

## MEMORANDUM

March 17, 2009

To: All Interested Parties

From: John C. Keeney, Jr.  
John Dewitt Altenburg, Jr.

Re: Report of ABA Advisors to Drafting Committee for the Military  
Services Overseas Civilian Absentee Voter Act

The second meeting of the Drafting Committee was held from Friday, March 6 through Sunday, March 8, 2009 in Chicago, Illinois. The draft was substantially revised. Following incorporation of these changes, the new draft will go to the Style Committee of the Uniform Law Commission and then recirculated for first preliminary consideration at the Uniform Law Commission annual meeting between July 9<sup>th</sup> and July 16<sup>th</sup>, 2009 in Santa Fe, New Mexico. Conclusions of the Drafting Committee remain preliminary. Each of the 8 articles is discussed in order below.

### Article 1

This article contains the general provisions, including definitions and emergency powers. The starting point for the proposed Uniform Act is existing federal law in the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA", 42 U.S.C. § 1973 ff.) It is the dual purpose of the proposed Uniform Act to standardize the varying UOCAVA implementation procedures by state and local jurisdictions and at the same time extend similar protections to other state and local elections. UOCAVA currently addresses only federal and other elections held at the same time as federal elections.

Definitions from UOCAVA provide the starting point for the definitions in the proposed Uniform Act, with certain variations. The definition of an absent uniformed services voter would be expanded to include members of the National Guard called up by the governor of a state. It was tentatively concluded that it is not necessary to define further a "member of the Merchant Marine" in the body of the Uniform Act. The definition of "covered election" would include all federal, state or local elections including those for ballot measures.

UOCAVA makes no temporal distinction between voters temporarily (students and others) and permanently overseas. At least one state does. It

is the tentative conclusion of the Drafting Committee not to add this additional temporary or permanent distinction to the Uniform Act. It is not currently in the federal Act and would likely lead to greater confusion among overseas voters.

It is also the tentative conclusion of the Drafting Committee to avoid, where possible, a term such as “domicile” which in many states includes an element of intent to return. Thus, the Drafting Committee uses “domicile” only in relation to past acts such as a past domicile. The Drafting Committee’s tentative conclusion is in accord with UOCAVA which has no “intent to return” element for overseas voters.

The proposed Uniform Act would add a new class of eligible voter, not covered by the UOCAVA. These are stateless children, born overseas who have become United States citizens of voting age without ever having resided in the United States, although subject to United States taxes, selective service registration and other citizen obligations. There are approximately 50,000 persons in this category of stateless citizens who have never resided in any of the 50 states. Sixteen states currently permit these citizens to vote in some elections. Twelve of the 16 states permit them to vote in all federal, state and local elections. Four of the 16 states limit participation to federal elections.

It is the tentative conclusion of the Drafting Committee that the stateless citizens should be allowed to vote, but there is a split in the Committee, as there is in the States, whether the stateless citizens should be restricted to voting only in federal elections or whether they should be permitted to vote in all elections as is done in 12 states.

The Drafting Committee intends to vest responsibility for implementation of the proposed Uniform Act with each state’s chief elections authority. This responsibility would include developing standard absentee voting materials, the types of which would be specified and include both paper and electronic materials. It is contemplated that local jurisdictions would then use the standard materials developed by the state.

The Act would also authorize emergency changes where substantial compliance becomes impossible or unreasonable. Eighteen states already provide some form of such emergency authority. An official declaration by the governor of a state of emergency would be sufficient to invoke the emergency powers. Additional objective tests of an emergency sufficient to trigger the emergency powers will be fine-tuned during the drafting process before submission to the Style Committee. These additional drafting details include situations where the emergency arises outside the state of the governor.

The proposed Uniform Act would contain an explicit provision superseding state laws for overseas absentee voters with different dates, timelines or deadlines for absentee ballot applications or voting.

## Article 2

This article details the voter registration and absentee ballot application provisions. Section 201 specifies the jurisdiction in which the proposed voters are eligible to participate. First, an absent uniformed services voter who is absent from a place of residence by reason of such service would be permitted to register and apply for an absentee ballot in the state of residence for all covered elections. Second, an overseas voter who was eligible to vote in a state or would have been eligible if he or she had been of voting age before leaving the United States, would be permitted to register to vote and to apply for an absentee ballot in that state for all covered elections. Third, a new provision addresses stateless citizens of voting age. Such a stateless voter would be eligible to register to vote and to apply for an absentee ballot at the last place of residence in a state of one of the voter's parents who was eligible to register to vote in that state prior to leaving the United States.

The first two categories of citizens track UOCAVA; for these a new Section 201 of the Uniform Act expands the eligibility to vote to non-federal elections, due to pre-existing ties to that state. The third category (stateless citizen residing overseas) is not in the federal Act; the proposed Act establishes a voting right in the last U.S. residence of the voter's parents.

Section 202 establishes that for any covered election, an overseas voter may use, and the state shall give effect to, the Federal Post Card Application that is prescribed under the UOCAVA, 42 U.S.C. § 1973 ff(b)(2), to register to vote and to request an absentee ballot simultaneously. For those absent voters who are already registered to vote in the state, such voter may apply for an absentee ballot with either the Federal Post Card Application or a regular absentee ballot application.

