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## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

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### Post-Election: Canvass and Recount

In Wisconsin, the results of an election are certified through a canvass process. That process may involve a municipal canvass, county canvass, and state canvass, depending on the offices and referenda involved in the election. After the canvass process, a candidate or voter may petition for a recount of an election to review the results of the election, if the candidate or voter satisfies certain criteria.

This Information Memorandum describes: (1) the municipal canvass, county canvass, and state canvass processes; and (2) the recount procedure, including who may petition for a recount, the requirements for a recount petition, and the appeal of a recount determination.

#### **CANVASS**

After each election in Wisconsin, the election results are certified through a canvass process, which involves municipal canvasses, county canvasses, and a state canvass.

#### ***MUNICIPAL CANVASS***

A municipal canvass is conducted by a municipal board of canvassers.<sup>1</sup> If a municipality constitutes one ward or combines all wards into a single polling place, the election officials (commonly referred to as “poll workers”) act as the board of canvassers. If a municipality uses more than one polling place, the board of canvassers consists of the municipal clerk and two qualified voters of the municipality appointed by the clerk. In the City of Milwaukee, the board of election commissioners serves as the board of canvassers.<sup>2</sup> [s. 7.53 (1) (a) and (2) (a) 1. and (c), Stats.]

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<sup>1</sup> A municipality may choose to canvass absentee ballots using a board of absentee ballot canvassers, rather than the municipal board of canvassers. A board of absentee ballot canvassers consists of the municipal clerk, or a voter designated by the clerk, and two other qualified voters of the municipality appointed by the clerk. [ss. 7.52 and 7.53 (2m), Stats.]

<sup>2</sup> A school district board of canvassers conducts the canvass for school district elections. Additional information about school district canvasses can be found in s. 7.53 (3), Stats.

### ***Examination and Statements***

After an election, the election officials prepare tally sheets that state the total number of votes cast for each office on the ballot in that election and for each individual receiving votes for that office and the vote for and against each proposition voted on. Upon completion of the tally sheets, the officials complete an “inspectors’ statement,” which states the excess, if any, by which the number of ballots exceeds the number of voters as shown by the poll list, as well as the number of the last voter as shown by the poll list. Then, the officials publicly announce the results from the statement. After the tallying procedure, the municipal clerk must deliver all ballots, statements, tally sheets, lists, and envelopes to the school district clerk or county clerk by the deadlines described below. [s. 7.51 (4) (a) and (5) (b), Stats.]

In addition, the municipal board of canvassers prepares a statement showing the results of each election for any municipal office or referendum. After each primary for municipal offices, the board prepares a statement certifying the names of those persons who have won nomination to office. After each other election for a municipal office or referendum, the board prepares a determination showing the names of the persons who are elected to each municipal office and the results of each municipal referendum. The board must file each statement and determination with the municipal clerk or, in the City of Milwaukee, with the board of election commissioners. [s. 7.53 (2) (d), Stats.]

### ***Timing***

In municipalities with one polling place, the election officials conduct the canvass on election night. If there are no provisional ballots and no absentee ballots being canvassed, the officials may complete and sign the canvass statement and determination on election night. If any voters of the municipality have cast provisional ballots, the election officials, acting as the board of canvassers, reconvene no later than 9:00 a.m. on the Monday after the election to count the valid provisional ballots and adjust the returns accordingly.<sup>3</sup> In other municipalities, the board of canvassers that conducts the canvass begins no earlier than the time that the board receives the returns from all polling places in the municipality on election night and no later than 9 a.m. on the Monday after the election. At the spring election, the board of canvassers declares the results on or before the third Tuesday in April. [s. 7.53 (1) (a) and (2) (d), Stats.]

In addition, each municipal clerk must deliver all ballots, statements, tally sheets, lists, and envelopes relating to a school district election to the school district clerk by 4:00 p.m. on the day following each such election, except that the municipal clerk must deliver to the school district clerk any amended statements, tally sheets, and lists for canvassed provisional ballots no later than 4:00 p.m. on the Monday after the election. The municipal clerk must deliver to the county clerk all ballots, statements, tally sheets, lists, and envelopes relating to any county, technical college district, state, or national election no later than 4:00 p.m. on the day following each such

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<sup>3</sup> The board of canvassers need not reconvene if the municipal clerk certifies that he or she has received no provisional ballots from the time that the board of canvassers completed the initial canvass and 4:00 p.m. on the Friday after the election. [s. 7.53 (1) (a), Stats.]

election,<sup>4</sup> except that the municipal clerk must deliver to the county clerk any canvassed provisional ballots together with amended statements, tally sheets, lists, and envelopes no later than 4:00 p.m. on the Monday after the election. [s. 7.51 (5) (b), Stats.]

