

ORDER OF THE WISCONSIN ELECTIONS COMMISSION EMERGENCY RULE

The Wisconsin Elections Commission adopts the following emergency rules to create EL 2.06 and 2.08 relating to challenge procedures for declarations of candidacy.

The statements of scope for this rule, SS 089-23, 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 May 23, 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 8.21, Stats.

Statutory Authority:

Sections 5.05(1), 8.07, and 227.11(2)(a), Stats.

Related Statutes:

Sections 8.04, 8.10, 8.15, 8.20, and 8.50, Stats.

Plain Language Analysis:

All candidates for local, state, and federal office in Wisconsin, except presidential electors, are required to file a Declaration of Candidacy with the appropriate filing officer. Wis. Stat. § 8.21(1). The Declaration of Candidacy must be sworn before a notary or other officer authorized to administer oaths. Wis. Stat. § 8.21(2). In the Declaration of Candidacy, each candidate states that he or she either meets, or will at the time he or she assumes office meet, any applicable requirements for holding office. Wis. Stat. § 8.21(2). Section 8.30 is the companion statute to § 8.21. The Commission and local filing officers have statutory authority to refuse to place a candidate's name on the ballot if any of the specified situations in § 8.30(1)(a), (b), or (c) apply, or if the Declaration of Candidacy is not timely filed. Wis. Stat. § 8.30(4). The proposed rule would

create a clear administrative process for an individual to challenge any aspect of a candidate's sworn Declaration of Candidacy, but not their nomination papers. The challenge to the Declaration of Candidacy would be brought to the Commission, or to the local filing officer. The proposed rule would identify the legal grounds for bringing these types of challenges by incorporating or cross-referencing the appropriate provisions in § 8.21, § 8.30, or both. The proposed rule would also describe the procedures by which the Commission or filing officer hear and decide these complaints, as well as the ability of an individual to seek review of the Commission's or filing officer's decision on their complaint.

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

There are no existing or proposed federal statutes or regulations that address challenge procedures for declarations of candidacy filed in Wisconsin.

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 a variety of written comments from the public regarding the scope statements for the challenge procedures for declarations of candidacy. All of the comments received for the declaration of candidacy statements of scope address subjective grounds for those types of challenges that are outside the scope statements, such as character. Subjective criteria such as "character" is not within the proposed rulemaking scope of any of the scope statements. No comments offered any suggested changes. The Commission reviewed the 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 law is very similar to the expanded procedures that would be effectuated by the proposed administrative rule. Illinois law requires candidates to file "Statements of Candidacy" and "Nominating Sheets" of signatures. Individuals may file "petition objection cases" to challenge the sufficiency of nominating sheets. Objection petitions must include an original and two copies, and are filed with the State Board of Elections, the election authority, or local election official with whom the nomination petition was filed. Once the objection is received, the filing officer transmits it no later than noon on the second business day to the chair of the proper electoral board and to the candidate who filed the nominating sheets. Within 24 hours of the receipt of the objecting petition, the appropriate electoral board notifies the objector and the candidate the day, hour and place at which the electoral board will hear the objection. The appropriate electoral board must meet not less than three nor more than five days after receipt of the objecting petition. At the first day of the meeting, the electoral board adopts rules and procedures for the introduction of evidence and the presentation of arguments and may, in its discretion, provide for the filing of briefs by the parties to the objection or by other interested persons. Within five days of the electoral board's decision, the candidate or objector aggrieved may petition for judicial review in the appropriate circuit court. The circuit court will then hear and decide the judicial review petition within 30 days.

Iowa law is very similar to current Wisconsin practices under the existing administrative rules. Iowa law requires candidates to file an "Affidavit of Candidacy" and "Nomination Petitions" with the appropriate filing officer. Nomination papers are inspected for completeness before they are

accepted for filing. Iowa law permits challenges, called “objections,” to both nomination papers and affidavits of candidacy. Objections must be made in writing, and can be brought by anyone who would have a right to vote for the candidate for office. Objections are filed with the officer with whom the nomination papers are filed. When an objection is filed, notice is mailed within 72 hours to the candidate. Objections filed with the state commissioner are decided by the State Objections Panel, comprised of the Secretary of State, State Auditor, and Attorney General. Objections filed with the county commissioner are considered by three county officers. Objections filed with the city clerk are considered by the mayor, clerk, and one city council member. Objections relating to incorrect or incomplete information shall be sustained.

