



Wisconsin Elections Commission

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DATE: For the April 5, 2021, Wisconsin Elections Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe
Administrator

SUBJECT: Administrative Rule Pertaining to the Nursing Home and Care Facility Voting Program

This memorandum provides an update to Commissioners regarding the status of the emergency administrative rule about Special Voting Deputy (SVD) procedures for facility visits that staff was directed to promulgate by the Commission during their March 2, 2021 meeting. Staff requests the Commission's guidance on next steps as the initial steps in the rule-making process have been completed. The Commission has options to consider on how to proceed with the next phase. Staff has provided a recommended approach for these next steps, but has also provided Commissioners with an explanation of other options available to them now.

A concise summary of steps in the administrative rule process is found in Appendix B but we have also provided materials that outline the required steps involved in the administrative rule process. See Appendix C: WEC Admin Rule Process Outline and Appendix D: Administrative Rules Procedure Manual for more detailed information on the overall rule promulgation processes.

History

State law requires that municipal clerks appoint and send SVDs into nursing homes and care facilities to conduct absentee voting for the eligible voters who reside in those facilities. Due to the availability of COVID-19 vaccines for nursing home and care facility residents and health care workers in early 2021, the Commission has anticipated that its guidance to clerks about SVDs could change for the Spring Election. Evidence was later presented to the Commission by public health experts from the Wisconsin Department of Health Services that some care facilities would be reopening to visitors such as SVDs. At its March 2, 2021 meeting, the Commission directed staff to begin the process of promulgating an emergency administrative rule to formalize the Commission's decisions regarding SVDs. The Commission unanimously passed the following motion summarizing the requested rule:

Specific to the April 6, 2021 election, Clerks shall contact all eligible facilities in their municipality no later than March 12, 2021 to determine whether special voting deputies will be admitted. If SVDs are permitted, SVDs should schedule their SVD visits immediately in the allowable SVD period and consolidate such visits to the greatest extent possible, so that there are at least 14 days prior to the election for any voter who does not vote with SVD assistance may receive and return their absentee ballot. These visits should be scheduled no later than March 19, 2021. SVDs and observers must comply with any requirements of the care facility and of state and local health

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departments to conduct the visits safely, recognizing the importance of preserving a resident's right to vote. If the clerk is informed that SVDs will not be permitted entry to the facility, the SVDs should schedule two tele-visits with the administrator of the facility. These tele-visits should be scheduled immediately in the allowable SVD period so that if attempted visits are denied that there are at least 14 days prior to the election for the voter to receive and return their absentee ballot. SVDs should use the tele-visit to confirm that SVDs are not permitted to enter the facility. If SVDs are denied access to the facility, then clerks must proceed to the provisions of Wis. Stat. §6.875(6)(e) and send voters their ballots.

Administrative Rule Process Status Update

Agency staff submitted a Statement of Scope for the proposed rule to the Wisconsin Department of Administration (DOA) on March 4, 2021, in accordance with Wis. Stat. §227.24. (See Appendix A to this memo: Statement of Scope). The scope statement was then forwarded to the Office of Governor Evers for additional approval, which was received on March 11, 2021. Finally, the document was forwarded to the Wisconsin Legislative Reference Bureau (LRB) for publishing in the Administrative Register on March 22, 2021. Statute requires that the scope statement be published in the register for at least 10 days before the Commission approves it, and staff cannot begin drafting the administrative rule until that approval is received. Before initiating the preparation of the Economic Impact Analysis, staff must also review the scope statement to determine whether it has changed in any meaningful way and shall submit a revised statement of scope to the Governor if any changes are proposed. The published rule is also open to public comment and all of the public comments that have been submitted to date can be found in Appendix E: Public Comment Submissions.

On March 31, the Co-Chairperson of the Joint Committee on Review of Administrative Rules (JCRAR) directed the Commission to hold a preliminary public hearing and comment period on Scope Statement SS 031-21, pursuant to Wis. Stat. § 227.136 (1). Because of JCRAR's directive, the statute states that the scope statement may not be approved by the Commission until after the preliminary public hearing and comment period are held by the agency.

With that in mind, the Commission has two options, which are described below. The approach will depend on the Commission's desire to continue to pursue the emergency rule, restart the process to pursue a permanent administrative rule, let the scope statement expire if it is no longer relevant, or pursue a combination of these options.

Rule Promulgation: Two Possible Approaches

1. The Commission could direct staff to allow the Statement of Scope for the emergency administrative rule to expire as the conditions which originally prompted its promulgation no longer exist.
2. The Commission could hold a public hearing on the emergency rule prior to approving the current Statement of Scope and drafting the proposed administrative rule.

Rule Promulgation: Recommended Commission Approach

Attached as Appendix B, you will see procedural steps in the rule making process. Ultimately, because the scope statement has been approved and published in the administrative register, the Commission needs to determine next steps. The administrative rule statutes are also very explicit that staff may not begin pursuing

these next steps without a Commission action. The April 5, 2020 meeting was scheduled as the earliest possible opportunity to take these actions. (10 days after publication)

To facilitate the Commission's discussion, WEC staff recommends the following approach. Because SVD voting for the April election has concluded, the conditions of the emergency rule no longer exist. The Commission could, therefore, allow the current scope statement to expire if no further action is directed. In the meantime, the Commission could direct staff to begin developing a proposal for scope statement for a potential permanent rule. While we are unable to begin the drafting process at today's meeting, the Commission may direct staff today to begin conceptualizing a scope for a permanent rule which addresses all scenarios in which SVDs are not allowed into care facilities and would not be tied to a specific election or emergency. The Commission could then consider this proposal at a future meeting.

If the Commission chooses this path, authorizing staff to allow the current Statement of Scope to expire and to prepare a proposal for a permanent rule, the following motion would be in order:

Recommended Motion: The Wisconsin Elections Commission directs staff to allow the Statement of Scope (SS 031-21) for the emergency administrative rule on SVD voting for the April 6, 2021 election to expire. The Commission also directs staff to study the issues involving promulgation of a permanent administrative rule that addresses nursing home, care facility, and Special Voting Deputy procedures when SVDs are not granted access to a care facility to administer voting and to present a report at a future meeting.

Rule Promulgation: Other Commission Option

The Commission could direct staff to continue to promulgate the emergency administrative rule after first holding a public hearing regarding the current Statement of Scope. The current Statement of Scope was drafted specifically as an emergency rule in reference to the April 6, 2021 Spring Election and SVD voting has concluded for this election. Therefore, this approach is not recommended by staff. As reflected in the recommended motion above, the Commission may choose to direct staff to study issues involved in drafting a proposal for a new permanent administrative rule that addresses nursing home, care facility, and Special Voting Deputy procedures when SVDs are not granted access to a care facility to administer voting that will be presented at a future meeting.

Conclusion

This memorandum has been prepared to update the Commission on the status of the emergency rule promulgation processes related to the nursing home and care facility voting programs. Agency staff have completed first steps, including the publication of a statement of scope in the Administrative Register. The Legislature has now directed the Commission to hold a public hearing on the Statement of Scope before proceeding. Agency staff now ask that the Commission consider the options presented above to determine how best to proceed.