

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
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Director and General Counsel

## MEMORANDUM

**DATE:** October 6, 2011

**TO:** Honorable Members, Joint Committee for the Review of Administrative Rules

**FROM:** Kevin J. Kennedy   
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Government Accountability Board

**SUBJECT:** Administrative Rulemaking Process and Timeline

At its meeting of September 27, 2011, members of the Joint Committee for the Review of Administrative Rules (JCRAR), asked several questions regarding promulgation of administrative rules and the anticipated timeline for the Government Accountability Board (G.A.B. or Board) to carry out required procedures to implement emergency rules. This memorandum addresses those questions along with some specific discussion on the development of the rules in light of issues raised by the Committee at its September 27, 2011 hearing. I believe the agency can address the concerns raised by Committee Members without the Committee directing the G.A.B. to adopt emergency administrative rules.

### Proposed Motion on Pre-Populating Address Information

I understand the Committee's concern that permitting an entity to pre-populate a recall petition with a potential signer's address information circumvents the traditional signature gathering process involving face-to-face contact between the petition signer and the petition circulator. In lieu of required rulemaking, I propose the G.A.B. staff share the Committee's concern with the Board and propose a different response to the individual who initiated the inquiry. The proposed response would be that current law requires the petition signer to affix their signature accompanied by their address and the date of signing and only the circulator may add residence information. Wis. Stats. §8.40 (1). GAB 2.05 (4), Wis. Adm. Code. This addresses the Committee's concern that a third party, not involved in the petition signature gathering process, is providing elector information. This would still permit the practice of circulators presenting a petition form for signing with the name of the municipality or the year of the date of signing listed. This approach effectively maintains the status quo for signing and circulating election-related petitions.

### Proposed Motion on Permitting the Use of Stickers on Student Identification Cards

The G.A.B. staff has learned that most universities and colleges are not planning on using stickers as a means to cut costs in crafting student identification cards that meet the statutory

requirements for use in obtaining a ballot. Wis. Stats §5.02 (6m)(f). While the idea of utilizing a sticker attached to a current student identification card originated with university and college representatives, we are now being informed that most would prefer developing a separate student identification card issued to a student upon request that conforms to the statutory requirements.

The main barrier to the use of current student identification cards as acceptable voter identification is that the cost of redesigning current identification cards is excessive. Current student identification cards are designed to serve a multitude of functions such as an entrance key to university and college facilities, access to financial resources for payment for course materials, meals, supplies and checking out instructional materials from libraries and other campus facilities. This requires a design that permits interfacing with various electronic systems. The cards traditionally have an expiration date that is longer than permitted for use as identification for voting.

Committee Members suggested the use of stickers would require the development of standards to ensure the integrity of the sticker. These standards could include adhesive quality, difficulty in unauthorized reproduction and other factors. Given that universities and colleges are not inclined to implement the use of stickers to ensure student identification compliance with voter identification requirements, it appears unnecessary to direct the G.A.B. to develop emergency rules. This would be a gross misallocation of resources.

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The one aspect where a sticker may be helpful to ensure conformity with the statutory voter identification requirements is for the student's signature. This could be easily affixed and not have the same concerns about unauthorized reproduction. A voter is required to sign the poll list in order to receive a ballot. The poll list signature can be used as a forensic tool in the event of an attempt at unauthorized voting.

In lieu of required rulemaking, I propose the G.A.B. staff share the Committee's concerns with the Board and recommend that stickers may only be used to add a student's signature to ensure conformity with the statutory voter identification requirements.

### **Practical Implications of Developing Administrative Rules**

Given the frequency with which Board staff is required to provide guidance and interpret statutory language for local election officials including 1,850 municipal clerks, 72 county clerks, candidates, and the public, and given the Board's regular meeting schedule, it is impractical to complete emergency rules for each and every policy requiring implementation within three months or less. Despite the statutory language requiring an agency to complete an emergency rule within 30 days of a directive issued by JCRAR, the actual process for completing an emergency rule will likely take four to five months, assuming the Board does not hold special board meetings; thus, incurring additional costs. Furthermore, an emergency rule is only valid for 150 days, while permanent rule-making normally takes months or years to complete, which will likely result in gaps between the expiration of an emergency rule and the effective dates of any permanent rules. This negatively impacts the clarity and certainty of guidance which the Board is authorized and required to issue, as well as the uniform

administration of laws pertaining to elections, campaign finance, lobbying, and ethics for public officials.