Michigan law has a few different procedures for nomination paper review, but their challenge process is substantively similar to Wisconsin’s current practice. Michigan law requires candidates to file “Nomination Petitions” and an “Affidavit of Candidacy.” Michigan law permits candidates for its Legislature to pay a filing fee in lieu of filing nomination papers; those candidates cannot be challenged for insufficient signatures. Michigan utilizes a petition sampling procedure to evaluate the validity of ballot signatures. Board of Elections staff utilize a single-step random sampling process using specially designed software. Once generated, the sample list is distributed for challenges. BOE staff review the sample signatures twice for sufficiency, and again if they are challenged. Challenges may be filed up to seven days following the filing deadline. The challenge must specify each signature being challenged and why. To challenge anything other than specific signatures, a full written description of what is being challenged must be submitted. Challenges are filed with the appropriate filing officer. The Board or county clerk is responsible for resolving any challenges and certifying qualified candidates the ballot.

Minnesota ballot access law and procedure are very different from Wisconsin for both the current rules and proposed rules. Minnesota requires candidates to submit an “Affidavit of Candidacy,” and most major party candidates choose to pay a filing fee to the appropriate filing officer in lieu of filing “Nomination Petitions.” For the minority of candidates who do file nomination papers, Minnesota filing officers examine nomination petitions for sufficiency and substantial compliance. There are different verifying procedures for major party and minor party candidates. Instead of an administrative challenge or process, Minnesota allows individuals to file a petition for the correction of errors, omissions, or wrongful acts for ballot access. The petition is filed in court, which then immediately sets a hearing on the matter. The court then issues its findings and a final order.

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 candidates, their representatives, and the public. Commission staff informally collected anecdotal evidence, which highlighted a concern that current ballot access procedures were vague and insufficient to address procedural issues in recent years.

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

EL 2.06 Treatment and Sufficiency of Declarations of Candidacy

2.06(1) DEFINITIONS. Except as provided below, all applicable definitions from EL 2.05(1) are incorporated into this section.

2.06(1)(a) “Declaration of Candidacy” means a document that meets the requirements of s. 8.21, Stats. and is filed by any candidate, except a presidential elector, seeking local, state, or federal office.

2.06(2) FILING OF DECLARATION OF CANDIDACY

2.06(2)(a) Each candidate for public office has the responsibility to assure that his or her declaration of candidacy is prepared, sworn, signed and filed in compliance with statutory and other legal requirements.

2.06(2)(b) In order to be timely filed, all declarations of candidacy shall be in the possession of the filing officer by the statutory deadline. Emailed or faxed copies of declarations of candidacy will be accepted pursuant to EL 6.04(2) and (3).

2.06(2)(b)1. An amended declaration of candidacy filed pursuant to s. 8.21(6), Stats., does not make the declaration of candidacy untimely filed so long as the original declaration of candidacy was filed by the statutory deadline.

2.06(3) SUFFICIENCY OF DECLARATION OF CANDIDACY, GENERAL

2.06(3)(a) The filing officer shall review all declarations of candidacy filed with it to determine the facial sufficiency of the declaration filed. Nothing in this provision shall constitute a defense against a challenge to the sufficiency of a declaration of candidacy. Facial review completed by a filing officer before the filing deadline is done as a courtesy only and does not bind a filing officer to a final determination of ballot access.

2.06(3)(b) Any facially sufficient information which appears on a declaration of candidacy is entitled to a presumption of validity.

2.06(3)(c) Errors in information contained in a declaration of candidacy may only be corrected by filing an amended declaration of candidacy. Declarations of candidacy cannot be amended by filing a correcting affidavit.