### ***Certificates of Election***

A municipal clerk must issue a certificate of election to each person elected to any municipal office, as soon as the deadline for filing a petition for a recount has passed. If a recount petition is filed, the clerk may not issue the certificate of election for the office in question until the recount has been completed and the time allowed for filing an appeal has passed or, if appealed, until the appeal is decided. [s. 7.53 (4), Stats.]

### ***COUNTY CANVASS***

A county canvass is conducted by a county board of canvassers. The county clerk and two qualified voters of the county appointed by the clerk constitute the county board of canvassers. In Milwaukee County, the county board of election commissioners serves as the board of canvassers. [s. 7.60 (2), Stats.]

### ***Examination and Statements***

The county board of canvassers must publicly examine the returns and review the tally sheets and inspectors' statements received from the municipal clerks. If the board rejects any votes, it must specify the reasons for the rejection. [s. 7.60 (3) and (4) (c), Stats.]

The county board of canvassers prepares statements showing the numbers of votes cast for the offices of president and vice president; state officials; U.S. senators and representatives; state legislators; Wisconsin Supreme Court justice; court of appeals judge; circuit court judges; district attorneys; and metropolitan sewerage commissioners, if elected. The board prepares a statement showing the results of any county, technical college district, or statewide referendum. Each statement states the total number of votes cast in the county for each office; the names of all persons for whom the votes were cast; the number of votes cast for each person; and the number of votes cast for and against any referendum question. The board must report the statement to the Elections Commission, technical college district board, or board of canvassers of any other county affected by a specific election. [s. 7.60 (4) (a), Stats.]

In addition, the county board of canvassers prepares a written determination giving the names of the persons elected to any county office and certain judicial offices and showing the results of any county referendum. Following any primary election, the board prepares a statement certifying the names of all persons who have won nomination to county offices and certain judicial offices. [s. 7.60 (4) (b), Stats.]

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<sup>4</sup> In municipalities where absentee ballots are canvassed by a board of absentee ballot canvassers, the municipal clerk must deliver to the county clerk the ballots, statements, tally sheets, lists, and envelopes by 4:00 p.m. on the second day following the election. [s. 7.51 (5) (b), Stats.]

The county board of canvassers must file all statements and determinations with the county clerk or, in Milwaukee County, with the board of election commissioners. [s. 7.60 (4), Stats.]

### ***Timing***

The county board of canvassers must convene no later than 9:00 a.m. on the Tuesday after each election. [s. 7.60 (3), Stats.]

Immediately following the canvass, the county clerk must deliver or transmit statements to the Elections Commission relating to votes cast for certain offices<sup>5</sup> or referenda no later than nine days after each primary, except the partisan primary; no later than 10 days after the partisan primary and any other election, except the general election; and no later than 14 days after the general election. The board of canvassers must also deliver or transmit a certified copy of each statement for any technical college district referendum to the secretary of the technical college district board. [s. 7.60 (5) (a), Stats.]

### ***Certificates of Elections***

A county clerk must issue a certificate of election to each person who is elected to any county office, immediately after expiration of the time allowed to file a petition for a recount. If a recount petition is filed, the county clerk may not issue the certificate of election for the office in question until the recount has been completed and the time allowed for filing an appeal has passed or, if appealed, until the appeal is decided. [s. 7.60 (6), Stats.]

### ***STATE CANVASS***

A state canvass is conducted by the Elections Commission chairperson, or his or her designee. [s. 7.70 (3) (a), Stats.]

### ***Examination and Statements***

The Elections Commission chairperson or designee examines the statements of the county boards of canvassers. Following that examination, the chairperson or designee makes statements of the number of votes cast for the following offices: president; vice-president; governor; lieutenant governor; secretary of state; state treasurer; attorney general; state superintendent; U.S. senator; U.S. representative for each congressional district; state Legislature; Wisconsin Supreme Court justice; court of appeals judge; circuit court judge; district attorney; and metropolitan sewerage commissioners, if elected. In addition, the chairperson or designee makes a statement of the number of votes cast for any referenda question submitted by the Legislature. [s. 7.70 (3) (a) to (d), Stats.]

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<sup>5</sup> The votes cast for the following offices are reported to the Elections Commission: president and vice president; state officials; U.S. senators and representatives; state legislators; Wisconsin Supreme Court justice; court of appeals judge; circuit court judges; district attorneys; and metropolitan sewerage commissioners, if elected. [s. 7.60 (5) (a), Stats.]

