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CERTIFICATION OF EMERGENCY RULES
FILED WITH LEGISLATIVE REFERENCE SERVICE
JERRY L. BASSETT, DIRECTOR

Pursuant to Code of Alabama 1975, §§41-22-5(b) and 41-22-6(c)(2)a. and b.

I certify that the attached emergency (amendment, new rule, new chapter, repeal or adoption by reference) is a correct copy as promulgated and adopted on the 21st day of December, 2015.

AGENCY NAME: Secretary of State

RULE NO. AND TITLE: 820-2-10-.18-02ER UOCAVA State Written Plan for Federal Primary Runoff Election

EFFECTIVE DATE OF RULE: December 21, 2015

EXPIRATION DATE (If less than 120 days): April 4, 2016

NATURE OF EMERGENCY: These amended emergency rules are necessary to provide the UOCAVA State Written Plan for Federal Primary Runoff Elections.

STATUTORY AUTHORITY: 52 U.S.C. section 20302 (a)(9); Code of Alabama 1975, section 17-13-8.1 (2015)

SUBJECT OF RULE TO BE ADOPTED ON PERMANENT BASIS _X_ YES ____ NO

NAME, ADDRESS, AND TELEPHONE NUMBER OF PERSON TO CONTACT FOR COPY OF RULE:

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REC'D & FILED

DEC 21 2015

LEGISLATIVE REF SERVICE

John H. Merrill
Secretary of State

FILING DATE

NEW

OFFICE OF THE SECRETARY OF STATE
ADMINISTRATIVE CODE

820-2-~~9-09-10ER~~.10-18-02ER UOCAVA State Written Plan for Federal Primary Runoff Election

Pursuant to 52 U.S.C. section 20302(a)(9), these rules provide the state written plan for any Federal primary runoff election.

(a) Federal law provides that, when a UOCAVA voter has requested a ballot for a federal election by the 45th day before that election, the State must transmit the ballot to that voter by the 45th day before the election. 52 U.S.C. section 20302(a)(8)(A). The U.S. District Court of the Middle District of Alabama and the Eleventh Circuit Court of Appeals have held that this provision applies to federal runoff elections.

Thus, when a UOCAVA voter requests to vote in a federal primary runoff election on or before the 45th day before such election, the ballot must be transmitted to the voter on or before the 45th day before the primary runoff election by the method of transmission requested by the voter.

For a variety of reasons, it has long been Alabama's preference to hold any runoff elections, also known as second primary elections, less than 45 days after the first primary election. Separating the elections sufficiently to allow for the determination of the primary election results and the printing and transmission of the primary runoff ballots would mean more than two months between the two elections. Accordingly, the State ~~recently~~ implemented instant runoff ballots for UOCAVA voters in order to address the State's concerns about the primary schedule while protecting the rights of UOCAVA voters to participate in federal elections and ensuring the State's compliance with federal law.

This chapter applies only to UOCAVA voters in the circumstances described below. It provides procedures for election officials to follow when there is a federal primary election in a county or portion of a county where three or more candidates have qualified with the same political party to run for the same federal office (other than the office of President).

These rules do not alter in any way the current election cycle.

Instant runoff ballots are not needed for a Presidential race, regardless of the number of candidates qualifying for that office, because Alabama does not hold a second primary election in that race.

(b) To facilitate the participation of UOCAVA voters in Alabama's federal second primary elections, ballot preparation under the UOCAVA State Written Plan for Federal Primary Runoff Election shall be as follows.

(1) When three or more candidates have qualified with the same political party to run for the same federal office (other than the office of President), the probate judge shall prepare both a special federal ballot and a special state ballot for the primary election. The special federal ballot materials shall include instructions prepared by the Secretary of State. These instructions shall explain how a UOCAVA voter casts his or her vote using the special federal instant runoff primary ballot.

(2) If necessary, the probate judge shall prepare a special state ballot for a second primary election.

(c) The content of special federal and special state ballots shall be as follows.

(1) A special federal ballot shall be used in a federal instant runoff primary election. The special federal ballot shall contain a list of all federal offices (other than the office of President) for which three or more candidates have qualified with the same political party to run for the same federal office and said candidates' names. The special federal ballot shall permit the UOCAVA voter to cast a ballot in a federal instant runoff primary election by indicating his or her order of preference for each candidate for each federal office listed on the ballot. UOCAVA voters may also use this ballot to participate in the second federal primary election alone, in which case it shall be specifically labeled "Runoff Only." The labeling may be done in the ballot preparation or manually prior to its transmission to the UOCAVA voter.

(2) A special state ballot shall be used when there is the possibility of a federal primary runoff election. This ballot shall contain the office of President in presidential election years, any federal offices for which <u>only two</u> candidates have qualified with the same political party to run for the same office and said candidates' names, all state and county offices and said candidates' names, and any referenda to be voted on in the primary election.

