DRAFT ORDER OF THE WISCONSIN ELECTIONS COMMISSION
EMERGENCY RULE

The Wisconsin Elections Commission adopts the following emergency rule to create EL 6.05, relating to the mandatory use of uniform instructions for absentee voting.

The statement of scope for this rule, SS 094–23, was approved by the Office of Wisconsin Governor Tony Evers on September 28, 2023, published in Register No. 814B, on October 30, 2023 and in Register No. 815A1, on November 6, 2023, and approved by the Wisconsin Elections Commission on December 19, 2023. This emergency rule was approved by the Governor on April 25, 2024.

FINDING OF EMERGENCY

The Wisconsin Elections Commission finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. The facts constituting the emergency are as follows: February 2024 kicked off the election cycle for a major presidential election year, which is expected to produce high voter turnout and high levels of scrutiny on Wisconsin's election procedures. Emergency rulemaking will provide the Commission an opportunity to address election administration needs ahead of the elections in 2024. There simply is not enough time to promulgate permanent rules on these topics and fully implement them before major elections in 2024, unless the Commission promulgates them as emergency rules under § 227.24(1)(a), although the Commission has directed staff to simultaneously pursue permanent rules to ensure long-term compliance.

RULE ANALYSIS

Statutes Interpreted:
Section 6.869, Stats.

Statutory Authority:
Sections 5.05(1), 6.869, and 227.11(2)(a), Stats.

Related Statutes:
Sections 6.22(4)(d), 6.24(6), 6.86(2)(a), 6.86(2m)(a), and 6.87(3)(d), Stats.

Plain Language Analysis:
The proposed administrative rule will prohibit Wisconsin municipalities from providing their electors with any version of uniform instructions for absentee voting that has not been prescribed by the Wisconsin Elections Commission. The proposed rule provides an exception for municipalities to provide electors with additional administrative and logistical instructions, provided they do not conflict with the uniform instructions prescribed by the Wisconsin Elections Commission. The proposed rule specifies three existing statutory mechanisms for enforcement of the rule. Finally, the proposed rule contains an effective date of June 10, 2024.

Summary of, and Comparison With, Existing or Proposed Federal Regulations:
There are no existing or proposed federal statutes or regulations intended to address the proposed rule that state Wisconsin municipalities are prohibited from providing their electors with any version of uniform instructions for absentee voting that has not been prescribed by the Wisconsin Elections Commission.

Summary of Comments Received During Preliminary Comment Period and at Public Hearing on Statement of Scope
No members of the public attended the November 9, 2023 public meeting to offer comments on the statement of scope for the proposed rule. The Commission received two written comments specific to the scope statements for this rule. Both written comments were supportive of the scope statements for this proposed rulemaking, specifically because they claimed the rule would lead to clearer, more consistent instruction to voters across the state. Neither comment offered any suggested changes. The Commission reviewed the two written comments and voted to approve the scope statement as written on December 19, 2023.

Comparison with Similar Rules in Illinois, Iowa, Michigan, and Minnesota
Illinois election authorities (local officials who perform election duties) are required to provide electors voting by mail with an instruction document that is written and approved by the State Board of Elections. 10 ILCS 5/19-4, 19-5. The substance of the instructions differs from what is required under Wisconsin law, but the requirement that local officials utilize a version of instructions that has been prescribed by the state-level election officials is the same as the proposed rule.

Iowa County Auditors serve as Commissioners of Elections and serve as the local officials who perform election duties. Iowa utilizes a standard State of Iowa Official Absentee Ballot Request Form that contains a section titled "Absentee Ballot Request Form Instructions." This form is required by statute to be prescribed by the Secretary of State, who oversees elections at the state level. IOWA CODE § 53.2(2)(a). The substance of the instructions differs from what is required under Wisconsin law, but the requirement that local officials utilize a version of instructions that has been prescribed by the state-level election officials is the same as the proposed rule.

