

NOTICE OF OPEN AND CLOSED MEETING

Wisconsin Elections Commission

Special Meeting

Wednesday, August 30, 2023

1:30 P.M.

This meeting is being held via video teleconference only. Members of the public and media may attend online or by telephone. Please visit <https://elections.wi.gov/event/special-meeting-4> to view materials for the meeting. All public participants' phones/microphones will be muted during the meeting. Members of the public wishing to communicate to the Commissioners should email electioncomments@wi.gov with "Message to Commissioners" in the subject line.

Zoom information for the meeting:

Please click the link below to join the webinar:

<https://us06web.zoom.us/j/85250153431?pwd=bDBzdGs1b3RGbkV2SnJHWjY5VDFkdz09>

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NOTICE OF OPEN AND CLOSED MEETING

AGENDA

A. Call to Order

B. Administrator's Report of Appropriate Meeting Notice

C. Consideration and Possible Authorization of Emergency and Permanent Administrative Rule Amendments to Update Ballot Access Challenge Processes.

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D. Closed Session

- 1. Litigation Update / Wis. Stat. § 5.05 Complaint**
- 2. Discussion of Grant Program Audit Results**

§ 19.85(1)(g) – The Commission may confer in closed session with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

§ 19.851(2) – The commission shall hold each meeting of the commission for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the commission in closed session under this section.

§ 19.85(1)(f) – Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

E. Adjourn



Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

DATE: August 30, 2023
TO: Members, Wisconsin Elections Commission
FROM: Meagan Wolfe, Administrator

Prepared and Presented by:

Angela O'Brien, Staff Attorney

SUBJECT: Authorization for New Emergency/Permanent Rulemaking

Introduction

The Commission is authorized to promulgate rules under chapter 227 of the state statutes “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. Wis. Stat. § 5.05(1)(f).

State agencies are permitted to promulgate rules as emergency rules “if the 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). Emergency rules are not required to comply with the notice, hearing, and publication requirements under chapter 227. Wis. Stat. § 227.24(1)(a).

The Commission should authorize emergency rulemaking for the two topics below because the preservation of peace, safety, and welfare of Wisconsin elections necessitates putting them into effect prior to the time it would take to promulgate them normally under chapter 227. In only six months, February 2024 will kick off the election cycle for a major presidential election year, which is expected to produce high voter turnout and high levels of scrutiny on Wisconsin’s election procedures. Emergency rulemaking will provide the Commission an opportunity to address election administration needs ahead of the elections in 2024. There simply is not enough time to promulgate permanent rules on these topics and fully implement them before major elections in 2024, unless the Commission authorizes their promulgation as emergency rules under § 227.24(1)(a).

Commission staff are accordingly seeking Commission authorization to begin the emergency and permanent rulemaking processes simultaneously for the topics described in this memo. With the Commission’s approval, staff will draft scope statements for Commission approval at the September 7, 2023 quarterly meeting.

A summary from the Wisconsin Legislative Council of the steps of the emergency administrative rulemaking process under § 227.24 is included for your reference in Attachment A.

Wisconsin Elections Commissioners

Don M. Millis, chair | Marge Bostelmann | Joseph J. Czarnecki | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Potential Rulemaking #1 – Required Use of Absentee Ballot Uniform Instructions

Litigation and audit activities necessitated and prompted the proposed edits to the existing Uniform Instructions for absentee voting that were presented to the Commission on June 1, 2023. Based on Commissioner feedback, staff will be working on updating and presenting a refreshed set of Uniform Instructions for Commission approval. The Commission approved the new absentee certificate envelope designs at the August 4, 2023 meeting.

The proposed administrative rule would require municipalities to use the Commission-approved version of the Uniform Instructions, without changes, when mailing out absentee ballots for the upcoming election cycles. Requiring universal use of the Uniform Instructions will ensure that all electors are receiving the same information regarding absentee voting procedure. Commission staff expect continued scrutiny of Wisconsin’s election administration in 2024, and requiring municipalities to use the same version of the Uniform Instructions will ensure that electors are receiving instructions which are compliant with recent changes in the law. This rule will bring the added benefit of reducing confusion that is sometimes caused by differences in election administration and legal interpretations in different municipalities.

