Wisconsin Elections Commission

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DATE: **January 26, 2022**

TO: **Wisconsin Elections Commission Members**

FROM: **Jim Witecha, Staff Attorney**

SUBJECT: **Legal analysis of Wis. Stat. § 227.26(2)(b), its implications, and the Commission's independent promulgation of administrative rules.**

Staff counsel have been called upon to provide clarity in advance of the Wisconsin Elections Commission's ("WEC" or "Commission") consideration of the Wis. Stat. § 227.26(2)(b) orders directed to the Commission by the Joint Committee for the Review of Administrative Rules ("JCRAR"), and the Commission's general review of administrative rule promulgation processes under Wis. Stat. Chapter 227, at its January 28, 2022, meeting.

The Commission unanimously passed the following motions at its December 1, 2021, meeting:

> Staff is directed to draft a scope statement to promulgate a rule regulating the use of drop boxes based on our current guidance.
>
> Staff is directed to prepare scope statements on the correction/addition of witness information on absentee ballot certificate envelopes, and staff should bring two versions of draft scope statements to the March 9, 2022, meeting of the Commission—one scope statement that is as close to identical to the current guidance as possible, and another scope statement that lists the best alternative to the current guidance.

Those Commission directives represented only two of many that were passed at the December meeting aimed at the promulgation of permanent rules on various election-related processes and practices. On January 10, 2022, the JCRAR sent two separate Wis. Stat. § 227.26(2)(b) orders:

> As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its guidance relating to the return of absentee ballots to drop boxes[.]
>
> As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its guidance relating to completeness of addresses and correction of errors and omissions on absentee ballots.

These orders were issued despite the Commission's directives a month earlier that staff begin a permanent rule promulgation process (*See* attached JCRAR order letters). The following questions and topics are relevant to the requested analysis and/or were directed to be researched by the Commission.

Are the JCRAR orders lawful:

Yes, staff counsel believe the orders issued to the Commission are lawful on their face. However, there are several considerations the Commission should evaluate. The orders direct the Commission to publish the rules no later than February 9, 2022, or cease issuance of Commission guidance on the topics. Please consider the following:

Wisconsin Statute § 227.26(2)(b) provides:

> *Requirement for promulgation*. If the committee [JCRAR] determines that a statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule under s. 227.24 (1) (a) within 30 days after the committee's action.

Wisconsin Statute § 227.24(1)(a) is the cross-referenced statutory provision relating to the emergency promulgation of an administrative rule:

> An agency may, except as provided in s. 227.136 (1), promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

The clear statutory language of Wis. Stat. § 227.26(2)(b) states, the JCRAR "…may direct the agency to promulgate the statement or interpretation as an emergency rule under s. 227.24 (1) (a) within 30 days after the committee's action."

The statute refers to the promulgation processes of Wis. Stat. § 227.24(1)(a), and only directs that the JCRAR has the authority to direct the promulgation of the statement or interpretation within 30 days, not the publication of the emergency rule. It is unlikely that even the initial publication of scope statements in the Administrative Register would be possible within a 30-day period, given there are multiple steps to reach that stage, but a significant number of all procedures in administrative rule promulgation involve third-party processes that are outside the control of the Commission and WEC staff.

Promulgation is not a directly defined term in statute. Wisconsin Statute Chapter 227 analysis shows that "promulgation" involves the collective processes of creating a complete/effective administrative rule (*See* Wis. Stat. § 227.11). Staff counsel believe the Commission would be in compliance with the JCRAR orders by directing staff to promulgate a rule and having staff begin those processes within the directed timeline, or on the contrary, by withdrawing the relevant guidance. The majority of subsequent promulgation processes are wholly outside of the Commission/staff's control, and there is no guarantee as to the timelines involved.

It is also important to note another deficiency within the JCRAR orders, if for nothing else, to ensure the Commission is fully informed when it discusses this topic. The Commission is directed by JCRAR to publish a rule or withdraw guidance "relating to completeness of addresses and correction of errors and omissions on

absentee ballots." Under the strictest of readings, this order directs the Commission to carry out a task which has no actual basis for compliance.

The Commission has never issued guidance or directed that an absentee ballot itself be modified or corrected. Rather, it is certain information on the absentee ballot certificate envelope that the clerk/voter may correct under defined circumstances. The JCRAR order letter does refer to the Legislative Audit Bureau's ("LAB") findings, which correctly point to the certificates and not ballots, but the Commission may decide to formally consider whether it can comply with the order in light of its wording.

Must there be a verifiable emergency for the JCRAR to issue an order under Wis. Stat. § 227.26(2)(b):

No, staff counsel believe the law is clear, and no emergency finding is required for a JCRAR ordered emergency/temporary rule.

The Administrative Rules Procedures Manual specifically refutes any argument that a finding of emergency is required for a JCRAR order:

> If JCRAR determines that a statement of policy or an interpretation of a statute meets the definition of a rule, JCRAR may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days after JCRAR's action. [s. 227.26 (2) (b), Stats.] These emergency rules are not required to have a finding of emergency. [s. 227.24 (3), Stats.] WIS. LEGISLATIVE COUNSEL / WIS. LEGISLATIVE REFERENCE BUREAU, ADMINISTRATIVE RULES PROCEDURES MANUAL, 58 (2020).

Wisconsin Statute § 227.26(2)(b) also specifically states that if JCRAR determines a statement of policy or an interpretation of a statute meets the definition of a rule, it may order the promulgation of an emergency rule under Wis. Stat. § 227.24(1)(a).

The clear language of the statute directs that JCRAR must only determine that the guidance, policy, or interpretation meets the definition of a rule to make an order (*i.e.* it represents an unpromulgated rule), not that JCRAR or the Commission must determine that an emergency exists. The JCRAR is given unique and independent statutory authority to order rule promulgation, totally separate from the other provisions of Chapter 227. The cross-reference to Wis. Stat. § 227.24(1)(a) is more likely a tie to the expedited and less comprehensive processes associated with an emergency rule promulgation than it is a requirement for the finding of emergency circumstances.

Additionally, Wis. Stat. § 227.24(3) provides that, "…Each copy, notice or description of a rule promulgated under sub. (1) (a) shall be accompanied by a statement of the emergency finding by the agency *or* by a statement that the rule is promulgated at the direction of the joint committee for review of administrative rules under s. 227.26 (2) (b) (*emphasis added*). This provision of statute seems to clearly differentiate between agency emergency findings and JCRAR orders, so it is reasonable to infer that requiring agency emergency findings would eviscerate the autonomy granted to the legislative body by Wis. Stat. § 227.26(2)(b).

Can the JCRAR order agency rule promulgation under Wis. Stat. § 227.26(2)(b) in light of legislative bill failures on the same issues:

Staff counsel must next address questions about whether the JCRAR orders constitute improper political motivations and/or an attempt to force the agency to promulgate a rule where similar legislation could not get

passed independently by the Legislature (*e.g.* prior bills on these same issues failed and were not codified into law).

It is not appropriate for nonpartisan WEC staff to opine on the partisan or political motivations of legislative or politically appointed bodies. As to whether a legislative body can force an agency/commission to promulgate an administrative rule where that same body has been unable to pass legislation/statute on the matter, that failure is of no legal consequence if the JCRAR has statutory authority to order the promulgation of a rule. The failure of any bill does not inherently negate the lawful, statutory authority of a codified provision such as Wis. Stat. § 227.26(2)(b).

There may be reason to object to a Wis. Stat. § 227.26(2)(b) order related to failed legislation, if the basis of the prior bill's failure was illegality or other conflict with state/federal statute or practices. There are also inherent and formal standards of law that allow a person/entity to ignore an unlawful order (*e.g.* Wisconsin Statutes require police and traffic officer orders to be lawful before a person is required to comply; an employer cannot force an employee to break the law; more generally a person/entity cannot force someone to carry out an action that violates the law; military law has standards that contemplate the lawful and unlawful orders of superiors, etc.). The only substantive question that remains is whether the Commission feels there exists a lawful reason to object to, otherwise challenge, or delay compliance with an order under Wis. Stat. § 227.26(2)(b).

