

Report From Agency

STATE OF WISCONSIN ELECTIONS COMMISSION

IN THE MATTER OF RULEMAKING	:	
PROCEEDINGS BEFORE THE	:	REPORT TO THE LEGISLATURE
ELECTIONS COMMISSION	:	CR 24-032

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS: N/A

III. FISCAL ESTIMATE AND EIA:

The Fiscal Estimate and EIA is attached.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

The basis and purpose of the proposed rule is to create Wisconsin Administrative Code ch. EL 4. The Commission is required to promulgate rules concerning election observers but does not yet have rules in place. Wis. Stat. § 7.41(5). The rule would advance statutory purposes by putting the rules in place and bringing consistency and clear directions to clerks, election inspectors, voters, and observers. With these rules, all parties would have one standard set of instructions for observing elections covering the full process from the sign-in to the location of observers, and election inspector and observer conduct throughout the day. The rules would clarify areas of uncertainty and allow for training that can be used by clerks and observers statewide.

V. SUMMARY OF PUBLIC COMMENTS AND THE COMMISSION'S RESPONSES, EXPLANATION OF MODIFICATIONS TO PROPOSED RULES PROMPTED BY PUBLIC COMMENTS:

The Elections Commission held a public hearing on April 24, 2024. The Commission received 54 pages of written comments during the comment period and 6 oral comments during its April 25, 2024, public hearing, which were recorded in minutes. Some individuals submitted both oral and written comments and some submitted multiple written comments. Individuals who appeared for the organization have the name listed in parenthesis.

The following individuals appeared or submitted comments mostly or entirely for the proposed rule: Eileen Newcomer (League of Women Voters of Wisconsin), Lori Stottler (Janesville Clerk), Caroline Hutton (Democratic Party of Wisconsin), Lisa Hassenstab (Disability Rights Wisconsin), Jay Heck (Common Cause Wisconsin), Diane Coenen (City of Oconomowoc Clerk), Scott Bolstad, and Julissa Velazquez (Milwaukee Area Labor Council).

The following individuals appeared or submitted comments mostly or entirely against the proposed rule: Julie Sounders Seegers, John Landwehr, Kathryn Bartelli, Ken Dragotta (True the Vote), Lane Ruhland (Center for Election Confidence), Peter Bernegger, Annette Kuglitsch (Republican Party of Waukesha County), Brian Jensen, and Jeffrey Manlove.

The following individuals appeared or submitted comments mostly asking for changes to the rule text but that were neither explicitly for or against the proposed rule as a whole: Sandy Juno (Election Integrity Network and Republican Party of Brown County), Kurt Goehre (Republican National Committee), Ardis Cerny, Molly Koranda, Sharon Foley, Debbie Morin, Joanne Leonard, Natalie Snyder (Town of Caledonia Clerk), Rose Eucke, Lesie Lauersdorf, Dawn Johnson, Brad Tangen, Diane Hall, Harry Keepthechange, John McCauley, Mary Anne Carlson, Elizabeth Bruders, Paul Driftmier, and Jacalyn Szehner.

Below, the Commission provides a high-level summary of the oral and written public comments. Comments that merely stated unspecified opposition to the rule, or proposed revisions that would be contrary to law, or that were not related to the topic of election observers are not included in the summary below. Likewise, comments offering support of the rule as written, either in general or specifically, are not summarized in detail.

Comments Relating to the Distance and Location of Observation Spaces:

This was the most common public comment received (11 different comments). These comments generally included requests to copy the statutory language of 7.41 to affirm that though observation areas must be between 3 and 8 feet away, they must be positioned so that observers can readily observe all public aspects of the voting process. Many comments included specific objections to only one observation area, as that may cause issues in polling places that have multiple tables set up throughout a large space with election activity occurring at each one.

Commission Response: The rule draft as written addresses these concerns. The rule contains the statutory language in Section EL 4.03(1)(a), which states that the designated election official must “[e]stablish at least one observation area to enable observers *to readily observe all public aspects of the voting process* during the election without disrupting the voting process” (statutory language from Wis. Stat. § 7.41(2) italicized). The rule language clearly contemplates that more than one observation area may be necessary in order to ensure that the public may readily observe all aspects of the process. Additionally, Section EL 4.03(1)(b) refers to *each* table at which voters announce their names, voters register to vote, election officials announce the names of absentee voters, and election officials remake ballots. If a polling place is spread out so that one observer area could not be within 3 to 8 feet of each of these tables, additional areas would be required until the rule language is met.

