

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3947/1dn

JTK:cjs:ch

December 6, 2005

Robert Conlin:

1. Section 5.68 (1) and (2), stats. relates to apportionment of the costs of acquisition of, among other things, election apparatus, ballots, supplies and other materials. Proposed s. 5.68 (3m) directs the election administration council to provide guidance to local governments covering the procurement of election apparatus, ballot forms and supplies. You may wish to consider broadening the scope of proposed s. 5.68 (3m) to cover ballots as well as ballot forms and to cover materials as well as supplies.

2. Proposed s. 6.22 (4) (c) provides that a military elector may indicate an alternate address on his or her absentee ballot application. Under the draft, if the elector's ballot is returned as undeliverable prior to the deadline for return of absentee ballots, the clerk must send or transmit an absentee ballot to the elector at the alternate address. Because under proposed s. 6.86 (1) (c) the deadline for military electors to request absentee ballots is 5 p.m. on the Friday before an election, the draft may not accord sufficient time in some situations for the clerk to mail an absentee ballot, have the ballot returned, and then mail an absentee ballot to an alternate site, and for the elector to receive and vote the ballot and have the voted ballot postmarked by election day.

3. Proposed s. 6.22 (5m) and related provisions, which permit military electors, as defined in s. 6.22 (1) (b), stats., to have their ballots delivered and counted after election day as long as they are postmarked by election day, would, in cases where a recount is requested, require canvasses to be reopened before a recount could proceed. It is difficult to say how much time might be used in the reopening of a canvass. However, because under current law most local elective officials take office either 7, 14 or 21 days after the date of the spring election, it is difficult currently in many cases to complete a recount in time for the winner to take office on the appointed day. The change could make it somewhat more difficult than it is currently. If an elective official cannot take office on time, it can have an effect upon who is appointed to other offices (such as county board chair or member of a city commission) whose terms begin shortly after the term of the elective official who appoints the official.

4. Also with respect to proposed s. 6.22 (5m) and related provisions, currently, under s. 7.15 (1) (cm), stats., municipalities must transmit absentee ballots to all absentee voters who have requested ballots, including the voters who are affected by this draft,

no later than 21 days before the spring election and no later than 30 days before the general election. Although calendar fluctuations can make this task more difficult or less difficult to complete within the time prescribed by law, as a general rule the time allotted for canvassing of the spring and September primaries and ballot preparation for the spring and general elections is used completely. Therefore, under this draft it is likely that, in municipalities where military electors do not return absentee ballots by election night, unless municipal clerks and boards of election commissioners exercise an unusual degree of initiative and municipalities agree to take on some additional costs for expedited printing service, absentee ballots could be distributed as late as approximately 15 days before the spring election and as late as approximately 24 days before the general election. This will make it more difficult for these ballots to be returned through the world mail system by election day. The voters who are affected by this draft will have extra time to return their ballots, but these voters could still be impacted to some degree by this change if their current ballot transit times are less than approximately seven days.

5. Proposed s. 6.22 (5m) permits the ballots of military electors to be counted under certain conditions if received after election day. Proposed s. 6.86 (1) (c) provides a later deadline for military electors to apply for an absentee ballot than is provided for other electors. The proposed treatment of s. 6.86 (1) (b), stats., similarly provides a later deadline for indefinitely confined electors to apply for an absentee ballot than is provided for other electors. Although these provisions generally provide a dispensation, the effect of the provisions is to create a procedure under which the ballots of electors may either be counted or not counted or absentee ballots may be provided or not provided based upon the status of the electors, which could raise an equal protection issue. The U.S. Supreme Court has sometimes approved distinctions made by states in the treatment of absentee voters. However, the Court has said that because voting is a fundamental right, any distinction made by a state will be subject to close scrutiny. See *McDonald v. Board of Election Commissioners*, 89 S. Ct. 1404, 1407 (1969), in which the Court, after applying this scrutiny, nevertheless permitted Illinois to make a distinction based upon prisoner status. One argument that could be advanced in support of this draft is that national security requires disparate treatment of the ballots of military electors, as defined in this draft, and that the conditions under which those electors must operate may prevent them from taking advantage of the same procedures for expeditious absentee balloting that other electors can conveniently use. It may also be argued that the type of treatment proposed in this draft is not invidious, which may distinguish it from other situations. It is possible to argue, however, that the class of electors that is affected by this draft may not be drawn with sufficient closeness to provide the state with a sufficient basis for treating their ballots differently in every case. Because the Court does not appear to have ruled on this point, it is not possible to predict how the issue posed by this draft will be assessed.

6. The treatment of s. 6.28 (1), stats., to change the deadline for voter registration from 13 days before an election to 20 days before an election will increase the number of voters who must register at an address where they do not expect to be residing on the 10th day before election day, which under s. 6.10 (1), stats., fixes an elector's voting residence. If moving from one election district to another, these electors will need to

vote at the polling places serving their new residences and file address change forms at those polling places. If the registration deadline were the same as the date on which an elector's voting residence is fixed, this process could be avoided.

