



**STATE OF HAWAII
OFFICE OF ELECTIONS**



SCOTT T. NAGO
CHIEF ELECTION OFFICER

March 25, 2010

Director Robert Carey
Federal Voting Assistance Program
Department of Defense



Dear Director Carey:

President Barack Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 on October 28, 2009. Subtitle H of that law, which may be cited as the Military and Overseas Voter Empowerment Act (MOVE), amended various parts of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) (42 USC §§ 1973ff et seq.). Among these amendments is a provision requiring states to transmit absentee ballots to uniformed and overseas voters no later than 45 days prior to a federal election. 42 USC § 1973ff-1(a)(8)(a). This provision takes effect on November 1, 2010. Given the short time frame, from an election administrator's perspective to comply with that provision of the law, the law provides the ability to seek waiver from this requirement.

Based on our limited time between the Primary and General Election, the State of Hawaii immediately took the following steps:

- Amended its Administrative Rules to incorporate the requirements of the MOVE Act; and
- Submitted proposed legislation to move the date of the Primary Election to the second Saturday in August in 2012.

The State of Hawaii likewise, immediately assessed that given our late Primary Election, which is the second to the last Saturday in September, it would need to apply for a waiver for the 2010 Election to meet this requirement of the Act. The reason being is changing the date of the Primary Election in the middle of an election year would create a cascade of problems, due to the impact on a variety of statutory deadlines tied to the date of the Primary Election and the significant amount of logistical preparations that are tied to the date of the Primary Election.

On December 3, 2009, as we were preparing to submit our application, you testified before the U.S. Election Assistance Commission on the status of the MOVE Act. You stated that you were "working with the Department of Justice right now on developing basically the methods by which the states can apply for waiver and the standards under which the waiver will be granted although the law is pretty clear." As a result of this, that same day we emailed our FVAP program analysts to confirm how long it would take for this consultation and the impact it would have on our ability to submit an application. We were told that we would be contacted when the consultation was completed and when we could submit our application. As we waited for FVAP to complete its consultation, we submitted the necessary proposed legislation to the Hawaii State Legislature.

As recently as March 9, 2010, we asked our FVAP program analyst to confirm that FVAP was still consulting with the U.S. Department of Justice and that once matters were clarified, states could submit their application. We were informed on March 10, 2010 that FVAP was finalizing the waiver evaluation process and that it intended to release a series of memos in the Spring, to the states, that would portray its understanding of UOCAVA as it was modified by the MOVE Act. As such, it was disappointing to read, in part, four days later, in a March 14, 2010 Associated Press article, the following: "FVAP Director Bob Carey said in an interview last Wednesday that states are free to apply whenever they want. He said states may be waiting for additional guidance, but the law is clear enough." As a result of this we had a telephone conference with you on March 19, 2010. At that time, you stated that we could immediately submit our application, but that there was no guarantee it would be resolved in the immediate future, as you had by law as late as 65 days prior to the General Election to grant or deny the application, and further you still needed to complete your consultation with the Attorney General.

In the end, it is quite clear that even if we had submitted an application on October 28, 2009, the same day the MOVE Act was signed into law, your office to this date would not be in a position to grant or deny the application, this leaving states like Hawaii in a position of still not knowing if they will be granted a waiver. In other words, your comment that nothing stops the states from submitting applications, may unintentionally lead someone to believe you are in a position to resolve the application, when you are not presently able to. Additionally, your reference to 65 days prior to the General Election, means that resolution of any application may take until August 29, 2010. Clearly any election administrator would know, this is too late a date to get any determination from FVAP to know whether or not its plans for the 2010 Elections is acceptable. Instead, it almost appears like FVAP has created a situation in which the states must first make an irreversible decision about the 2010 Primary Election date, and then FVAP will let them know if the waiver will be granted. It is ironic that the MOVE Act has created an application process for a waiver due to hardship, but FVAP is creating a further hardship for the states due to its inability to resolve such applications in a timely manner.

