



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

**FINAL REPORT**

**USE OF APPROPRIATED FUNDS TO SETTLE A CLAIM**

**EVALUATION REPORT NO.  
I-EV-EAC-01-10**

**SEPTEMBER 2010**



**U.S. ELECTION ASSISTANCE COMMISSION**  
Office of Inspector General

September 28, 2010

TO: Donetta Davidson  
Chair, U.S. Election Assistance Commission

FROM: Curtis W. Crider *Curtis W. Crider*  
Inspector General

SUBJECT: Evaluation of the U.S. Election Assistance Commission's Use of  
Appropriated Funds to Settle a Claim

On December 10, 2009, U. S. Representative Jo Ann Emerson requested that the U. S. Election Assistance Commission (EAC) Office of Inspector General (OIG) examine and provide information to Congress regarding the EAC's use of appropriated funds to settle a claim against the agency. Attached is a copy of our final report.

The payment of a settlement to a prohibited personnel practices claim which the EAC and the Office of Special Counsel (OSC) have determined proper is incident to the general operations of the EAC. Therefore, based on the documentation and overall evidence available, our evaluation noted that using appropriated funds and charging the EAC's operating appropriations was appropriate. Additionally, we found no conclusive evidence that the use of fiscal year 2010 funds was improper.

In its response to the draft report dated September 8, 2010, the EAC agreed with the report and provided no additional comments.

The legislation as amended, creating the Office of Inspector General (5 U.S.C. § App. 3) requires semiannual reporting to Congress on all inspection and evaluation reports issued, actions taken to implement recommendations, and recommendations that have been implemented. Therefore, a summary of this report will be included in our next semiannual report to Congress.

If you have any questions regarding this report, please call me at (202) 566-3125.

cc: Gineen Bresso, Commissioner  
Gracia Hillman, Commissioner  
Thomas Wilkey, Executive Director

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



**HIGHLIGHTS**

EVALUATION REPORT NO.  
I-EV-EAC-01-010

**SUBJECT**

We conducted an evaluation of the U.S. Election Assistance Commission's (EAC) use of appropriated funds for the purpose of settling a claim brought by a candidate for the position of general counsel.

Our evaluation objectives were to determine whether:

- EAC had authority to enter into such a settlement agreement;
- EAC used proper fiscal year funds; and
- EAC followed appropriate protocols in entering into the settlement agreement.

SEPTEMBER 2010

**EVALUATION REPORT**

**USE OF APPROPRIATED FUNDS TO SETTLE A CLAIM AGAINST THE U.S. ELECTION ASSISTANCE COMMISSION**

**RESULTS IN BRIEF**

On December 10, 2009, U. S. Representative Jo Ann Emerson requested that the U. S. Election Assistance Commission (EAC) Office of Inspector General (OIG) examine and provide information to Congress regarding the EAC's use of appropriated funds to settle a claim against the agency. The claim in question was brought by a candidate for the position of general counsel and was based on allegations that the EAC refused to hire the applicant based upon the candidate's political affiliation. The claim was made through the Office of Special Counsel (OSC). The claim was settled confidentially and without admission of liability by the EAC.

We examined the EAC's records concerning the claim and interviewed EAC employees regarding the negotiation and settlement of the claim. The OSC declined our request for information concerning the settlement of the claim.

Our evaluation found that the EAC had authority to settle claims of this type. We also found that the EAC used appropriate fiscal year funds to pay the settlement amount. Last, we found that while the EAC did not have established policies and procedures for settling claims, the EAC made use of available advice and guidance from other federal agencies to negotiate and finalize the settlement agreement.

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## INTRODUCTION

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The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA) to assist states with improving the process of conducting elections for federal office. EAC is an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information about election administration. EAC also accredits testing laboratories and certifies voting systems, as well as audits the use of HAVA funds.

The EAC employs several statutory officers, including an executive director and general counsel. These statutory officers must be appointed by majority vote of the Commission. In late 2008, the EAC sought to fill a vacancy in the position of general counsel.

A qualified candidate applied for the position of the EAC general counsel. Subsequently, the candidate was offered and accepted the position. However, after the candidate accepted the position, the EAC commissioners took a tally vote<sup>1</sup> and two of the commissioners refused to approve his appointment as general counsel to the EAC.

