



PERSONNEL AND  
READINESS

UNDER SECRETARY OF DEFENSE  
4000 DEFENSE PENTAGON  
WASHINGTON, D.C. 20301-4000

AUG 29 2016

Executive Director Robert A. Brehm  
Executive Director Todd D. Valentine  
New York State Board of Elections  
40 North Pearl Street, Suite 5  
Albany, NY 12207-2729

Dear Executive Directors Brehm and Valentine:

On August 22, 2016, the Department of Defense received from New York State an application dated August 22, 2016, for an undue hardship waiver under the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* for the November 8, 2016, New York Third Congressional District general election.

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*, I have reviewed the State's application, and after consultation with the representative of the Attorney General, find that it meets the requirements for an undue hardship waiver under 52 U.S.C. § 20302 (g)(2). Accordingly, I approve the State of New York's request to waive the application of 52 U.S.C. § 20302 (a)(8)(A) for the November 8, 2016, general election.

In rendering this decision, I carefully considered the assertions made by the State in support of its waiver request, which are addressed in detail in the Memorandum attached to this letter. This waiver is based on the understanding that the State of New York will comply with all commitments described herein, including that New York will seek a court order for an eight-day extension of its ballot receipt deadline for the November 8, 2016, general election in the Third Congressional District. Based on those assertions and the attached memorandum, I have determined the following: the State faces an undue hardship, and the State's proposed comprehensive plan for this election provides sufficient time for *UOCAVA* voters to vote and have their ballots counted as a substitute for the requirement that timely-requested absentee ballots be transmitted to all *UOCAVA* voters at least 45 days prior to Election Day.

Sincerely,

A handwritten signature in black ink, appearing to be "Peter Levine", written over a large, loopy scribble.

Peter Levine  
Acting

Enclosure:  
As stated

## MEMORANDUM

### **Approval of the State of New York's Waiver Request under 52 U.S.C. § 20302 (g)(2) for the November 8, 2016, NY Third Congressional District General Election**

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of New York (the State), dated August 22, 2016, for an undue hardship waiver for the November 8, 2016, Third Congressional District general election, as provided by the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*.<sup>1</sup> Approval of the waiver request and this memorandum rely on the statements made by the State in support of its August 22, 2016, official waiver request and subsequent supplementary information provided during the August 23, 2016, conference call between the State, FVAP, and the United States Department of Justice.

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*,<sup>2</sup> the Acting Under Secretary of Defense for Personnel and Readiness has reviewed New York's application, consulted with the representative of the Attorney General, and finds the State's application meets the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302 (g)(2)(A),<sup>3</sup> and approves New York's waiver request under 52 U.S.C. § 20302 (a)(8)(A)<sup>4</sup> for the November 8, 2016, Federal general election in New York's Third Congressional District. For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

#### **I. Background and Initial Findings**

*UOCAVA* authorizes the Presidential Designee to grant a waiver only to those States whose reason for a waiver corresponds with one of the following situations:

1. The State's primary election date prohibits the State from complying with subsection (a)(8)(A);
2. The State has suffered a delay in generating ballots due to a legal contest; or
3. The State Constitution prohibits the State from complying with such Section.<sup>5</sup>

On August 17, 2016, the United States District Court for the Northern District of New York ordered the State to hold a Republican primary election for New York's Third Congressional District on October 6, 2016. The court further ordered that the State seek a hardship exemption

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<sup>1</sup> 52 U.S.C § 20302 (*formerly* 42 U.S.C. § 1973ff, *et seq.*) *UOCAVA*'s waiver provision is found at 52 U.S.C. § 20302 (g)(2).

<sup>2</sup> The Secretary of Defense was designated the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 CFR § 21975. The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DOD Directive 5124.02.

<sup>3</sup> *Formerly* 42 U.S.C. § 1973ff-1 (g)(2)(B)(ii).

<sup>4</sup> *Formerly* 42 U.S.C. § 1973ff-1 (a)(8)(A).