Frustrated by these uncertainties, the State of Hawaii must nevertheless move forward with its election planning and this waiver process. It is our hope that your agency is quickly moving towards formalizing the waiver process, in order for all states to have the

basic fundamental certainty as to the election preparations meant to serve all voters, uniformed, overseas, and otherwise. This effort would go a long way towards restoring FVAP's long record of working cooperatively with states under your new leadership.

Therefore, pursuant to 42 USC § 1973ff-1(g) the State of Hawaii hereby submits its application for a waiver from the requirements under subsection (a)(8)(A). As the law is specific about the requirements of the waiver application, the text of each part of the law is provided, along with the corresponding part of our application.

a recognition that the purpose of such subsection is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office;

42 USC § 1973ff-1(g)(1)(A)

The State of Hawaii recognizes that the purpose of 42 USC § 1973ff-1(a)(8)(A) is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office. The State of Hawaii has a long history of taking steps to ensure accessibility of voting to all of our residents, including absent uniformed services voters and overseas voters.

an explanation of the hardship that indicates why the State is unable to transmit absent uniformed services voters and overseas voters an absentee ballot in accordance with such subsection

42 USC § 1973ff-1(g)(1)(B)

The State of Hawaii's Primary Election date prohibits it from Complying with subsection (a)(8)(A) as a result of there only being 45 days between the Primary Election and General election. State law provides for the Primary Election to be held on the second to the last Saturday in September in every even numbered year, provided that it no case does it precede the General Election by less than 45 days. HRS § 12-2. Given that the General Election is held on the first Tuesday following the first Monday in November in every even numbered year, most Primary Elections are exactly forty-five days prior to the General Election. Haw. Const. Article II, § 8 (State Elections); 2 USC §§ 1 & 7 (Congressional Elections); and 3 USC § 1(Presidential Elections).¹ A period of 45 days between the Primary and General Election is insufficient to finalize election results, address legal challenges, proof the contents of the General Election ballot, print the ballots, and finally mail them out in compliance with the new federal law.

¹ The Primary Election is forty-five days prior to the general election in 2010, 2014, 2018, and 2020. In 2012 and 2022 the Primary Election is fifty-two days prior to the General Election, due to the first day of November in those years being a Tuesday, thus causing an additional week to elapse before the first Tuesday after the first Monday in November.

Any change in the Primary Election date during an election year, creates a cascade effect of problems with the administration of election. This is due to the fact that any such law which may be proposed when the Hawaii State Legislature convenes on January 20, 2010 may not be ultimately decided upon until the close of the legislature, which is currently schedule for April 29, 2010. Depending on when the legislature passes a bill, any veto or override could occur during the session, or possibly as late as July. Article III, Sections 16 & 17.

In an election year, a series of election dates set by statute, beginning in February occur that shape preparations for the Primary and General Elections. A significant amount of these date are tied to the date of the Primary Election (e.g. 170th day, 150th day, 90th day, 60th day, 30th day, 20th day, 10th day, 7th day, and 3rd day prior to the Primary Election). HRS §§ 11-24 (Last day to register to vote), 11-62 (Filing of petitions to form political parties), 11-63 (Filing of party rules), 11-64 (Filing of party officers), 11-117 (Withdrawals due to ill health), 11-119 (Submission of ballot questions), 12-6 (Filing of nomination papers), 12-8 (Objections to nomination papers), 15-4 (Requests for absentee ballots), and 15-7 (Absentee walk polling places). The later that in the session it is determined that the Primary Election will be changed, the more likely it will be that certain deadlines will have already passed, raising issues over how to treat the due process rights of those candidates, political parties, and voters who are impacted by those deadlines.

Additionally, polling places are reserved up to 2 years prior to the election in order to ensure site availability, especially since many of the sites frequently are scheduled to serve other community and/or government functions. As such, the earlier it is determined if the Primary Election date will be changed, the better chance there is to reserve the required polling places. Otherwise, the State of Hawaii would need to consolidate those polling places that are not available on the new Primary Election date with the next closest available polling place. This may result in having more than 1 ballot type (ballots containing different contest) in a polling place. This would increase voter confusion and hurt voter turnout.

