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MEMORANDUM

DATE: For the May 24, 2018 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe
Interim Administrator, Wisconsin Elections Commission

Prepared and Presented by:
Michael Haas
Staff Counsel

SUBJECT: U.S. Department of Justice Request Regarding Temporary Overseas Electors

As part of its legislative agenda, the Elections Commission requested that the Legislature address possible discrepancies between state law and federal law related to the treatment of temporary overseas electors. Unlike most other states, Wisconsin Statutes create a distinction between Wisconsin voters who are overseas permanently and have no intent to return to Wisconsin, and those who are out of the country on a temporary basis and do intend to return to the state. Electors in the latter category may be traveling overseas on a short vacation or working on a short- or long-term basis in another country. Regardless of the length of their stay overseas, these voters are considered temporary overseas electors if they have an intent to return to Wisconsin. They may cast votes for all offices on the ballot, unlike permanent overseas electors who may vote only in contests for federal offices.

The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) affords certain rights to overseas electors, including the right to obtain a ballot electronically and the right to use the Federal Write In Absentee Ballot (FWAB) to cast their votes. The FWAB is a back up ballot which overseas electors may download, write in candidates, and submit to their municipal clerk, and which is counted if the elector does not have time to obtain and return an official ballot. Wisconsin clerks typically receive relatively few FWAB's and temporary overseas electors are permitted to use them as an absentee ballot application, but not as an actual ballot.

UOCAVA does not distinguish between permanent and overseas electors, and because of the definitions used in the federal and state laws, there has been some discussion over the past several years as to whether Wisconsin law complies with UOCAVA regarding the electronic transmission of ballots to temporary overseas electors and the use of the FWAB by those voters. The Government Accountability Board and the WEC have advised clerks that Wisconsin Statutes do

not permit the electronic transmission of ballots to temporary overseas electors but do afford those two options to permanent overseas electors. The One Wisconsin Institute court decision which is on appeal to the 7th Circuit Court of Appeals has modified that guidance by giving municipal clerks the option to transmit ballots electronically to all absentee voters upon their request.

The Federal Voting Assistance Program (FVAP) in the Department of Defense, and more recently the U.S. Department of Justice, have requested that Wisconsin resolve any uncertainty regarding compliance with UOCAVA by making it clear that temporary overseas electors may receive ballots electronically and may use the FWAB to cast votes. At the Commission's direction, staff worked with the Legislature to draft a legislative remedy regarding use of the FWAB by, and electronic transmission of ballots to, temporary overseas electors. These changes were included in Assembly Bill 947, which was passed by the Assembly in February but not by the Senate prior to the end of the legislative session. There was a public hearing in the Senate to use AB 947 as the vehicle to amend the timeline for the Governor to call special elections for legislative vacancies, but the bill did not receive a vote in committee or by the full Senate. Commission staff provided periodic updates to FVAP and the U.S. Department of Justice (US DOJ) regarding the status of the legislation.

On May 9, 2018, the Commission received a copy of the attached correspondence from U.S. DOJ addressed to the Attorney General. Absent legislative changes, U.S. DOJ has advised that it is prepared to file litigation to require that Wisconsin permit the use of the FWAB and the electronic receipt of absentee ballots by temporary overseas electors. The correspondence indicates that U.S. DOJ wishes to work cooperatively with the WEC and State of Wisconsin to resolve the litigation.

On May 10, 2018, U.S. DOJ provided a draft consent decree for the WEC's review outlining proposed terms for resolving potential litigation, which has been provided to Commissioners. In short, the draft consent decree would require that Wisconsin permit temporary overseas electors to receive absentee ballots electronically and to use the Federal Write In Absentee Ballot. It would require the WEC to provide guidance regarding these changes to clerks, alter forms and instructions, and publicize the changes through a press release and on the agency website. Finally, the consent decree would require the WEC to pursue legislative and administrative solutions to ensure the changes continue for future elections, and to file a status report with the federal court regarding those efforts.

Commission staff seeks the Commission's direction regarding whether or not to enter into a consent decree with U.S. DOJ to resolve this matter. The Commission has the option to discuss this potential litigation and proposed consent decree in closed session. Given that these issues, and the federal government's involvement, have previously been discussed in the context of the Commission's legislative agenda, and given that implementing the requested changes would require some time in preparation for the Partisan Primary, the Commission may wish to consider this matter in open session. Doing so would lend increased transparency to the Commission's decision for policymakers, election officials and the public. Assistant Attorney General Tom Bellavia, who is representing the WEC, will also be available to discuss specific terms of the consent decree in closed session if necessary.