UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, *et al.*,
individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, *et al.*,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

Plaintiffs oppose Defendants' Motion to Stay Proceedings [ECF No. 175] ("Motion"), which seeks to indefinitely stay further proceedings and final relief in this case based on the mere possibility that Defendant Wisconsin Department of Health Services ("DHS") might promulgate a permanent rule eliminating the Challenged Exclusion at issue in this case. Defendants have wholly failed to justify a lengthy stay that would unnecessarily delay the final resolution of Plaintiffs' class-wide and individual claims—which are likely to be resolved on Plaintiffs' pending motion for summary judgment or following the trial set to begin on September 16—until some indeterminate point in the future.

DHS simply cannot predict whether it will be successful in removing the Challenged Exclusion—or, even if it is successful, how long that process will take. This Court should not stay proceedings in this case indefinitely based on speculation that rulemaking might succeed. Furthermore, because this Court will need to rule on the legality of the Challenged Exclusion regardless of the outcome of DHS's planned rulemaking process, an indefinite stay would serve

only to delay, not simplify, the Court's ultimate resolution of Plaintiffs' class-wide and individual claims. Accordingly, and for the reasons explained below, Plaintiffs respectfully ask the Court to deny Defendants' Motion.

I. LEGAL STANDARD

In considering a stay, a federal court must balance any interests favoring a stay against the court's "'virtually unflagging obligation' absent 'exceptional circumstances' to exercise jurisdiction when a case is properly before it" in a timely manner. *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *R.R. Street & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)). This Court and others typically consider four factors when assessing the necessity of a stay: "(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-cv-168-wmc, 2010 WL 2079866, at *1 (W.D. Wis. May 19, 2010) (quoting *Grice*, 691 F. Supp. 2d at 920). "The party seeking the stay carries the burden of establishing its necessity." *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

II. ARGUMENT

Defendants have failed to show why an indefinite stay pending the outcome of an administrative rulemaking process that has not even begun—and which could extend long past the scheduled trial date in this case—is warranted. A stay would only delay, not moot, the need for a final judgment in this case. Given the late stage of this litigation, the likelihood that

Plaintiffs' liability claims will be resolved on their pending motion for summary judgment, and the fast-approaching trial date, there is no valid basis to stay proceedings in the case. A stay would only delay the final class-wide and individual relief to which Plaintiffs are entitled.

A. Defendants Improperly Seek an Indefinite Stay with No Ascertainable End Date.

While a district court has broad discretion to stay proceedings, "[t]his discretion is not . . . without bounds." *Hy Cite*, 2010 WL 2079866, at *1 (citing *Cherokee Nation*, 124 F.3d at 1416). As this Court has noted, "[a] district court abuses its discretion when the stay is 'immoderate or indefinite.'" *Id.* (citing same); *see also Grice*, 691 F. Supp. 2d at 920 ("A stay that is so extensive as to be 'immoderate' is an abuse of discretion.") (internal citations omitted). "[A] court would abuse this discretion by issuing 'a stay of indefinite duration in the absence of a pressing need.'" *Hy Cite*, 2010 WL 2079866, at *1 (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936)). Accordingly, this Court has denied requests for indefinite stays. *See, e.g.*, *id.* (denying requested stay pending related decisions by other courts, as defendants "do not and cannot know how long the stay would need to be in place"); *Rumpf v. Quorum Fed. Credit Union*, No. 17-cv-290-wmc, 2018 WL 6271597, at *9-10 (W.D. Wis. Nov. 30, 2018) (denying stay sought after summary judgment deadline based on pending state Supreme Court decision in another case, because if the stay were granted, "the trial . . . would likely be postponed at least six months, if not more.")

A stay of indefinite duration is precisely what Defendants are requesting now, but they have failed to show any legitimate need for it, let alone a "pressing" one. Defendants ask that the Court stay all proceedings in the case—including suspending Defendants' deadline to respond to Plaintiffs' pending motion for summary judgment, staying all further briefing and pretrial proceedings, and cancelling the long-scheduled trial date set for September 16, 2019 without

rescheduling it—for an unspecified period "pending the outcome of [DHS's] promulgation of emergency and permanent rules to remove [the Challenged Exclusion]." Mot. at 1-2.