Does the LAB's recommendation to promulgate a permanent rule on these issues raise questions about the validity of a temporary/emergency rule order:

The nonpartisan LAB recommended the Commission seek the promulgation of a permanent rule, as opposed to the temporary/emergency rule that the JCRAR has ordered as necessary. Unfortunately, this is not a question that can be answered by staff counsel or WEC staff. Perhaps the most relevant consideration is that an entity like the LAB is not postured to render decisions on whether an emergency exists, and it is unlikely that their audit report findings will recommend emergency rules as opposed to permanent rules. Additionally, the LAB does not possess the statutory authority of the JCRAR under Wis. Stat. § 227.26(2)(b) to order an agency to promulgate a temporary/emergency rule, so the auditee agency's emergency determination is a necessary component of an emergency rule promulgation outside the confines of a JCRAR order. The Commission would need to assess whether it believes there is any validity to an argument that the LAB consciously chose to recommend only a permanent rule for specific reasons.

Does the Commission's decision to promulgate permanent rules negate the JCRAR order for temporary/emergency rules:

This question resides in an unsettled area of the law but may represent the most sound basis the Commission has for challenging the JCRAR's order (except perhaps the questions about the validity and phrasing of the orders themselves). For instance, the JCRAR's order relies on a process that only promulgates a temporary rule, but it does so in a slightly faster manner by eliminating or delaying certain statutory processes required for permanent rule promulgation.

The Commission, and perhaps the LAB, only formally determined or stated that a permanent rule should be sought. The Commission may also see little use in promulgating a short-term rule when it has formally approved a directive that a long-term rule is appropriate. It may also determine that there is not much to be gained in seeking temporary or emergency rules, given that the rules are unlikely to be approved prior to the February of 2022 Primary and Spring of 2022 Election. A legislative denial of, or amendment to, the proposed rule is the only outcome likely to happen before to the upcoming elections, and again, WEC staff cannot take a

position on such matters. The only certainty is that the JCRAR ordered specific rule promulgation in the form of publication before a definite date.

What would be the impact of simply withdrawing the guidance:

The *Teigen* case has already called the future of some of these guidance documents into question, although a stay has been granted and the case is proceeding on appeal. That said, the Commission would be acting within its authority to order the public removal of guidance documents on these topics, and that decision would comply with the second alternative offered by JCRAR. The Commission, WEC staff, and the Commission's litigation counsel, have consistently and publicly voiced opinions and legal arguments that drop box guidance materials are generally not directive in nature and/or necessitate independent review by municipal counsel before clerks begin implementing any new processes. The correction of absentee ballot certificate information is slightly more affirmative/directive in nature, but again, Commission staff have always advised local clerks and counsel to review that guidance before putting it into practice.

Removal of this guidance would likely negate the order of the JCRAR, but it would not necessarily require any changes to existing practices by the clerks. Clerks and local counsel would still be well within their authority to evaluate the legality of these, and similar election practices, even in the absence of a formal Commission opinion. Certain factors would impact the long-term viability of these local decisions (*e.g.* the *Teigen* decision is upheld on appeal, the *Teigen* courts do not interpret Wis. Stat. § 6.855 to allow local governing bodies to designate certain alternate or drop box sites, etc.).

What would the temporary/emergency rule promulgation process entail, and are there any procedural implications to consider:

Included with this memorandum is a copy of the WEC's Administrative Rulemaking Process Outline and a prior memorandum on rule promulgation and guidance from November 29, 2021. Commissioners should note that the Wisconsin Legislative Council estimates that from start to finish, for standard rules that move through the process without any major disruption, rule promulgation takes between 7.5 and 13 months. There are fewer steps involved with the emergency rulemaking process, but it is still a lengthy process, and an emergency rule will only remain in place for a limited period (150 days initially, with possible extensions not to exceed 120 days).

The process begins with the Commission issuing a directive to staff to draft a scope statement. Traditionally, that scope statement is submitted for initial approvals from the Department of Administration ("DOA") and the Office of the Governor before coming back to the Commission for approval, but recent Commission directives have ordered staff to bring the scope statement to the next meeting for approval before it moves forward. Neither option is inappropriate or unlawful. Various parties then have the authority to review, approve, reject, or modify the scope/rule as it progresses through different stages.

As highlighted above, the proposed scope statement is sent to DOA and the Office of the Governor for approvals after the Commission authorizes staff to do so. Wisconsin Statute § 227.135(2) states:

> An agency that has prepared a statement of the scope of the proposed rule shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor who, in his or her discretion, may approve or reject the statement of scope…

As the clear language of the statute provides, the Governor has complete discretion in determining whether and why to approve or reject a scope statement or the eventual rule language (*See Koschkee v. Taylor*, 387 Wis. 2d 552). This initial approval is necessary before the scope statement is published in the Administrative Register. Only after the first publication will the scope statements and potential public comments typically be brought to the Commission for consideration and approval (*i.e.* if the Commission did not order staff to present a draft to the Commission for approval before submission/publication).

Staff can only begin drafting the rule language and associated analysis after this stage has been reached. There are additional steps to the process outlined in the provided materials, but two primary questions remain: 1) Do any other parties maintain authority over the rulemaking process, and 2) Does existing guidance remain intact if the scope/rule are rejected at any stage?

Wisconsin Statute § 227.19 details the various means that a legislative committee and/or JCRAR may use to object to all or part of a proposed rule. These legislative bodies also have approval authority and an ability to propose amendments. Commission guidance would remain in place if a proposed rule on same issue is rejected at any stage (absent a Commission vote to then retract the guidance), but the basis of a gubernatorial or legislative rejection might be the basis for a subsequent legal challenge to the original guidance (*e.g.* a rule is rejected based on a valid assessment that it conflicts with state law, the Commission fails to retract the guidance, it is subsequently challenged via some legal means).

It is also important to note that the matters at issue in the JCRAR orders are being litigated at the moment, or were previously litigated to some degree (*e.g. Richard Teigen v. WEC* (on appeal), *Jeré Fabick v. WEC* (Wis. Supreme Court rejected an original action request), *Donald J. Trump et al. v. Joseph R. Biden et al.* (Wis. Supreme Court rejected arguments based on laches/Hagedorn Concurrence – Legislature/WEC/Clerks may wish to look at certificate correction as a valid election administration concern).

What are the Commission's options in response to the Wis. Stat. § 227.26(2)(b) order:

The Commission may exercise any of the following options, or in some cases fail to exercise an option. Certain of these decisions are quite likely to result in legal action against the Commission or are generally not advisable. Several of the options are detailed below not because staff counsel recommends them, but rather to lay out a complete decision tree and analysis of likely outcomes. The Commission, in theory, could:

1. Fail to reach an affirmative two-thirds majority vote and thus not take any action.
   - This would leave WEC staff without a directive. Nonaction by the Commission is likely to result in the JCRAR seeking recourse for noncompliance with the order. In this instance, existing guidance would remain in place, and staff would continue the processes associated with permanent rule promulgation, but staff do not recommend this approach (Note: The findings of the Waukesha County Circuit Court in *Teigen* may impact all drop box analysis in this memorandum if the stay is lifted or the courts render a decision against the Commission, thus necessitating that the Commission decide whether to pull its existing guidance because of an unfavorable ruling that it is unlawful).
2. Exercise the Commission's authority to act by an affirmative vote of a two-thirds majority under Wis. Stat. § 5.05(1e):
   - Render a finding that the JCRAR order should be disregarded. In this scenario, JCRAR is likely to take legal action (*e.g.* Writ of Mandamus, lawsuit, etc.), and the Commission's defenses to such inaction are based on unsettled areas of the law. The basis for any decision to ignore the JCRAR order must rely on Commission reasoning that would present a defensible position in a court of law (*e.g.* the current guidance is not an unpromulgated rule, JCRAR otherwise exceeded its authority, the

JCRAR order was unlawful on its face because of certain deficiencies in its directives, the decision to promulgate a permanent rule negates the need for JCRAR compliance, etc.).

