

ORDER OF THE WISCONSIN ELECTIONS COMMISSION

EMERGENCY RULE

The Wisconsin Elections Commission (“Commission”) adopts the following emergency rule to amend EL Chapter 6 and create EL 6.06 relating to the correction of absentee ballot certificate envelopes.

The scope statement for this rule was approved by the Office of Wisconsin Governor Tony Evers on February 3, 2022, and SS [009-22](#) was published in Administrative Register [794A1](#) on February 7, 2022. The Commission adopted the scope statement at its March 9, 2022, meeting.

FINDING OF EMERGENCY

The Commission need not make a finding of emergency, as this rule promulgation was directed by a unanimous vote of the Commission on January 28, 2022, as a response to a s. [227.26 \(2\) \(b\)](#) Stats. order by the Joint Committee for the Review of Administrative Rules (“JCRAR”) dated January 10, 2022.

RULE SUMMARY

Statutes Interpreted:

Section [6.87](#), Stats.

Statutory Authority:

Sections [5.05 \(1\)](#), [6.869](#), [7.08 \(3\)](#), and [227.11 \(2\) \(a\)](#), Stats.

Explanation of Agency Authority:

Section [5.05 \(1\)](#), Stats., grants the Commission authority to administer Chapters 5-10 and 12 of the Wisconsin Statutes, as well as other laws relating to elections and elections campaigns, with the exception of campaign finance. Section [5.05 \(1\) \(f\)](#), Stats., also states that the Commission may, “Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.”

Related Statute or Rule:

Section [6.87](#), Stats.

Plain Language Analysis:

As provided in s. [6.87 \(6d\)](#), Stats., an absentee ballot may not be counted if the certificate is missing the address of a witness. The Commission formally approved and issued guidance on this topic shortly after the creation of that statutory provision. This emergency rule would formally promulgate that guidance into an administrative rule which authorizes clerks to correct or seek correction of any missing address information for the witnesses signing the certificate on behalf of the voter.

This rule will also mitigate voter disenfranchisement because of relatively preventable clerical errors in a witness address on an absentee certificate envelope. It also defines what precisely an “address” is, as it pertains to the applicable statutory requirements. The Commission determined that clerks must take corrective action in an attempt to remedy a witness address error. If clerks are reasonably able to discern some missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope.

Summary of, and Comparison With, Existing or Proposed Federal Regulations:

This rule process is directly related to the interpretation of Wisconsin Statutes and is not a reflection of any federal regulation.

Comparison With Rules in Adjacent States:

Illinois Code 10 ILCS 5/19-8 provides the following:

If a vote by mail ballot is rejected by the election judge or official for any reason, the election authority shall, within 2 days after the rejection but in all cases before the close of the period for counting provisional ballots, notify the vote by mail voter that his or her ballot was rejected. The notice shall inform the voter of the reason or reasons the ballot was rejected and shall state that the voter may appear before the election authority, on or before the 14th day after the election, to show cause as to why the ballot should not be rejected. The voter may present evidence to the election authority supporting his or her contention that the ballot should be counted. The election authority shall appoint a panel of 3 election judges to review the contested ballot, application, and certification envelope, as well as any evidence submitted by the vote by mail voter. No more than 2 election judges on the reviewing panel shall be of the same political party. The reviewing panel of election judges shall make a final determination as to the validity of the contested vote by mail ballot. The judges' determination shall not be reviewable either administratively or judicially.

Minnesota Statute § 203B.121 similarly addresses the issue of mailed ballot deficiencies:

If a majority of the members of the ballot board examining a signature envelope find that an absentee voter has failed to meet one of the requirements provided in paragraph (b), they shall mark the signature envelope "Rejected," initial or sign it below the word "Rejected," list the reason for the rejection on the envelope, and return it to the county auditor. There is no other reason for rejecting an absentee ballot beyond those permitted by this section. Failure to place the ballot within the secrecy envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot. If an envelope has been rejected at least five days before the election, the envelope must remain sealed and the official in charge of the ballot board shall provide the voter with a replacement absentee ballot and signature envelope in place of the rejected ballot. If an envelope is rejected within five days of the election, the envelope must remain sealed and the official in charge of the ballot board must attempt to contact the voter by telephone or e-mail to notify the voter that the voter's ballot has been rejected. The official must document the attempts made to contact the voter.