Comments Relating to Observers Representing the Parties or Organizations:

This was the second most common public comment received (6 different comments). These comments generally included requests to further clarify “organizations” that observers can represent as it’s possible an observer could be there independently, but also was trained by a political party. One comment also requested that the rule affirm that observers can be there by themselves without any party or organization affiliation. One

comment also included a request not to limit observers representing the same number of organizations if that means that any aspect of voting cannot be fully observed. Two comments also requested to further define “reasonably limit” the number of observers as that is subjective, and the rule should provide that as many interested observers can watch so long as there is space and they are not disruptive.

Commission Response: In response to the comment that Section EL 4.02(17) applies to individuals “trained by” the same organization, and that individuals who merely attend a training may have no further or lasting affiliation with the organization the Commission has deleted the term “trained by.” Representing an organization requires at least some affiliation, and the remaining terms better capture that meaning. Nothing in the rule requires an observer to represent an organization, and Section EL 4.04(1) only requires that an observer print “the name of the organization the observer represents, *if any*” (emphasis added) which clearly shows that a name is only required if the observer is representing an organization, and can otherwise be left blank. To add clarity on this point, the Commission has added a sentence stating that: “[a]n observer is not required to be affiliated with or represent an organization.” If a polling place is large enough to need more than one observation area, it is likely large enough to accommodate at least one individual representing the same organization in each area. However, this would be fact specific, and would likely need to be resolved on a case-by-case bases depending on what is reasonable in the circumstances. The rule text, and the governing statute, represent a compromise between the right of an organization to send observers and the physical limitations of observable locations. The Commission believes that these interests are properly balanced in the text.

Comments Relating to Observation Location in Residential Care Facilities

Another common comment (5 different comments) included requests that the rule affirm that observers have the right to be permitted to observe the voting process even in the private room of a voter residing in a residential care facility who is voting with the assistance of a special voting deputy. One comment specifically argues that because a residential care facility is treated as a polling place under Wis. Stat. 6.875(6)(b), any part of the facility must be observable as a polling place is observable.

Commission Response: The Commission discussed and voted on the language of section EL 4.05(4) several times and considered these concerns in detail. The Commission discussed and determined that a voter in a residential care facility must be able to secure their own privacy, and the privacy of their vote, when voting in their own room. Observers may still observe who votes and who does not vote from the common areas, even if a voter decides to affirmatively close the door.

Comments Relating to Expulsion of Disruptive Observers

Another common comment (4 different comments) received included requests that the rule define “loud” and “boisterous” for disruptive conduct or limit it to the statutory definition in § 7.41. A specific request asked that the rule limit election inspector discretion to eject observers for disruptive conduct, which should in turn be limited to overt acts. Another specific request asked that election inspectors be required to provide a specific provision of law or code that a disruptive observer is violating. A couple of

comments expressed apprehension or frustration at what they claim is “unchecked” discretion of election inspectors to eject observers, made worse by the current rule language being very subjective.

Commission Response: Section EL 4.04(6) again must apply to all polling places, and some discretion is required of local election officials. In general, dictionary definitions, as well as common sense, can be used to help determine when behavior is “loud” or “boisterous,” but the circumstance will necessarily be fact specific, and further definition may not help in making a determination based on the specific circumstance. Regarding overt acts, the rule requires first a warning to cease the offending conduct, and then, only if the conduct does not cease, the official may order the observer to leave. The official then must record the “incident” on the inspectors’ statement and provide a copy to the Commission. Therefore, the conduct must be specified, and therefore specific, and the Commission will have the opportunity to monitor whether the removal provision is being abused. An observer could also file a complaint with the Commission if they believe they have been improperly ordered to leave, and the Commission could then examine the factual circumstances as well as the observer’s argument, and potentially issue a corrective order.