- Vote to proactively seek DOJ legal representation for the purpose of disputing/litigating the JCRAR order (Note: DOJ had not responded to staff counsel questions about the theoretical feasibility of this option before this memorandum was shared with the Commission). In the alternative, additional guidance may be formally sought by vote of the Commission (*e.g.* seek an opinion of the Wisconsin Attorney General on certain issues that appear to be open questions of law—JCRAR may seek recourse while such a request is pending).
- Affirmatively vote to only pursue a permanent rule (likely to be challenged).
- Vote to independently pursue an emergency rule under Wis. Stat. § 227.24(1)(a). The "benefit" of this decision would be that the Commission would be taking a stance on the validity of the JCRAR order, while minimizing the risk of noncompliance with the order to seek a rule under Wis. Stat. § 227.26(2)(b) (although the JCRAR may still seek some form of remedial remedy to force compliance with its order). The "disadvantage" of this approach is that certain Commission members have already publicly stated that they do not believe an emergency exists, and it would undermine certain other arguments the Commissioners may have in disputing the JCRAR order.
- Vote to comply with the JCRAR order. This choice is the least likely to result in litigation or other forms of remedial action.
- Vote to withdraw the applicable guidance in accordance with the JCRAR order, which offered this as an alternative to a temporary/emergency rule promulgation. This option, like the promulgation of a temporary or emergency administrative rule, would be least likely to result in litigation or challenge from JCRAR. The basis for this decision would not require a finding that the guidance was improper, and the Commission could take action in any way that it sees fit (*e.g.* a statement that the Commission believes the guidance is proper and it will be revisited upon completion of pending litigation or as necessary in the future).
- Vote to pursue any of the various combinations of choices above simultaneously. A nondecision or lack of action on the pursuit of a temporary/emergency rule will dictate that WEC staff continue with the prior, December 1, 2021, Commission directive for the promulgation of a permanent rule regardless.

What are the enforcement mechanisms and risks associated with these questions of law:

As outlined above, all or most of the potential Commission decisions could result in some level of legal response, litigation, or other risk. Even if the Commission were to pull its guidance, in theory, an interested party or voter could sue the Commission based on some form of argument that the person's rights were infringed upon.

Research on this matter has not been able to uncover any indications that the JCRAR has ever attempted to enforce a directive issued to an agency under Wis. Stat. § 227.26(2)(b). The JCRAR may attempt to bring suit, enlist the assistance of citizens or organizations to file suit, and/or utilize other mechanisms at its disposal.

Theoretically, a request for a writ of mandamus or a similar form of relief may be the most likely tool employed by the JCRAR in response to a Commission decision not to pursue a rule in accordance with the Wis. Stat. § 227.26(2)(b) order. Mandamus would require that Wis. Stat. § 227.26(2)(b) imposes a non-discretionary, ministerial duty on the agency. It is arguable in this instance that a Wis. Stat. § 227.26(2)(b) order leaves an agency with little or no discretion in complying with the directive. If true, that may be an available mechanism for the JCRAR. It is unknown whether the JCRAR would attempt a writ of mandamus, and what the likely outcome of that request would be.

Please direct any advance questions you may have on this matter to Staff Attorneys Witecha and/or Judnic, independent of the collective body of the Commission, and they will be addressed prior to the meeting.

JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES

COMMITTEE CO-CHAIRS: SENATOR STEVE NASS AND REPRESENTATIVE ADAM NEYLON

January 10, 2022

Ann Jacobs, Chairperson
Meagan Wolfe, Administrator
Wisconsin Elections Commission
P.O. Box 7984
Madison, WI 53707-7984

RE: Correction of Errors and Omissions on Absentee Ballots

Dear Chairperson Jacobs and Administrator Wolfe:

We are writing to inform you that the Joint Committee for Review of Administrative Rules (JCRAR) voted on January 10, 2022, pursuant to s. 227.26 (2) (b), Stats., **to require the Wisconsin Elections Commission (WEC) to show statutory authority for its guidance regarding completeness of addresses and correction of errors and omissions on absentee ballots and promulgate it as an emergency rule or cease issuing such guidance to clerks.**

The motion passed by JCRAR is as follows:

> Moved, that the Joint Committee for Review of Administrative Rules, pursuant to s. 227.26 (2) (b), Stats., determines that the written guidance of the Wisconsin Elections Commission relating to the completeness of addresses and correction of errors and omissions on absentee ballots, as described by the Legislative Audit Bureau, below, meets the definition of a rule under s. 227.01 (13), Stats., and directs the agency to promulgate the guidance as an emergency rule within 30 days.
>
> > *In October 2016, WEC approved written guidance indicating that municipal clerks must take action to correct errors in the witness addresses on certificates. This guidance indicated that clerks were not required to contact the individuals who cast the ballots but were required to include their initials next to any corrections they made to witness addresses. This guidance also indicated that a complete address must include at least a street name and number as well as a municipality. In October 2020, WEC's staff updated this guidance to indicate that clerks should attempt to resolve any missing witness address information before Election Day, and this can be done by using reliable information, such as personal knowledge, voter registration information, or a telephone call with a voter or witness. The guidance indicates that a witness does not need to appear in person to add a missing address. If certificates did not have signatures or*

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contained other errors, the updated guidance indicated that clerks must require the individuals who cast the ballots or the witnesses to resolve these issues.

[Legislative Audit Bureau, Elections Administration, Report 21-19, pp. 40-41 (October 2021)]

As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its guidance relating to completeness of addresses and correction of errors and omissions on absentee ballots.

The nonpartisan Wisconsin Legislative Audit Bureau (LAB) report on elections administration, issued in October 2021, found that the WEC's guidance to clerks on completeness of addresses and correction of errors and omissions on absentee ballots fails to comply with Chapter 227 of state statutes, the state's Administrative Rules Law. WEC's guidance that allows clerks to correct or add missing information to absentee ballots must be promulgated as an administrative rule, if the agency believes it has the authority to permit clerks to do so under current law. *[Legislative Audit Bureau, Elections Administration, Report 21-19, October 2021].*

As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its current guidance to clerks relating to correction of errors and omissions on absentee ballots. If WEC cannot show statutory authority to do so, the agency would be prohibited from advancing an emergency rule or directing this action by clerks.

Please contact us if you have further questions on this matter.

Sincerely,

Senator Steve Nass
Co-Chair, JCRAR

Rep. Adam Neylon
Co-Chair, JCRAR

Cc: Commissioners Marge Bostelmann, Julie Glancey, Dean Knudson, Robert Spindell, Jr., and Mark Thomsen

JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES

COMMITTEE CO-CHAIRS: SENATOR STEVE NASS AND REPRESENTATIVE ADAM NEYLON

January 10, 2022

Ann Jacobs, Chairperson
Meagan Wolfe, Administrator
Wisconsin Elections Commission
P.O. Box 7984
Madison, WI 53707-7984

RE: Use of Drop Boxes to Return Absentee Ballots

Dear Chairperson Jacobs and Administrator Wolfe:

We are writing to inform you that the Joint Committee for Review of Administrative Rules (JCRAR) voted on January 10, 2022, pursuant to s. 227.26 (2) (b), Stats., **to require the Wisconsin Elections Commission (WEC) to show statutory authority for its guidance regarding the return of absentee ballots to drop boxes and promulgate it as an emergency rule or cease issuing such guidance to clerks.**

The motion passed by JCRAR is as follows:

> Moved, that the Joint Committee for Review of Administrative Rules, pursuant to s. 227.26 (2) (b), Stats., determines that the written guidance of the Wisconsin Elections Commission relating to the return of absentee ballots to drop boxes, as described by the Legislative Audit Bureau, below, meets the definition of a rule under s. 227.01 (13), Stats., and directs the agency to promulgate the guidance as an emergency rule within 30 days.
>
> > *In March 2020, WEC's staff issued written guidance indicating that municipal clerks can allow individuals to return absentee ballots to drop boxes that are secure, monitored, and emptied regularly, or return the ballots through mail slots at municipal facilities and book return slots at municipal libraries, as long as clerks collected such ballots daily. In July 2020, WEC's staff issued written guidance indicating that alternate sites for requesting, voting, and returning absentee ballots could be established according to the statutory requirements.*
>
> [Legislative Audit Bureau, Elections Administration, Report 21-19, p. 46 (October 2021)]
>
> As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its guidance relating to the return of absentee ballots to drop boxes

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The nonpartisan Wisconsin Legislative Audit Bureau (LAB) report on elections administration, issued in October 2021, found that the WEC's guidance to clerks on the use of drop boxes fails to comply with Chapter 227 of state statutes, the state's Administrative Rules Law. WEC's guidance to clerks on the use of drop boxes to return absentee ballots must be promulgated as an administrative rule, if the agency believes it has the authority to permit clerks to establish drop boxes under current law. *[Legislative Audit Bureau, Elections Administration, Report 21-19, October 2021]*.

