

Clearinghouse Rule 24-067

DRAFT ORDER OF THE WISCONSIN ELECTIONS COMMISSION

The Wisconsin Elections Commission adopts the following permanent rule to amend EL 7, relating to approval and security of electronic voting equipment and ballot security.

The statement of scope for this rule, SS 029-22, was approved by the Office of Wisconsin Governor Tony Evers on March 31, 2022, published in Register No. 796A1, on April 4, 2022, and approved by the Wisconsin Elections Commission on July 22, 2022.

RULE ANALYSIS

Statutes Interpreted:

Sections 5.91, 5.905, Stats.

Statutory Authority:

Sections 5.05(1), 5.87(2), 5.905(3), 5.93, 7.08(1)(d), and 227.11(2)(a), Stats.

Related Statutes:

Sections 5.76—5.95, Stats.

Plain Language Analysis:

The proposed administrative rule will make two amendments to Wis. Admin. Code EL Ch. 7. First, the rule will create new EL § 7.04, which will promulgate the Commission’s voting systems standards, testing protocols, and procedures pertaining to the use of communication devices in electronic voting systems. The rule will require the Commission to annually review and approve new versions of these standards, testing protocols, and procedures. Second, the rule will create new EL § 7.05, which will ensure the security, review, and verification of software components for electronic voting systems. The rule will require that all applications for certification of electronic voting systems contain completed testing from an accredited Voting System Testing Laboratory (“VSTL”) so that the Commission can verify the security, review, and verification of the software components of the voting system.

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

The Help America Vote Act (“HAVA”) prescribes practices and associated documentation used to test and maintain voting systems. 52 U.S.C. § 21081. HAVA requires the U.S. Election Assistance Commission to develop and maintain a set of guidelines called the Voluntary Voting System Guidelines (“VVSG”), which are voluntary specifications for the functionality, accessibility, and security capabilities. HAVA also requires the Elections Assistance Commission (“EAC”) to provide for the testing, certification, decertification, and recertification of voting systems technology by accredited laboratories. 52 U.S.C. § 20971. The VVSG 1.0/1.1 contain voluntary requirements for, among other things, telecommunications requirements, data transmission, protection against external threats, wireless communications, controlling usage, protecting wireless path, and protecting the physical voting system.

Summary of Comments Received During Preliminary Comment Period and at Public Hearing on Statement of Scope

No members of the public attended the April 29, 2022, public meeting to offer comments on the statement of scope for the proposed rule.

The Commission received three written comments specific to the scope statements for this rule. A comment from the League of Women Voters of Wisconsin requested that the Commission consider including testing of accessible voting equipment as part of the pre-election equipment testing as part of this rulemaking. Comments from the Wisconsin Disability Vote Coalition and Verified Voting were substantively similar to the comment from the LWVW.

The Commission reviewed the three written comments and voted to approve the scope statement as written on July 22, 2022.

Comparison with Similar Rules in Illinois, Iowa, Michigan, and Minnesota

While Illinois has extensive statutory and administrative regulations related to the approval process for voting systems, it does not have an explicit provision imposing additional requirements on voting systems with telecommunication components. *See* 10 ILL. COMP. STAT. 5/24–5/24C (2024), ILL. ADMIN. CODE TIT. 26 (2024). Illinois statutes do, however, explicitly ban the use of voting systems with Infrared Data Association communication ports. 10 ILL. COMP. STAT. 5/24A-16. The Illinois administrative code does require that the State Board of Elections apply all requirements of the Federal Elections Commission, the Elections Assistance Commission (“EAC”), or the Elections Assistance Commission Standards board, as well as the testing requirements of an approved independent testing authority. ILL. ADMIN. CODE TIT. 26 § 204.10.

While the proposed rule sets standards for voting systems with telecommunications components that are more explicit than the standards in Illinois law, they are also less strict than Illinois’s categorical ban on devices with Infrared Data Association communication ports. Additionally, the Illinois requirement that the State Board of Elections apply the requirements of the EAC or an approved independent testing authority likely imposes similar testing requirement to the proposed rule’s requirement that voting systems undergo testing from a VSTL accredited by the EAC.

Iowa also has extensive statutory and administrative regulations regarding testing standards for voting systems. The Secretary of State—who also serves as the State Commissioner of Elections—has the statutory authority to adopt rules prescribing testing methodologies and performance standards for voting systems. IOWA CODE § 52.5 (2024). The rules promulgated by the Secretary of State are required to at least meet the standards adopted by the Federal Elections Commission (“FEC”) in 2002. *Id.* Iowa’s administrative rules currently require voting systems to meet either the 2002 FEC guidelines or the EAC’s 2005 voluntary guidelines. IOWA ADMIN. CODE r. 720-22.2. Compliance with these guidelines must be certified by a test authority accredited by the National Association of Electronic Directors (“NASED”) or a test laboratory certified by the EAC. IOWA ADMIN. CODE rs. 720-22.1, 720-22.2. Neither Iowa’s statute nor administrative code set additional standards or testing protocols for voting systems containing telecommunication devices.