While Defendants have not presented the precise content of the proposed rule to the Court, they posit that it would eliminate the Challenged Exclusion from the State's Medicaid regulations. Mot. at 4. But they neglect to mention the lengthy, multi-step process involved in promulgating a permanent rule to accomplish this goal. In fact, the rulemaking process involves six stages typically spanning *7.5 to 13 months*. *See* S. Grosz & M. Kelley, Wis. Legis. Council, "Chapter 4: Administrative Rulemaking," *Wisconsin Legislator Briefing Book 2019-20*, 15 (Nov. 2018), at 15, *available at* https://docs.legis.wisconsin.gov/misc/lc/briefing_book [attached as Ex. A] ("Legislator Briefing Book"). According to the Motion, DHS does not even plan to initiate permanent rulemaking until after a temporary emergency rule goes into effect (itself an uncertain prospect). Mot. at 4. Even assuming DHS commenced the permanent rulemaking process in early June, the process, if it ran the normal course, would likely culminate sometime between January and July 2020—four to ten months *after* the scheduled September trial date in this case.

Moreover, DHS is not the sole decision maker in the rulemaking process: the Wisconsin legislature may suspend or block a new rule from being promulgated. Legislator Briefing Book at 9, 11, 15. Legislative review—the fifth stage of the six-stage promulgation process—does not typically commence until 6.5 to 11 months after the agency initiates the rulemaking process. *Id.* at 15. During the months-long legislative review phase, a standing committee of the legislature may request modifications or object to the proposed rule. *Id.* at 8-9, 15. Subsequently, the proposed rule will be referred to the legislature's Joint Committee for Review of Administrative Rules ("JCRAR"). *Id.* at 9. If the standing committee has objected to the rule, JCRAR will be required to take action to agree or disagree with the objection, or to seek modifications to the

rule. *Id.* at 9. If JCRAR objects, it may seek introduction in either house of the legislature of a bill to support the objection; if that bill passes either house, DHS will be barred from promulgating the rule. *Id.* Alternatively, JCRAR may "indefinitely object" to the proposed rule, during which time DHS would also be unable to promulgate the final rule unless it received specific authorization to do so via new legislation. *Id.* Whether a permanent rule replacing the Challenged Exclusion ever goes into effect will depend in large part on whether the Wisconsin legislature uses its powers to suspend or block the new rule from going into effect. The inherent uncertainty involved in the rulemaking process offers nothing more than, as Defendants themselves put it, "a chance" of lifting the exclusion through the political process. Mot. at 5.

It is simply impossible for the Parties or this Court to predict whether DHS's attempt at repealing the Challenged Exclusion through the promulgation of a permanent rule will succeed—or how long it will take for the process to play out. Nor is there any reason to wait to find out before this Court reaches its final judgment on Plaintiffs' claims. An indefinite stay of proceedings is improper and unwarranted in these circumstances.

B. This Case is Already in a Late Stage and a Stay Would Only Delay, not Moot, the Need for the Court to Rule on Plaintiffs' Summary Judgment Motion and Hold a Trial.

As Defendants concede, "this case is not at its early stages." Mot. at 5. To the contrary, the Parties have been litigating this case for over a year, the dispositive motion deadline has passed, and Plaintiffs' motion for summary judgment and a permanent injunction of the Challenged Exclusion is now pending. Fact discovery, including the Parties' exchange of expert witness reports on liability issues, is essentially complete (though Plaintiffs reserve the right to seek limited additional discovery before the August 2, 2019 cutoff date). Plaintiffs' expert disclosures on damages are due this week, on May 15, 2019, and their expert's work on her

report is nearly complete. The trial date of September 16, 2019 is just four months away, leaving only Defendants' response to Plaintiffs' summary judgment motion, Plaintiffs' reply, and the pretrial submission deadlines and conferences between now and then.

