



MEMORANDUM

To: All Interested American Bar Association Entities and Persons

From: John C. Keeney, Jr.

Date: September 28, 2009

Re: Report of ABA Advisor to Drafting Committee for the Military Services and Overseas Civilian Absentee Voters Act

The third meeting of the Drafting Committee was held Friday, September 25 and Saturday, September 26, 2009 in Minneapolis, Minnesota. The draft, incorporating comments from the Uniform Law Commission Annual Meeting in Santa Fe, New Mexico in July 2009, was further revised. These Minneapolis changes will be circulated in a new draft. The Minneapolis meeting had the active participation of current election officials in Minnesota and Arizona, a Commissioner who is a past election official in New Mexico, and representatives from the United States Department of Defense, Department of State, and others.

The provisions are substantially reordered and now comprise 25 sections. Given the brevity of the Act, it was deemed unnecessary to group these under eight articles. This analysis uses the current numbering system based on the clean draft of the Uniform Act presented at the Minneapolis meeting. The redlined version, reflecting changes from the March 7, 2009 version discussed in Chicago, Illinois, had a different numbering system.

New federal legislation is imminent. Presently pending in Congressional conference committee reconciliation of the House and Senate versions of the Department of Defense authorization bill is The Military and Overseas Voter Empowerment Act ("MOVE Act"). It amends UOCAVA to implement, for federal elections, some of the provisions recommended in this proposed Uniform Act for all covered elections. The MOVE Act will likely become law in October 2009, but will not extend to state and local elections that are not held at the same time as federal elections. Only the Uniform Act would do that.

The Director of the Federal Voting Assistance Program of the Department of Defense participated in this meeting. The Federal Voting Assistance Program (FVAP) 2010 legislative initiatives in the states emphasize timeliness of ballot transmission to UOCAVA voters, uniform procedures for UOCAVA voters, and ease of participation by UOCAVA voters. It has prioritized the following four legislative initiatives: 45 to 60-day ballot transmission times (a functional equivalent would be a combination of earlier ballot transmission and a post-election deadline for receipt of the executed ballot from the uniformed services or overseas voter); electronic transmission of election materials; expanded use of the federal write-in absentee ballot;

and adoption of this Uniform Act, once finalized by the Uniform Law Commission. Other legislative initiatives include late registration procedures; emergency authority to protect UOCAVA voters; elimination of notarization or witnessing requirements; and enfranchising overseas citizens who pay taxes in the United States but have never resided in the United States. FVAP has been actively engaged as an observer in the Drafting Committee and is encouraging every state to do likewise. The FVAP legislative initiatives reflect discussions to date of this Drafting Committee.

Section-by-Section Analysis of the proposed Uniform Act

1. Sections 1 (title), 24 (repeals) and 25 (effective date) are boilerplate.

2. Section 2's definitions conform, where applicable, to existing federal law in the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 USC § 1973 ff. The proposed Uniform Act would extend the UOCAVA protections to state and local elections, to which they currently only apply if held at the same time as federal elections. The Uniform Act would also standardize the varying UOCAVA implementation in state and local jurisdictions.

The definition of Uniformed Services in Subsection 5 was clarified to differentiate two definitions that derive from UOCAVA, and the new addition in 5(C) of National Guard and state militia units, when activated. The National Guard and state militia units are not covered under UOCAVA, but would be covered by the Uniform Act.

The definition of Covered Election in Subsection 2 broadly extends to elections, including runoffs, for federal, state or local government offices or ballot measures, but with the limit "conducted according to the procedure of [applicable state code]." This limitation excludes those elections below the level of local government offices for which state law does not govern that local election. Thus, elections solely for a water district or similar type local entity would not be covered if not conducted according to the state election code. However, the Act would confer an absolute right of military and overseas absentee voters to participate by absentee ballot in all "covered elections."

A definition of "dependent" was added in a new Subsection 3 circulated on Saturday, September 26 to mean a person recognized as a dependent by the United States Department of Defense, Social Security Administration, the Internal Revenue Code or the tax laws of the state.