Research indicates that more than twenty states have some form of code or statute-based regulations detailing how to rectify challenges or deficiencies on ballot envelopes. This includes processes for curing the deficiency, re-voting and spoiling the deficient envelope/ballot, and contacting the voter under these varied circumstances.

Summary of Factual Data and Analytical Methodologies:

The Commission formally examined the risk of voter disenfranchisement in light of new statutory requirements, as it pertains to missing absentee ballot certificate information, several years ago. Commission staff were tasked with researching and presenting viable solutions. This review led to the conclusion that many instances of potential disenfranchisement could be avoided through proactive measures by the municipal clerk. The Commission's selected solution was issued in the form of 2016 guidance. That guidance was recently reassessed by the Commission against alternative solutions, and the original guidance was still found to be the best solution. The Commission thereby directed staff to promulgate the guidance into an emergency administrative rule.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis:

None, the proposed rule will affect clerks and election officials, although it is likely to provide necessary clarity, authority, and streamline certificate envelope correction processes. The proposed rule will do so by codifying existing practices and will require minimal compliance outreach and training to clerks because of their familiarity with the 2016 guidance. As such, there will be little to no financial impact on local officials or small businesses.

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Comments may be submitted directly to the agency contact person.

RULE TEXT

Section 1. EL 6.06 is created to read:

EL 6.06 Correction of Absentee Ballot Certificate Envelopes. Under s. [6.87 \(6d\)](#), Stats., a ballot may not be counted if the certificate is missing the address of a witness.

(1) A complete address, for the purposes of s. [6.87 \(6d\)](#), Stats., must contain the entire street number, street name, and name of municipality in the witness address column of the certificate.

(2) If one or more of the address requirements provided in sub. (1) is missing or inaccurate, the municipal clerk, as defined in s. [5.02 \(10\)](#), Stats., must take one or more of the following corrective actions in an attempt to remedy the missing or inaccurate information:

(a) The municipal clerk is not required to contact the voter, and may personally correct the certificate deficiency, if the municipal clerk can reasonably discern any missing or inaccurate information from outside sources, through independent research, or based on personal knowledge.

(b) The municipal clerk is required to attempt contact with the voter if the missing or inaccurate information cannot be reasonably discerned as provided in sub. (2) (a). The voter must be advised that the ballot will not be counted if the address remains uncorrected. The municipal clerk shall assist in rehabilitating a deficient or incorrect certificate by offer of the following options:

1. The voter may be allowed to appear at the office of the municipal clerk to personally add or correct the deficient address information.

2. The voter may be allowed to provide the missing or corrective information to the municipal clerk by phone, fax, email, mail, or other available means. The municipal clerk will then add or correct the deficient address information. Correction must be done by striking a line through the inaccurate information, adding the accurate information, and applying the initials of the municipal clerk making the change to the certificate envelope, immediately adjacent to the correction.

3. The voter can request that the municipal clerk return the certificate to the voter by mail or another form of delivery, so the voter can personally perform the correction. The municipal clerk must include a self-addressed, stamped or postage prepaid envelope with the returned certificate. The voter will then return the corrected certificate using the provided envelope, or by any other lawful means of return.

4. The voter may request that the municipal clerk spoil the original ballot. The municipal clerk will mail a second ballot and new certificate envelope to the voter if sufficient time remains to vote and return the ballot. The voter may otherwise opt to vote in person by any lawful means in lieu of continuing the absentee ballot processes.