Comments Relating to Scope of Observable Activity

A number of comments weighed in on different provisions to generally conclude that the current rule does not permit sufficient election activity to be observed by observers. Three comments included a request that the rule reiterate the public’s right to observe the return of voted by-mail ballots “on any day that absentee ballots may be cast” at the clerk’s office, instead of during the same hours as issuing and voting of ballots. One comment suggested specifically defining the words “cast” and “vote” in order to accomplish this goal.

Other comments provided more specific requests of the type of activity that should be covered by the observer rule. The most common activity commentors wanted included in observable activity are other types of election administration and processing related to the processing of ballots beyond the tabulation of ballots at central count. Another common request was expanded visual access to absentee ballot certificate envelopes and specifically to the addresses and signatures, including two requests to project them as images so they can be more easily seen. Other commenters wanted greater access to what could be observed with respect to electronic voting equipment, including the deposit of ballots into the tabulator, the data transmission of vote totals, source code of voting machines, and the ability to take pictures of the tape of the final tally results. One comment asserted that observers should have the same observation, access, and recording rights that the rule currently gives to media, both inside and outside of the polling place or voting location. Other comments stated that observers should be able to observe a voter’s ID.

Commission Response: The Commission discussed the meaning of the word “cast” and when the observer rule would apply to clerk’s offices and alternate sites regarding the return of absentee ballots. The Commission debated this issue and voted on the language in the current rule, and believes that the text allows observation within a clerk’s office or alternate site as directed by Wis. Stat. § 7.41(1). The rule text allows the observation of

each table at which election inspectors process absentee ballots, and allows, in Section EL 4.03(6), for requests to repeat a name and address. The governing statute clearly explains where the observer areas shall be, and that all other activity remain observable. The current rule protects the right to observe without placing extra burdens on election officials. Observers under this rule have greater and more protected access than media members. Only if a media member signs in as an observer and follows this rule entirely are they allowed into an observer area. Otherwise, a media member must independently coordinate with a designated election official in order to record a limited amount of information, and must remain outside of the observer area, unless they have signed in and are following the observer rule.

Comments Specific to Election Observation at Board of Absentee Ballot Canvasser Locations

A subset of comments related specifically to observer procedures at board of absentee ballot canvassers locations (almost always called “central count” in the comments, though this technically refers to a different type of location). Many commenters had personal experience observing at such locations, and the most common suggestion was expanding the rule to include more observable activity. This includes general requests like being able to observe set up and tear down of the central count location, as well as being able to see when ballots come in and any processing steps that are performed before election inspectors start processing ballots. One comment specifically requested that observers should be permitted to see how many ballots are taken to the tabulators from each ward, and then be permitted to view the electronic number on the tabulators after the ward is done. One comment opposed the restriction on observers taking pictures or videos of election inspectors depositing ballots or correcting absentee certificate envelopes, and one comment was in favor of this restriction.

Commission Response: Observers will have a greater ability to record information, including pictures and videos, at board of absentee ballot canvasser locations under Section EL 4.05(3)(b). The only prohibition is against filming a voter or lawful agent dropping off or correcting a ballot. To clarify this section, the Commission changed the word “depositing” to “returning” to distinguish activities done by voters and lawful agents, which may not be recorded, from election officials, which may be recorded. Additionally, the start time for observation may begin no later than when the tabulators are zeroed. Observers must be able to observe all opening, announcing, and remaking of ballots within 3 to 8 feet from the table at which the election officials are working, and the remaining activities should still be viewable from those locations under the current rule text.

Comments Concerning Observation and the Use of Electronic Poll Books (Badger Books)

A subset of comments related specifically to observer procedures at polling places using electronic poll books (Badger Books). The comments included requests that the rule better integrate and address how observers may observe the voting process in polling places that use electronic poll books like Badger Books. A comment also suggested that the Commission could define what on an e-poll book an observer would be allowed to observe.

Commission Response: The Commission considered this concern during the drafting process, and the definition “confidential information” in Section EL 4.02(5) balances the right of observers to be within 3 to 8 feet of the tables at which Badger Books are used (they may be used at the check in or the registration tables) with the need to protect the private information of voters, such as birth dates and ID numbers.

Comments Concerning Clerks’ Role in Interacting with Observers

A subset of comments focused on the role of the clerk, or their election inspectors, with respect to interactions with observers. These requests were very specific, so staff have produced a list of them below in lieu of synthesizing them.