In terms of statewide training of Election Day Officials, a change in the date of the Primary Election, would involve the rescheduling of 2,100 Election Day Officials, which would involve not only finding new dates, but possibly new locations for the trainings.

Simply, put these are just a few of the examples of the cascade effect that occurs if one changes the date of the Primary Election in an election year, without providing adequate notice.

With this in mind, the State of Hawaii, shortly after the passage of the MOVE Act on October 29, 2009, looked for guidance from the Federal Voting Assistance Program, in regards to how it would be handling the waiver application process.

On December 3, 2009, you testified before the U.S. Election Commission on the topic of the Military and Overseas Voters Empowerment (MOVE) Act and were asked

about the waiver process by Commissioner Donetta Davidson.

<http://msite.yorkmedia.com/yorkcast/Viewer/?peid=a96dd1bc5d7943569d278294d4108f3d>

Specifically, the following was said, according to the transcription displayed on the monitor, during your testimony:

40:54

Commissioner Davidson

"And that also now even goes further because of the 45 days, that is in there and you have to give a really give them a redemption I guess, however you want to put it, of your, because of their constitution or their state law or something in that manner that they didn't have to meet that 45 days."

41:13

Director Carey

"There is a waiver provision in the law that the Secretary of Defense in coordination with the Attorney General can grant a waiver under certain circumstances. And we are working with the Department of Justice right now on developing basically the methods by which the states can apply for waiver and the standards under which the waiver will be granted although the law is pretty clear."

41:39

Commissioner Davidson

"That is one place the law is clear it seems like, and so in that area, have you done research on how many states possibly have a problem with the constitution or the states laws to be able to move towards that 45 days and reach that goal?"

42:00

Director Carey

"Not in the constitutional problem, I have heard or states have late primaries that are concerned. They are not going to be able to certify their general election ballot in time to get a ballot out 45 days prior to the election so I have seen press reports that they are looking to some states will be looking to ask for a waiver."

42:21

Commissioner Davidson

"Okay. But you don't have any idea how many states you are going to be dealing with at this time?"

42:27

Director Carey

"Not at this time, no."

US EAC Transcript.

That same day, based on your testimony, our office submitted an email to Senior Program Analyst Brian Griffiths and Program Analyst Sara Richman asking several questions about the waiver process and whether we could immediately submit an application or if we needed to wait for your office to complete its consultation with the Attorney General.

It is our understanding that under the recent Military and Overseas Empowerment Act (MOVE) ballots must be transported 45 days before a federal election to absent uniformed services voters and overseas civilian voters.

As you may know, the State of Hawaii's primary in 2010 on September 18th is exactly 45 days from the General Election. This appears to mean that we will either need to move our primary election date or obtain a waiver from the requirement. In regards to moving the primary election date that would require a change in the law by the legislature and approval by the Governor. Our legislative session does not start until the third Wednesday in January and most bills do not become effective until June or July. This of course would make it difficult to properly plan for the 2010 Primary Election if we essentially have no idea of whether the date will be moved, or not, by the legislature until early summer.

As a result of this, while we will be submitting legislation to move the primary eElection, it will in all likelihood not be effective until the 2012 elections.

Against this backdrop, we will in all likelihood be seeking a waiver request. We have been asked by several people as to what the timeline would be on such a request and if it is not granted what the consequences would be. As such, we have the following questions:

1. *Is there a formal process for the waiver request and if so has it been developed at this point?*

On December 3, 2009, I was watching a webcast of a hearing before the U.S. EAC in which FVAP Director Bob Carey, during his testimony, appeared to say that FVAP was consulting with the Department of Justice on what the application process would involve or maybe the review process.

If this is correct, does this mean that there will be a specific form or application that will need to be filled out, or can a state simply refer to the requirements in the law and write up a memorandum to the Secretary of Defense, as the Presidential Designee, requesting a waiver and including its comprehensive plan.