As required by s. 227.26 (2) (b), Stats., the Wisconsin Elections Commission has 30 days to comply with the Joint Committee for Review of Administrative Rules' directive and must complete promulgation of the emergency rule by publishing it no later than February 9, 2022 or cease issuance of its current guidance to clerks relating to the use of drop boxes. If WEC cannot show statutory authority to do so, the agency would be prohibited from advancing an emergency rule or directing this action by clerks.

Please contact us if you have further questions on this matter.

Sincerely,

Senator Steve Nass
Co-Chair, JCRAR

Rep. Adam Neylon
Co-Chair, JCRAR

Cc: Commissioners Marge Bostelmann, Julie Glancey, Dean Knudson, Robert Spindell, Jr., and Mark Thomsen

Wisconsin Elections Commission

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Administrative Rulemaking Process

Step:	Description:	Authority:	Provide to Admin. Rules Website and Gov.?[1]
1	Commission authorizes staff to draft a Statement of Scope for a proposed rule.	WIS. STAT. §§5.05(1)(f), 227.135	--
2	Staff drafts proposed Statement of Scope.	WIS. STAT. §§5.05(1)(f), 227.135(1), 227.24(1)(e)	--
3	Staff electronically submits[2] proposed Statement of Scope to the Governor for consideration and approval (pdf. for Gov. Office).	WIS. STAT. §227.135(2); 2011 Executive Order #50, §II, ¶5	Yes
4	Staff receives Governor's approval of Statement of Scope in writing.	WIS. STAT. §227.135(2); 2011 Executive Order #50, §II, ¶5	Yes
5	Staff submits Governor-approved Statement of Scope to the Legislative Reference Bureau[3] for publication in the Administrative Register within 30 calendar days of receipt of Governor's written approval; staff also sends Statement of Scope to Secretary of the Department of Administration to the chief clerks of each house of the legislature for distribution to the co-chairpersons of JCRAR with a statement on the date it was approved by the Governor [4].	WIS. STAT. §227.135(3), 2011 Executive Order #50, §II, ¶9	Yes
6	Statement of Scope is published in the Administrative Register for at least ten (10) days.	WIS. STAT. §227.135(2)	Yes
7	Commission approves Statement of Scope after it has been published in the Administrative Register for at least	WIS. STAT. §227.135(2)	--

[1] Email to SBOAdminRules@spmail.wi.gov; DOARulesReview@wi.gov. MANUAL, p. 38.

[2] Email to SBOAdminRules@spmail.wi.gov. (Forwarded to Governor by DOA) 2011 Executive Order #50, §I, ¶4; §II, ¶1.

[3] Email to Admin-Code-Register@legis.wi.gov. MANUAL, p. 35, Rule 2.001(2).

[4] Emailing to SBOAdminRules@spmail.wi.gov satisfies the WEC's duty to send to the Department of Administration. 2011 Executive Order #50, §I, ¶4. Via chief clerks of both houses: ted.blazel@legis.wisconsin.gov, michael.queensland@legis.wisconsin.gov.

	ten (10) days. Staff cannot begin drafting the rule until the Commission approves the scope.		
8	Before initiating the preparation of the Economic Impact Analysis, Staff reviews Statement of Scope to determine whether it has changed in any meaningful way while being developed, and shall submit revised Statement of Scope to the Governor if any such changes occurred.	WIS. STAT. §§227.135(4), 2011 Executive Order #50, §IV, ¶2	--
9	Staff drafts language of proposed rule.	WIS. STAT. §§227.135(2), 227.137, 227.14	--
	Staff drafts analysis of proposed rule. Analysis includes a place to submit comments and a deadline for submitting those comments.	WIS. STAT. §227.14(2)	--
	Staff drafts fiscal estimate of proposed rule.	WIS. STAT. §227.14(4)	--
10	(Optional) Staff submit proposed rule to Legislative Reference Bureau for "presubmission editing" and drafting comments.	MANUAL, p. 36, Rule 2.007.	--
11	Staff solicits information and advice from entities and individuals that may be affected by proposed rule by 1) posting proposed language on Wis. Admin. Rules website, 2) accepting comments for at least 14 calendar days (if little or no economic impact), or at least 30 days (if moderate impact), or at least 60 days (if significant impact)	2011 Executive Order #50, §IV, ¶¶1, 3.	Yes
12	Staff prepares Economic Impact Analysis for proposed rule with information obtained from entities and individuals that may be affected by the rule and with local governmental units that respond to WEC's solicitation for information, unless rule will not have an economic impact.	WIS. STAT. §§227.137(2), (3); 2011 Executive Order #50, §IV, ¶¶1, 4, 8.	--
	Economic Impact Analysis includes determination as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state.	WIS. STAT. §227.137(3)(e); 2011 Executive Order #50, §IV, ¶1, 5.	--
13	If the Commission intends to establish an advisory committee, the Commission must provide[5] a list of members to the Governor prior to establishing the committee (recommended if the EIA indicates that the rule will have a significant economic impact). **Unlikely this will occur with the rules the Commission promulgates**	WIS. STAT. §227.13; 2011 Executive Order #50, §III, ¶1; §IV, ¶6.	Yes
13	Staff prepares notice of submission of proposed rule to Rules Clearinghouse.	WIS. STAT. §§227.14(4m), 227.17	--

[5] Email to AdminsitrativeRules@wisconsin.gov.

14	Commission approves notice of submission of proposed rule to Rules Clearinghouse, which includes the proposed rule order and Economic Impact Analysis.	WIS. STAT. §§227.14(4m)	--
15	Staff provides proposed final draft of proposed rule and Economic Impact Analysis to Legislative Council Rules Clearinghouse,[6] Governor/Secretary of DOA,[7] and Legislature.[8] (pdf. for Gov. Office) ***Hard copy of economic impact analysis and proposed rule must be provided to Clearinghouse before it is considered filed and can be published in the register.*	WIS. STAT. §227.137(4); 2011 Executive Order #50, §IV, ¶1	Yes
	Staff submits, to Legislative Reference Bureau for publication in Administrative Register, notice of submission of proposed rule to Rules Clearinghouse.	WIS. STAT. §§227.14(4m), 227.17	Yes
	Staff submits proposed rule to the Small Business Regulatory Review Board if rule may have an economic impact on small businesses.	WIS. STAT. §227.14(2g)	Yes
16	Staff submits revised Economic Impact Statement to Governor if there is a significant change in economic impact.	WIS. STAT. §227.137(4); 2011 Executive Order #50, §IV, ¶9.	Yes
17	Staff coordinates with Department of Administration to complete review and report if the Economic Impact Analysis indicates that the rule will cost $10,000,000+ for implementation and compliance. Staff may not submit a report to the Legislature until DOA provides this report to the agency, if required.	WIS. STAT. §§227.137(3)(c), 227.137(3)(b)2, 227.19(2); 2011 Executive Order #50, §IV, ¶11.	Yes
18	Within 20 working days of receipt of rule and Economic Impact Analysis, Rules Clearinghouse provides staff with advisory and technical review report. 20 days starts once they receive the hard copy of the rule.	WIS. STAT. §227.15	Yes
19	Staff publishes notice[9] of public hearing at least ten (10) days prior to the hearing (if hearing required);[10] staff also provides such notice to Legislative Reference Bureau,	WIS. STAT. §§227.16, 227.17(2), (3), 227.18;	Yes

[6] Email to: Clearing.House@Legis.wisconsin.gov.