- Request to eliminate the requirement for clerks to notify Commission if they cannot accommodate observers within 3 to 8 feet as that makes it sound as if observing is optional or at the discretion of the clerk.
- Several requests to include a parallel section concerning the process if an election official violates the rules to provide specific recourse for observers.
- Request to clarify inconsistent provisions, such as positioning observer areas to limit contact between observers and election officials, but then directing observers explicitly to communicate with election officials in some circumstances.
- Request that the rule require observers to be informed at check in who the designated official in charge is if it’s someone other than the chief inspector or the clerk.
- Request to provide detailed training on the rule, once passed, for all clerks in Wisconsin.
- Request to prohibit observers from interacting with election inspectors or chief inspectors on election day, and should instead be directed to the election day manual if they have questions because answering observer questions is distracting and disruptive. This request would include an exception for an observer to challenge a voter.
- Request to have observers sign out in addition to signing in so that it is clear when a specific observer was present.

Commission Response: Allowing observers and following these rules would not be optional for clerks and election officials. The requirement to notify the Commission does not excuse a failure to follow the rule or prevent an observer from filing a complaint or the Commission from taking corrective action. The purpose of the section is for the Commission to be made aware of issues so that they may be addressed, and it does not make any requirement optional. If an election official violates a section of the rule, or otherwise abuses his or her discretion, an observer who is an elector of that official’s jurisdiction may file a Wis. Stat. § 5.06 complaint with the Commission detailing that allegation and asking the Commission to address it. Minimizing contact does not exclude all communication but merely reduces the chance that observers and officials will get in each other’s way during an election. In Section 4.03(2)(b)1. the designated election official must inform observers how they can ask questions during the day, and will necessarily need to introduce themselves. Additionally, all election inspectors’ names and titles, including the chief inspector, are public information. The Commission fully intends to create and implement training once the rule takes effect. Observers are required to sign in on election day, and may be removed if they cause a disturbance. Both the governing statute and the rule require a certain amount of interaction. Again, a balance must be struck between allowing observers to ask relevant questions and officials to conduct the election. Election officials are given discretion under this rule to determine the way

observers may ask questions. The Commission discussed a sign-in and sign-out possibility, but determined it could be difficult to manage. Clerks may still provide the option of a sign out, and ask observers to mark when they sign out.

Other Miscellaneous Comments

Other specific comments included:

- Request that political parties should be notified of the removal of their affiliated observers and given the option to provide a substitute.
- Request to remove the alternative start of observable activity (“or whenever machines are zeroed out on Election Day”) because that could occur much earlier than 7 a.m., and poll workers need to focus on setting up and opening the polls by 7 a.m.

Commission Response: Political parties and organizations may be notified by the removed observer and provide a replacement under the current text, and that could be incorporated into political party or organization trainings. The Commission discussed when precisely election observation should begin, and the consensus was that if the machines have been zeroed observers should be able to observe them.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

Comment: 1.a. Clarify that Wis. Stat. § 227.11(2)(a) is a general statute granting rulemaking authority to agencies, rather than just the Commission.

Response: The Commission accepted this recommendation in whole.

Comment: 1.b Clarify or remove the citation of authority that discusses the election manual.

Response: The Commission accepted this recommendation in whole and removed the reference to Wis. Stat. § 7.08(3) from the rulemaking authority section. Though the Commission would be almost certain to update its election manual following promulgation of this rule, that section complements but does not authorize this rulemaking.

Comment: 1.c. Clarify what is meant by “qualified observer” in regard to challenging electors.

Response: The Commission accepted this recommendation in whole and removed the undefined word “qualified” and replaced it with the phrase “an observer who is an elector.” Anyone may be an observer, but only electors (US citizens over 18 who are not otherwise unqualified) may challenge a vote. Some addition to the term observer is warranted in this section because challenging electors is available only to the subset of observers who are also electors as defined in Ch. 6 of the Wisconsin Statutes.

Comment: 1.d. “It is not entirely clear that s. EL 4.07 falls into the realm of regulating election observers, as authorized by s. 7.41 (5), Stats. The provision does not regulate the conduct of an election observer, which is the subject matter of the proposed chapter. The

relationship to the regulation of election observers should be explained. For example, is media access viewed as a form of the public's right to access? Or that the role of media is similar to an observer's, in observing and reporting on an election?"