<sup>5</sup> 52 U.S.C. § 20302 (g)(2)(B) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)).

pursuant to 52 U.S.C. § 20302(g)(2)(B)(II) from *UOCAVA*'s 45-day advance transmission requirement with regard to the November 8, 2016, Federal general election in that district. As the court-ordered primary election will occur after the 45-day deadline for transmitting *UOCAVA* ballots for the November 8, 2016, general election, and the State will be unable to transmit ballots for the Third Congressional District until the Republican primary election results are known, the State is unable to comply with 52 U.S.C. § 20302 (a)(8)(A).<sup>6</sup>

Under *UOCAVA*, if a State determines that it is unable to comply with the requirement to transmit timely-requested absentee ballots at least 45 days before an election for Federal office (45-day advance transmission requirement) due to one of the three situations referenced above resulting in an undue hardship, the Chief State Election Official shall request a waiver from the Presidential Designee pursuant to the Act. The Presidential Designee shall approve such a request if the Presidential Designee determines that:

1. One or more of the three referenced situations creates an undue hardship for the State; and,
2. The State's comprehensive plan presented in support of its request provides absent uniformed services and overseas voters (*UOCAVA* voters) sufficient time to receive and submit absentee ballots they have requested in time to be counted in the election for Federal office.

The Presidential Designee's findings for each of these requirements are addressed separately below.

In the memorandum of February 7, 2012, to Chief State Election Officials, the Director of FVAP provided guidance on *UOCAVA* ballot delivery waivers. In Appendix A, Section IV, Evaluation of Comprehensive Plans, the guidance concludes:

In summary, a State's comprehensive plan must provide sufficient time for *UOCAVA* voters to receive, mark, and return the ballot in time to be counted. The burden is upon the State to demonstrate that a waiver qualifying condition exists, that compliance with the requirements of *UOCAVA* in light of the condition presents an undue hardship to the State, and that the comprehensive plan provides the *UOCAVA* voters sufficient time to receive, mark, and return their ballots in time to be counted. To serve as a substitute for the 45-day prior requirement, the comprehensive plan must provide *UOCAVA* voters sufficient time to successfully vote as compared to the time available by strictly complying with *UOCAVA*'s minimum ballot transmission requirements.<sup>7</sup>

The comprehensive plan proposed by New York addressed the following requirements set forth in *UOCAVA*:

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<sup>6</sup> Formerly 42 U.S.C. § 1973ff-1(a)(8)(A)); see also 52 U.S.C. § 20302 (g)(2)(B)(i) (formerly 42 U.S.C. § 1973ff-1 (g)(2)(B)(i)).

<sup>7</sup> Guidance on *Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) Ballot Delivery Waivers*, Memorandum Dated February 7, 2012, available at <http://www.fvap.gov/eo/waivers>.

- (i) the steps the State will take to ensure that *UOCAVA* 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 *UOCAVA* voters sufficient time to vote as a substitute for the requirements of the *UOCAVA*; and
- (iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.<sup>8</sup>

Further, as required by 52 U.S.C. § 20302 (g)(1)(A),<sup>9</sup> New York's application recognizes that the purpose of the Act's 45-day advance transmission requirement is to allow *UOCAVA* voters enough time to vote and have their votes counted in an election for Federal office.

In determining whether the State's comprehensive plan provides sufficient time to vote as a substitute for the requirement to transmit ballots 45 days before the election, the Presidential Designee considered that the minimum absentee ballot requirements under the law require timely-requested ballots to be transmitted 45 days prior to Election Day, using the voter's choice of either postal mail or electronic transmission method.

The State's comprehensive plan was evaluated against several criteria; the analysis as to whether the comprehensive plan provides sufficient time was examined by considering the totality of circumstances presented. Among the issues considered was the total time a voter has to receive, mark, return the ballot, and have it counted (including the number of days before and after Election Day). Also among the issues considered was the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as additional alternative methods provide more *UOCAVA* voters with the likelihood they will have sufficient time to receive, vote, return their ballot, and have it counted. Finally, the comprehensive plan was reviewed for any additional efforts made by the State that improved the likelihood a *UOCAVA* voter would be able to receive, vote, return the ballot, and have it count.

## **II. The State Has Shown Undue Hardship**

New York states that the court has ordered it to hold a Republican primary election on October 6, 2016, for New York's Third Congressional District. The October 6, 2016, date for that court-ordered primary election falls after the September 24, 2016, 45-day deadline for transmitting *UOCAVA* ballots for the November 8, 2016, general election. Due to New York's inability to transmit the general election ballot for the Third Congressional District until after a winner of the Republican primary election is determined, the court further ordered the State to seek a hardship exemption pursuant to 52 U.S.C. § 20302(g)(2)(B)(II) from *UOCAVA*'s 45-day requirement with regard to the November 8, 2016, general election.