The candidate subsequently filed a complaint with both the EAC Office of Inspector General (OIG) and the Office of Special Counsel (OSC). The OSC investigated the applicant's complaint. The OSC, in a press release dated December 2, 2009, reported that a resolution of a prohibited personnel practice complaint filed against the EAC had been reached. The OSC reported that their investigation had uncovered evidence indicating that the EAC illegally refused to approve the complainant's appointment because he was a Republican.

During the investigation, the OSC negotiated an informal agreement between the complainant and EAC. The EAC, without admitting fault, agreed to a monetary settlement to resolve the OSC complaint.

On December 10, 2009, U. S. Representative Jo Ann Emerson requested that the U. S. Election Assistance Commission (EAC) Office of Inspector General (OIG) examine and provide information to Congress on the EAC's use of appropriated funds to settle a claim against the agency. The claim was based on the EAC rescinding an offer after agreeing to hire an applicant for the position of general counsel.

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<sup>1</sup> A tally vote is a written voting procedure in lieu of a vote at a public meeting.

## **OBJECTIVES, SCOPE, AND METHODOLOGY**

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Our evaluation objectives were to determine whether:

- EAC had authority to enter into such a settlement agreement;
- EAC followed appropriate protocols in entering into the settlement agreement; and
- EAC used proper fiscal year funds to settle the complaint.

To achieve our objectives, we interviewed EAC commissioners, management, and staff. We requested and examined internal documentation such as emails and internal memorandums issued relative to the candidate for the position of general counsel. We reviewed applicable federal requirements, regulations, and other guidance such as relevant Comptroller General decisions and opinions. We inquired and reviewed EAC's policies and procedures relative to the general counsel selection process. The OSC declined our request for information related to the settlement of this claim.

Our scope of work did not include reviewing OSC's investigation to the allegation. Additionally, we did not perform an evaluation to determine whether the EAC violated any employment or anti-discrimination laws and regulations.

We conducted our evaluation in accordance with the Quality Standards for Inspections as prescribed by the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency. An inspection includes the evaluation, review, study and/or analysis of programs and activities of a department or agency for the purpose of providing information to managers for decision making; making recommendations for improvements to programs, policies, or procedures; and identifying where administrative action may be necessary.

## EVALUATION RESULTS

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Based upon our evaluation of the law, documentation, and information available, we found that the EAC had authority to enter into a monetary settlement agreement with the former candidate for the position of EAC general counsel. Additionally, EAC used proper fiscal year funds, and sought advice and counsel from other federal agencies in the absence of established policy, procedures, or protocol for settling claims.

### *EAC's Authority to Enter into the Settlement Agreement*

Our evaluation of the law, documentation, and overall evidence available noted no exceptions to the EAC's authority to enter into a monetary agreement to settle a claim of this type. The EAC, an executive branch agency, was delegated authority by the Office of Management and Budget (OMB) to settle claims of this type by OMB's December 17, 1996 determination - Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316. The EAC's policies and procedures, as established in its responsibilities document, allow the EAC's executive director to settle claims on behalf of EAC. This claim fell within the scope and dollar threshold of the executive director's authority to settle claims. The settlement agreement was signed by the EAC's executive director on behalf of the EAC.

### *Use of Fiscal Year 2010 Funds*

Based upon a review of the Government Accountability Office (GAO) precedents regarding the use of fiscal year funds to satisfy administrative settlements, we take no exception to the EAC's use of fiscal year 2010 funds to pay the current settlement amount.

Payment of an administrative settlement from fiscal year funds is dependent upon two determinations. First, what type of appropriation can be used to satisfy the claim? Second, which fiscal year funds should be used? The statute governing the settlement or claim may specify from which appropriation a payment may be made. If the statute is silent, then the agency may pay the settlement from its operating appropriations. See GAO-08-978SP Appropriations Law, Vol. III. The claim settled by the EAC was for an alleged prohibited personnel practice. The statute governing such claims is silent as to the type of appropriation that can be used to pay a settlement or award. This claim is not the type of claim that is payable from the judgment fund<sup>2</sup> administered by the U.S. Department of Justice. See 31 C.F.R. 256.1. Thus, the EAC could use its salaries and expense appropriation for this purpose.

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<sup>2</sup> The Judgment Fund is available for court judgments and Justice Department compromise settlements of actual or imminent lawsuits against the government.