Response: The Commission rejected this recommendation in whole. The Commission discussed and voted on this provision to ensure that observers and election officials understand how media fit into the election observation landscape, and this language adds needed clarity concerning when someone is or is not acting as an observer. This rule provision clarifies when a media member is an observer, and thus subject to the benefits and restrictions of this rule, and when they are not. Unless a media member, as described in subsection (3), signs in as an observer and is bound by these rules, which allow close access but limit filming, the media member must be located outside the voting area, and may film a limited amount of information only at the discretion of the municipal clerk. This rule will largely codify the status quo, in which media members contact clerks to determine whether and how they may record information on election day. This section clarifies that media members do not have an exemption to the rule, but may choose to be observers or discuss recording information outside of the voting area with a municipal clerk. This section creates an important line that municipal clerks will need in order to effectively carry out these rules. Requiring a media member to identify him or herself initially allows a designated election official to understand that someone may or may not be acting as an observer, and to follow the proper procedure if they are and to exclude them from the voting area if not.

Comment: 2.a. Add a section describing the factual data and analytical methodologies used in preparing the proposed rule by adding a narrative describing steps taken and sources considered in preparing the proposed rule.

Response: The Commission accepted this recommendation in whole and added this information to the rule order.

Comment: 2.b. Revise the cross-references in the rule to reflect the correct format, including adding "s." and leaving spaces between sections and subsections, etc.

Response: The Commission accepted the recommendation in whole and updated the references.

Comment: 2.c. Add a chapter title.

Response: The Commission accepted the recommendation in whole and added "Election Observers" as the title of the chapter.

Comment: 2.d. Place the definitions in alphabetical order, change agency names to lowercase, and add missing quotation marks.

Response: The Commission accepted the recommendations in whole.

Comment: 2.e. Spell out "ID" instead of using an abbreviation.

Response: The Commission accepted the recommendation in whole.

Comment: 2.f. Revise the structure of s. EL 4.03 (2) so that the introduction is either a numbered paragraph or clearly introduces and indicates the applicability of pars. (a) and (b).

Response: The Commission accepted the recommendation in whole to change the introduction to a numbered paragraph because the language contained the first step in the check-in process. The section was then titled “Observer check-in process.”

Comment: 2.g. Add an introductory statement to s. EL 4.03 (14) (intro.)

Response: The Commission accepted the recommendation in whole and added, “Following a warning, the designated election official shall, if necessary, carry out the following procedures:.”

Comment: 2.h. Regarding s. EL 4.04(5), add the word “and” before 6.935, make Ch. lowercase, and remove “Wis. Admin. Code.

Response: The Commission accepted the recommendations in whole.

Comment: 2.i. Regarding s. EL 4.04 (15), revise “ss.” to “s.” due to the disjunctive “or.”

Response: The Commission accepted the recommendation in whole.

Comment: 2.j. Regarding s. EL 4.05 (2) (b), change the format to “par. (a).”

Response: The Commission accepted the recommendation in whole.

Comment: 2.k. Regarding s. EL 4.05 (4) (f), change the format to “par. (d).”

Response: The Commission accepted the recommendation in whole.

Comment: 2.l. Regarding s. EL 4.06, remove the designation for sub. (1).

Response: The Commission accepted the recommendation in whole.

Comment: 4.a. Add s. 5.25 (4) (a) as a related statute as it is cited in s. EL 4.02 (1).

Response: The Commission accepted the recommendation in whole.

Comment: 4.b. Add a description of the different requirements for observers for SVD voting and for recounts.

Response: The Commission accepted the recommendation in whole.

Comment: 4.c. Regarding s. EL 4.02 (9), cross reference the definition of election official given by statute.

Response: The Commission accepted the recommendation in whole and added “has the meaning given in s. 5.02 (3m), Stats.”

Comment: 4.d. Regarding s. EL 4.04 (13), fix the cross reference and abbreviate “subsection.”

Response: The Commission accepted the recommendations in whole. The correct cross reference was sub. (15).