[7] Email to SBOAdminRules@spmail.wi.gov. *See* 2011 Executive Order #50, §I, ¶4; §IV, ¶1.

[8] Via chief clerks of both houses: ted.blazel@legis.wisconsin.gov, michael.queensland@legis.wisconsin.gov.

[9] Staff must provide notice to every member of the Legislature who has filed a request for notice in writing with the LRB. Staff may receive a list of the names and addresses of those legislators from LRB upon request. MANUAL, Rule. 2.04(3).

[10] Hearing not required if: 1) proposed rule brings an existing rule into conformity with a statute that has been changed or enacted or with a controlling judicial decision. WIS. STAT. §227.16(2)(b); 2) proposed rule is adopted as an emergency rule. WIS. STAT. §227.16(2)(c), and MANUAL, Rule 2.12; 3) proposed rule is being promulgated as directed by JCRAR under WIS. STAT. §227.26(20(b). WIS. STAT. §227.16(2)(d), and MANUAL, Rule 2.06; 4) proposed rule published under the 30-day notice procedure in WIS. STAT. §227.16(2)(e). MANUAL, Rule 2.05; or 5) proposed rule consists of one or more forms that impose a requirement that meets the definition of a rule. WIS. STAT. §227.23.

	and to Legislators.[11] Staff is also required to take whatever steps it deems necessary to convey notice to interested persons.		MANUAL, Rule 2.04(3), Rule 2.04(4).	
	Staff holds public hearing, if required. Hearing may not occur until staff receives Rules Clearinghouse review report. Hearing to give interested parties a change to be heard and to have influence over final form of rule.		WIS. STAT. §§227.15(1), 227.16; *HM Distributors of Milwaukee v. Dept. of Agri.*, 55 Wis. 2d 261, 268 (1972)	--
Alt. 20	Alt. 20.a.	If staff uses 30-day notice procedure instead of a public hearing, staff must provide notice to the Legislative Reference Bureau for publication in the Administrative Register.	WIS. STAT. §227.16(2)(e)	Yes
	Alt. 20.b.	If staff receives a petition within 30 days of publication, staff may not proceed with proposed rule until it holds a public hearing.	MANUAL, Rule 2.05(2)	Yes
		If staff does not receive a petition within 30 days of publication of the notice, staff may submit the proposed rule to the Governor for approval.	MANUAL, Rule 2.05(2)	Yes
21	Staff prepares final draft of rule, with analysis and fiscal estimate.		WIS. STAT. §§227.14(1), (2), 227.15(7); 2011 Executive Order #50, §V, ¶1.	--
22	Staff submits final draft of rule to Governor within 30 days after the public comment period.		WIS. STAT. §227.185; 2011 Executive Order #50, §V, ¶1; MANUAL, Rule 2.09(1)	Yes
23	Governor provides written approval of final draft of rule to staff.		WIS. STAT. §227.185; 2011 Executive Order #50, §V, ¶4	Yes
24	Staff prepares report for Legislature, with the proposed rule, the rule summary, reference to applicable forms, the fiscal estimate, any statement from SBRRB, the economic impact analysis, any DOA report, any energy impact report from PSC, the Rules Clearinghouse report, statement of the basis and purpose of proposed rule, summary of public comments, list of persons who appeared or registered for or against the proposed rule, any changes to the rule summary or fiscal estimate, response to recommendations from Rules Clearinghouse, final regulatory flexibility analysis for a rule that impacts small business, any changes to any energy impact report, any DOA report on housing, any response to any SBRRB report.		WIS. STAT. §227.19(3)	--
25	Staff prepares notice to chief clerk of each house of the legislature when the rule is in final draft form.		WIS. STAT. §227.19(2)	--
	Staff prepares notice of submission of rule to the Legislature.		WIS. STAT. §227.19(2)	--

[11] Staff must provide notice to every member of the Legislature who has filed a request for notice in writing with the LRB. Staff may receive a list of the names and addresses of those legislators from LRB upon request. MANUAL, Rule. 2.04(3).

	Staff records on each rule jacket the date of any agency public hearing held regarding the proposed rule.	MANUAL, Rule 3.03	--
26	Staff submits notice, report, and rule to Legislature in triplicate.[12]	WIS. STAT. §227.19(2); MANUAL, Rule 3.02(1)	Yes
	Staff submits, to the Legislative Reference Bureau for publication in the Administrative Register, notice of submission of rule to the Legislature.	WIS. STAT. §227.19(2)	Yes
27	Presiding officer directs each chief clerk to refer the rule jackets to one standing committee in each house.	WIS. STAT. §227.19(2)	--
28	Committee reviews the rule. Committee may request modifications of a proposed rule. Committee may object to a proposed rule if there is an absence of statutory authority, emergency relating to public health/safety/welfare, failure to comply with legislative intent, contrary to state law, change in circumstances since enactment of the law, arbitrary and capricious or imposing undue hardship.	WIS. STAT. §227.19(4)	--
29	When committee finishes review, rule referred to JCRAR. JCRAR review lasts 30 days, but may be extended. JCRAR will consider any committee objections, may make its own objections,[13] may seek modifications, and may approve part/whole of the rule. WEC may not promulgate the rule until JCRAR non-concurs in any objection or concurs in the approval.	WIS. STAT. §227.19(5)	--
30	When promulgated, staff files a certified copy of the rule and a Microsoft Word version of the rule with the Legislative Reference Bureau for incorporation in the Administrative Code and publication in the Administrative Register.	WIS. STAT. §§227.20, 227.21, 227.22; MANUAL, Rule 3.02(4)	Yes
31	Legislative Reference Bureau publishes rule in administrative register, and rule is effective upon first day of the month commencing after publication.	WIS. STAT. §227.22	Yes

[12] Via chief clerks of both houses: ted.blazel@legis.wisconsin.gov, michael.queensland@legis.wisconsin.gov.

[13] If JCRAR objects, then it must take executive action within 30 days regarding introduction of a bill in each house to support the objection. WIS. STAT. §227.19(5)(e).

Wisconsin Elections Commission

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MEMORANDUM

DATE: November 29, 2021

TO: Members, Wisconsin Elections Commission

FROM: WEC Legal Staff

SUBJECT: Administrative Rulemaking and the Issuance of Guidance

Overview

Wis. Stat. § 5.05(1) states that: "[t]he elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Subsection one of that provision goes on to say that, "Pursuant to such responsibility, the commission may: (f) Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration." Subsection sixteen states: (c) The commission may reconsider at any time any written directives or written guidance provided to the general public or to any person subject to the provisions of chs. 5 to 10 and 12 with regard to the enforcement and administration of those provisions. This memo provides a brief overview of the statutory provisions pertaining to the creation of administrative rules and emergency rules, amending such rules, and creating guidance documents, as well as other considerations stemming from recent court decisions.

Permanent and Emergency Rulemaking Steps and Timelines

Wisconsin Statute § 227.10 provides:

> (1) Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule.
> (2) No agency may promulgate a rule which conflicts with state law.
> (2g) No agency may seek deference in any proceeding based on the agency's interpretation of any law.
> (2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard,

> requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.
> (2p) No agency may promulgate a rule or take any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.
> (3)
> (a) No rule, either by its terms or in its application, may discriminate for or against any person by reason of sex, race, creed, color, sexual orientation, national origin or ancestry.
> (b) A rule may discriminate for or against a person by reason of physical condition or developmental disability as defined in s. 51.01 (5) only if it is strictly necessary to a function of the agency and is supported by data demonstrating that necessity.
> (c) Each person affected by a rule is entitled to the same benefits and is subject to the same obligations as any other person under the same or similar circumstances.
> (d) No rule may use any term removed from the statutes by chapter 83, laws of 1977.
> (e) Nothing in this subsection prohibits the director of the bureau of merit recruitment and selection in the department of administration from promulgating rules relating to expanded certification under s. 230.25 (1n).