2. *Assuming a waiver request is submitted, either on an application form or in the form of a memorandum, how long will it generally take for a decision to be made?*

We understand that the law says that the request must be made more than 90 days before the election and that the approval or denial of the request will occur no later than 65 days before the election. As such, in if a state were to wait until 90th day, the Secretary of Defense would respond within 25 days (i.e. the 65th day prior to the election).

Given that the State of Hawaii would want to resolve, prior to the 2010 legislative session, whether the waiver would be granted, we would like to know if a request were submitted this month whether it would be reasonable to inform the legislature that we might have a response in January or early February as to whether the request was granted. This would impact the legislation regarding moving the primary date or other possible alternatives to complying with the law.

3. *Assuming that the waiver is not granted and that it is too late in the legislative session to get a bill through to move the primary election, or if the bill fails, what are the penalties for a failure to comply?*

While we would not want this to occur, we would like to inform the legislature and others of the possible consequences. The only frame of reference we have is what occurred to the State of Hawaii in 1988.

Specifically, in 1988, the state was unable to prepare, print, and mail the overseas absentee ballots within a reasonable amount of time, due to an injunction that was filed in a federal case regarding the legality of not allowing write-in ballots. Burdick v. Takushi, Civil No. 86-0582 (USDC Hawaii). Eventually, the injunction was lifted and the original ballots were allowed to

be mailed on October 15, 1986. As a result of this the State was sued by the Department of Justice (DOJ) on behalf of the FVAP for failure to allow sufficient time for overseas voters to receive, vote, and return their absentee ballots. The state entered into a consent decree and agreed to conduct a late count on overseas ballots, which postponed the release of the final general election results. Specifically, it was agreed that ballots mailed on October 15, 1986 would be received up to November 14, 1986 (i.e. 30 days). United States of America v. State of Hawaii, Civil No. 86-1024 (1986).

Based on that experience, we assume one possible consequence that FVAP might want a consent decree that would require the State of Hawaii to receive ballots from UOCAVA voters a specific amount of days after the General Election, in order to ensure 45 days of ballot transit time. Of course, it has been 20 plus years since that case and it could be FVAP would want something else in order to remedy the situation

In the end, any information you can provide would be appreciated.

Our office subsequently spoke to our program analyst and was informed that your office was still in consultation with the Attorney General and that we would be informed once that had been completed. We were not told that any application could be submitted. In addition, it is our understanding that no application has been submitted by any jurisdiction, with a late Primary Election, as they are all waiting for further guidance from your office.

When the legislature convened in January, our office made sure to submit legislation to move the Primary Election date. HB 2397. <http://capitol.hawaii.gov/session2010/>. The bill has proceeded through the legislative process, but we cannot say at this point if it will pass and if so what the effective date would be. Given that the election year is in full swing, we will be recommending that it be effective in 2012, otherwise this year's election would be compromised.

Most recently, this month my office sought to reconfirm that we were still waiting on FVAP to complete its consultation with the Attorney General. In an email, dated March 10, 2010, Senior Program Analyst John Godley said the following:

You are correct--we have received no waiver requests from any State and we are finalizing the waiver evaluation process. We intend to release a series of memos to the states that portray our understanding of UOCAVA as it was modified by the MOVE Act. These should be released later this Spring.

Against this backdrop, we were surprised to read the most recent Associated Press article, dated March 14, 2010, which said, in part, the following:

But FVAP Director Bob Carey said in an interview last Wednesday that states are free to apply whenever they want. He said states may be waiting for additional guidance, but the law is clear enough.

http://www.armytimes.com/news/2010/03/ap_military_hawaii_primary_031410/

As such, my office immediately wrote to you on March 15, 2010, seeking a telephone conference with you, and for your office to provide us a specific written response to our earlier December 3, 2010 email, as we have been under the impression that you were not accepting applications until you finished your consultation with the Attorney General. We also pointed out that we believe other states are of the same impression as none have submitted any waiver applications at this point. Finally, we asked when would your office actually be able to finish its review of any application, given that you appear to be still in consultation with the Attorney General.

On March 19, 2010, you participated in a telephone conference with our office. You explained that we should simply submit an application, and that our application would have a better chance if we passed legislation to move the Primary Election date, effective in 2012. As for our other questions that we had asked for a written response, such as when would you complete the review of any such application, we have heard nothing definite at this time.