7. This drafts amends s. 6.33 (1), stats., and creates proposed s. 6.36 (4) to require new applicants for registration who possess a valid driver's license issued by another state to provide the name of the state, the license number, and the expiration date of the license. The draft then requires the Elections Board, following every general election, to contact the chief election official of each state that has issued a valid driver's license to an elector who votes in that election and to inquire whether the elector voted in the same election in that state. The committee's original draft provided for this contact to be made after every election, but since the general election is the only election held in this state that coincides with an election that is also held in every other state, and since it well may be legal for an elector to vote in one state and then vote in this state on a later date, I changed the draft to apply only to general elections. Please let me know if you would like to see this treated differently. The draft also provides for each applicant to enter the expiration date of his or her out-of-state licence on his or her registration form, and for this verification to be made by the board at every general election for so long as the license remains valid. It should be noted that many holders of out-of-state licenses are recent arrivals who eventually apply for Wisconsin licenses. When an applicant receives a Wisconsin license, the Wisconsin DOT requires the applicant to surrender any valid out-of-state license that the applicant possesses. DOT then forwards the out-of-state license to the issuing state with instructions to cancel the license. Therefore, it is possible under the draft for voting inquiries to continue to be made after a license has been canceled. It would be desirable, therefore, to provide that DOT must forward information to the board regarding any out-of-state licenses that are surrendered to it so the board can stop its inquiries. In addition, although this license information remains confidential under the draft, it remains on the registration list forever and may therefore be a source of confusion in later years. You may wish to consider entering this information on a separate list because it will likely be used only for short-term purposes.

8. Proposed s. 6.34, which requires all electors to provide proof of residence when registering to vote and defines the only forms of proof that are acceptable, permits an elector to use as proof "[a]n official identification card or license issued by an employer in the normal course of business that contains a photograph of the license holder, but not including a business card." Because a significant portion of the voting population is self-employed or employed only within the same family, this provision in effect permits this portion of the electorate to create their own registration identification cards. You may wish to consider whether such a self-identification procedure effectuates your purpose in creating this new requirement. In addition, while some of the forms of acceptable proof of residence must be current, the proposed text permits an official identification card issued by a Wisconsin governmental body or unit that does not contain an expiration date, a bank statement, a paycheck, or a check or other document issued by any unit of government to be used as proof even if the document that is used is not current. You may wish to consider requiring that a document that

does not contain an expiration date be dated within some period, for example one year, prior to the date of application for registration.

9. Under proposed s. 6.36 (5), the Elections Board prescribes a fee for obtaining a copy of the registration list that may exceed the cost of reproduction. The draft requires that revenues from fees received be shared between the state and local governments. Because the bill provides no appropriation to the board for use in depositing and dispensing fee revenues, any apportionment of revenues will necessitate requesters of copies to write multiple checks to all jurisdictions receiving revenues in the appropriate amounts. For a statewide list, the procedure approaches unworkability. Therefore, you may wish to add an appropriation or remove this provision from the draft and place it in separate legislation together with the necessary appropriation.

10. Currently, s. 6.56 (3), stats., requires each municipal clerk or board of election commissioners to conduct a postcard audit of voter registrations that occur at polling places on election day. This draft amends that subsection to require that either the clerk, board of election commissioners or elections board conduct the audits. It would be preferable to indicate in the draft who has primary responsibility to ensure that the audit is conducted, in case the parties should disagree over who should conduct the audit. Also in this connection, s. 6.56 (4), stats., requires municipal clerks to perform a similar audit of electors who appear to have voted more than once at an election. You may wish to adopt the same procedure for this audit. In addition, it should be noted that while polling place registrations are audited and mail registrations are confirmed under s. 6.32 (4), stats., (thereby ensuring that the voter's address is deliverable), and this draft proposes to extend confirmation requirements to all registrations not received in person by the municipal clerk or at by a deputy at another authorized location, there exists no similar audit or confirmation for registrations taken in person by the municipal clerk or by a deputy at another authorized location. You may wish to extend the confirmation/audit process to cover these registrations.

11. Currently, under s. 6.79 (2) (d), stats., and related provisions, an elector is required to show identification before voting (or enclose a copy of identification with his or her absentee ballot) if he or she has registered by mail and has not voted in an election for national office in this state. This requirement implements a federal mandate contained in the federal Help America Vote Act of 2002 (HAVA), section 303 (b). The term "identification" is defined in s. 5.02 (6m), stats., and this definition also conforms to HAVA. HAVA also requires that an elector who does not have the requisite identification must be permitted to vote a provisional ballot. Current state law in s. 6.97, stats., implements this requirement. This draft deletes the federally required language from state law and substitutes a system under which all electors, other than military and overseas electors as defined by federal law, must provide "proof of residence" (as defined in the draft) in order to register to vote (see proposed s. 6.34). Under the draft, no separate identification is required to vote because an elector (except a military elector) must have provided the ID in order to register. Section 303 (b) (3) of HAVA provides that the federal identification requirements do not apply to any individual who has registered to vote on a form prescribed under the National Voter Registration Act and HAVA. Among other things, the National Voter Registration Act and HAVA require registration forms to include certain specific

quoted questions and in the case of a question relating to citizenship, specific boxes for the registrant to check “yes” or “no”. Although current state law specifies certain information that must be on the registration form and authorizes the board to prescribe the format of the form, Wisconsin’s registration forms under current state law and this draft do not conform to these requirements. Therefore, at this point the changes proposed by this draft that delete the federal identification requirements do not appear to be consistent with federal law.