Defendants are mistaken that "[a] stay and successful promulgation could render moot or unnecessary the remaining summary judgment briefing by both parties, this Court's decision as to the summary judgment motion, the parties' pre-trial motions and the Court's related decisions, a five-day jury trial, and the parties' post-trial motions and the Court's related decisions." Mot. at 5. Defendants' suggestion that a rule that has not even been introduced yet (the anticipated substance of which has been shared with the Court in only the broadest strokes) *might* moot *any* of Plaintiffs' claims is, at best, highly speculative and grossly premature. And it is not even theoretically possible for such an agency action to moot the need for further adjudication.

A permanent rule, even if it removed the Challenged Exclusion from the books at some point in 2020 or beyond, would *not* moot Plaintiffs' damages claims under Section 1557 or their need for a declaratory judgment that would serve as the predicate for those damages.[1] Even assuming *arguendo* that a permanent rule gave Plaintiffs all the relief they would seek from a permanent injunction, Plaintiffs would still be entitled, at minimum, to a summary judgment ruling or trial on liability and a trial on damages. *See Wernsing v. Thompson*, 423 F.3d 732, 746

[1] An emergency rule lifting the Challenged Exclusion, if promulgated, would certainly *not* moot Plaintiffs' claims (nor are Defendants claiming it would). An agency's temporary rescission of a challenged policy, including where that rescission is in response to litigation, does not moot legal challenges to that policy. *See Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 747 (7th Cir. 1999) (finding that a memorandum temporarily rescinding a challenged policy "was nothing more than an effort to comply with the TRO, and was by its express terms temporary in nature"). As Defendants admit, "an emergency rule would take effect and last for 150 days or more (if extensions are granted), absent legislative temporary suspension." Mot. at 4. Such rules may be extended only for a total of 120 days (270 days total), and may be suspended by the JCRAR while they are in effect. Legislator Briefing Book at 10-11. In sum, an emergency rule expressly adopted to comply with the preliminary injunction here would necessarily be temporary.

(7th Cir. 2005) (finding that, although plaintiffs' claim for injunctive relief was moot, their claims for monetary damages and declaratory relief must be considered on the merits). Moreover, in addition to a permanent injunction, Plaintiffs are seeking other equitable relief necessary to cure the longstanding deprivation of class members' rights while the Challenged Exclusion has been in effect, which may or may not be satisfied by Defendants' voluntary rescission of the exclusion.

In any event, now is not the time for the Parties or the Court to engage in speculation about whether Plaintiffs' claims might be mooted following the possible promulgation of a rule, at some point long after the scheduled trial date. Because a ruling on Plaintiffs' summary judgment motion and a trial will be necessary regardless of the outcome of the anticipated rulemaking process, a stay would not "reduce the burden of litigation on the parties and on the court," which is especially so here given the late date of Defendants' request after much of the work of litigation has already been undertaken. Defendants' desire to seek *possible* change through the "political process" is simply not a valid basis for a stay, finds no support in case law, and is far from the type of "pressing need" that might justify a stay of indeterminate length.

CONCLUSION

For the reasons explained above, the Court should deny Defendants' Motion to Stay Proceedings.