Under these circumstances, we are submitting the present application. It is our hope that we receive a response prior to the statutory deadline of 65 days prior to the General Election, that the law permits you to resolve all applications. 42 USC § 1973ff-1(g)(3)(A). Such a late response, as noted above, is destined to compromise our ability to properly prepare for the 2010 elections.

the number of days prior to the election for Federal office that the State requires absentee ballots be transmitted to absent uniformed services voters and overseas voters; and

42 USC § 1973ff-1(g)(1)(C).

The State of Hawaii by practice requires ballots to be mailed out at least 35 days before an election. As such, it is our intention to mail out ballots on September 28, 2010, which is 35 days prior to the November 2, 2010 General Election.

This 35 day period is consistent with the 30 day time period that was approved of in United States of America v. State of Hawaii, et al.; Civ. No. 86-1024 (USDC Hawaii) (Consent Decree) (November 24, 1986). Additionally, our review of other consent decrees, all the way up to the present, reflect legally that "providing a minimum of 30 days for the round-trip transit of absentee ballots to and from UOCAVA voters will ensure that overseas voters . . . have a reasonable opportunity to vote." United States of America v. State of New York, et al.; Civ. No. 1:09-cv-335GLS-RFT (USDC N. District of New York) (Consent Decree) (March 26, 2009).

(D) a comprehensive plan to ensure that absent uniformed services voters and overseas voters are able to receive absentee ballots which they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted in the election for Federal office, which includes--

(i) the steps the State will undertake to ensure that absent uniformed services voters and overseas voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;

(ii) why the plan provides absent uniformed services voters and overseas voters sufficient time to vote as a substitute for the requirements under such subsection; and

(iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.

42 USC § 1973ff-1(g)(1)(D).

Shortly after the passage of the MOVE Act, the State of Hawaii promulgated an extensive administrative rule that addressed all mandatory parts of the Act. The rule became effective on January 9, 2010.

§3-174-22 Voting, registration, and counting of absentee ballots of overseas citizens. (a) The general purpose of the Uniformed and Overseas Citizens Absentee Voting Act (hereinafter referred to as "UOCAVA" or 42 USC §1973ff et seq.) is to:

- (1) Permit absent uniformed services citizens and overseas citizens to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for federal office; and
- (2) Permit overseas citizens to use a "federal write-in" absentee ballot in general elections for federal office.

(b) The term "federal election" means any presidential, U.S. senatorial, or congressional election.

(c) Citizens shall be regarded as residing overseas if they reside anywhere except the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.

(d) The clerk may maintain a separate register for overseas citizens who apply to vote under the provisions of 42 USC §§1973ff et seq., as amended.

(e) An overseas citizen may use the federal postcard (SF-76) form to register to vote and to request an absentee ballot. A federal postcard form used by an overseas citizen to request an absentee ballot which is received in the year of the election will be held and processed sixty days prior to the election.

(f) A duly registered overseas citizen voter who wishes to vote the federal election ballot in person at the clerk's office may do so upon presentation of proper identification.

(g) An overseas citizen who makes timely application for, and does not receive the State's absentee ballot, may use the federal write-in absentee ballot in general elections. In completing the ballot the overseas voter may write-in the name of a qualified candidate or political party and any abbreviation, misspelling, or other minor variation shall be disregarded if the intent of the voter can be ascertained.

(h) The federal election absentee ballot may be a paper ballot or electronic ballot card. The federal election absentee ballot shall be received by the clerk not later than closing of the polls on election day. A federal write-in absentee ballot will be processed according to established procedures for regular absentee ballots only if:

- (1) A request for the state absentee ballot was received at least thirty days prior to the election;
- (2) A state absentee ballot has not been received; and
- (3) There is a valid affirmation signature and no evidence of tampering.

