

Testimony of the Wisconsin Elections Commission

**Joint Committee on Finance
December 3, 2018**

**Room 412 East, State Capitol
Public Hearing**

Assembly Bill 1071

Co-Chairpersons Darling and Nygren and Committee Members:

Thank you for the opportunity to provide the testimony of the Wisconsin Elections Commission (WEC) regarding Assembly Bill 1071. The WEC has reviewed this bill, and this testimony reflects the Commission's position on the bill. It is provided for information purposes.

AB 1071 would move the Presidential Preference Primary to the second Tuesday in March and make other changes to in-person absentee voting and absentee voting by overseas and military voters.

Under AB 1071 as drafted, it would be extraordinarily difficult to accomplish an additional election date given the existing statutory framework. We are aware of multiple conflicts not resolved with this legislation and are concerned that completion of mandatory election tasks may not be feasible. We are also concerned that the costs associated with AB 1071 will be significant and no funding is provided.

Presidential Preference Primary Date

Wisconsin's Presidential Preference Primary has been held in conjunction with either the Spring Election or the Spring Primary for decades. Since 1948, turnout in Presidential Preference Primaries has averaged 37 percent of the state's voting age population, with a high of 50 percent in 1960 and low of 22 percent in 2000. At the 2016 Presidential Primary held in April, turnout was 47.4 percent.

In three cases over the last two decades, the Presidential Preference Primary was not held in April: 1996 when it was held on March 19 in conjunction with an earlier Spring Election, and in 2004 and 2008, when it was held in conjunction with the Spring Primary in February. While Wisconsin has shifted its Presidential Primary between the dates of the Spring Primary in February and the Spring Election in March, it has never held a completely separate Presidential Preference Primary.

Last week, the Legislative Fiscal Bureau requested a high-level cost estimate in the event that the 2020 Presidential Primary is moved to a date in March rather than holding it during the Spring Election as currently required by statute. Given the short turnaround, we provided the limited information we have available with the understanding that it is incomplete and has not been fully vetted in the way that a formal fiscal estimate would be created. We can anticipate some of the additional costs but have not had time to consult with local election officials or WEC staff to determine whether other costs should be included.

As a result of legislative and public interest in the cost of administering elections, the former Government Accountability Board began collecting cost data from county and municipal election officials beginning in April of 2012 until the WEC decided to end the practice following the 2017 Spring Election.

During this time, local officials reported costs specific to each election, including costs for publishing notices, printing ballots, sending absentee ballots, programming and testing voting equipment and purchasing memory devices, operating polling places, hiring poll workers, staff time, and miscellaneous costs.

At a very high level, these cost reports can provide initial estimates of what it may cost to conduct a separate election, but the figures include several caveats. For instance, there were inconsistencies in how local clerks reported cost data and whether it is assigned to a specific election or to a separate calculation for annual costs. Some municipalities did not report their cost data. And the cost figures have not been confirmed or audited by WEC staff.

Cost data for each county and municipality for the 2016 Spring Election, which included the Presidential Primary, can be found on the WEC website under “2016 Presidential Preference and Spring Election – Specific Costs Report EL-191 2016-10-07” at this link:

<https://elections.wi.gov/publications/statistics/gab-190/2016-spring-election-presidential-primary>.

Cost data for each county and municipality for the 2017 Spring Election, which did not include a Presidential Primary, can be found under “EL-191 2017 Spring Election Cost Report Final” at this link: <https://elections.wi.gov/publications/statistics/gab-190/2017-spring-election>.

Based on the data reported by local election officials, the costs for local jurisdictions of conducting the 2016 Presidential Preference and Spring Election totaled approximately \$6,809,866 and the costs of conducting the 2017 Spring election totaled approximately \$6,470,528.

An additional cost for a separate Presidential Primary, which may be significant for counties, is the purchase or lease of memory devices for electronic voting equipment. Memory devices tabulate and store election results, and under state and federal law, the data contained on memory devices cannot be transferred to another medium for retention until 14 days after a primary election or 21 days after any other election. Wis. Stat. § 7.23(1)(g).