Included with this memo is a process outline titled "Administrative Rulemaking Process." That document generally outlines the thirty-one steps involved in the process, including a brief description of each step and the applicable statutory citations. Additionally, the Wisconsin Legislative Council has published a helpful flowchart that outlines the stages of administrative rulemaking for standard rules. For each stage, they assign an estimate as to the amount of time it takes for a rule to be fully promulgated. The Wisconsin Legislative Council estimates that from start to finish, for standard rules that move through the process without any major disruption, rules take between 7.5 and 13 months to promulgate. The Wisconsin Legislative Council flowchart is also included with this memo.

There are fewer steps involved with the emergency rulemaking process, but an emergency rule will only remain in place for a limited period (150 days initially, with possible extensions not to exceed 120 days). As such, there is a strong likelihood that an emergency rule will expire before a permanent one can be promulgated. Additionally, an agency must be able to justify that an emergency rule is necessary ("An agency may…promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures."). Wis. Stat. § 227.24(1)(a). The steps to promulgate an emergency rule are set out in Wis. Stat. § 227.24 and summarized below:

1. Commission directs staff to draft a scope statement and submit it to the Governor.
2. Department of Administration and the Governor review the scope statement, determine whether the agency has the authority to act as proposed, and then issue an approval or denial. Until approval is obtained, no work can be done on the rule by Commission staff.
3. Once approval is obtained, Commission staff prepares the scope statement to be published in the Administrative Register, which is published once a week. A copy of the scope statement is sent to the chief clerks in each house of the Legislature and the DOA Secretary.

4. If directed to do so by either of the chairs of the Joint Committee for Review of Administrative Rules (JCRAR), WEC will hold a public hearing after providing at least 3-days' notice.
5. After the public hearing (if required), Commission reviews comments and testimony from hearing and approves statement of scope.
6. If no public hearing was required, scope statement must be published for at least 10 days before the Commission approves the statement of scope.
7. Commission staff drafts emergency rule, plain language analysis of the rule and fiscal analysis.
8. Submit completed emergency rule to Governor for approval.
9. Governor has discretion to approve or deny the rule as drafted – no provisions for amendments or modifications.
10. Once approval of emergency rule is obtained in writing, Commission staff publish the emergency rule in the *Wisconsin State Journal*. The rule goes into effect after such publication.
11. Commission staff send the emergency rule to the chief clerks in each house of the Legislature and Legislative Reference Bureau (LRB) along with the statement of emergency finding.
12. Commission staff send the emergency rule to the Small Business Regulatory Review Board (if there is an impact on small business) on the same day it is sent to LRB.
13. Within 10 days of publishing the emergency rule, Commission staff mail a copy of the fiscal estimate to every member of the Legislature.
14. Commission holds a public hearing on the emergency rule within 45 days of the rule being published.
15. If necessary, seek extension of the emergency rule for 60 days (request must be made within 30 days of rule expiration). Extensions will not exceed a total of 120 days.

Amendment of Existing Administrative Rules

The amendment of existing administrative code requires all the processes enumerated above for the promulgation of new rules. However, the amendment/modification process is generally similar to a legislative bill to amend statute (*e.g.* the WEC submits the rulemaking materials, those materials will include the existing verbiage from the administrative code provision, that language will contain striking and underscoring for the changes being proposed, etc.). The administrative code section may be repealed and recreated if major changes are required. Similarly, certain minor changes may be submitted to the Legislative Council for consideration of code updating without a full, formal rule promulgation process (*e.g.* updating cross references in the code, changing titles/summary numbering, etc.).

Guidance Documents

Wisconsin Statute § 227.01(3m) defines guidance documents as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin that:

- Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
- Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The statutory definition of a guidance document does not include:

- A rule that has been promulgated and that is currently in effect or a proposed rule that is in the process of being promulgated.
- A standard adopted, or a statement of policy or interpretation made, whether preliminary or final, in the decision of a contested case, in a private letter ruling under s. 73.035 (not applicable to the WEC, only DOR), or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts.
- Any document or activity described in sub. (13) (a) to (zz) (see below), except that "guidance document" includes a pamphlet or other explanatory material described under sub. (13) (r) that otherwise satisfies the definition of "guidance document" under par. (a).
- Any document that any statute specifically provides is not required to be promulgated as a rule
- A declaratory ruling issued under s. 227.41.
- A pleading or brief filed in court by the state, an agency, or an agency official.
- A letter or written legal advice of the department of justice or a formal or informal opinion of the attorney general, including an opinion issued under s. 165.015 (1).
- Any document or communication for which a procedure for public input, other than that provided under s. 227.112 (1), is provided by law.
- Any document or communication that is not subject to the right of inspection and copying under s. 19.35 (1).

Wisconsin Statute § 227.01 (13)(a-zz) references the following:

- (a) Concerns the internal management of an agency and does not affect private rights or interests.
- (b) Is a decision or order in a contested case.
- (c) Is an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class, and which is served on the person or persons to whom it is directed by the appropriate means applicable to the order. The fact that a named person serves a group of unnamed persons that will also be affected does not make an order a rule.
- (d) Relates to the use of highways and is made known to the public by means of signs or signals.
- (e) Relates to the construction or maintenance of highways or bridges, except as provided in ss. 84.11 (1r) and 85.025.
- (f) Relates to the curriculum of, admission to or graduation from a public educational institution, as determined by each institution.
- (g) Relates to the use of facilities of a public library.
- (h) Prorates or establishes priority schedules for state payments under s. 16.53 (10) (a) or temporarily reallocates state moneys under s. 20.002 (11).
- (i) Relates to military or naval affairs.
- (j) Relates to the form and content of reports, records or accounts of a state, county or municipal officer, institution or agency.
- (k) Relates to expenditures by a state agency, the purchase of materials, equipment or supplies by or for a state agency, or printing or duplicating of materials for a state agency.
- (km) Establishes policies for information technology development projects as required under s. 16.971 (2) (Lg).
- (kr) Establishes policies for information technology development projects as required under s. 36.59 (1) (c).
- (L) Establishes personnel standards, job classifications or salary ranges for state, county or municipal employees in the classified civil service.

