

**MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES AND THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS REGARDING COMPLIANCE WITH THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT**

**A. Introduction**

This agreement is entered into between the United States of America, through the United States Department of Justice (“United States”), and the District of Columbia and the District of Columbia Board of Elections and Ethics (“Board”) (collectively, “the District”), to facilitate the District’s compliance with Section 102(a)(8) of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). UOCAVA provides that absent uniformed services voters and overseas voters (“UOCAVA voters”) shall be permitted “to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 42 U.S.C. § 1973ff-1.

This matter arises out of UOCAVA’s requirement, pursuant to amendments by the MOVE Act, that states that have not received a hardship exemption transmit to their UOCAVA voters validly requested absentee ballots at least 45 days before an election for Federal office. 42 U.S.C. § 1973ff-1(a)(8). The definition of “state” includes the District of Columbia. 42 U.S.C. § 1973ff-6. Based on the District’s September 14, 2010 primary election date, the District requested from the Presidential designee for UOCAVA, the Secretary of Defense, a hardship exemption from the “45 day advance” transmission requirement of UOCAVA, pursuant to 42 U.S.C. § 1973ff-1(g). On August 27, 2010, the Secretary of Defense denied the District’s request. That same day, the Department of Justice notified the District that in light of the waiver request denial, it appeared the District would be in violation of UOCAVA for the upcoming Federal general election and a lawsuit to enforce UOCAVA had been authorized.

Following discussions between the Department of Justice and the District, the District has taken steps to ensure that UOCAVA voters have 45 days to receive and return their ballots for the upcoming Federal general election. Pursuant to authority set forth in D.C. Code §1-1001.05(a)(14), the Board met on September 1, 2010 and passed emergency rules amending 3 DCMR Chapter 7, “Election Procedures” to incorporate October 4, 2010 as the ballot transmission deadline. Pursuant to authority set forth in D.C. Code §1-1001.05(a)(14), the Board met on September 1, 2010 and passed emergency rules amending 3 DCMR Chapter 7, “Election Procedures” and 3 DCMR Chapter 8, “Tabulation and Certification of Election Results” to add seven (7) additional days to its ballot receipt deadline extension.

The United States and the District, through counsel, have conferred and agree that this matter should be resolved without the burden and expense of litigation. The parties share the goals of providing UOCAVA voters with sufficient opportunity to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for the November 2, 2010 Federal general election and in future Federal general elections. As consideration for this Agreement, the United States has agreed to forgo litigation, subject to compliance with the terms

of this Agreement. The parties negotiated in good faith and enter into this Agreement as an appropriate resolution of the UOCAVA violations alleged by the United States.

## **B. Recitals**

The United States and the District stipulate and agree that:

1. The United States District Court for the District of Columbia has jurisdiction to enforce provisions of UOCAVA, 42 U.S.C. §§ 1973ff to 1973ff-7, and the Federal Court would have jurisdiction over an action brought by the United States to enforce the terms of this Agreement pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201(a).
2. The United States Attorney General is authorized to enforce the provisions of UOCAVA. 42 U.S.C. § 1973ff-4.
3. The District is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.
4. The Board is the District agency primarily responsible for conducting elections in the District. D.C. Code § 1-1001.05(a)(3). As part of that responsibility, the Board is responsible for recording and counting votes, certifying election results, providing information to UOCAVA voters, and complying with UOCAVA's mandates. D.C. Code §§ 1-1001.05(a)(4), (10), and (11).
5. Section 102(a)(8) of UOCAVA requires that states transmit validly requested absentee ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election. 42 U.S.C. § 1973ff-1(a)(8).
6. States can be exempted from the 45-day requirement if they apply for and are granted a hardship waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 42 U.S.C. § 1973ff-1(g). The District applied for a hardship waiver on the grounds that its September 14, 2010 primary election prevented the District from complying with Section 102(a)(8)(A). On August 27, 2010, pursuant to its statutory authority, the Department of Defense denied the District's request for a hardship waiver, finding that although the District's primary election date caused the District undue hardship, the District's proposed comprehensive plan did not provide sufficient time for UOCAVA voters to vote and have their ballots counted as a substitute for transmitting absentee ballots not later than the 45<sup>th</sup> day prior to the November 2, 2010 Federal general election in accordance with Section 102(a)(8)(A) of UOCAVA.
7. On September 14, 2010, the District conducted a Federal primary election in which voters selected candidates for the Federal general election on November 2, 2010. The

date of the September 14, 2010 primary election is 49 days prior to the November 2, 2010 general election for Federal office.

8. Election officials of the District have received timely requests for absentee ballots for the November 2, 2010 Federal general election from voters who are entitled to vote pursuant to the provisions of UOCAVA.
9. To be counted under District of Columbia law, all mailed and postmarked absentee ballots must be postmarked not later than the day of the election; all mailed absentee ballots (postmarked and non-postmarked) must be received not later than ten days after the election. D.C. Mun. Regs. tit. 3, § 717.10.
10. The District concedes that, absent emergency remedial measures, it would not be able to send absentee ballots to UOCAVA voters until October 13, 2010, and thus would transmit ballots by mail no more than 20 days prior to the Federal general election, and no more than 30 days in advance of the November 12, 2010 deadline for the return of mailed ballots for the November 2, 2010 Federal general election.
11. The District's failure to either obtain a hardship waiver or to transmit absentee ballots to qualified UOCAVA voters 45 days in advance of the November 2, 2010 Federal general election violates Section 102(a)(8)(A) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A). Absent the remedial actions described herein, United States citizens protected under UOCAVA may be deprived of a sufficient opportunity to vote in that election, in violation of UOCAVA.