(3) If necessary, a special state ballot for a second primary election shall be used. This ballot shall contain any state or county offices for which a second primary election is required, the names of the candidates who have qualified for said offices, and any referenda to be voted on in a second primary election.

(d) Except with respect to cross-over voting, which is addressed below, issuance and transmission of ballots shall be as follows.

(1) When a UOCAVA voter requests an absentee ballot and votes in a precinct where a federal race with the potential for a runoff is on the ballot, the absentee election manager shall initially issue both a special federal ballot and a special state ballot.

(2) The ballots shall be transmitted together, with provisions made for both ballots to be returned together.

(3) If the UOCAVA voter has requested a runoff ballot, and there is the potential for a runoff in a non-federal race, or if any referenda are contained on a special state second primary election ballot, the absentee election manager shall issue the special state second primary election ballot to the voter <u>when it is ready</u>.

(e) In the event of authorized cross-over voting, issuance and transmission of ballots shall be as follows:

(1) Alabama law authorizes the political parties holding a primary election to permit or prohibit cross-over voting. Code of Alabama 1975, section 17-3-7. Because the instant runoff legislation does not explicitly prohibit UOCAVA voters from taking advantage of any political party's decision to allow voters to cross-over, and because federal law is designed to enable UOCAVA voters to have the same electoral opportunities as Alabama's non-UOCAVA voters, these rules provide for cross-over voting for UOCAVA voters.

(2) When a UOCAVA voter applies to participate in the primary election of one political party and the primary runoff election of a second political party, and that second political party allows for cross-over voting, the absentee election manager

shall initially issue the requested primary election ballot and the federal instant runoff primary election ballot (which shall be labeled "Runoff Only"). If the requested first primary ballot is also a special federal instant runoff primary election ballot - and thus only contains federal races - then the absentee election manager shall also issue the special state ballot.

(3) The ballots shall be transmitted together, with provisions made for both ballots to be returned together.

(4) If the UOCAVA voter has requested a runoff ballot, and there is the potential for a runoff in a non-federal race, or if any referenda are contained on a special state second primary election ballot, the absentee election manager shall issue the special state second primary election ballot to the voter when it is ready.

(f) UOCAVA voters may participate in Alabama's federal primary election and any second federal primary elections using the Federal Write-In Absentee Ballot ("FWAB").

(1) UOCAVA voters who vote using a Federal Write-In Absentee Ballot ("FWAB") in a federal primary election in which three or more candidates have qualified with the same political party to run for the same federal office may rank their choices for such candidates on the FWAB in the same manner provided for in Code of Alabama 1975, section 17-13-8.1(c)(2).

(2) UOCAVA voters participating in the primary election of one political party and the primary runoff election of a second political party, when that second political party allows for cross-over voting, may specify their choice for the primary election and may then rank their choices for the

federal runoff election candidates on the FWAB in the same manner provided for in Code of Alabama 1975, section 17-13-8.1(c)(2).

(3) The rules contained in the UOCAVA State Written Plan for Federal Primary Runoff Election shall govern the receipt, counting, canvassing, storage, and reporting of FWAB ranked ballots cast in the first federal primary election, and second federal primary election, if necessary.

(g) The deadline for receipt of ballots shall be as follows.

(1) Special Federal Ballot, FWAB, or Special State Ballot for Primary Election.

If received by mail, no special federal ballot, FWAB, or special state primary ballot shall be opened or counted in the first federal primary election unless the absentee ballot is postmarked as of the date of the first primary election and received by the absentee election manager no later than noon seven days after the first primary election.

<u>If received electronically, no special federal ballot, FWAB, or special state primary ballot shall be opened or counted in the first federal primary election unless the absentee ballot is received by midnight on the date of the first primary election.</u>

(2) Special Federal Ballot, FWAB, or Special State Ballot for Second Primary Election.

If received by mail, no special federal ballot, FWAB, or special state ballot for a second primary election shall be opened or counted unless the absentee ballot is postmarked as of the date of the second primary election and received by the

absentee election manager no later than noon seven days after the second primary election.

If received electronically, no special federal ballot, FWAB, or special state ballot for a second primary election shall be opened or counted unless the absentee ballot is received by midnight on the night of the federal primary runoff election.

(h) The determination as to whether the special federal ballot is entitled to be counted shall be as follows.

(1) For a federal primary election in which three or more candidates have qualified with a single political party to run for the same federal office (other than the office of President), where the voter is required to complete an absentee ballot affidavit, the absentee election poll officials provided for in Code of Alabama 1975, section 17-11-11 shall follow the procedures set forth in Code of Alabama 1975, section 17-11-10 to determine whether the UOCAVA absentee ballot affidavit~~, or overseas voter certificate, as applicable,~~ establishes that the UOCAVA voter is entitled to vote by absentee ballot. Where the voter is required to complete an overseas voter certificate in accordance with Code of Alabama 1975, section 17-11-46, the absentee election manager shall determine whether the overseas voter certificate establishes that the UOCAVA voter is entitled to vote by absentee ballot.

