reauthorized July 2014

WHEREAS, the Help America Vote Act of 2002 ("HAVA") established the Election Assistance Commission (EAC) to assist in the administration of federal elections and charged the EAC with distributing payments to states under its authorized funding programs (Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002); 42 U.S.C. sections 15301-15545. See HAVA Sections 101, 251 and 261); and

WHEREAS, the Help America Vote Act of 2002 ("HAVA") also charged the EAC with distributing grants to other entities under its authorized funding programs (See HAVA Sections 271 and 295); and

WHEREAS, HAVA authorizes the EAC in making a grant or payment to audit or examine the recipient of such a grant or payment made under HAVA, and in so doing makes an express categorical distinction between "grant" and "payment" (See HAVA Section 902); and

WHEREAS, in conducting audits of grants and payments, the EAC has no rule-making authority, and therefore, in performing its functions must act in accordance with the express statutory provisions of HAVA (See HAVA Section 209); and

WHEREAS, in enacting HAVA, Congress expressly used the terms "payments" and "requirements payments" in Sections 101, 251, and 261 of the Act; and

WHEREAS, Congress also used the terms "grants" and authorized the EAC to award "grants" in Sections 271 and 295 of the Act; and

WHEREAS, Congress does not interchange the use of the term "payments" and/or "requirements payments" in Section 101, 251, and 261, with the use of the term "grant" in Sections 271 and 295; and

NOW THEREFORE BE IT RESOLVED that the National Association of Secretaries of State finds that:

1. Under HAVA, a "payment" is not a "grant," and a "grant" is not a "payment;" and
2. In effectuating its duties under HAVA, the EAC should create an accurate administrative record by using the term "payment" when the federal law means "payment", and it should use the term "grant" when the federal law means "grant."

Adopted the 16th day of July 2014  
in Baltimore, MD

EXPIRES: Summer 2019



# Federal Administrative Procedure Act From U.S. Government Printing Office

<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partI-chap5-subchapII-sec553.pdf>

## Title 5 U.S.C. §551, 552 & 553

### § 551. Definitions

For the purpose of this subchapter—

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

## Attachment G - Administrative Procedure Act

### § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) 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; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

# Attachment G - Administrative Procedure Act

§ 552

TITLE 5—GOVERNMENT ORG

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

## § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

## Attachment G - Administrative Procedure Act

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

### AMENDMENTS

1995—Subsec. (j). Pub. L. 104-66 amended subsec. (j) generally. Prior to amendment, subsec. (j) read as follows: “Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).”

## Government in the Sunshine Act

From General Services Administration Portal

<https://www.gsa.gov/portal/getMediaData?mediaId=217779>

### Title 5 U.S.C. §552

#### § 552b. Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(f) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

## Attachment H - Sunshine Act

(e) (1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

## **APPENDIX A-2**

### **Response of the U.S. Election Assistance Commission to the Draft Report**



**EAC RESPONSE TO THE DRAFT AUDIT:**


*OIG Performance Audit Report on the Administration of Payments Received Under the Help America Vote Act by the New Hampshire Secretary of State for the Period May 3, 2003 through September 30, 2015.*

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July 20, 2017

**MEMORANDUM**

To: Patricia Layfield, Inspector General

From: Brian Newby, Executive Director 

Subject: Draft Performance Audit Report – “Administration of Payments Received under the Help America Vote Act by the New Hampshire Secretary of State

Thank you for this opportunity to review and respond to the draft audit report for the New Hampshire Secretary of State.

The Election Assistance Commission (EAC) appreciates the auditor’s detailed findings and recommendations outlined in the draft audit report and will work with the Secretary’s Office to ensure appropriate corrective actions are taken in a timely and complete manner.



## **APPENDIX B**

### **Audit Methodology**

## AUDIT METHODOLOGY

Our audit methodology included:

- Assessing audit risk and significance within the context of the audit objectives.
- Obtaining an understanding of internal control that is significant to the administration of the HAVA funds and of relevant information systems controls as applicable.
- Identifying sources of evidence and the amount and type of evidence required.
- Determining whether other auditors have conducted, or are conducting, audits of the program that could be relevant to the audit objectives.

To implement our audit methodology, below are some of the audit procedures we performed.

- Interviewed appropriate Office employees about the organization and operations of the HAVA program.
- Reviewed prior single audit reports and other reviews related to the State's financial management systems and the HAVA program for the period under review.
- Reviewed policies, procedures and regulations for the Office management and accounting systems as they relate to the administration of the HAVA program.
- Analyzed the inventory lists of equipment purchased with HAVA funds.
- Tested major purchases and the supporting documentation.
- Tested randomly sampled payments made with HAVA funds.
- Evaluated compliance with the requirements for accumulating financial information reported to the Commission on the financial status reports and progress reports, accounting for property, purchasing HAVA related goods and services, and accounting for salaries.
- Verified the establishment and maintenance of an election fund.
- Verified the State expenditures met the Maintenance of Expenditures requirement
- Observed the physical security/safeguards of selected equipment purchased with HAVA funds and ensure compliance with federal regulation.
- Verified that the matching requirement was timely met and matching expenditures met the prescribed criteria and allowability requirements of HAVA.
- Verified program income was properly accounted for and not remitted to the State's general fund.

## **APPENDIX C**

### **Monetary Impact**

**MONETARY IMPACT AS OF SEPTEMBER 30, 2015**

<u>Description</u>	<u>Questioned Costs</u>	<u>Additional Funds for Program</u>
Unapproved Capital Expenditures	\$ 1,000,000	\$ -
Unsupported Payroll Costs	<u>2,446</u>	<u>-</u>
Total	<u>\$ 1,002,446</u>	<u>\$ -</u>