This requirement would not impact a clerk’s ability to provide other instructions that do not conflict with the Uniform Instructions or otherwise violate state law. For example, clerks may wish to add additional instructions regarding their hours of operation and clerk staffing for voting functions, and may still do so under the new proposed rule.

Potential Rulemaking #2 – Administrative Process for Ballot Access Challenges

Ballot access challenges have historically been more prevalent during general election cycles, and there is no reason to believe that 2024 will be an exception. Recent challenge periods have highlighted the need to modernize, more explicitly detail, and more carefully craft administrative rule language pertaining ballot access. Nomination papers for candidates who were not selected by the Presidential Preference Selection Committee for the April 2, 2024 Presidential Preference Primary will be circulated between January 2 and January 30, 2024. Political organizations that have not attained ballot status for the November 5, 2024 General Election will circulate nomination papers between January 1 and April 1, 2024. Independent candidates for President and Vice President will circulate nomination papers between July 1 and August 6, 2024. Each of these nomination paper cycles are expected to generate several ballot access challenges.

The Legislature has delegated clear statutory authority to the Commission to promulgate rules under Chapter 8 “for use by election officials in determining the validity of nomination papers and signatures thereon.” Wis. Stat. § 8.07. Currently, administrative rules address the sufficiency of form and filing for nomination papers, but the administrative rule that regulates the challenge process for nomination papers, Wis. Admin. Code § EL 2.07, is unclear and in need of procedural solidification.

Specifically, § EL 2.07(1) seems to state that challenges to the sufficiency of nomination papers are brought under the complaint procedures in §§ 5.05 and 5.06, despite the many procedural differences between § EL 2.07(1) and §§ 5.05 and 5.06. For example, the standard of proof is different—challenges to the sufficiency of nomination papers must establish clear and convincing evidence, whereas complaints under §§ 5.05 and 5.06 require a showing of probable cause. *Compare* Wis. Admin. Code § EL 2.07(4) *with* § 5.05(2m)(c)9. *and* § 5.06(1). In another example, the challenge procedure described by § EL 2.07 uses a completely different timeline than complaints filed under §§ 5.05 and 5.06. *Compare* Wis. Admin. Code § EL 2.07(2)(a) (response filed within 3 calendar days) *with* § EL 20.04(3) (response filed within 10 business days) *and* § 5.05(2m)(c)2.a. (response filed within 15 days). Perhaps most obviously, a challenge to nomination papers cannot substantively arise from either

§§ 5.05 *or* 5.06, because it is filed against another candidate, not an election official, and is not alleging any criminal allegations prohibited under Chapter 12.

In short, although § EL 2.07 outlines procedures for bringing challenges to nomination papers, it does so through confusing cross-references to other complaint statutes and administrative rules that are simply not relevant to ballot access and challenge to nomination papers. Historically, Commission staff have followed § EL 2.07(1) and, to the extent possible, shoehorned the ballot access challenge process into the procedures outlined in Wis. Stat. § 5.06 because that is what the current rule seems to require.

The proposed administrative rule would revise § EL 2.07 to remove cross-references to other complaint procedures, and if necessary, will supplement the existing procedures for challenges to nomination papers pursuant to the delegation of authority under § 8.07.

The proposed rule would also provide an opportunity for the Commission to consider whether any additional procedures should be promulgated in Chapter EL 2 for ballot access challenges against candidates who do not file nomination papers. The Commission is authorized to “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...or ensuring their proper administration.” Wis. Stat. § 5.05(1)(f). Currently, there are no administrative rules or statutes that govern challenges to candidates seeking ballot access outside of the nomination paper process. As part of this proposed rulemaking, the Commission can consider whether to exercise its authority under § 5.05(1)(f) to develop ballot access challenge procedures for challenges that are not based on the sufficiency of nomination papers.

Accordingly, Commission staff are proposing this rulemaking as an amendment to Chapter EL 2 as a whole to incorporate any and all changes, modifications, or new rulemaking that the Commission directs for all ballot access challenges.

Staff Recommended Motion:

Recommended Motion: The Wisconsin Elections Commission authorizes staff to begin the emergency rulemaking process for rules to require municipalities to use the Uniform Instructions for absentee voting and to implement a discrete administrative process for ballot access challenges.