### ***Timing***

The Elections Commission chairperson or designee must publicly canvass the returns and make the certifications on or before: (1) the second Tuesday after a spring primary; (2) May 15 after a spring election; (3) the third Wednesday after a partisan primary; (4) December 1 after a general election; (5) the second Thursday after a special primary; or (6) within 18 days after any special election. In addition, the chairperson or designee must conclude the state canvass within 10 days after its commencement. [s. 7.70 (3) (a) and (c), Stats.]

### ***Certificates of Election***

The Elections Commission must issue a certificate of election to each person who is elected to an office included in the state canvass, immediately after the expiration of the time allowed to file a petition for a recount. If a recount petition is filed, the Commission chairperson or designee may not issue a certificate of election until the recount has been completed and time allowed for filing an appeal has passed or, if appealed, until the appeal is decided. For presidential electors, the Commission must prepare a certificate showing the determination of the canvass results and the names of the persons elected. [s. 7.70 (5), Stats.]

### **RECOUNT**

In Wisconsin, a candidate or voter may petition for a recount of an election to review the results of an election.

#### ***PETITIONER***

Wisconsin law allows a candidate who is an “aggrieved party” or a voter who voted on a referendum question to petition for a recount. An “aggrieved party” means any of the following: (1) for an election at which 4,000 or fewer votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate by no more than 40 votes; or (2) for an election at which more than 4,000 votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate by no more than 1% of the total votes cast for that office. [s. 9.01 (1) (a) 1. and 5., Stats.]

#### ***PETITION***

Wisconsin law requires a person seeking a recount to file a petition with the clerk or body with whom nomination papers are filed for that office or with the clerk of the jurisdiction in which the referendum was called. A recount petition must be filed no earlier than the time of completion of the canvass and no later than by 5:00 p.m. on the third business day after the last meeting of the board of canvassers that determines the election for that office or referendum question. If the Elections Commission makes the determination for the office or referendum question, the petitioner must file a recount petition no later than 5:00 p.m. on the third business day after the day on which the Commission receives the last statement from a county board of canvassers for the election or referendum. For an election for president, a petitioner must file a recount petition no later than 5:00 p.m. on the first business day following the day on which the Elections Commission receives the last statement from a county board of canvassers for the election. [s. 9.01 (1) (a) 1., Stats.]

A recount petition must state all of the following:

- That at the election the petitioner was a candidate for the office in question or that the petitioner voted on the referendum question in issue.
- That the petitioner is informed and believes that a mistake or fraud has been committed in a specified ward or municipality in the counting and return of the votes cast for the office or upon the question or that another specified defect, irregularity, or illegality occurred in the conduct of the election.
- If the petitioner is a candidate voted for at the election for which the petitioner seeks a recount, that the petitioner is an aggrieved party.

The petition must also specify each ward, or each municipality where no wards exist, in which a recount is desired. If a recount is requested for all wards within a jurisdiction, each ward need not be specified. [s. 9.01 (1) (a) 2. and 3., Stats.]

### ***FEE***

Under Wisconsin law, a petitioner either receives a free recount or is required to pay a fee equal to the actual cost of the recount. In smaller elections, where 4,000 or fewer votes are cast, the petitioner is not required to pay a fee for a recount if the vote margin is less than 10 votes. In larger elections, where more than 4,000 votes are cast, the petitioner receives a free recount if the vote margin is 0.25% or less. If the vote margin is larger than the threshold for a free recount, the petitioner must pay the actual cost of the recount. [s. 9.01 (1) (ag) 1. and 2., Stats.]

In addition, a petitioner receives a fee refund if the result of the recount alters the outcome of the election. A petitioner is not entitled to a refund of the recount fee, however, if the recount results in a vote margin below 0.25% or 10 votes, but does not change the outcome of the election. [s. 9.01 (1) (ag) 3m., Stats.]

### ***PROCEDURE***

Wisconsin law provides that a clerk who receives a valid recount petition and any payment of the recount fee must notify the proper board of canvassers. If the Elections Commission receives a valid petition and payment, it must promptly order the proper county boards of canvassers to commence the recount. [s. 9.01 (1) (ar) 3., Stats.]

The board of canvassers reconvenes no earlier than 9:00 a.m. on the day following delivery of notice to all candidates regarding the petition and no later than 9:00 a.m. on the day following the last day for filing a petition. However, if the Elections Commission orders a recount, the county boards of canvassers convene no later than 9:00 a.m. on the third day after receipt of an order and may adjourn for not more than one day at a time until the recount is completed in the county. [s. 9.01 (1) (ar) 3. and (b) (intro.), Stats.]