### **C. Terms of Agreement**

Now, therefore, for full and adequate consideration given and received, the United States and the District agree that:

1. For the November 2, 2010 Federal general election, the District shall take the following steps to ensure that all UOCAVA voters are sent the official absentee ballot no later than October 4, 2010: (a) The District will complete final tabulation of all election ballots for the September 14, 2010 primary election no later than September 24, 2010; (b) The District will certify the results of the September 14, 2010 primary election no later than September 27, 2010; (c) The District will transmit the official absentee ballots to UOCAVA voters by postal mail, or electronically by either email or fax or the District's Digital Vote by Mail system, according to the request of the voter, no later than October 4, 2010.
2. For the November 2, 2010 general election, the District shall extend by 7 days the deadline for receipt of ballots from UOCAVA voters to ensure that UOCAVA voters have the benefit of a full 45-day period to receive and return their ballots. Under this extension, absentee ballots from all UOCAVA voters that are executed and sent by November 2, 2010 and received by the close of business on November 19, 2010 will be accepted and tabulated in the final

Federal general election results. For the November 2, 2010 general election for Federal office, the District shall take such steps as are necessary to count as validly cast those ballots, including Federal Write-in Absentee Ballots, cast by absent uniformed service voters and overseas voters qualified to vote in the District pursuant to UOCAVA, provided such ballots are executed by November 2, 2010, received by November 19, 2010, and are otherwise valid.

3. The District shall take all necessary steps to afford eligible UOCAVA voters a reasonable opportunity to learn of this Memorandum of Agreement by including a notice with every absentee ballot sent to UOCAVA voters. The notice shall, at minimum: (a) explain that the deadline for the ballot to be executed and sent is November 2, 2010; (b) explain that the deadline for receipt of the ballot has been extended to November 19, 2010; and (c) provide appropriate contact information at the District's Board of Elections and Ethics for assistance.
4. Upon execution of this Agreement, the District shall issue a press statement for immediate release, posted immediately on the District's election information website and distributed to the Federal Voting Assistance Program; International Herald Tribune (<http://www.ihf.com>); USA Today International (<http://www.usatoday.com>); Military Times Media Group ([cvinch@militarytimes.com](mailto:cvinch@militarytimes.com)); Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes ([www.estripes.com](http://www.estripes.com)), and any other appropriate newspaper or news media in the District. The news release shall, at minimum: (a) summarize this Agreement, including a notice that the deadline for receipt of the ballot has been extended to November 19, 2010 for UOCAVA voters; (b) identify the contests for Federal office that will be on the ballot on November 2, 2010; and (c) provide appropriate contact information at the District's Board of Elections and Ethics for assistance.
5. The District shall provide a report to the United States Department of Justice no later than October 6, 2010 concerning the transmittal of UOCAVA absentee ballots. The report shall (a) certify that absentee ballots were transmitted no later than October 4, 2010 to all qualified UOCAVA voters whose applications for ballots have been received and approved by that date; and (b) indicate the number of requests received, the number of UOCAVA absentee ballots transmitted, and the method of transmittal.
6. The District shall provide a report to the United States Department of Justice no later than December 17, 2010 concerning the number of UOCAVA absentee ballots received and counted for the November 2, 2010 general election for Federal office. The report will set forth the following information categorized by absent uniformed services voters with APO and FPO addresses, uniformed services voters at a street address within the United

States, and overseas civilian voters:

- a. The number of absentee ballots from UOCAVA voters received before the close of the polls on November 2, 2010 and counted;
  - b. The number of absentee ballots from UOCAVA voters received and counted after the close of the polls on November 2, 2010 but prior to the close of business on November 19, 2010;
  - c. The number of absentee ballots from UOCAVA voters received later than the close of business on November 19, 2010; and
  - d. The number of absentee ballots from UOCAVA voters that were not counted in the general election for Federal office, for reasons other than late receipt.
7. The District shall take all necessary actions to assure that UOCAVA voters shall have a fair and reasonable opportunity to participate in future Federal elections, including all legislative and administrative actions needed to fully comply with UOCAVA. The parties recognize that on June 1, 2010, the Council of the District of Columbia adopted a "Sense of the Council Primary Election Timing Resolution of 2010" acknowledging that the District needed to enact legislation to move its primary election for federal offices to a date no later than the first Tuesday of the first full week of August, beginning in 2012. The parties agree to confer on the progress of these efforts, and the District shall provide a status report to the United States by April 1, 2011.

#### **D. Term**

The District's obligations under this Agreement shall commence immediately and shall expire in their entirety on January 31, 2013.

#### **E. Enforcement**

The terms of this Agreement are intended to resolve the potential violation of Section 102(a)(8) of UOCAVA arising from the denial of the District's waiver application on August 27, 2010. Where the District fails in any manner to comply with the terms of this Agreement, this Agreement is enforceable immediately in United States District Court for the District of Columbia as set forth above. In such event, the United States also may take any other actions required to enforce Section 102(a)(8) of UOCAVA in the United States District Court, including seeking appropriate relief as a substitute for or in addition to the actions which are the subject of this Agreement. Nothing in this Agreement precludes the United States from taking appropriate enforcement action against the District for any other violations of UOCAVA that are not the subject of this Agreement.

## **F. General**

This Agreement is binding on the parties and their successors in office. The parties agree to the admissibility of this Agreement without objection in any subsequent proceeding for its enforcement or other action filed to enforce Section 102(a)(8) of UOCAVA.

The undersigned enter into this Agreement this 17<sup>th</sup> day of September, 2010:

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