Section 227.24, Wis. Stats., as affected by 2011 Act 21 (and as amended by 2001 Act 32) requires the following steps to promulgate an emergency administrative rule:

1. The agency staff submits a Statement of Scope to the Governor for review and either approval or rejection. There is no statutory deadline for gubernatorial approval or denial of a Statement of Scope.

The Secretary of Administration issued a memo on July 19, 2011 indicating that the Governor intended to respond to submissions within "a few days;" however, the G.A.B.'s experience with the one Statement of Scope submitted thus far shows that it actually takes weeks (submitted on July 14, 2011 and written approval received on August 24, 2011.) In addition, the Secretary of Administration's July 19, 2011 memo indicated that the Governor was expected to issue an Executive Order providing further guidance on the rule-making procedures, which could make the rule-making process more complex; however, the G.A.B. is unaware of any such Executive Order as yet.

2. Upon the Governor's written approval of the Statement of Scope, it must be published in the Administrative Register for at least 10 days before approval by the Government Accountability Board. The practical impact of this requirement is that if staff were to draft a Statement of Scope this week and submit it to the Governor for approval, the gubernatorial written approval would need to be received by October 16, 2011, if the Board is to meet the October 17, 2011 deadline for publishing in the November 1, 2011 Administrative Register.
3. The Board's next scheduled meeting is November 9, 2011. If the Statement of Scope is published on November 1, 2011, that meeting date does not satisfy the ten-day publishing requirement, meaning that the Board would need to grant approval at its December 13, 2011 meeting, hold a special meeting, or delegate the approval authority to the Board Chair.
4. Until the Board affirmatively approves the Statement of Scope, Board staff is specifically prohibited by statute from performing any work related to the rule. Assuming that expedited approval is granted by the Governor, that publication occurs on November 1, 2011, and that the Board either holds a special meeting to grant approval in November or delegates to its Chair authority to approve the Statement of Scope, the earliest the Board could consider a proposed emergency rule at a regular meeting is December 13, 2011.
5. Once the Board approves the emergency rule, it must be submitted to the Governor for written approval before it can be published in the official newspaper and Administrative Register. There are also no statutory deadlines for gubernatorial approval of an emergency rule, so it is impossible to predict whether or when gubernatorial approval might be received.

6. Publication of the emergency rule usually takes two to three weeks after the newspaper is notified. Publishing the emergency rule in the paper and filing of such notice in the Administrative Register determines the effective date of any emergency rule.
7. Within ten days of the emergency rule being published, the Board must prepare an abbreviated fiscal impact statement and provide it to each member of the Legislature.

Assuming that the Board schedules a special meeting or delegates authority to approve the Statement of Scope to its Chair, and assuming prompt gubernatorial approval of both the Statement of Scope and the emergency rule itself, the earliest publication date and effective date of any emergency rule would likely be some time in mid to late January. If the Board approves the Statement of Scope and emergency rule at its regularly-scheduled meetings, the completion date is likely to be delayed for another month. This timetable also assumes that the emergency rulemaking process is begun by October 7, 2011, and that no policy complications regarding the substance of the rule delay its promulgation.

This timetable illustrates that the effective date of an emergency rule initiated immediately would be too late to govern procedures for circulating nomination papers or possible recall petitions in the fall of 2011, or the validity of student identification cards to be used at the February 2012 Spring Primary. In the meantime, the Board will continue to be asked for guidance and policy determinations on these and related issues which will affect the decisions and actions of local election officials, voters, candidates circulating nomination papers, and any other parties circulating recall or other election petitions. The absence of an emergency rule will not eliminate the need for the Board to make identical policy determinations, except they will be made on a more *ad hoc* basis, which reduces the clarity and uniformity of election administration decisions. The *ad hoc* advice provided to local election officials could also result in multiple clerks applying the statutes in multiple different fashions, further undermining the clarity, uniformity and integrity of the application of the statutes and administration of elections.

### **Conclusion**

On behalf of the Government Accountability Board, I request the Committee refrain from adopting the proposed motions directing the promulgation of emergency administrative rules. Instead, the G.A.B staff will present the Committee's concerns to the G.A.B at its November 9, 2011 meeting with a recommendation to modify its approach to the issue of pre-populated address information on election-related petitions and the use of stickers on student identification cards.