(2) The determination in paragraph (1) governs all ballots submitted together, including for any second federal primary election, such that no new determination as to the adequacy of the same absentee ballot affidavit, or overseas voter certificate, as applicable, need be made.

(3) For any ballots submitted separately, such as stand-alone runoff ballots or a special state

ballot for a second primary election, where the voter is required to complete an absentee ballot affidavit, the absentee election poll officials provided for in Code of Alabama 1975, section 17-11-11 shall follow the procedures set forth in Code of Alabama 1975, section 17-11-10 to determine whether the UOCAVA absentee ballot affidavit ~~or overseas voter certificate, as applicable,~~ establishes that the UOCAVA voter is entitled to vote by absentee ballot. Where the voter is required to complete an overseas voter certificate in accordance with Code of Alabama 1975, section 17-11-46, the absentee election manager shall determine whether the overseas voter certificate establishes that the UOCAVA voter is entitled to vote by absentee ballot.

(4) If the absentee election poll officials or absentee election manager, as applicable, determine(s) that the UOCAVA absentee ballot is entitled to be counted, upon the closing of the polls, the ballot shall be counted in accordance with state law.

(5) If the absentee election officials determine that an absentee ballot affidavit is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made as to the reason for rejection of the ballot and said record of the reason for rejection of any ballot shall be provided to the absentee election manager. If the absentee election manager determines that an overseas voter certificate is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made and maintained as to the reason for rejection of the ballot. The absentee election manager shall thereafter record in the statewide election management system which absentee ballots

have been accepted or rejected and if rejected, the reason therefor.

(i) The method for counting the special federal ballot and FWAB and securing same shall be as follows.

(1) In a federal primary election in which the special federal ballot or FWAB is used, the first choice preference of each voter shall be the vote counted as cast by the voter. Only the first choice preference votes of the voters shall be counted or divulged during the count or upon the conclusion of the primary election. The total count of first choice preference votes received by each federal candidate shall be added to the count of votes produced for candidates pursuant to Section 17-13-13.

(2) Upon the conclusion of this count, the special federal ballots or FWABs shall be returned to the absentee election manager, who shall secure and maintain the ballots until the time for counting the ballots for any second primary election. Any FWAB on which the UOCAVA voter has written in a single choice in the federal Congressional races, without crossing-over for the runoff, and where the voter's single choice is facing only one opponent is a FWAB which has not registered a vote for any potential federal runoff election, and it may be returned to the absentee election manager or secured along with the traditional ballots pursuant to governing state law.

(3) If a federal second primary election is necessary, the vote to be counted as cast by each voter shall be the highest designated choice of the voter of the two candidates participating in the contest. In the event that the voter has only ranked one choice, the vote will be counted for that candidate if he or she is a candidate in the federal runoff election. The total count of

the votes received by each candidate shall be added to the count of votes pursuant to Section 17-13-18.

(4) If, on the special federal ballot, the voter marks an "X" or places a check mark by only one candidate's name, circles only one candidate's name, or otherwise clearly designates his or her choice for only one candidate, that candidate shall be counted as the voter's first choice candidate.

(5) The votes for any office listed on the special federal ballot or FWAB shall be canvassed, certified, and announced in the manner provided for in Section 17-13-17 and Section 17-13-18.

(6) Upon the conclusion of the first federal primary election, and the second federal primary election, if necessary, the special federal ballots and FWABs shall be stored with the records of election as required by state law, but shall be segregated from regular absentee ballots and labeled.

(j) The method for counting the special state ballot shall be as follows.

(1) The special state ballot shall be counted in the manner provided for in Section 17-13-13 or Section 17-13-18, as applicable to a primary election or second primary election.

(2) The votes for any office listed on the special state ballot shall be canvassed, certified, and announced in the manner provided for in Section 17-13-17 and Section 17-13-18.

(3) If the absentee election officials determine that an absentee ballot affidavit is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made as

to the reason for rejection of the ballot and said record of the reason for rejection of any ballot shall be provided to the absentee election manager. If the absentee election manager determines that an overseas voter certificate is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made and maintained as to the reason for rejection of the ballot. The absentee election manager shall thereafter record in the statewide election management system which absentee ballots have been accepted or rejected and if rejected, the reason therefor.

Authors: Jean Brown; Edward Packard

Authority: 52 U.S.C. Section 20302 (a) (9); Code of Alabama 1975, section 17-13-8.1 (2015)

History: Emergency Rule filed December 7, 2015; Amended Emergency Rule filed December 21, 2015.