12. The treatment of s. 6.875 (6), stats., and proposed s. 6.875 (7), which require certain information to be posted in nursing and retirement homes and community-based residential facilities and which authorize representatives of political parties to enter the homes and facilities to observe absentee voting procedures, may be difficult to enforce given the fact that these homes and facilities are located on private property. If the owner of the property does not permit the posting or the entry of the observers, do you want to allow the voting at the home or facility to go forward?

13. Proposed s. 7.37 (13) directs an inspector to stand at the end of any line of voters waiting to vote when the polls close. Proposed s. 7.30 (1) (b) also permits municipalities to appoint an additional inspector who may be available to close the line of voters. If an additional inspector is not appointed or the additional inspector must be assigned to perform other work, and the inspectors are fully occupied (which would ordinarily be the case if there is a line of voters at closing time), you may wish to permit or direct the municipal clerk or board of election commissioners to assign another appropriate person to close the line at each polling place. The person could be an inspector, an employee of the clerk or board, or a police officer.

14. The treatment of s. 7.51 (5) (b), stats., by this draft changes the deadline for municipal election returns to be delivered to county clerks and boards of election commissioners from 2 p.m. on the day after an election to 4 p.m. on that day. Because this time is closer to the end of the business day, it may increase the difficulty in dispatching a messenger to secure any late returns on that day. Closely tied to this deadline is the deadline of 9 a.m. on the Thursday following each election under s. 7.60 (3), stats., which is the latest that the county board of canvassers may begin its canvass. You may wish to consider pushing back this deadline to accommodate the revised municipal deadline provided in this draft.

15. Proposed s. 7.52 and related provisions authorize municipalities to canvass absentee ballots at an alternate site instead of at polling places as currently provided. Under the draft, the canvassing is performed by a separate board of absentee ballot canvassers consisting of 3 individuals. The canvassing may not begin earlier than the time that the polls open (7 a.m. on election day). Per s. 6.87 (6), stats., absentee ballots may be received as late as 8 p.m. on election day [the draft proposes to allow the ballots of military electors to be received later under certain conditions]. The canvassing of absentee ballots, except late ballots of military electors, may not be completed until the poll lists are returned from the polls together with the nonabsentee returns, because the absentee voters must be cross-checked against the voters casting nonabsentee returns to ensure that voters do not vote more than once. Under s. 7.51 (5) (b), stats., municipal election returns must be delivered to the counties no later than 2 p.m. on the

day after an election [the draft proposes to change this time to 4 p.m.]. Under s. 7.60 (3), stats., county boards of canvassers must convene to canvass the municipal returns no later than 9 a.m. on the 2nd day after an election. Under these provisions, the feasibility of adopting an alternate site for absentee ballot canvassing will depend upon the population of the municipality and the turnout at an election. However, it is obvious that if a populous municipality attempts to use the proposed alternate procedure at a high-turnout election ( and perhaps even at a low-turnout election), there will not be sufficient time to accomplish the task within the aggressive constraints provided in the draft. It is not unreasonable to assume that inspectors would take 90 minutes to canvass the absentee ballots in one ward at a high-turnout election in a populous municipality. In the city of Milwaukee, for example, if there are 220 wards, the canvassing time for one separate board to count all the absentee ballots might reasonably be estimated at 330 hours, not including the time required for the cross check.

16. Also with regard to the separate absentee ballot canvassing procedure under proposed s. 7.52, because informal election night returns will no longer include absentee ballot returns in some cases, you may wish to consider requiring municipal clerks and boards of election commissioners to post the number of absentee ballots outstanding for their municipalities after the polls close on election night. This will permit candidates on election night to determine whether the absentee ballots outstanding could potentially shift the apparent results based on the preliminary returns when all of the the absentee ballots are finally canvassed.

17. This draft amends s. 8.37, stats., to require each school district clerk to file a copy of each proposed ballot measure or question with the county clerk of each county having territory within the school district no later than 42 days before the date of the referendum at which the measure or question appears on the ballot. Because under the same statute the question must be filed with the school district clerk no later than the same date, you may wish to give the clerk at least one day after receiving the notice to prepare and transmit the notice to the appropriate county clerks. In addition, you may wish to extend this change to apply to clerks of all special purpose districts in which questions or measures are submitted.

18. Most of the component drafts that are included in this draft contained an effective date of January 1, 2006. Because it appears likely that this draft will not become law before January 1, 2006, and because retroactive application of many components of this draft could be logistically or legally problematic, this draft contains a general effective date of January 1, 2006, or the day after publication, whichever is later. Please let me know if you would like to see this issue treated differently.

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