Dated: May 13, 2019

Respectfully submitted,

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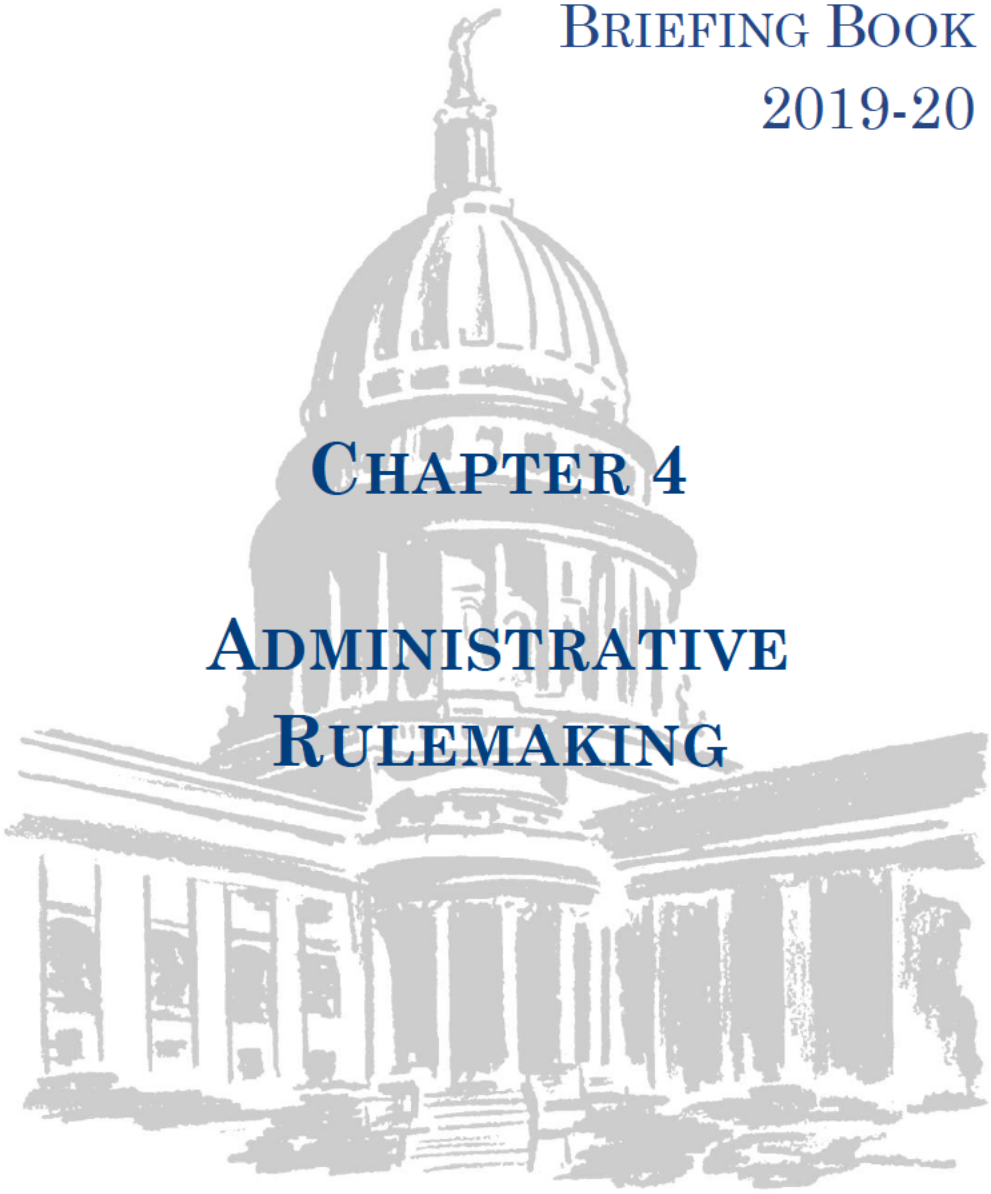
Exhibit A

WISCONSIN LEGISLATOR BRIEFING BOOK 2019-20



CHAPTER 4

ADMINISTRATIVE RULEMAKING

Scott Grosz, Principal Attorney, and Margit S. Kelley, Senior Staff Attorney
Wisconsin Legislative Council

Table of Contents

Copies of the Wisconsin Legislator Briefing Book are available at:
http://www.legis.wisconsin.gov/lc

INTRODUCTION

State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature. The Legislature retains oversight of the rulemaking process through the review of proposed rules by the Legislative Council's Administrative Rules Clearinghouse, legislative standing committees in each house, and the Joint Committee for Review of Administrative Rules (JCRAR).