For this reason, the State's waiver application has demonstrated an undue hardship.

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<sup>8</sup> 52 U.S.C. § 20302 (g)(1)(D) (formerly 42 U.S.C. § 1973ff-1(g)(1)(D)).

<sup>9</sup> Formerly 42 U.S.C. § 1973ff-1 (g)(1)(A).

### **III. The State's Comprehensive Plan Provides Time for *UOCAVA* Voters To Vote and Have Those Votes Counted**

Once the State has shown that it has suffered an undue hardship, as it has in this case, the State must show that its comprehensive plan provides “sufficient time for *UOCAVA* voters to receive, mark, and return the ballot in time to be counted.”<sup>10</sup> In this case, the only *UOCAVA* voters affected are those *UOCAVA* voters in New York's Third Congressional District. In reaching a determination, the Presidential Designee must examine the totality of circumstances presented in the plan to determine whether it provides sufficient time to vote as a substitute for *UOCAVA*'s requirement that ballots be transmitted at least 45 days prior to Election Day. Among the issues considered are the time voters have to receive, mark, return their ballots, and have them counted (both before and after Election Day); the cumulative number of alternative methods of ballot transmission and return; and the accessibility of the alternative ballot transmission methods presented in the comprehensive plan.

New York's comprehensive plan to provide sufficient time to vote as a substitute for *UOCAVA*'s 45-day advance transmission requirement is as follows:

- As soon as practicable, each county board will transmit to its affected *UOCAVA* voters, in the manner of transmission stated on each voter's application, a communication providing a clear and concise summary of the court-ordered primary and how it will impact the number and timing of ballots they will receive. The communication will also include the various deadlines and methods of return of each ballot to be received.
- For those voters who have requested to receive their voting materials by postal mail, but have not previously provided an email address, additional language will be included in their September 24, 2016, mailing of the November General Election ballots communication encouraging them to submit a revised Federal Post Card Application for the purposes of establishing an email address of record and to facilitate a change in their transmission preference, if they choose, to “Email/Online” to allow for the expeditious delivery of all future voting materials. New York will work with FVAP to identify and seek assistance from the Department in communicating to these voters at any official Department sponsored email address.
- A communication will be included with the September 24, 2016, voting materials explaining to each voter that a general election ballot for the Third Congressional District will not be transmitted until after the results of the October 6, 2016, primary election are known. At this time, voters will be informed of their option to use an enclosed Federal Write-In Absentee Ballot for the purpose of voting in the Third Congressional District in advance of them receiving their official ballots, along with information on how to obtain the results of the October 6, 2016, primary election.

A separate ballot, containing only the Third Congressional District contest will be transmitted once the results from the October 6, 2016, Republican primary election are certified. This

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<sup>10</sup> 52 U.S.C. § 20302 (g)(2)(A) (formerly 42 U.S.C. § 1973ff-1(g)(2)(A)).

certification date is dependent on whether an “unambiguous winner”<sup>11</sup> can be determined by the polls closing on October 6, 2016. Should an “unambiguous winner” be determined on October 6, 2016, each county board of elections will issue a provisional certification of the results by October 7, 2016, which will allow the State to certify the general election ballot on the same day. Should all of these criteria be met in the timeline specified, the counties will transmit the Third Congressional District ballots on October 8, 2016, or 31 days before to the November 8, 2016, general election.

- If an “unambiguous winner” cannot be determined based on Election Day returns, then each affected county election board will enter an expedited post-primary certification process with the intended completion date of not later than seven days after the election. Under this revised timeframe, the State will transmit Third Congressional District general election ballots by October 15, 2016, or 24 days before the general election.
- The State will coordinate county voter registration systems with the State’s voter list and its online ballot delivery portal. For voters who have requested their voting materials be transmitted by postal mail, the Third Congressional District ballot will be sent by an unspecified expedited mail service. Voters will also be provided a return envelope allowing them to use the same expedited service to return their ballot at no expense to the voter.
- New York will seek a court order for an eight-day extension of their ballot receipt deadline until November 29, 2016.
- All communications to voters will include a point of contact at their respective county board for assistance in the process.
- The State will provide sample language to all county boards to use for each communication to ensure uniform language is being used for all affected voters.