When the board of canvassers convenes, it must recount the ballots in the wards or municipalities specified and review the allegations of fact contained in the recount petition. The

board follows a step-by-step process, which is detailed in state statutes, to recount the ballots.<sup>6</sup> [s. 9.01 (1) (b), Stats.]

The board of canvassers or the Elections Commission's chairperson, or the chairperson's designee, keeps complete minutes of all proceedings before the board or Commission. The minutes include a record of objections and offers of evidence. In addition, the board or chairperson makes specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount. Upon the completion of its proceedings, a board of canvassers delivers one copy of the minutes to the Commission and one copy to the chief officer of a political party whose candidate appears on the ballot for national, state, or county office under the name of the political party. [s. 9.01 (5) (a) and (bm), Stats.]

If the recount is conducted by a municipal or county board of canvassers and the result is required to be reported to a county board of canvassers or to the Elections Commission chairperson, or the chairperson's designee, the board of canvassers making the initial recount immediately certifies the results to the county board of canvassers or to the Commission chairperson or designee. If a county board of canvassers receives such results, it then convenes not later than 9:00 a.m. on the next business day following receipt to examine the returns and determine the results. If the Commission chairperson or the chairperson's designee receives such results, the chairperson or designee examines the returns and determines the results not later than 9:00 a.m. on the third business day following receipt or by the deadline for the Commission to canvass an election.<sup>7</sup> [s. 9.01 (5) (c), Stats.]

## ***APPEAL***

### ***Circuit Court***

Under Wisconsin law, any candidate, or any voter when for a referendum, aggrieved by the recount may appeal to circuit court within five business days after completion of the recount determination. If an appeal is filed from a recount determination in an election that is held in more than one judicial circuit, the chief judge of the judicial administrative district in which the election is held consolidates all appeals relating to that election and appoints a circuit court judge to hear the appeal. If the election is held in more than one judicial administrative district, the chief justice of the Wisconsin Supreme Court makes the appointment. [s. 9.01 (6), Stats.]

The appeal is heard by a judge without a jury. Within the time ordered by the court, the appellant files a complaint enumerating, with specificity, every alleged irregularity, defect, mistake, or

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<sup>6</sup> All steps of the recount are performed publicly. Generally, all materials and ballots may be viewed and identified by the candidates, the petitioner, and their authorized representatives and counsel, but only members of the board of canvassers and tabulators assisting them may touch any of the materials or ballots. The candidates, petitioner, and their authorized representatives and counsel may object to the counting of any ballot. Any errors must be corrected. [s. 9.01 (1) (b) 11., Stats.]

<sup>7</sup> Returns from a recount ordered by the Elections Commission must be transmitted to the Commission as soon as possible, but no later than 13 days from the date of the Commission's order for the recount. The Commission chairperson or the chairperson's designee need not recount actual ballots, but must verify the returns of the county boards of canvassers in making his or her determinations. [s. 9.01 (1) (ar) 3., Stats.]

fraud committed during the recount. The other parties to the appeal file an answer. The court summarily hears and determines the matter. [s. 9.01 (7), Stats.]

Unless the court finds a ground for setting aside or modifying the determination of the board of canvassers or the Elections Commission chairperson or designee, the court must affirm the determination. The court must set aside or modify the determination of the board or Commission if it finds that the board or the Commission chairperson or designee erroneously interpreted a provision of law and a correct interpretation compels a particular action. If the determination depends on any fact found by the board or Commission, the court may not substitute its judgment for that of the board, chairperson, or designee as to the weight of the evidence of any disputed finding of fact. The court must set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence. [s. 9.01 (8), Stats.]

### ***Court of Appeals***

Within 30 days after the circuit court enters its order, an aggrieved party may appeal to the court of appeals. If an appeal is filed for an election that is held in more than one court of appeals district, the chief justice of the Wisconsin Supreme Court consolidates all appeals relating to that election and designates one district to hear the appeal, except that if an appeal is filed for an election for statewide office or statewide referendum, the appeal is heard by the Fourth District Court of Appeals. The court of appeals must give precedence to the appeal over other matters not accorded similar precedence by law. [s. 9.01 (9), Stats.]

### ***EXCLUSIVE REMEDY***

Wisconsin law provides that the recount procedure is the exclusive judicial remedy for testing the right to hold an elected office as the result of an alleged irregularity, defect, or mistake committed during the voting or canvassing process. [s. 9.01 (11), Stats.]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Jessica Karls-Ruplinger, Deputy Director, on July 27, 2018.