The Committee's tentative view is to emphasize the use of the pre-existing federal forms. Such standardized forms help to reduce confusion among overseas voters, and provide for ease of administration.

In Section 203, it is the preliminary conclusion of the Drafting Committee that the proposed Act should extend to all elections the same federal requirement applicable to federal elections that a Federal Post Card Application be considered an application for an absentee ballot for all subsequent elections for the same time period (now four years) provided under UOCAVA, as amended from time to time. The Committee noted that UOCAVA mailings for subsequent federal elections are frequently returned

as undeliverable. Nonetheless, the majority of the Drafting Committee believes that the federal and Uniform Act should have the identical time period to avoid voter confusion. There would be an exception for any election held after the voter is otherwise no longer eligible to vote in the state. The drafting of the exception must be consistent with the National Voter Registration Act and its purging provisions that UOCAVA incorporates by reference.

Section 204 of the proposed Act would mandate that the states shall request the email addresses of overseas voters but does not require that the overseas voters supply those email addresses. The states would be required to keep the email addresses private, consistent with other privacy protections for personal identification such as social security numbers.

### Article 3

This article sets deadlines for application for absentee ballots and transmission of unvoted ballots to overseas voters. It would encourage electronic transmission, as currently provided by 32 states, to the voter. It will also provide for a paper option. It does not authorize, for security reasons, electronic transmission over the Internet of voted ballots from the voter. The Article provides three deadlines. First, an otherwise valid application for an absentee ballot from an overseas voter is timely if received by the later of the 30<sup>th</sup> day before the election or the last date for other voters in the state to apply. Second, no later than a fixed number of days before the election, possibly 45, local election officials shall transmit by paper or electronically as designated by the voter, the materials to any overseas voter who has by that date submitted a valid Federal Post Card Application. Third, for overseas voters whose Federal Post Card Applications arrive after the jurisdiction has begun transmitting absentee ballot materials, their materials should be transmitted to the voter as promptly as possible.

Section 303 would set a uniform time for an absentee ballot from an overseas voter to be marked and submitted as no later than 11:59 p.m. local time on the day before the election. A postmark would not be required. Instead, at the time of completing the ballot, the voter would affirm under penalty of perjury that the absentee ballot was timely marked and would be transmitted no later than 11:59 p.m. local time in the place where the voter was completing the ballot.

Section 304 would establish a uniform receipt date that an overseas absentee ballot must be counted if received by the canvassing date. Currently, 31 states do not accept an absentee ballot from a uniformed or overseas voter after election day. The choice of canvassing date accommodates varying local jurisdictions' deadlines to count and report results to state election officials.

#### Article 4

This Article expressly authorizes electronic transmission methods. Section 401 states that a Federal Post Card Application can be transmitted electronically in the manner directed by the state's elections officer.

Section 402 establishes that, where reasonably possible, local election jurisdictions that maintain a presence on the internet shall make available on internet sites downloadable versions of the absentee ballot and voting instructions. The Committee observed that if voters are able to download and print absentee ballots, it may interfere with the current numbering system used by many states to track the receipt of an absentee ballot by a voter. It is the intent of the Drafting Committee to seek additional information about reconciling internet downloads with inventory control of absentee ballots for overseas voters.

Section 403 would require an electronic system by which an overseas voter could determine, either by telephone or internet, whether a Federal Post Card Application has been received and its current status.

#### Article 5

The proposed Act would mandate the acceptance of the Federal Write In Absentee Ballot in any covered election. In addition, state and local election descriptions of the offices to be decided and ballot measures to be considered must be prepared in conjunction with the Federal Write In Absentee Ballot. This description would list the offices and not the candidates, since many of the candidates would not have been selected. It is contemplated that an absent overseas voter may request, not earlier than 180 days before a covered election, a copy of the state and local election ballot listing. The Committee discussed, without mandating, whether internet posting would be sufficient, particularly if an overseas voter requested transmission by another means.

#### Article 6

Section 601 provides details of the declaration to be submitted by the overseas voter. It need not be notarized. The tentative view of the Committee is that the proposed text of the declaration be restated in full in this Article of the Uniform Act, rather than incorporated by reference to the UOCAVA affirmation. Non-essential elements of the absentee voting process would be disregarded if the intention of the voter could be ascertained.

## Article 7

This provides for enforcement by a private cause of action for civil injunctive relief by any registered voter of the state or by any person alleging eligibility to register to vote under the Uniform Act.

## Article 8

This miscellaneous article contains ministerial provisions. It notes that in construction of the Uniform Act, consideration be given to the need for uniformity among the states that enacted it. It emphasizes that the provisions of this Act are designed to facilitate and, therefore, should be read in harmony with the federal mandate of the UOCAVA. Its relation to electronic signatures requirement in other federal acts is stated. In addition, this Act applies only for the purposes of voting and shall not by itself affect, for purposes of any other state or local tax law or any other non-election law, the residence or domicile of the person exercising rights under this Act.

## Conclusion

The latest copy of the Draft Uniform Act is expected to be available by early April. The next draft will be submitted to interested ABA entities.

Questions, comments, or concerns for the Drafting Committee can be sent to either of the two ABA advisors whose addresses are below

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