Typically, the same memory devices can be used for the Spring Primary and the Spring Election, though the timeline is tight to clear the memory devices and program them for the next election. Memory devices are programmed at the time that ballot formats are prepared by county clerks to be delivered to the ballot printer. Ballots must be made available to absentee electors at least 21 days before the Spring Primary and at least 47 days before an election involving a federal office.

After a Spring Primary, memory devices are programmed as soon as possible after results are certified to prepare ballots for the Spring Election. Because ballots would need to be available 47 days before a Presidential Primary in March, memory devices for that election would need to be programmed by early January, which is also the timeline for programming memory devices for the Spring Primary.

Due to these time constraints, counties and municipalities will not be able to use the same memory devices for a Spring Primary in February and a Presidential Preference election held in March. Some jurisdictions may have additional memory devices on hand, and the costs will vary for those jurisdictions which need to obtain additional devices. Dane County and Marathon County have each advised the WEC that they would anticipate additional cost of approximately \$9,000 to obtain memory devices for its municipalities for an additional election. This is an example of a cost that is not represented in the figures reported for the 2016 and 2017 spring elections because the memory devices used at the Spring Primary can normally be cleared and re-used.

Other unknown costs at this time relate to administrative and procedural changes in the election cycle and calendar, and we expect that implementing the changes would pose challenges for our staff and local election officials. Deadlines and timelines would overlap for the February and March elections. This would require the WEC to make changes to its clerk training and voter information resources. The WEC would also need to make significant changes to WisVote, the statewide voter registration system, and to MyVote Wisconsin, the voter-focused website that provides election information and facilitates online registration and transmission of military and overseas absentee ballots.

Because online registration is not available in the 20 days prior to an election and on Election Day, electors attempting to register for the Presidential Primary would not be able to use the online registration process for 21 days in February. Absentee voting would also take place concurrently for the Spring Primary and the Presidential Primary, and possibly for the Presidential Primary and the Spring Election. Municipal and county clerks would have compressed time periods to canvass and certify results from one election to the next, while also programming voting equipment and preparing and transmitting absentee ballots.

These changes and timelines are likely to result in additional state and local costs to create required guidance and resources and to ensure adequate staffing in clerks' offices and at the polls, which the WEC has not had the opportunity to quantify. Based upon its experience in providing both clerk training and voter information, the Wisconsin Elections Commission is concerned about the potential for voter confusion and election official errors resulting from the abbreviated timelines and additional election.

For example, absentee voters would receive ballots for two elections at the same time and would need to return them in separate certificate envelopes. There is a risk that some ballots would be returned in the incorrect envelope, or that voters may return both ballots in the same envelope. WEC staff would need to develop and distribute guidance about the procedures for processing such ballots and whether or not they should be counted, which is not addressed in the statutes. In addition, the added election does not take into consideration the possibility of any recounts at the Spring Primary or the Presidential Preference Primary. Due to the small number of votes involved, it is not uncommon for primaries for local offices to result in a recount, which insert additional processes and tasks for local election officials during the time they would otherwise be focusing on the next election.

Finally, regarding the Presidential Primary, the bill would reduce the time period for independent candidates to circulate petitions to request ballot access to 15 days. Under current statutes those petitions may be circulated for either three or four weeks, depending on the calendar. Petitions must contain at least 1,000 valid signatures from each Congressional district in order to qualify an independent candidate for the Presidential Primary ballot.

In-Person Absentee Voting Period

Under current statutes, a qualified elector may apply for an absentee ballot in-person no earlier than the third Monday preceding the election and no later than the Friday preceding the election. The statutes require that in-person absentee voting take place only on Monday to Friday between the hours of 8 a.m. and 7 p.m. As you know, however, in 2016 a federal court struck down those restriction in combination with other absentee voting restrictions, and municipalities may now conduct in-person absentee voting at times of their choosing from the date that absentee ballots are available until the Sunday prior to an election. That case is on appeal and we have been awaiting a decision from the 7th Circuit Court of Appeals since April of 2017.

AB 1071 would limit the period of in-person absentee voting to the period from the third Saturday preceding an election until the Friday before the election, and to the days of Monday through Saturday between the hours of 8 a.m. and 7 p.m. Due to the pending litigation and the interaction of this provision with the court's decision, if AB 1071 is enacted the Commission would need to consult with the Attorney General's office to determine the allowable time period for in-person absentee voting, in order to minimize legal exposure to the State and municipalities.