Comment: 4.e. “In s. EL 4.05 (5) and (6), it is not entirely clear which of the requirements from ss. EL 4.03 and 4.04 apply to election officials and observers in a recount. For example, s. EL 4.05 (5) (c) requires the designated election official to establish at least one observation area but it is not clear whether the siting requirements are the same as for polling places. It is unclear whether observers need to sign in, acquire a badge or name tag, are subject to removal, etc. Consider either specifying that all of the rules in ss. EL 4.03 and 4.04 apply “except as provided in” the relevant sections that are site-specific, or cross-referencing in s. EL 4.05 (5) and (6) the rules that do apply.”

Response: The Commission rejected this recommendation in part and accepted it in part. The word observer is used in both sections, and therefore all sections applying to observers apply in those locations to the extent the elements of the rule are present. Section EL 4.05(6), like 4.05(1)–(4) is merely adding specifications for the central count location to the overall observer rule. Some aspects of the rule would not apply because elements of the statute and rule are not present. For example, a central count location (as distinguished from a board of absentee ballot canvassers location for which key elements are present) will not have any tables at which voters sign in or register to vote, or at which election officials announce names, and thus there would be no locations subject to the 3 to 8 foot rule because there would be no tables from which to measure. The rule would therefore simply require that all public aspects of the process be observable. All elements of the rule which are present, such as having a sign-in sheet, would need to be carried out. As for recounts under Section 4.05(5), subsection (b) excludes those parties named in Chapter 9 from the entirety of this observer rule, but any other individual would be bound by the rule. To address this comment, the Commission removed “the limitations of” and added “however, they must state to the designated election official that they are either the petitioner, an opposing candidate, an interested person, or counsel for any such individual.” This language should create a clearer line and explain who is and who is not covered by these provisions.

Comment: 4.f. Regarding s. EL 4.07 (3), change “this rule” to “this chapter.”

Response: The Commission accepted the recommendation in whole.

Comment: 5.a, c, d, e, f, j, l, n, p, q, s, z, bb, dd, ff. These recommendations involve minor points such as active and passive voice, punctuation, capitalization, word choice, and paragraph structure.

Response: The Commission accepted the recommendations in whole.

Comment: 5.b. Revise the third paragraph of the plain language analysis to fix errors and clarify that the rule concerns procedures for election officials, rather than the conduct of election officials.

Response: The Commission accepted the recommendation in whole.

Comment: 5.g. Choose either the word “voter” or the word “elector,” and then standardize the use of the term within the rule.

Response: The Commission accepted the recommendation in whole. The Commission opted to use the generic word “voter” as that word would likely contribute more to reader understanding without losing meaning. It is also the more common word used in the Commission’s various training and guidance documents. The Commission kept the word “elector” in s. EL 4.05 (5) because the word elector there is being used in a technical sense to refer to someone who is eligible to vote but who may not be registered to vote.

Comment: 5.h., u., aa. Change sections that use passive voice to active voice.

Response: The Commission accepted the recommendation in whole and revised many sections to use active voice.

Comment: 5.i. Move the definition of “accessibility reviewer,” and its exclusion from the definition of “observer” to the section that defines “observer.”

Response: The Commission accepted the recommendation in whole.

Comment: 5.k. Change the definition of clerk to reference the statutory definition.

Response: The Commission accepted the recommendation in whole.

Comment: 5.m., 5.x. “In the definition of ‘member of the public,’ consider deleting the material relating to a candidate or a registered write-in candidate and creating a separate section stating that a candidate or registered write-in candidate may not serve as an observer at a polling place where he or she appears on a ballot. Alternatively, it may not be necessary to define “member of the public.” “Consider placing the prohibition on candidates and write-in candidates being election observers at the end of s. EL 4.04.”

Response: The Commission rejected this recommendation in whole and believes that this language is best kept in the definition section. This language carries out the statutory prohibition against a candidate being an observer and also adds that election officials are excluded from the definition, meaning that an election official may carry out their duties without being classified as an observer. This is particularly important for accessibility reviewers who are recording whether or not selected polling places are meeting their accessibility requirements. The Commission intends to including training that will

reinforce who is an election observer and who is not using this definition, and believes that keeping this information together as part of the definition of “member of the public” is the clearest way to do so.