Absent a waiver request, States are specifically required to transmit timely-requested absentee ballots 45 days prior to Election Day. A waiver request becomes necessary when a State is no longer able to meet this requirement. In this case, it is impossible for New York to transmit timely-requested ballots 45 days prior to Election Day. Under the potential scenario in which there is not a “unambiguous” primary election winner on October 6, 2016, voters will have 24 days from the time ballots are transmitted to the postmark deadline of November 7, 2016. This is 21 days fewer than *UOCAVA* voters are provided under 52 U.S.C. § 20302 (a)(8)(A).

A State’s comprehensive plan submitted as a part of a waiver request must provide remedies for affected voters that will allow them sufficient time to receive, mark, and return their ballot. To help ensure sufficient time for voters to receive, mark, and return their ballot in time to be counted, New York’s proposed remedy is to take immediate steps to communicate directly with affected voters regarding when and how they will receive and return their ballots, to provide for

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<sup>11</sup> New York defines an “unambiguous winner” as “when the margin of victory is greater than the total number of outstanding absentee and affidavit ballots such that the uncanvassed ballots cannot change the winner of the election.”

expedited mailing of ballots to those who have requested their materials by mail, and to provide those voters with an expedited cost-free method of return. Voters who have requested their materials be provided electronically will receive their ballots on the day of transmittal.

New York also proposes an extension of the ballot return deadline by eight days and has committed to seeking a Federal court order approving such extension. Although the number of days ballots are transmitted before an election are qualitatively superior to days after Election Day, because voters must have time to receive and mark them by the state's deadline for casting or postmarking the ballot, the Department considered not only the overall timing, but the nature of the State's comprehensive approach to offset this timeline with direct voter communications and express delivery of the ballots to voters who request postal mail delivery. FVAP reviewed New York's plan pursuant to its published waiver guidance and provided a set of formal clarifying questions during the course of its deliberation. The original questions and corresponding responses are included in Appendix A.

FVAP recognizes the unique legal contest situation presented in this hardship waiver request. Given the court's order, compliance with the 45-day prior requirement, 52 U.S.C. § 20302 (a)(8)(A), is impossible. Therefore, based on the totality of the circumstances in this case, as well as the commitments made by the State in its comprehensive plan, especially its stated intent to seek Federal court approval of its proposed calendar, the Presidential Designee finds that New York's comprehensive plan provides *UOCAVA* voters with sufficient time to receive, mark, and return their ballots in time to be counted.

#### **IV. Conclusion**

The Presidential Designee has determined that, given the totality of circumstances, New York's comprehensive plan provides absent *UOCAVA* voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the November 8, 2016, election. Accordingly, the plan in this specific circumstance is a sufficient substitute for 52 U.S.C. § 20302 (a)(8)(A)'s<sup>12</sup> requirement to transmit timely-requested ballots 45 days in advance of Election Day in Federal elections, and thus serves as the basis for granting a hardship waiver under 52 U.S.C. § 20302 (g)(2).<sup>13</sup>

##### **A. Post-Election Evaluation**

Because a waiver plan must provide *UOCAVA* voters sufficient time to vote, an important component of the approved comprehensive plan is a post-election evaluation of the comprehensive plan, provided to FVAP by January 6, 2017, which must include the following:

- Written certification that ballots were transmitted to *UOCAVA* voters on the date and in the manner described in the waiver application;
- The numbers of ballots sent to absent uniformed services voters to APO and FPO addresses, the number of ballots sent to uniformed services voters at a street

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<sup>12</sup> Formerly 42 U.S.C. § 1973ff-1 (a)(8)(A).

<sup>13</sup> Formerly 42 U.S.C. § 1973ff-1(g)(2).

address within the United States, and the number of ballots sent to overseas civilian voters;

- The number of ballots from each of these groups returned in time to be counted;
- The number of ballots from each of these groups returned too late to be counted;
- If possible, a breakdown of further details about each of the above categories between ballots faxed, emailed, downloaded from the online ballot delivery and ballot marking system and sent by postal mail;
- Any feedback, whether positive or negative, received from voters about any elements of the State's waiver plan; and
- Any additional information relevant to the effectiveness of the comprehensive plan, including information to show measured results of the comprehensive plan, and how the plan provided *UOCAVA* voters sufficient opportunity to receive, vote, and return their ballots.