Military and Overseas Voters

For several years, the Federal Voting Assistance Program of the U.S. Department of Defense (FVAP) has requested that Wisconsin revisit and revise its treatment of electors who are overseas temporarily and therefore have an intent to return to Wisconsin and retain their Wisconsin residency. These individuals may be short-term travelers who happen to be out of the country during an election period, or they may be working overseas for years at a time but

always with an intent to return to Wisconsin. Under current law and the proposed bill, these electors are entitled to cast votes for all offices on the ballot.

Another category of electors are considered permanent overseas electors. Those voters, or their parents, were previously residents of Wisconsin, and they have moved out of the country and no longer have an intent to return to the state. They are U.S. citizens and under both the current law and the proposed bill, they have the right to vote for candidates for national offices, including President and Congress, but may not vote for state or local contests.

The federal government recognizes that states may make such distinctions regarding which offices permanent and temporary overseas electors may vote for. However, for several years FVAP has argued that federal law (specifically the Uniformed and Overseas Citizens Absentee Voting Act or UOCAVA) requires that both permanent and temporary overseas electors be treated the same for purposes of electronic transmission of the ballot and use of the Federal Write-In Absentee Ballot (or FWAB). In recent years, the U.S. Department of Justice has become involved in our conversations with FVAP and has persisted in requesting that Wisconsin bring its statutes in line with federal law.

The general definition of “overseas elector” in the proposed bill describes permanent overseas electors. The proposed bill refers to temporary overseas electors as an overseas elector who qualifies as a resident of this state under Wis. Stat. Section 6.10. The proposed bill would accomplish the following two changes with respect to temporary overseas electors to satisfy the requests of federal officials:

1. Temporary overseas electors would be able to receive an absentee ballot from their municipal clerk electronically. Currently the statutes permit only military and permanent overseas electors to receive a ballot electronically. Due to a federal court decision which is currently under appeal, clerks may, but are not required to, transmit ballots electronically to any absentee elector.

Also, the WEC entered into a separate federal court consent decree with the U.S. Department of Justice to permit temporary overseas electors to receive absentee ballots electronically. The consent decree was executed after consultation with and approval by the Attorney General’s Office. AB 1071 would codify the terms of the consent decree as requested by FVAP and the federal Department of Justice.

Military and permanent overseas electors may receive a ballot by fax or email, or by downloading their ballot from the Commission’s MyVote Wisconsin website. While the proposed bill would permit temporary overseas electors to receive a ballot electronically, they would be limited to receiving ballots by fax or email and would not be able to receive ballots through the MyVote system. This is due to several factors related to the MyVote website as well as the requirement that temporary overseas electors must submit their photo ID to the municipal clerk, which military and permanent overseas electors are not required to do.

2. Temporary overseas electors could also use the Federal Write-In Absentee Ballot, or FWAB, which may currently be used only by military and permanent overseas electors under current statutes. The FWAB is a back-up ballot which permits the voter to write in votes for all candidates for which the elector is entitled to vote. Electors may obtain the FWAB through the FVAP website if they believe they will not receive their official ballots in time to return it to their municipal clerk. If the official ballot is also submitted by the voter, the official ballot is counted and the FWAB is rejected.

The 2018 federal court consent decree permitted temporary overseas electors to use the FWAB for the fall elections. AB 1071 would codify this change.

The proposed bill makes another change which the Elections Commission has requested that the Legislature consider, by removing the requirement that an individual signing as a witness for a military elector or a permanent or temporary overseas elector be a U.S. citizen. Wisconsin is currently the only state which requires that such witnesses be a U.S. citizen. The requirement for a U.S. citizen to serve as a witness would remain for absentee voters who are not military or overseas electors.

As part of the consent decree, the WEC committed to working with the Legislature to pursue legislation to equalize the treatment of temporary and permanent overseas electors. We believe that the provisions of the bill related to military and overseas electors will address the concerns raised by the federal government related to Wisconsin's compliance with federal law and its treatment of electors who are out of the country temporarily.

Respectfully submitted,

Meagan Wolfe
Interim Administrator
On Behalf of the Wisconsin Elections Commission