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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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**Scott Grosz**  
Clearinghouse Director

**Anne Sappenfield**  
Legislative Council Director

**Margit Kelley**  
Clearinghouse Assistant Director

## CLEARINGHOUSE RULE 24-052

### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

#### 2. Form, Style and Placement in Administrative Code

- a. Section EL 6.05 must include a section title. [s. 1.10 (2) (a) 2., Manual.]
- b. Section EL 6.05 (1) and (1) (a) should be reorganized. Section EL 6.05 (1) appears to be substantive in nature, and as such, should follow the definition created in s. EL 6.05 (1) (a). [s. 1.09 (2) (c) 2. and 3., Manual.] Alternatively, the agency may consider consolidating s. EL 6.05 (1) and (1) (a) to form a single, substantive directive that mandates use of specific forms. [See the subsequent comments, below.]
- c. The agency should avoid excessive subdivision of s. EL 6.05 (1). In the rule text, a provision is labeled as s. EL 6.05 (1) (a), but the rule does not include a par. (b). [s. 1.10 (1), Manual.]
- d. The rule text should be revised for consistency with s. 1.07 of the Manual, relating to the organization and use of definitions, as related to s. EL 6.05 (1) (a).
- e. Throughout the rule text, the agency should use “; Stats.,” to follow statutory references. [s. 1.15 (2) (b) 1., Manual.]
- f. Throughout the proposed rule, cross-references to other rule provisions should follow the style prescribed in s. 1.15 of the Manual.
- g. The effective date of the proposed rule should be specified in a separate SECTION of the rule text. [s. 1.03 (4), Manual.]

#### 4. Adequacy of References to Related Statutes, Rules and Forms

The rule refers to instructions created by the agency as forms but it is unclear whether the contents of the instructions are a part of the rule (i.e., whether the contents carry the force of law). If some or all of the contents of the instructions are not statutory requirements but are intended to carry the force of law, best practice is for the rule text to contain the provisions it means to enforce, organized using the typical numbering structure for rule text, before being reproduced in the

instructions as a “form”. Under this approach, the agency can clearly indicate whether a provision of the form is required by statute or case law, or whether the provision arises as an interpretation thereof under the agency’s exercise of rulemaking authority. [See s. 227.01 (13) (q), Stats., which excludes “a form the content or substantive requirements of which are prescribed by a rule or a statute” from the definition of “rule.”]

Alternatively, an agency may include a form in the rule text, organized in a way that does not conform to the typical numbering structure for rule text. [s. 1.13, Manual.]

At a minimum, regardless of whether the contents of the instructions are intended to be part of the rule, the instructional forms should be identified by the date on which they were created by the agency, as it appears the intent of the rule is to mandate use of specific forms identified in the rule text. Reference to specific forms by date of issuance would further this intent and improve the clarity of the directive. Note that an implication of the agency’s directive to mandate use of specific forms is that an agency decision to mandate use of other forms (e.g., a new version with an updated date of issuance) will require future rulemaking.

## **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The proposed rule should clarify what instructions municipalities can and cannot provide to absentee electors by creating a narrower prohibition, instead of a broad prohibition with exceptions. Relatedly, the introductory clause to the rule states it relates to the “mandatory use” of uniform instructions, while the rule text may be better characterized as prohibiting the provision of other material that is inconsistent with or contrary to the uniform instructions.

- (1) The rule prohibits municipalities from providing anything other than the agency’s uniform instructions, but also creates an exception for “administrative or logistical instructions” that: (a) do not conflict with the agency’s uniform instructions; and (b) do not otherwise violate state or federal law. The rule then explains that administrative or logistical instructions conflict with the agency’s uniform instructions if they are “inconsistent with or contrary to” substantive procedures for completing or returning an absentee ballot.
- (2) If the rule intends to prohibit municipalities from providing any instructions on how to vote an absentee ballot or how to return an absentee ballot not contained in the agency’s uniform instructions, then the rule should state this directly.
- (3) Alternatively, the rule could require municipalities to post or distribute the agency’s uniform instructions, and allow municipalities to supplement the agency’s uniform instructions with local administrative or logistical instructions that do not conflict with the uniform instructions. Under this approach, the rule should limit and specify the supplemental information a municipality may provide.

b. In s. EL 6.05 (1), use of a title more descriptive than the current title, “GENERAL”, may improve the clarity of the proposed rule.

c. Throughout the rule text, use of active voice and avoidance of double negatives may improve the clarity of the rule. [For example, in s. EL 6.05 (1), write “A municipality shall provide absentee electors with the uniform instructions prescribed by the commission...”, instead of “A

municipality is not permitted to provide absentee electors with any version of uniform instructions that has not been prescribed...”.]

d. The enforcement provision in the rule is unnecessary, as current law provides the same means for enforcing any election-related statute or administrative rule.