DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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JTK & RJM:cmh:kjf

July 15, 1999

1. This draft is generally the same as 1997 AB–959, with updates to reflect legislation enacted since that bill was drafted and a chief clerk's correction and other miscellaneous corrections and changes to keep the statutes consistent. Please let one of us know if you do not approve of any of these changes.

2. We identified a few provisions that we believe require treatment to coordinate with changes proposed in AB–959. Please review the treatment of the following statutes to ensure that you approve: ss. 6.275 (1) (c), 6.30 (3) (c), 6.79 (5), 10.66 (3) (b) and 10.76 (3) (a), stats. In addition, this draft does not treat s. 8.11 (1) (b) and (5), stats., although this statute was treated in AB–959. The treatment in AB–959 was inappropriate because write–in candidates do not file nomination papers.

3. Under this draft, as provided in AB–959, town officers take office on the 3rd, rather than the 2nd, Tuesday in April. AB–959 accomplished this transition by extending the term for officials currently in office by 7 days. The method of transition in AB–959 may be unconstitutional and, thus, we have utilized a different method in this draft. Article XIII, section 9, of the Wisconsin Constitution requires municipal officials to be elected by the electors of the city or appointed by other city officers. The Wisconsin Supreme Court has held that the "continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election." *Oconnor v. City of Fond du Lac*, 109.Wis. 253, 268 (1901). In order to avoid this constitutional issue, this draft extends for 7 days the term of office for town officers that will be elected in 2001 and 2002.

4. AB–959 did not provide a method for transitioning to a system in which the elections board determines the questions required for challenging electors. This draft provides a delayed effective date for the treatment of ss. 6.92 (intro.) and (1) to (6), stats., so that the elections board may have time to promulgate the necessary rules determining these questions. With this change, the language of this draft conforms to ASA–1 to 1999 AB–150 (the budget bill).

5. See the material concerning the elimination of separate ballots and columns for parties which field no candidates for state office at a particular election under ss. 5.62 (1) (a) and (b), (2) and (5), 5.64 (1) (e), 8.20 (9) and 10.02 (3) (b) 2m., stats. Currently at the primary there is no independent ballot or column for the county office candidates

to which the party write–in candidates could be shifted, so this draft places all independent candidates for county office on the primary ballot in order to create a place to which the shift can be made. This may create some confusion because a vote for any of these independent candidates at the primary is completely ineffective and irrelevant. Independent candidates are nominated by nomination papers only. In the independent ballot or column, the draft therefore permits a write–in vote only for the party candidates who are shifted over to this ballot or column from a party ballot or column that would otherwise be blank, but does not permit a write–in vote for the "real" independent candidates. See s. 5.62 (5), stats.

6. Currently, s. 6.275 (1) (c), stats., requires a municipal clerk to report to the county clerk or board of election commissioners the number of voters who registered under s. 6.29, stats. The proposed treatment of s. 6.28 (1), stats., would provide an additional method to preregister voters after the registration deadline. Unlike AB–959, this draft would also require a clerk to report the number of individuals registering under revised s. 6.28 (1), stats., after the deadline.

7. Proposed s. 6.77 (3), which provides that an elector who becomes a resident of a municipality less than 10 days before an election as the result of a municipal annexation shall vote in the municipality where the elector formerly resided, appears to contravene article III, section 1, of the Wisconsin Constitution, which provides that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." A more legally feasible approach to this issue might be to preclude annexation ordinances from becoming effective less than 10 days before an election.

8. The text of s. 6.79, stats., as amended by this draft, permits electronic data entry of poll lists but requires any data entry system to be approved by the board. You may wish to provide that any data entry system shall meet the same security standard that is required for recording of votes by electronic voting systems under s. 5.91 (11), stats., in order to preserve entered data in the event of a power outage, evacuation or malfunction.

There is one other problem we can foresee if the officials are able to generate updated poll lists periodically from a printer. There may develop confusion over which list is the final list. Either preliminary lists should not be generated or each list should prominently be dated and timed or labeled "preliminary" or "final" by the computer. (The elections board may be able to handle this problem administratively.)

9. The repeal of the requirements for preparation and delivery of a write–in absentee ballot for military and overseas electors under s. 7.15 (1) (cs), stats. may result in some confusion because under 42 USC 1973ff–2 and s. 6.25 (2) and (3), stats., overseas electors may continue to use these ballots to vote for national offices and military electors may continue to use these ballots to vote for national, state and local offices. This change requires that electors handwrite the offices, in addition to the names of the candidates, from whom they wish to vote. As a result, electors may not only attempt to cast votes for the wrong candidates (as is possible now) but also for the wrong offices or improperly named offices. It also appears that, under this change, any

slip of paper may be used as a ballot as long as it contains the required information under s. 6.25 (2) and (3), stats.

10. Concerning proposed s. 8.37, stats., which requires the legislature to submit questions no later than 42 days prior to the election at which they will appear on the ballot, this provision creates a rule of procedure under article IV, section 8, of the Wisconsin Constitution. The supreme court has held that the remedy for noncompliance with this type of provision lies exclusively within the legislative branch. See *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 363–369 (1983). In other words, while this type of provision may be effective to govern internal legislative procedure, the courts will not enforce this type of provision and it does not affect the validity of any enactment resulting from a procedure that may be viewed as contravening the provision.

Also, the deadline for filing of petitions under this provision is somewhat problematic because it can sometimes take a while to verify the legal sufficiency of a petition and the filing officer is not always the one who directly places the question on the ballot in response to the petition. See, for example, s. 9.20 (3) and (4), stats. [direct legislation], where the municipal governing body must consider and act upon the petition.

11. Although we did not make any change to the treatment of s. 9. 01 (1) (ag), stats., we think there is a problem with this text in that s. 9.01 (1) (ag) 1., stats., as affected by this draft, requires prepayment of any recount charge or fee at the time that a recount petition is filed and proposed s. 9.01 (1) (ag) 2g. and 2r. fix the amount of the charge in certain cases at either 50% or 100% of the actual cost of conducting a recount. Since the actual cost is not known at the time that the petition is filed, it is not possible to administer this proposed language. Since AB–959 was drafted, we have revisited this issue in 1999 AB–337 and 1999 SB–175, which require any fee that is not known at the time a petition is filed to be estimated at that time and then adjusted after the recount is complete. At some point, we will need to address this problem with the draft.

12. Currently, s. 197.04 (1) (b), stats., allows a municipality to place a referendum regarding the municipal acquisition of a utility on the general election ballot only if the general election is held 30 to 35 days after the filing of the referendum petition. Otherwise, the municipality must call a special election. Although the 5–day period is unusual, the proposed treatment of s. 197.04 (1) (b), stats., retains this window of opportunity to utilize the general election to hold such a referendum. AB–959 did not retain this window. You may want to amend these provisions, in order to allow a greater opportunity to utilize the general election to hold such a referendum.

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