- (Lm) Relates to the personnel systems developed under s. 36.115.
- (Lr) Determines what constitutes high-demand fields for purposes of s. 38.28 (2) (be) 1. b.
- (m) Determines water levels.
- (n) Fixes or approves rates, prices or charges, unless a statute specifically requires them to be fixed or approved by rule.
- (o) Determines the valuation of securities held by an insurer.
- (p) Is a statistical plan relating to the administration of rate regulation laws under ch. 625 or 626.
- (pm) Relates to setting fees under s. 655.27 (3) for the injured patients and families compensation fund or setting fees under s. 655.61 for the mediation fund.
- (pt) Creates an annual schedule of fees under s. 299.11 (9).
- (q) Is a form the content or substantive requirements of which are prescribed by a rule or a statute.
- (r) Is a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature.
- (rm) Is a form prescribed by the attorney general for an accounting under s. 846.40 (8) (b) 2.
- (rs) Relates to any form prescribed by the department of transportation under s. 348.03 (1) or 348.27 (19) (d) 1. or procedure prescribed under s. 348.27 (19) (d) 2.
- (rt) Is a general permit issued under s. 30.206 or 30.2065.
- (ru) Is a wetland general permit issued under s. 281.36 (3g).
- (s) Prescribes or relates to a uniform system of accounts for any person, including a municipality, that is regulated by the office of the commissioner of railroads or the public service commission.
- (u) Relates to computing or publishing the number of nursing home beds to be added in each health planning area under s. 150.33 (1).
- (um) Lists over-the-counter drugs covered by Medical Assistance under s. 49.46 (2) (b) 6. i. or 49.471 (11) (a).
- (v) Establishes procedures used for the determination of allocations as charges to agencies under s. 20.865 (1) (fm).
- (w) Establishes rates for the use of a personal automobile under s. 20.916 (4) (a).
- (x) Establishes rental policies for state-owned housing under s. 16.004 (8).
- (xm) Establishes camping fees within the fee limits specified under s. 27.01 (10) (d) 1. or 2.
- (y) Prescribes measures to minimize the adverse environmental impact of bridge and highway construction and maintenance.
- (yc) Adjusts the total cost threshold for highway projects under ss. 84.013 (2m) and 84.0145 (4).
- (yd) Relates to any form prescribed by the department of transportation under s. 218.0171 (8).
- (yg) Relates to standards for memorial highway designations authorized under s. 84.1045.
- (yj) Relates to standards for memorial highway designations authorized under s. 84.1042.
- (yk) Relates to standards for memorial highway designations authorized under s. 84.1038.
- (ym) Establishes conditions for a waiver to allow the burning of brush or other woody material under s. 287.07 (7) (e).
- (yo) Establishes procedures under s. 39.86 (3) (c) or fees under s. 39.86 (5).
- (yp) Lists exempt institutions under s. 39.87 (2).
- (ys) Establishes a technical standard for abating nonpoint source water pollution under s. 281.16 (2) or (3) (c).
- (yt) Relates to implementing, interpreting, or administering s. 283.16, including determining social and economic impacts of compliance with phosphorus effluent limitations, establishing application and eligibility requirements for obtaining a variance, and providing guidance to the public.

- (yw) Establishes additional services as bank services as provided in s. 221.1101 (6).
- (yx) Relates to adjustments under s. 202.12 (8), exemptions under s. 202.12 (6m) (e), or the alternative registration of professional employer organizations under s. 202.22 (7) (b).
- (yy) Expands the list of services that a credit union service organization may provide, as provided in s. 186.11 (4) (bd).
- (z) Defines or lists nonattainment areas under s. 285.23.
- (za) Is a manual prepared under s. 227.15 (7) to provide agencies with information on drafting, promulgation and legislative review of rules.
- (zb) Establishes a list of substances in groundwater and their categories under s. 160.05.
- (zc) Establishes a database under s. 292.31.
- (zd) Establishes procedures for oil inspection fee collection under s. 168.12.
- (ze) Relates to establishing features of and procedures for lottery games, under s. 565.27 (1).
- (zf) Establishes the list of properties on the state register of historic places under s. 44.36 or the list of locally designated historic places under s. 44.45.
- (zg) Designates under s. 30.41 the lower Wisconsin state riverway.
- (zh) Implements the standard for the lower Wisconsin state riverway as required under s. 30.455 (2) (c).
- (zi) Lists responsible units, as defined in s. 287.01 (9), with an effective recycling program under s. 287.11 (3).
- (zj) Establishes continuing educational requirements for real estate brokers and salespersons under s. 452.05 (1) (d).
- (zk) Are guidelines issued under s. 440.035 (2m) (b).
- (zn) Establishes criteria and standards for certifying instructors for the trapper education program.
- (zp) Establishes water quality objectives for priority watersheds or priority lakes under s. 281.65 (4) (dm).
- (zq) Designates the Kickapoo valley reserve under s. 41.41 (2).
- (zr) Relates to the administration or implementation of a cooperative agreement under s. 28.15.
- (zs) Establishes geographical areas under s. 49.143 for the administration of Wisconsin works under ss. 49.141 to 49.161.
- (zt) Establishes a rate increase factor under s. 196.193 (2) or an overall rate of return under s. 196.193 (3).
- (zu) Establishes standards under subch. IX of ch. 254.
- (zv) Specifies the form required under s. 196.137 (4).
- (zw) Determines whether a state law is reciprocal under s. 221.0901 (8) (e) 2. or 221.0904 (3) (b).
- (zx) Determines a fee under s. 440.03 (9) for an initial credential for which no examination is required, for a reciprocal credential, or for a credential renewal.
- (zy) Relates to any form prescribed by the division of banking in the department of financial institutions in connection with the licensing of mortgage bankers or mortgage brokers under s. 224.72 or the licensing of mortgage loan originators under s. 224.725.
- (zz) Adjusts, under s. 551.206, the amounts specified in s. 551.202 (26) (c) 1. a. and b. and (27) (c) 1. a. and b.

Wisconsin Statute § 227.112 then goes on to elaborate on the processes associated with guidance documents. This includes submission to the Legislative Reference Bureau, notice and public comment periods, publication in the register, and other procedural considerations similar to the administrative rulemaking process. Additionally, a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any

license… Wis. Stat. § 227.112(3). These provisions of statute make it clear that the Legislature intended agency guidance documents to go through a formal, enumerated process, unless some other exception applies, or the material does not meet the statutory definition of a guidance document. That said, the "Additional Considerations" section below provides a synopsis of the *SEIU* case which held this provision of statute to be facially unconstitutional. The Commission may also be able to issue certain informational materials regardless, provided it has predetermined authority (*e.g.* Wis. Stat. § 7.08(3) authorizes the Commission to prepare and publish an election manual).

Additional Considerations

State and federal courts have recently considered administrative rulemaking and guidance documents on several occasions. Below are the primary findings from several such decisions.

Judge Brett H. Ludwig of the United States District Court for the Eastern District of Wisconsin recently opined:

> Plaintiff's "Manner" challenges all stem from the WEC's having issued guidance concerning indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses on absentee ballots. (Compl., ECF No. 1.) Plaintiff expresses strong disagreement with the WEC's interpretations of Wisconsin's election statutes, accusing the WEC of "deviat[ing] from the law" and "substitut[ing] their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) While plaintiff's statutory construction arguments are not frivolous, when they are cleared of their rhetoric, they consist of little more than ordinary disputes over statutory construction.
>
> These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC. Wis. Stat. §5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes and new binding court decisions. Wis. Stat. §5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. §5.05(6a), and to "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of … laws relating to elections and election campaigns." Wis. Stat. §5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives. *Donald J. Trump v. The Wisconsin Elections Commission et al.*, 506 F.Supp.3d 620, 638 (E.D. Wis. 2020).

This matter was appealed to and affirmed by the United States Court of Appeals for the Seventh Circuit (considering both laches and the merits):

> The Wisconsin Legislature expressly assigned to the Commission "the responsibility for the administration of ... laws relating to elections," WIS. STAT. § 5.05(1), just as Florida's Legislature had delegated a similar responsibility to its Secretary of State. See Bush, 531 U.S. at 116, 121 S.Ct. 525 (Rehnquist, C.J., concurring). Florida's legislative

> scheme included this "statutorily provided apportionment of responsibility," id. at 114, 121 S.Ct. 525, and three Justices found a departure from that scheme when the Florida Supreme Court rejected the Secretary's interpretation of state law. See id. at 119, 123, 121 S.Ct. 525. And it was the Minnesota Secretary of State's lack of a similar responsibility that prompted two judges of the Eighth Circuit to conclude that he likely violated the Electors Clause by adding a week to the deadline for receipt of absentee ballots. See Carson, 978 F.3d at 1060. By contrast, whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature. And that authority is not diminished by allegations that the Commission erred in its exercise. *Donald J. Trump v. The Wisconsin Elections Commission et al.*, 983 F.3d 919, 927 (7th Cir. 2020).