2.06(3)(d) The declaration of candidacy must contain all of the information required by s. 8.21, Stats. If it does not, the filing officer shall not accept it. This section does not apply if there are errors in the sworn certification made before any officer authorized to administer oaths.

2.06(4) SUFFICIENCY OF DECLARATION OF CANDIDACY, CERTIFICATION INFORMATION. In this section, “certification information” means the candidate’s name and the official name of the office sought.

2.06(4)(a) In the candidate certification information section, a candidate must provide their name in the form specified under s. 8.10(2)(b), Stats., for candidates for nonpartisan office or s.s. 8.15(5)(a) or 8.20(2)(a), Stats., for candidates for partisan office.

2.06(4)(b) In the official name of office line, a candidate must provide the named office required by s. 8.21(2)(a), Stats. The named office shall include the district, branch, or seat number.

2.06(4)(b)1. For legislative offices, the named office shall include the title and district number.

2.06(4)(b)2. For district attorneys, the named office shall include the title and the county.

2.06(4)(b)3. For circuit court offices, the named office shall include the title, county, and branch number.

2.06(4)(b)4. For municipal and school board offices, the named office shall include the title and any district seat number.

2.06(5) SUFFICIENCY OF CANDIDATE ADDRESS AND NAME ON BALLOT

2.06(5)(a) State and local candidates must provide their residential address and municipality for voting purposes. The residential address shall include the street and number, and cannot be a mailing address. This information is not required for federal offices.

2.06(5)(b) All candidates must include their name in the form in which it will appear on the ballot. The candidate’s preferred ballot name cannot contain the word “incumbent,” include a professional title, or include an attempt to manipulate the electoral process. An

intended name containing a nickname or initial, middle name, or former legal surname is permitted, provided that it does not include quotation marks or parentheses.

2.08 CHALLENGES TO DECLARATIONS OF CANDIDACY

2.08(1) DEFINITIONS All applicable definitions from EL ss. 2.05(1), 2.06(1), and 2.07(1) are incorporated into this section.

2.08(2) PROCEDURE AND TIMELINE. Any challenge to the sufficiency of a declaration of candidacy brought under this section shall be filed with the appropriate filing officer. The filing officer shall apply the standards in EL 2.06 and s. 8.21, Stats., to determine the sufficiency of declarations of candidacy. Unless otherwise specified, this subsection contains the exclusive procedure by which challenges to declarations of candidacy may be brought. The filing officer shall make declarations of candidacy available for public inspection, either physically or electronically, within 1 business day of when they are filed.

2.08(2)(a) Form of challenges to declarations of candidacy. A challenge is a short, plain statement of the basis upon which the challenger seeks to invalidate a declaration of candidacy filed by a candidate. All factual allegations upon which the challenge relies must be verified by one or more persons who certify that they possess personal knowledge of the facts alleged therein. Individuals other than the challenger may support a challenge with sworn affidavits or declarations pursuant to s. 887.015, Stats. A brief or summary of the legal standards applicable to a challenge and their application to the alleged facts may be filed simultaneously with, or as part of, the challenge and any affidavits or declarations pursuant to s. 887.015, Stats. The brief or summary need not be verified, but if it is prepared by an attorney, that attorney must sign the brief and that signature should meet the requirements of s. 802.05, Stats.

2.08(2)(b) Deadlines for filing a challenge. Any challenge shall be filed by 5 p.m. on the third calendar day after the filing deadline for the challenged declaration of candidacy. The challenge must be in the physical or electronic possession of the filing officer by 5 p.m. of the challenge deadline. If a challenge is submitted on a Saturday, Sunday, or legal holiday, it must be submitted via facsimile transmission or electronic mail. Challenges received after 5 p.m. on the challenge deadline shall not be accepted.

2.08(2)(c) Filing challenges to declarations of candidacy.