## **B. Reporting**

As part of its comprehensive plan, New York officials agreed to keep FVAP and DOJ/ Voting appraised of any subsequent problems in implementing the comprehensive plan as proposed, including but not limited to any failures of local election officials to transmit absentee ballots in accordance with the timeframe specified by the State's comprehensive plan.

If you have any questions or concerns, please contact Nate Bacchus, FVAP State Affairs Specialist for New York State, at 571-372-0739, or [nate.a.bacchus@fvap.gov](mailto:nate.a.bacchus@fvap.gov).



**Appendix A: New York State Board of Elections Responses to Questions**

1. Can you please verify that all three affected counties sent ballots for the Primary by the 45 day deadline (yesterday)?

**All counties have verified to the State Board that all ballots were transmitted to voters in the manner in which they requested it by the August 22<sup>nd</sup> deadline.**

2. Please provide data on the # of voters who have overseas and APO/FPO addresses who have requested postal ballots and have not provided an email address.

**For the General Election in the 3<sup>rd</sup> Congressional District, there is a slight revision to the numbers of voters who have requested their balloting materials by postal mail, but for whom an email address is on file. Of the 349 voters cited in the waiver request, there are actually 266 (not 221) who have also provided an email address (76%). Of the remaining 83 voters who have requested to receive their balloting materials by postal mail, and for whom no email address is on file, 67 are located overseas and 16 are domestic. The county breakdown of these voters is as follows: Nassau – 42 overseas / 9 domestic; Suffolk – 12 overseas / 6 domestic; Queens – 13 overseas / 1 domestic. For those voters overseas, the following table shows a breakdown of the countries in which these voters are located.**

Nassau	
Country	#
Aruba	1
Australia	1
Austria	1
Canada	8
China	1
France	5
Germany	5
Holland	1
Hungary	1
Ireland	1
Israel	5
Italy	2
Netherlands	1
Norway	1
Republic of	1

Suffolk	
Country	#
Canada	3
France	2
Germany	1
Ireland	1
Israel	1
Japan	1
Netherlands	1
Spain	1
United Kingdom	1

Queens	
Country	#
Argentina	1
Canada	1
Germany	1
Greece	4
Israel	4
Switzerland	1
United Kingdom	1

Korea	
Serbia	1
Spain	1
Sweden	2
Switzerland	1
United Kingdom	2

3. Can you provide the communication to voters that went out with the August 22nd primary ballots?

**The following language was provided to counties to use in their communications to voters and were also instructed to include contact information for their board:**

*On August 17, 2016 a Federal Judge ordered that a Republican primary in the 3rd Congressional District be held on October 6, 2016. This is your ballot for that election only.*

*If you have any questions, please contact your local board of elections.*

4. Is the State amenable to sending out an expedited communication/ mailing to affected voters prior to the September 24th general election ballot transmittal date?

**The State Board would work with each County Board to facilitate such a communication and ensure it is done in a timely and consistent manner.**

5. Is the State amenable to allowing for expedited return for all voters, including those who receive their ballot electronically?

**The State has been investigating various commercial vendor offerings that counties could potentially use for allowing those voters who have requested their balloting materials electronically to expedite their ballots' return. However, we have not to date found a process that would make the provision of this service feasible for counties or that would mitigate potential issues with international voters who may have moved from the address originally stated on their application or who have provided an email address without also providing a physical address.**

6. Please provide the citation that grants the State the authority over the counties to ensure compliance with the plan.

**The following sections of NYS Election Law grant the State the necessary authority.**

\* \* \*

**§ 3–102. State board of elections; general powers and duties**

**In addition to the enforcement powers and any other powers and duties specified by law, the state board of elections shall have the power and duty to:**

- 1. issue instructions and promulgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law;**

\* \* \*

**§ 10–124. Military voting; state board of elections; regulatory powers**

- 1. The state board of elections is hereby authorized to take such steps and do such things as, in its opinion, are necessary to make effective the provisions of any other legislation, in order to utilize fully any federal or other facilities in the distribution of military ballots. The state board of elections shall have power to adopt and promulgate orders or regulations adopting, with respect to the military voters of this state, the provisions of that legislation.**

\* \* \*

**§ 11–220. Federal voting; applicability of general provisions**

**The general provisions of this chapter shall apply to this article, except as they are inconsistent herewith. The provisions of this article shall be liberally construed for the purpose of providing special federal voters the opportunity to vote. The state board of elections shall have power to adopt and promulgate regulations to effectuate the provisions of this article.**