(i) A voter covered by UOCAVA shall be able to request voter registration applications and absentee ballot applications by mail or electronically for general, special, primary, and runoff elections for Federal office. This includes the ability of the voter to designate if the voter wishes to receive the application by mail or electronically. The voter registration application or absentee ballot application will be transmitted based on the preference selected by the voter. If the voter does not indicate a preference, the application shall be delivered as otherwise required by state law. To the extent practicable, election officials must : (1) protect the security and integrity of the voter registration and absentee ballot application request process and (2) protect the privacy of the identity and personal data of the UOCAVA when the voter requests, and is sent a voter registration application or absentee ballot application.

(j) Election officials shall designate at least one means of electronic communication for the following purposes: (1) for use by UOCAVA voters to request voter registration applications and absentee ballot applications; (2) for use by election officials to send voter registration and absentee ballot applications to voters; and (3) for providing UOCAVA voters with election and voting information. In addition to the means of electronic communication designated by election officials. Finally, election officials must include the

designated means of electronic communication on all information and instructional materials that accompany balloting materials sent by election officials to UOCAVA voters.

(k) Election officials shall provide for transmitting blank ballots to UOCAVA voters by mail and electronically for general, special, primary, and runoff elections for Federal office. Voters will be able to designate if they wish to receive the blank ballot by mail or electronically. Election officials must transmit the ballot based on the preference selected by the voter. If the voter does not indicate a preference, the ballot must be delivered in accordance with state law. To the extent practicable, election officials must: (1) protect the security and integrity of absentee ballots and (2) protect the privacy of the identity and personal data of the UOCAVA voter throughout the transmission process.

(l) Election officials will have a free access system that allows a UOCAVA voter to determine whether his/her absentee ballot was received by the election officials.

(m) Election officials will allow for the use of the federal write-in absentee ballot in accordance with UOCAVA.

(n) Election officials will comply with the provisions regarding adequate ballot transmittal time for UOCAVA voters, unless a waiver regarding the ballot transmittal time is granted by the federal government. [Eff JAN 09 2010] (Auth: HRS §11-4, 42 USC §§1973ff et seq.) (Imp: HRS §11-16, 42 USC §§1973ff et seq.)

As indicated in the rule, the State of Hawaii, permits UOCAVA voters, among other things, to do the following: (1) utilize federal write-in absentee ballots; (2) use the federal postcard form to register to vote and to request and absentee ballot; (3) vote in person at the clerk's office; (4) request voter registration applications and absentee ballot applications by mail or electronically; and (5) receive blank ballots by mail or electronically. The final item of receiving blank ballots electronically, should essentially cut ballot transport time in half.

While the above noted administrative rule clearly makes the 35 day timeline utilized by the State of Hawaii sufficient for UOCAVA voters making use of the receipt of blank ballots electronically, there are other provisions of the Hawaii Administrative Rules, such as HAR § 3-174-19, that also facilitate the timely receipt of voted ballots.

§3-174-19 Mail absentee ballots; replacement by facsimile transmission. (a) A voter who requested but has not received a mail absentee ballot within five days of the election, may request and receive a replacement ballot by facsimile (fax) transmission or, if available, via uneditable portable document file email attachment from the clerk from whom the original mail absentee ballot was requested.

(b) Upon receipt of a phone or facsimile request for a replacement mail absentee ballot, the clerk or the clerk's designee, shall confirm that the

voter previously requested a mail absentee ballot for that election and that a voted mail absentee ballot for that voter has not been received.

- (1) If the voter did not previously request a mail absentee ballot for the election, then the clerk or clerk's designee shall notify the voter, by facsimile transmission or by phone, that the voter is not eligible to receive a mail absentee ballot by facsimile transmission.
- (2) If the clerk's records indicate that a voted mail absentee ballot has already been received from that voter, then the clerk or clerk's designee shall notify the voter that a replacement ballot shall not be sent by facsimile transmission.
- (3) If the clerk's records confirm that a voted mail absentee ballot has not been received by the clerk, a replacement ballot and waiver of secrecy and affirmation statement form and a copy of HRS §11-137, shall be sent to the voter by facsimile transmission within 24 hours of receiving the request or as soon thereafter as practicable.