This case largely dealt with whether the Commission's guidance reflected such a deviation from the Wisconsin Legislature's directives as to violate the Electors Clause. As such, the Commission must still examine all the provisions of statute and case law, in addition to individual circumstances relevant to each decision, when deciding how to proceed with administrative rules, guidance documents, and other forms of guidance or informational materials. Please consider that the Seventh Circuit also opined:

> We confine our conclusions to applications of the Electors Clause. We are not the ultimate authority on Wisconsin law. That responsibility rests with the State's Supreme Court. Put another way, the errors that the President alleges occurred in the Commission's exercise of its authority are in the main matters of state law. They belong, then, in the state courts, where the President had an opportunity to raise his concerns. Indeed, the Wisconsin Supreme Court rejected his claims regarding the guidance on indefinitely confined voters, see Trump v. Biden, 2020 WI 91 ¶ 8, 951 N.W.2d 568 (2020), and declined to reach the rest of his arguments on grounds of laches. *Id*.

One Wisconsin Supreme Court case has addressed the issue of guidance in depth, and held Wis. Stats. §§ 227.05 and 227.112 unconstitutional. *SEIU v. Vos*, 2020 WI 67, 393 Wis.2d 38, 946 N.W.2d 35. The Court stated that:

> [Guidance documents] are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply "explain" statutes and rules, or they "provide guidance or advice" about how the executive branch is "likely to apply" a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications <u>about</u> the law—they are not the law itself. They communicate intended applications of the law—they are not the actual execution of the law. Functionally, and as a matter of law, they are entirely inert. That is to say, they represent nothing more than the knowledge and intentions of their authors.

Id. at ¶102. The Court stated that it:

> "conclude[s] that the creation and dissemination of guidance documents fall within the executive's core authority. Guidance documents, as the legislature has defined them, necessarily exist outside of the legislature's authority because of what they are and who creates them. As we explained above, a guidance document is something created by executive branch employees through the exercise of executive authority native to that branch of government. Creation of a guidance document requires no legislative authority

> and no legislative personnel. A guidance document cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything.

Id. at ¶105. As to Wis. Stats. §§ 227.05 and 227.112, which correspond to § 33 and § 38 of the Act discussed in the case, the Court stated:

> The legislature may enact the laws the executive is duty-bound to execute. But it may not control his knowledge or intentions about those laws. Nor may it mute or modulate the communication of his knowledge or intentions to the public. Because there are no set of facts pursuant to which § 33 (to the extent it applies to guidance documents) and § 38 would not impermissibly interfere with the executive's exercise of his core constitutional power, they are in that respect facially unconstitutional.

Id. at ¶108. There were several dissents related to the above reasoning, and the majority opinion has a large section justifying its opinion against the charges of the dissenting Justices. Regarding Justice Hagedorn's dissent the Court stated, in part:

> We part ways with Justice Hagedorn's belief that the legislature's power to command the executive branch to create and disseminate a document is coextensive with the power to ban the executive branch from creating and disseminating a document unless it complies with the legislature's content (§ 33) and publication (§ 38) requirements. There is no logical correlation between those two concepts, and Justice Hagedorn's opinion does nothing to link them. Nonetheless, the bulk of his opinion is simply an extended discussion of statutes that require the executive branch to create certain documents, followed by his assumption that this confers on the legislature the power to prevent the executive branch from creating and disseminating documents unless they comply with the legislature's content and publication requirements. Justice Hagedorn introduces this part of his analysis by accusing the court of resting its analysis on "its mistaken interpretation of what guidance documents are." Justice Hagedorn's concurrence/dissent, ¶192. He then proceeds to essentially repeat the statute's definition of guidance documents, a definition on which we based our entire analysis. As relevant here, a guidance document "[e]xplains the agency's implementation of a statute or rule[,]" or "[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule[.]" See 2017 Wis. Act 369, § 31 (Wis. Stat. § 227.01(3m)(a)1.-2.). Because the executive branch (through its agencies) creates and issues guidance documents, it necessarily follows that they contain the executive's explanations, or the executive's guidance or advice. Naturally, that means the explanations, guidance, and advice must originate in the minds of executive branch employees, which further means guidance documents are nothing but the written manifestations of the executive branch's thought processes. But if the legislature can "determine the content" of a guidance document, then it is no longer the executive's explanation, or the executive's guidance or advice—it is the legislature's explanation, guidance, or advice. So, to the extent the legislature commands production of a document, or determines the content of a guidance document, it simply is no longer a guidance document. The failure to make that distinction explains his assertions that "determining the content and timing of executive branch communications are not the exclusive prerogative of the executive," and that "nothing in the constitution suggests the legislature cannot, at least in some circumstances, make laws that determine the content of certain formal

> communications from the government to the public." Justice Hagedorn's concurrence/dissent, ¶198. His assertions are correct with respect to documents the legislature has the power to command. But they are not correct with respect to guidance documents, because having not been commanded, they belong entirely to the executive. Nothing in Justice Hagedorn's opinion describes how the power to command the former translates into the power to ban the latter unless they comply with the legislature's content and publication requirements.

Id. at ¶122. Regarding Chief Justice Roggensack's dissent, the Court stated, in part:

> With respect to the granting of power to administrative agencies, the Chief Justice mistakes the import of our analysis in Martinez. There, we said "administrative agencies are creations of the legislature and ... they can exercise only those powers granted by the legislature." Martinez, 165 Wis. 2d at 697, 478 N.W.2d 582. From this the Chief Justice concludes that because agencies are created by the legislature they are subject to its plenary control. Chief Justice Roggensack's concurrence/dissent, ¶147. That, however, overlooks the fact that agencies exercise both executive and legislative powers. Our observations in Martinez related to the legislature's ability to govern the rule-making authority—that is, the legislative power—it delegates to administrative agencies. So our statements on the legislature's ability to limit the legislative authority the agencies exercise say nothing about its ability to limit the agencies' exercise of executive authority. Nor does the Chief Justice find any authority for the proposition that an agency's exercise of that executive authority arises from or is dependent on the legislature. The legislature undeniably has plenary authority to govern administrative agencies' exercise of their delegated rule-making power because the legislature could simply choose to revoke it altogether. Martinez, 165 Wis. 2d at 698, 478 N.W.2d 582. It naturally follows that if the legislature may eliminate the power it conferred, it may also condition the exercise of that power. Koschkee, 387 Wis. 2d 552, ¶20, 929 N.W.2d 600. But the legislature does not confer on administrative agencies the ability to exercise executive power; that comes by virtue of being part of the executive branch. The Chief Justice cites no authority nor presents any argument suggesting the legislature's authority over an agency's exercise of legislative power is necessarily (or even potentially) co-extensive with its authority over an agency's exercise of executive power.

Id. at ¶130. In responding to Chief Justice Roggensack's argument in her dissent that interpreting law is a shared power rather than a core power of the executive branch, and that "'[i]f explaining what the law means through guidance documents actually were a constitutional core power of the executive, courts could not strike down such an interpretation,'" the majority stated that "we don't strike down executive interpretations of the law. We strike down the executive's application of the law in specific cases. A guidance document is not an application of the law, it is simply the executive branch's understanding of what the law requires." *Id*. at ¶133. The majority also responded to the Chief's Justice's argument in her dissent that "'[g]uidance documents can have a practical effect similar to an unpromulgated rule,' noting that 'historically, administrative agencies have relied on guidance documents to circumvent rulemaking' by stating:

> Now that the legislature has specifically defined a guidance document as something that cannot be a rule, impose any obligations, set no standards, or bind anyone, it is no longer even conceptually possible for them to be "applied" or "enforced" against a person in accordance with the law. However, should an administrative employee treat a guidance

> document as a source of authority, that employee would be making a mistake, not defining the nature of a guidance document. So although the Chief Justice accurately describes how guidance documents were used prior to adoption of 2017 Wis. Act 369, they may no longer be lawfully used in that manner. We expect, as befits a co-equal branch of government, that executive branch employees will respect that change in the law. But if they should mistakenly use them as before, their mistakes are subject to judicial review pursuant to §§ 65-71, as we explained above. The Chief Justice's concern that executive branch employees will misuse guidance documents in the future is not a justification for allowing the legislature to overstep its constitutional boundaries in order to check those transgressions. Procedural safeguards enacted by the legislature, even those that respond to the executive's historical misuse of guidance documents, must comport with the constitution. Sections 33 and 38 do not.

Id. at ¶134.