2.08(2)(c)1. Filing challenges electronically to declarations of candidacy. A challenger may choose to file a challenge electronically. The filing officer will make instructions for filing challenges electronically publicly available no less than 24 hours before the start of the circulation period. Challenges that are filed electronically must conform to those instructions. If the challenge and all supporting materials are filed in electronic form, the filing officer shall electronically transmit a copy of the challenge to the challenged candidate within 4 hours of the deadline for filing the challenge complaint.

2.08(2)(c)2. Filing challenges in paper form to declarations of candidacy. If the challenge and supporting materials are filed in paper form, the filing officer shall deliver a copy to the challenged candidate, either in paper or electronic form, no later than noon the day after the challenge is filed. Along with a copy of the challenge, the filing officer shall also provide the challenged candidate with notice of the response deadline, as well as notice that the procedures governing declaration of candidacy challenges are covered by this chapter.

2.08(2)(d) The challenge shall establish by clear and convincing evidence, presented in the sworn challenge, an accompanying affidavit, or exhibits, which demonstrate that the declaration of candidacy is insufficient pursuant to s. 8.21, Stats. The filing officer must review the evidence submitted when deciding the challenge.

2.08(2)(e) A response to a challenge is a short, plain statement of the basis upon which the challenged candidate asserts that their declaration of candidacy is sufficient pursuant to s. 8.21, Stats. All factual allegations upon which the response relies must be verified by one or more persons with personal knowledge of the facts alleged therein. Individuals other than the challenged candidate may support a response with additional affidavits. A brief or summary of the legal standards applicable to the challenged declaration of candidacy and the application of those legal standards to the alleged facts may be filed simultaneously with the response and any affidavits. The brief or summary need not be verified, but if it is prepared by an attorney, that attorney must sign the brief and that signature should meet the requirements of s. 802.05, Stats.

2.08(2)(f) If the challenged candidate elects to file a response to the challenge to their declaration of candidacy, that response shall be filed, by the candidate challenged, by 5 p.m. of the third calendar day after the date the challenge was filed. The response must be in the physical or electronic possession of the filing officer by 5 p.m. of the response deadline. If a response is submitted on a Saturday, Sunday, or legal holiday, it must be submitted via facsimile transmission or electronic mail. Responses received after 5 p.m. on the response deadline shall not be accepted. If the challenged candidate elects to file a response and/or any correcting affidavits electronically, the filing officer shall electronically transmit a copy of those materials to the challenger within 4 hours of the deadline for filing those materials; if the challenge and supporting materials are filed in paper form, the filing officer shall deliver a copy to the challenger, either in paper or electronic form, no later than noon on the day after those materials are filed.

2.08(2)(g) If a challenged candidate files a response, the challenger may file a short rebuttal brief and one or more rebuttal affidavits. If the challenger elects to file a rebuttal brief and rebuttal affidavits, those materials shall be filed by the challenger within 24 hours of the filing officer's transmission of the response. A rebuttal brief need not be verified, but if it is prepared by an attorney that attorney must sign the brief and that signature should meet the requirements of s. 802.05, Stats. The rebuttal brief and rebuttal affidavits must be in the electronic possession of the filing officer within 24 hours from the filing officer's transmission of the response. Any rebuttal brief and any rebuttal affidavits must be submitted via facsimile transmission or electronic mail. Paper copies of rebuttal briefs and

rebuttal affidavits will not be accepted. Rebuttal briefs and rebuttal affidavits received after the applicable deadline shall not be accepted.

2.08(2)(h) After the deadline for filing any rebuttal brief and rebuttal affidavits, but not later than the date for certifying candidates to the ballot, the filing officer shall decide the challenge. In deciding the challenge, the filing officer may elect to hold a hearing if the filing officer deems that such a hearing would assist them in the adjudication of the challenge; however, a filing officer is not required to hold a hearing.