## EVALUATION RESULTS

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The second determination that must be made is which fiscal year funds may be used to pay the settlement. The GAO has found that many settlement types are payable from current fiscal year funds in the year in which the settlement is entered because the settlement or award creates a new right that gives rise to the government's liability. In an opinion related to the payment of compensatory damages in settlement of a claim of discrimination under the Civil Rights Act of 1991, the GAO found that the settlement amount was chargeable to the current year appropriation for the year in which the claim was determined and allowed. B-272984 (September 26, 1996). The claim was paid from the fiscal year funds for the year in which the settlement award was made.

The claim against EAC was one alleging discrimination based upon political affiliation, a prohibited personnel practice. The statute governing this type of claim allows for corrective action and damages, including: "reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages." The settlement agreement in question was not finalized until December 2009. The EAC did not admit liability and had no obligation to pay the claim until the settlement agreement was final. The signed settlement agreement created the administrative award and thereby established the financial liability for the EAC. Since the settlement agreement was finalized in fiscal year 2010, it was appropriate to use fiscal year 2010 funds to pay the settlement amount.

### *Proper Protocols*

Our evaluation noted no exceptions to the protocols used during the settlement process. The EAC is a relatively new agency. Despite the fact that the EAC had not adopted formal policies and procedures relative to handling settlements, we found that the EAC obtained advice and guidance from other federal agencies in negotiating and finalizing this settlement agreement. Our inquiry, review, and analysis of the available documentation and processes used by the EAC found that the EAC consulted with the General Services Administration's legal department throughout the process to obtain information and guidance relative to the settlement agreement. Our evaluation further found that the settlement was mediated by and the settlement agreement, itself, was drafted in large part by the Office of Special Counsel (OSC).

### *EAC's Response*

In its response to the draft report (Appendix A), the EAC agreed with the report and provided no additional comments.





U.S. ELECTION ASSISTANCE COMMISSION  
1201 NEW YORK AVENUE, N.W., SUITE 300  
WASHINGTON, D.C. 20005

OFFICE OF THE CHAIR

September 8, 2010

Mr. Curtis Crider  
Inspector General  
U.S. Election Assistance Commission  
Washington, DC 20005

**VIA ELECTRONIC TRANSMISSION**  
**INTER-OFFICE MAIL**

RE: Draft Report: Use of Appropriated Funds to Settle a Claim

Dear Mr. Crider:

On August 26, 2010, you provided the U.S. Election Assistance Commission (EAC) with the Office of the Inspector General's (OIG) draft report on the use of appropriated funds to settle a claim. You also offered EAC the opportunity to comment on the draft report before OIG issues its final report.

I am writing to thank you for your attention to this matter and the thorough review OIG conducted. I am pleased that you found EAC acted within the scope of its authority, correctly recorded the transaction, and followed appropriate guidance. Further, I commend EAC staff for being available to assist OIG; and for fully cooperating with OIG staff during your evaluation.

If you would like to further discuss EAC's response to the draft report, please feel free to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Donetta Davidson".

Donetta Davidson  
Chair

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## **OIG's Mission**

The OIG audit mission is to provide timely, high-quality professional products and services that are useful to OIG's clients. OIG seeks to provide value through its work, which is designed to enhance the economy, efficiency, and effectiveness in EAC operations so they work better and cost less in the context of today's declining resources. OIG also seeks to detect and prevent fraud, waste, abuse, and mismanagement in these programs and operations. Products and services include traditional financial and performance audits, contract and grant audits, information systems audits, and evaluations.

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## **Obtaining Copies of OIG Reports**

Copies of OIG reports can be requested by e-mail.  
([eacoig@eac.gov](mailto:eacoig@eac.gov)).

Mail orders should be sent to:

U.S. Election Assistance Commission  
Office of Inspector General  
1201 New York Ave. NW - Suite 300  
Washington, DC 20005

To order by phone: Voice: (202) 566-3100  
Fax: (202) 566-0957

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## **To Report Fraud, Waste and Abuse Involving the U.S. Election Assistance Commission or Help America Vote Act Funds**

By Mail: U.S. Election Assistance Commission  
Office of Inspector General  
1201 New York Ave. NW - Suite 300  
Washington, DC 20005

E-mail: [eacoig@eac.gov](mailto:eacoig@eac.gov)

OIG Hotline: 866-552-0004 (toll free)

FAX: 202-566-0957

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