The definition of "United States" was corrected.

3. Section 3 establishes the role of the state's chief election authority to implement the Act. It was essentially unchanged.

4. Section 4, Eligibility to Vote, had duplicative language stricken. Subsection (C) specifies the voting jurisdiction for a non-domiciled citizen as defined in renumbered Section 2 (4)(C).

5. Section 5 –The Committee endorsed a more expansive use of the Federal Post Card Application, established under UOCAVA, or its electronic equivalent, to register to vote and to request an absentee ballot simultaneously. There was a consensus that “best efforts” should be confined to “reasonable efforts” by a state’s chief election officer to minimize and standardize information collection and streamline the absentee ballot application process.

6. Section 6 – Electronic transmission of registration and absentee ballot applications is strongly encouraged to reduce mail delays overseas. This Section will be revised from a permissive right of the voter to instead mandate statewide procedures to facilitate the electronic transmission of registration and absentee ballot applications. The protection of personal identifying information, not otherwise publicly available, was discussed at length. To the extent that other state laws already protect this data, there was a consensus that additional general language was not needed. However, specific parts of the electronic transmission, such as social security numbers and emails addresses, would be subject to specific protection, as dealt with in Section 15 below.

7. Section 7, previously Section 8, involving a standing request for absentee ballots initially mirrored the UOCAVA provision. However, UOCAVA is about to be amended effective October 2009 to substantially change the federal law provision on which Section 7 is currently based. Section 7 of the Uniform Act may be deleted in its current form since there will no longer be a period required under federal law. To the extent that Section 7 then merely incorporates the period provided under the law of the state, further consideration of a standardized recommendation for this state law period will be discussed at the Spring Committee meeting.

8. Section 8 – It is the view of the Drafting Committee that the application for absentee ballot should be effective for any runoff election necessary to conclude the election for which the application was submitted. There was discussion whether the deadline for timely receipt should vary depending on whether transmission was by hard copy/mail or electronically. There was further discussion whether an application for an absentee ballot for a primary election should also be deemed as an application for the general election too. There was discussion whether the 30-day period for receipt was too long and should be shortened to ten days. The reporter is doing further research on the current state laws and will make a recommendation in a conference call with the drafting committee prior to the spring meeting.

9. Section 9 – For transmission of unvoted ballots to uniformed services and overseas voters, the Drafting Committee believes that ballots be made available no later than 45 days before an election. This 45-day period will be the new federal period time limit under the likely October 2009 amendments to UOCAVA. The federal amendment has a hardship exemption and applies only to federal elections (or those state and local elections conducted at the same time as federal elections).

In subsection (d) it was the view of the committee that the local jurisdiction website is aspirational and that, in the event that a local jurisdiction does not have such a website, the duty would default to the state election of supervisors. There was extensive discussion about which local elections were to be included in the local election listing required by Section 16.

10. Section 10, Casting of Ballot, added the word “measured” to the specified time of 11:59 p.m. in the place where the voter completes the ballot on the day before the date of the election. The Committee revisited and agreed again that was the appropriate latest time to cast an absentee ballot.

11. Section 11 mandates the acceptance in all states of the Federal Write-In Absentee Ballot for all covered elections. It was the preliminary conclusion of the Drafting Committee to delete as duplicative here the repetition of the federal requirement of the contents of the affirmation. It was emphasized that the federal write-in absentee ballot is a fail-safe, a backup. The Arizona election official in attendance at estimated that only 1% of the military voters and only 1% of the overseas voters use the federal write-in absentee ballot. Nevertheless it is important as a fail-safe.

A new Subsection B(2) was suggested at the annual meeting in Santa Fe. It is the tentative conclusion of the Drafting Committee that this additional language disenfranchises the non-domiciled voter overseas that the remainder of the Act attempts to enfranchise for the first time. Therefore, the additional language was rejected.