Comment: 5.o. Regarding s. EL 4.03 (1), move the subsection down to better track the timeline for election officials, and eliminate passive voice.

Response: The Commission accepted the recommendation in whole and eliminated passive voice as well as moving along with a general reordering of EL 4.03 as recommended in 5.r. below.

Comment: 5.r. Combine s. EL 4.03 (4), (6), and (7) for greater clarity.

Response: The Commission accepted the recommendation in whole and generally reorganized section 4.03 to follow a chronological order.

Comment: 5.t. Rewrite s. EL 4.03 (14) (c) to assign the duty to offer an opportunity to sign a written order to a specific person, and to clarify the language.

Response: The Commission accepted the recommendation in whole.

Comment: 5.v. Clarify the language and fix the grammar of s. EL 4.04 (9).

Response: The Commission accepted the recommendation in whole.

Comment: 5.w. “The proposed rules relating to audio and video recordings are confusing and seemingly inconsistent. Consider placing all of the requirements and restrictions on audio and video recordings into a separate section of ch. EL 4 by creating a separate section that encompasses ss. EL 4.04 (12), 4.05 (1) (b), (3) (b), (5) (d), and (6) (b), and 4.06.”

Response: The Commission rejected this recommendation in whole. Section EL 4.04(7) contains a general prohibition against creating and transmitting photo, video, or audio recordings, which are qualified or lifted by the subsections of Section EL 4.05 dealing with specific locations. Section EL 4.04(12) contains a general rule against “live” audio or visual communication device use which is distinct from the other cited sections, and is intended primarily to limit disturbances, primarily extra noise, which is distracting for other observers, voters, and election officials. The referenced sub sections of Section 4.05 were considered individually by the Commission and apply to those specific types of locations due to important differences in the locations. The key difference is the presence of voters and voted ballots which may be visually tied to a specific voter, and the limitation is designed to prevent identifying how a voter voted, intimidating a voter by recording their actions, or identifying a confidential voter. Locations for which these concerns are not present (recounts and central count) lift the prohibition, locations for which the concerns are limited (board of absentee ballot canvassers) lift the prohibitions except when individuals are returning ballots or correcting envelopes, locations for which the concerns are present up until a specific time name that time (polling places), and locations for which the concerns are always present (municipal clerk offices and alternate

sites and residential care facilities) contain no additional qualification, and the general prohibition in Section EL 4.04(7) always applies. Restrictions on audio and video vary based on location, and are best placed within the location specific sections of Section EL 4.05.

Comment: 5.y. “Section EL 4.05 (1) (a) could be simplified to state that an observer may remain at a polling place until all election-related activities are concluded. The reference to the open meetings law is confusing and may not be necessary. Additionally, the term “Election Day” should not be capitalized.”

Response: The Commission rejected this recommendation in part, and it accepted it in part concerning capitalization. The Commission believes that this section requires this level of detail and that it clarifies an important and potentially confusing transition. The Commission does not believe that this rule or Wis. Stat. § 7.41 applies to the canvassing of the votes once the election inspectors become canvassers after voting has concluded, even though those activities are entirely election related. However, many of the same people who were observers may wish to remain at the location to observe the public meeting of the board of canvassers. This rule, and Commission guidance following it, needs to clarify when this transition occurs even if, in practice, an observer might not need to be aware of the difference because they may simply remain where they are and continue to observe the public meeting.

Comment: 5.cc. Consolidate s. EL 4.05 (4) (f) and (d).

Response: The Commission accepted the recommendation in whole.

Comment: 5.ee. “In s. EL 4.07 (1), what does it mean to “use video and still cameras outside of the voting area”? Does this mean that the recording equipment must be placed outside of the voting area, but may capture videos or images of actions within the voting area, so long as there is no disruption or interference, or recording of confidential information? Or does it mean that the physical placement of equipment and the images of actions must both be outside the voting area? It may be helpful to differentiate between the location of physical equipment and the location of the actions being captured.”

Response: The Commission accepted this recommendation in whole and added the words “place” and “only” to clarify that the equipment itself must be placed outside of the voting area if the individual is not signed in as an observer. Such equipment may capture anything except what is described, which may include some things in the voting area, such as election officials sitting at tables, but not others, such as voters handing their IDs to those officials.

VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS: N/A