(c) Before sending the replacement ballot with instructions by facsimile transmission, the clerk or clerk's designee shall:

- (1) Remove an appropriate replacement ballot from inventory;
- (2) Record the replacement ballot serial number on the voter's request form and other forms required for reconciliation purposes;
- (3) Make a copy of the replacement ballot;
- (4) Record the replacement ballot serial number on the copied replacement ballot; and
- (5) Send the copied replacement ballot and related documents to the voter by facsimile transmission or as an uneditable portable document file if transmitting electronically.

(d) The clerk or clerk's designee shall retain the replacement ballot and copied replacement ballot until the voter returns the waiver of secrecy and affirmation statement form and voted replacement ballot by facsimile transmission.

(e) Upon receipt of a completed waiver of secrecy and affirmation statement form and the voted facsimile ballot, the clerk or clerk's designee shall process the voted ballot in accordance with procedures established in sections 3-174-11 and 3-174-12.

(f) When a waiver of secrecy and affirmation statement form and voted facsimile ballot have been determined to be valid, the following procedures shall apply:

- (1) The voted facsimile ballot and the replacement ballot shall be placed in the absentee return envelope and the envelope sealed;

- (2) The clerk or the clerk's designee shall note in the affirmation block that a facsimile contained in the sealed absentee return envelope; and
- (3) The sealed absentee return envelope shall be deposited in the absentee ballot box.

(g) In lieu of forwarding a replacement ballot to the counting center as prescribed in this section, the clerk may rely upon the duplication team to produce the duplicate ballot. The clerk shall document this situation for ballot inventory purposes and forward all other materials pursuant to subsection (f).

(h) The clerk or clerk's designee shall transport the absentee ballot box to the counting center in accordance with procedures established in section 3-174-15(3).

(i) The counting center officials shall copy the votes on the facsimile ballot onto the replacement ballot in accordance with the procedures established by the chief election officer. [Eff JAN 09 2010] (Auth: HRS §§11-4, 15-2) (Imp: HRS §15-5)

As indicated in the rule, the State of Hawaii, “[a] voter who has requested but has not received a mail absentee ballot within five days of the election, may request and receive a replacement ballot by facsimile (fax) transmission or, if available, via uneditable portable document file email attachment from the clerk from whom the original mail absentee ballot was requested.” HAR § 3-174-19(a).

Finally, even if neither of these administrative rules existed, it is the contention of the State of Hawaii that the 35 day timeline it plans to utilize is sufficient in that it ensures UOCAVA voters have reasonably opportunity to vote. Numerous cases have addressed this question, as recently 2009, and it has generally been found that a minimum of 30 days of ballot transit time is sufficient under UOCAVA.

For example, the State of Hawaii in 1986 entered into a consent decree regarding ballot transit time, in which 30 days was found sufficient. United States of America v. State of Hawaii, et al.; Civ. No. 86-1024 (USDC Hawaii) (Consent Decree) (November 24, 1986). This case resulted from another U.S. District Court case in which an injunction was granted that delayed the mailing of absentee ballots. Specifically, on September 29, 1986, in Burdick v. Takushi, Civil No. 86-0582 (D. Haw.), the Court issued an injunction “necessitating to alterations to Hawaii’s general election ballots and its ballot processing system” to allow voters to submit write-in ballots. This prevented the State of Hawaii from mailing out its previously printed absentee ballots. Consent Decree at ¶ 10. The Ninth Circuit Court of Appeals stayed the injunction on October 15, 1986. Id. at ¶ 12.

The mailing of ballots on that late date impacted the Overseas Citizens Voting Rights Act and the Federal Voting Assistance Act², as there were only 20 days left until the November 4, 1986 General Election. As such, the United States of America entered into a

² These two acts were the predecessors to UOCAVA which was enacted in 1986.