While Iowa administrative rules appear to be more lenient regarding certification than the proposed rule, the mention of NASED certification is largely anachronistic as the NASED itself no longer certifies voting equipment. <https://www.nased.org/about-nased>. All modern electronic voting systems will only be approved in Iowa if they have been tested by an EAC certified lab. As a result, the proposed rule imposes more updated certification requirements than Iowa's rules. The proposed rule will also place more explicit standards on voting systems with telecommunication devices than those contained in Iowa statute or administrative code.

The Michigan board of state canvassers is responsible for approving all voting systems. MICH. COMP. LAWS § 168.795a(1). Michigan statutes require that all electronic voting systems either be certified by an independent testing authority accredited by NASED and the board of state canvassers, or have certification from the manufacturer that the system meets or exceeds the performance and test standards prescribed by the board of state canvassers. *Id.* Specific testing standards are prescribed by Michigan statute and elaborated upon through administrative rules. *See* MICH. COMP. LAWS § 168.794a, MICH. ADMIN. CODE r. 168.773. No provisions specifically impose additional standards for voting systems which contain telecommunication devices.

As with Iowa, the reference to NASED accreditation in Michigan statute is largely anachronistic. As a result, all modern voting systems will require certification from their manufacturer that they meet the board of state canvassers requirements in order to be approved in Michigan. The proposed rule will impose a higher standard than the existing Michigan testing requirement and is more in line with federal guidance regarding testing certification. The proposed rule will also place higher standards on voting systems with telecommunication components than those contained in Michigan statute and administrative code.

The Minnesota Secretary of State reviews and approves all applications for new voting systems. MINN. STAT. § 206.57 subdivision 1. Voting systems must be certified by an independent testing authority accredited by the EAC or an appropriate federal agency that is responsible for testing and certification of compliance with federal guidelines. MINN. STAT. § 206.57 subdivision 6. Minnesota's administrative code contains additional pre-testing procedures but does not impose approval requirements exceeding those found in statute. MINN. R. 8220–8230. No provisions in Minnesota statute or administrative code impose additional standards for voting systems which contain telecommunication devices.

The proposed rule imposes certification requirements which are practically identical to Minnesota statute. While Minnesota allows for certification by testing authorities certified by additional appropriate federal agencies, at this time the EAC is the only appropriate federal agency. The proposed rule will place higher standards on voting systems with telecommunication components than those contained in Minnesota statute or administrative code.

Summary of Factual Data and Analytical Methodologies

Commission staff did not perform empirical analysis for this rule as the intent of the rule is simply to implement existing guidance. The Commission relied on its existing guidance and practices which have been used to certify elections systems in Wisconsin.

Analysis and Supporting Documents used to Determine Effect on Small Business

There is no anticipated effect on small business. 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.

Agency Contact Person:

Angela O'Brien Sharpe, Staff Attorney
Wisconsin Elections Commission
201 West Washington Avenue
P.O. Box 7984
Madison, WI 53707-7984
Telephone: 608-264-6764
Email: angela.sharpe@wisconsin.gov

RULE TEXT

SECTION 1. EL 7.01(1)(h) is created to read:

EL 7.01 Application for approval of electronic voting system.

7.01(1)(h) An electronic voting system containing telecommunications components must meet the additional requirements and procedures in s. EL 7.04.

SECTION 2. EL 7.04 is created to read:

EL 7.04 Voting systems standards, testing protocols, and procedures pertaining to the use of communication devices

7.04(1) Any voting system containing a telecommunications component must comply with the standards, testing protocols, and procedures pertaining to the use of telecommunication devices in Wisconsin that are prescribed by the commission.

7.04(2) The commission shall annually review and approve a new version of the standards, testing protocols, and procedures pertaining to the use of telecommunication devices in Wisconsin. Prescribing a version of the standards, protocols, and procedures described in this section constitutes an action by the commission per s. 5.05(1e), Stats.

SECTION 3. EL 7.05 is created to read:

EL 7.05 Security, review, and verification of software components for electronic voting systems

7.05(1) An application for commission certification of an electronic voting system must contain completed testing from an accredited Voting System Test Laboratory (VSTL) so that the commission can ensure the security, review, and verification of software components as a condition of certification. In order to determine that the software components correspond to the instructions actually used by the system to count votes, each software component must be either certified by the EAC, where EAC certification is available, or be tested by an accredited VSTL.

7.05(2) A qualifying VSTL under sub. 1 can only be accredited by the United States Election Assistance Commission.

SECTION 4. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), Stats.