2.08(2)(i) Hearing. If the filing officer elects to hold a hearing, the procedures for the hearing shall accord with this section. The hearing should be noticed in advance and open to the public in compliance with ss. 19.81 – 19.98, Stats. The filing officer shall conduct the hearing in a manner that affords the same offered rights and opportunities to all parties. If the filing officer elects to accept oral presentations from the parties or their assigned representative, the same opportunity must be afforded to all parties. Factual evidence should not be received at a hearing unless the filing officer elects to swear in witnesses, in which case all witnesses must be sworn in.

2.08(3) BURDENS. The initial burden is on the challenger to establish any deficiency in the challenged candidate's declaration of candidacy. If the challenger makes an initial showing by clear, satisfactory, and convincing evidence that establishes the declaration of candidacy is insufficient pursuant to s. 8.21, Stats., the burden shifts to the challenged candidate to establish the sufficiency of the declaration of candidacy by clear, satisfactory, and convincing evidence.

2.08(4) BASIS FOR CHALLENGES. An administrative challenge to the sufficiency of a declaration of candidacy may only be brought on one or more grounds in this subsection. The challenge should allege with specificity the ground or grounds of each challenge.

2.08(4)(a) Certification, Missing Information. A challenge may be brought if any of the information in the candidate certification section is missing or incomplete, including the candidate's name and the official name of the office.

2.08(4)(b) Certification, Qualifications. A challenge may be brought to the candidate's certification on the declaration of candidacy that they possess qualifications to run for the office identified. A challenge under this ground shall be limited to the sworn statements that are required by ss. 8.21(2) and 8.21(4), Stats. A challenge to sworn statements required by s. 8.21(4), Stats., shall only be brought against candidates for state and local office.

2.08(4)(c) Candidate Address. A challenge under this ground may only be brought against candidates for state and local office pursuant to s. 8.21(4), Stats. A challenge may be brought if the present address, including the municipality for voting purposes, is missing, incomplete, or incorrect. A challenge may also be brought under this ground if this information is inconsistent with a candidate's nomination papers.

2.08(4)(d) Candidate Name on Ballot. A challenge may be brought if the name the candidate wishes to appear on the ballot is missing. A challenge may also be brought under

this ground if this information is inconsistent with a candidate's nomination papers. A challenge may also be brought if the intended name of the candidate on the ballot contains the word "incumbent," includes a professional title, or includes an attempt to manipulate the electoral process. This section cannot serve as a basis for a challenge if the candidate has provided a last name plus first name, nickname or initial, middle name, or former legal surname, provided the name does not otherwise violate this provision and also does not include quotation marks or parentheses.

2.08(4)(e) Sworn Statement. A challenge may be brought if the declaration of candidacy has not been sworn to before any officer authorized to administer oaths per ss. 8.21(2) and 8.21(5), Stats.

2.08(4)(f) Timeliness of Filing. A challenge may be brought if the declaration of candidacy was not timely filed pursuant to s. 8.21(1), Stats.

2.08(5) DECISION OF FILING OFFICER. If the filing officer elects not to hold a hearing, the filing officer must promptly issue a written decision on the challenge and a signed order memorializing their disposition of the challenge within 3 calendar days of the date for certifying candidates to the ballot. If the filing officer elects to hold a hearing and announces an oral ruling during that hearing, any party seeking to appeal from the filing officer's adjudication of a challenge decided at the hearing may submit a proposed order, memorializing the filing officer's ruling, to the filing officer for adoption and signature. The filing officer shall promptly transmit all signed orders to the challenger and challenged candidate electronically. The filing officer may draft and sign their own order rather than using a version proposed by any party.

2.08(6) APPEAL. Any order of a local filing officer disposing of a challenge may be appealed to the commission pursuant to ss. 5.05 or 5.06, Stats. The party aggrieved by the filing officer's decision shall notify the commission of its intent to appeal within 48 hours of receipt of the filing officer's signed order. The commission administrator, in consultation with the commission chair, shall establish a briefing schedule that will allow for a commission decision before the deadlines before ballot printing. Any signed order of the commission disposing of a challenge or adjudicating an appeal from a local filing officer's order disposing of a challenge may be appealed to a circuit court pursuant to s. 5.06(8), Stats.