Director Robert Carey

March 25, 2010

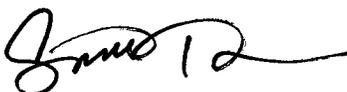
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consent decree with the State of Hawaii to permit a late count of the 632 ballots that had been mailed to civilians and military citizens covered by Overseas Citizens Voting Rights Act and Voting Assistance Act. The deadline was extended an additional 10 days to “the close of business on November 14, 1986 . . . and the votes cast for those three federal offices [on the ballot] tabulated and reported in the final election results (so long as the ballots are otherwise valid).” Id. at ¶ 13.

More recently, on March 26, 2009, the State of New York and the U.S. Department of Justice entered into a consent decree which stated “providing a minimum of 30 days for the round-trip transit of absentee ballots to and from UOCAVA voters will ensure that overseas voters . . . have a reasonable opportunity to vote.” United States of America v. State of New York, et al.; Civ. No. 1:09-cv-335GLS-RFT (USDC N. District of New York) (Consent Decree) (March 26, 2009). Finally, on October 19, 2009, the Honorable Richard L. Williams, in his memorandum opinion involving compliance by the State of Virginia with UOCAVA, noted that “[f]urthermore, other courts have accepted thirty days as the average round-trip transit time for the receiving and casting of overseas absentee ballots. United States v. Pennsylvania, No. 1:CV:-04-830 (MD.D. Pa. Apr. 16, 2004); United States v. Georgia, No. 1:04-CV-2040-CAP (N.D. Ga. July 15, 2004).” United States of America v. Jean Cunningham, et al.; Civ. No. 3:08cv709 (USDC E.D. Virginia) (Memorandum Opinion) (October 15, 2009).

Please feel free to contact me at [REDACTED] if you require additional information or any further questions.

Sincerely,



SCOTT T. NAGO
Chief Election Officer

.STN:AHS:cr
OE-088-10

Enclosure

APPENDIX

Text of 42 USC § 1973ff-1(g)

(g) Hardship exemption

(1) In general

If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) with respect to an election for Federal office due to an undue hardship described in paragraph (2)(B), the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection. Such request shall include--

(A) a recognition that the purpose of such subsection is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office;

(B) an explanation of the hardship that indicates why the State is unable to transmit absent uniformed services voters and overseas voters an absentee ballot in accordance with such subsection;

(C) the number of days prior to the election for Federal office that the State requires absentee ballots be transmitted to absent uniformed services voters and overseas voters; and

(D) a comprehensive plan to ensure that absent uniformed services voters and overseas voters are able to receive absentee ballots which they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted in the election for Federal office, which includes--

(i) the steps the State will undertake to ensure that absent uniformed services voters and overseas voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;

(ii) why the plan provides absent uniformed services voters and overseas voters sufficient time to vote as a substitute for the requirements under such subsection; and

(iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.

(2) Approval of waiver request

After consulting with the Attorney General, the Presidential designee shall approve a waiver request under paragraph (1) if the Presidential designee determines each of the following requirements are met:

(A) The comprehensive plan under subparagraph (D) of such paragraph provides absent uniformed services voters and overseas voters sufficient time to receive absentee ballots they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted in the election for Federal office.

(B) One or more of the following issues creates an undue hardship for the State:

(i) The State's primary election date prohibits the State from complying with subsection (a)(8)(A).

(ii) The State has suffered a delay in generating ballots due to a legal contest.

(iii) The State Constitution prohibits the State from complying with such subsection.

(3) Timing of waiver

(A) In general

Except as provided under subparagraph (B), a State that requests a waiver under paragraph (1) shall submit to the Presidential designee the written waiver request not later than 90 days before the election for Federal office with respect to which the request is submitted. The Presidential designee shall approve or deny the waiver request not later than 65 days before such election.

(B) Exception

If a State requests a waiver under paragraph (1) as the result of an undue hardship described in paragraph (2)(B)(ii), the State shall submit to the Presidential designee the written waiver request as soon as practicable. The Presidential designee shall approve or deny the waiver request not later than 5 business days after the date on which the request is received.

(4) Application of waiver

A waiver approved under paragraph (2) shall only apply with respect to the election for Federal office for which the request was submitted. For each subsequent election for Federal office, the Presidential designee shall only approve a waiver if the State has submitted a request under paragraph (1) with respect to such election.