12. Section 12 – The proposed deadline for receipt of a voted ballot in order to be counted is by the deadline for completion of the local canvass period. Further research will verify that local canvass is the correct and meaningful term.

13. Section 13 – Declaration Requirements. The election official from Arizona correctly questioned whether it was necessary to receive the same declaration three times as the initial wording seems to suggest. It is the tentative conclusion of the Drafting Committee that the declaration be submitted once and accompany the executed ballot.

While it was suggested in the Santa Fe annual meeting to add the word “improperly,” it was the unanimous preliminary view of the Drafting Committee that this oath should track the wording of the federal oath. Further grammatical clarity was also suggested for subsection (c) and will be in the next draft.

14. Section 14 – Confirmation of Receipt of Application and Voted Ballot. The sole change was a recommendation that the verb “develop” be expanded to include “and implement” an electronic system by which uniformed and overseas voters could determine if a ballot had been received and accepted.

15. Section 15 requesting voter email addresses was strongly encouraged. The modern trend is toward email transmission of voting materials to the potential voter. Electronic transmission on the front-end of the voting process substantially alleviates many of the barriers faced by military and overseas voters. It is the single most effective accommodation of the unique circumstances of these absent uniformed services and overseas voters.

Only the last sentence was controversial. Current state laws provide privacy protections. It was thought that the current sentence is too broad. Nevertheless, specific protections of individual email addresses and social security numbers were deemed important. Thus, this section will be revised to specify in detail protection for this particular information.

16. Section 16 – Preparation of Election Listing. This was discussed at length due to some uncertainty about the number of local elections that would qualify as covered elections. The 180-day limit was also discussed. Because the election listing is only a heads up about future elections to be conducted, one of the alternatives to be discussed in a conference call by the Drafting Committee is how important the election listing would be to a military or overseas voter and whether this section could be deleted in its entirety.

In order of priority, the following portions of the current Section 16 were deemed most important. Subsection (c) for updating certified candidates and the text of ballot measures; the last sentence of subsection (a) about specific instructions for how to cast the federal write-in absentee ballot (a one-time preparation of instructions that could be used in future elections); and (b) delivery of a copy of the election listing as requested by a voter in the form requested by the voter. Although there is not yet a preliminary view of the committee, there seems to be an evolving consensus to limit this Section to these three specific priority provisions.

17. Section 17 essentially voids any nonessential requirements. This Section will be further revised to specifically reference statewide standards for discerning the intent of a voter and the meaning of a mark. Under the Help America Vote Act, each state is already required to have such a standard and therefore this Uniform Act would not create a new standard. However, not all states are yet in compliance with the federal UOCAVA requirement to have such a standard.

18. Section 18, Emergency Power, may be retitled Exemptions in Special Circumstances, and was controversial. It implements a recommendation from the Federal Voting Assistance Program of the Department of Defense. As of 2008, 18 states had provided some form of emergency authority to their chief elections official. Revised language will state that the governor or his or her designee may prescribe these emergency rules to facilitate voting by absent uniformed services or overseas voters. Inasmuch as state election officials have the ability to go to a judge for emergency relief, additional power affecting voting by a politically elected official may bypass the checks and balances provided by the involvement of the judicial branch. This will be further discussed at the spring meeting of the Committee.

19. Section 19 – Enforcement by injunction or other equitable relief was non-controversial.

20. Section 20 – Supersession of other law was non-controversial and unchanged.

21. Section 21 – In the application and construction of the Act, it is the preliminary conclusion of the Drafting Committee that the Act “must” be read in harmony with the federal UOCAVA.

22. Section 22 involving electronic signatures was non-controversial and unchanged.

23. Section 23 about the effect on other state and local laws may be deleted. As phrased, it would have had little effect because the exercise of any right under this Act would never “by itself” effect any other legal determinations because those determinations are multi-factor tests.

Conclusion – The latest revised draft of the proposed Uniform Act is expected to be available later this fall. It 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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