Michigan law requires an absent voter ballot application to include specific instructions for how an elector can vote and return their absentee ballot. Mich. Comp. Laws § 168.759(8). Michigan voters are not limited to using the absent voter ballot application and may also request an absent voter ballot by written request or by federal postcard application. For the latter type of voter, it is not clear whether an election official is required to furnish the voter with the instructions specified by § 168.759(8). However, it can be assumed that most Michigan voters do utilize the absent voter ballot application, either by paper or online, in which case anyone printing or distributing that application must include a copy of the instructions prescribed by the Michigan Legislature.

Minnesota law requires the county auditor or municipal clerk to include "a copy of the directions for casting an absentee ballot to each applicant whose application for absentee ballots is accepted…" Minn. Stat. § 203B.07, subdivision 1 (2023). An administrative code provision further specifies the content and form of the absentee voting directions required by § 203B.07, subdivision 1. Minn. R. 8210.0500 (2024). That administrative code provision is captioned "Required

Instructions," which implies that no other version of absentee voting instructions is permitted. The substance of Minnesota's absentee voting directions differs from what the Commission has prescribed, but the requirement that local officials utilize a version of instructions that has been approved by state level officials is the same.

Summary of Factual Data and Analytical Methodologies
Commission staff did not perform empirical analysis for this rule, but the rule was proposed as a result of feedback provided by municipal and county clerks, as well as feedback from the public. Commission staff informally collected anecdotal evidence, which highlighted a concern that voters in various municipalities were receiving inconsistent absentee voting instructions across the state.

Analysis and Supporting Documents used to Determine Effect on Small Business
There is no anticipated effect on small business. A full economic impact analysis is not required for an emergency rule pursuant to Wis. Stat. § 227.24(1)(e)2., but staff did prepare the required fiscal estimate. No specific analysis was performed for the fiscal estimate, nor were any supporting documents generated, because there is no anticipated effect on any fiscal liabilities and revenue, and no anticipated costs to be incurred by the private sector.

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RULE TEXT

SECTION 1. EL 6.05 is created to read:

6.05(1) GENERAL. A municipality is not permitted to provide absentee electors with any version of uniform instructions that has not been prescribed by the commission pursuant to s. 6.869 or to represent that any additional administrative or logistical instructions are the uniform instructions being provided or required in accordance with s. 6.869.

6.05(1)(a) As used in this section, "uniform instructions" mean those that are prescribed by the commission pursuant to s. 6.869. The commission has prescribed four versions of uniform instructions, which are numbered EL-128, EL-128CC, EL-128U, and EL 128-UP, as well as Spanish translations of those forms, which use the same form numbers but end in 'S'.

6.05(2) EXCEPTIONS.

6.05(2)(a) Nothing in subsection (1) above shall be interpreted to restrict a municipality's ability to provide administrative or logistical instructions to absentee electors in addition to the uniform instructions, provided the additional instructions do not conflict with the commission's uniform instructions or otherwise violate state or federal law.

6.05(2)(b) In this section, additional administrative or logistical instructions conflict with the commission's versions of the uniform instructions if they provide information that is inconsistent with or contrary to the substantive procedures for completing and returning an absentee ballot. Additional administrative or logistical instructions also conflict with the commission's versions of the uniform instructions if they provide details regarding the substantive procedures for completing and returning an absentee ballot that have not been prescribed by the commission.

6.05(2)(c) If a municipality elects to provide administrative or logistical instructions pursuant to 6.05(2)(a) in addition to the uniform instructions, those instructions cannot be added to any page containing the commission's uniform instructions, including the blank reverse side of any page. They must appear on a separate, independent page to distinguish them from the versions of the uniform instructions that have been prescribed by the commission pursuant to s. 6.869.

6.05(2)(d) Nothing in subsection (1) above shall be interpreted to restrict a municipality's ability to complete the "Municipal Clerk Contact Information" section on the versions of the uniform instructions that have been prescribed by the commission.

6.05(3) ENFORCEMENT.

6.05(3)(a) This rule may be enforced pursuant to an administrative complaint brought under ss. 5.06 or 5.05.

6.05(3)(b) This rule may be enforced through an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in s. 5.06(1) provided that the condition in s. 5.06(2) is also satisfied.

6.05(4) EFFECTIVE DATE.

6.05(4)(a) This emergency rule is effective as of June 10, 2024.