Administrative rules are promulgated by state agencies to implement or interpret statutes enforced or administered by the agency.

Statutes governing the rulemaking process are contained in subch. II of ch. 227, Stats. The statutes define an administrative rule as a regulation, standard, policy statement, or order of general application promulgated by a state agency:

- To implement or interpret provisions of statutes that are enforced or administered by the agency; or
- To establish procedures for the agency to follow in administering its programs.

An agency undertakes rulemaking when it seeks to create new rules or to amend or repeal existing rules. Administrative rules have the force and effect of law.

[s. 227.01 (13), Stats.]

AGENCY RULEMAKING AUTHORITY

All authority for administrative rulemaking is conferred by statute. An agency may promulgate rules interpreting the provisions of a statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation. An agency may not promulgate a rule that conflicts with state law. Likewise, an agency may not find rulemaking authority in a legislative statement of intent, purpose, findings, or policy, or in a statutory provision describing the agency's **general** powers or duties. The agency is limited to rulemaking authority that is explicitly conferred by the Legislature.

[ss. 227.10 and 227.11, Stats.]

Furthermore:

- An agency may not impose any standard, requirement, or threshold, in a rule or as a license condition, unless the standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by another properly-promulgated rule.
- With respect to a specific standard, requirement, or threshold, an agency may not promulgate a rule that is more restrictive than a statute.

Executive Order #50

On November 2, 2011, Governor Walker issued Executive Order #50, which sets forth requirements for agency rulemaking in addition to those specified in the statutes, as well as detailed rule promulgation instructions to agencies. The order also establishes an Office of Regulatory Compliance in the Governor's office as the point of contact for administrative rulemaking. The Office of Regulatory Compliance in the Governor's office may be contacted at 267-3672 or at: SBOAdminRules@webapps.wi.gov.

Executive Order #50 contains rulemaking requirements in addition to those specified in the statutes.

Publication of Administrative Rules

For questions about the rulemaking process or specific Clearinghouse Rules, contact the Legislative Council Rules Clearinghouse staff:

Scott Grosz, Director (504-5715)

Margit S. Kelley, Assistant Director (504-5717)

Administrative rules are published in the Wisconsin Administrative Code. The Legislative Reference Bureau (LRB) publishes and edits the Code, as well as the Wisconsin Administrative Register. The Register is published every Monday. All final administrative rules are initially published in the Register and are then compiled, maintained, and updated in the Administrative Code. Each issue of the Register contains a section with notices and other items that are required to be published during the rulemaking process. The Administrative Code and Administrative Register are published online at: http://docs.legis.wisconsin.gov/code. As of January 2015, printing and distribution of the Code and Register was discontinued, but the Code and Register continue to be available in a printer-friendly PDF format online.

[ss. 227.20 and 227.21, Stats.]

For questions about the Administrative Code and Register, and rule promulgation and publication, contact the LRB (266-3561).

Rule Promulgation Process

Agencies typically promulgate **permanent** rules, which are subject to the rule promulgation and legislative review procedures discussed throughout this chapter. On occasion, however, preservation of the public peace, health, safety, or welfare necessitates placing a rule into effect prior to the time it could take effect as a permanent rule, in which case the agency may initially adopt the rule as an **emergency** rule. Some of the rule promulgation steps discussed in this section pertain only to proposed permanent rules, while others, where indicated, also apply to emergency rules.

A flowchart describing the rulemaking process is located at the end of this chapter.

Preparation and Approval of Scope Statement

The first step in the rule promulgation process is preparation of a scope statement that sets forth information about the agency's intended rulemaking, including the objective of the proposed rule, the statutory authority for the rule, and a description of all entities that may be affected by the rule. Scope statements must be prepared for both proposed permanent rules and emergency rules. [s. 227.135, Stats.]

The Governor has specific authority to approve or disapprove most agency scope statements and final draft rules.

Before work may commence on actual rule drafting, the agency must submit the scope statement to the Department of Administration (DOA), which reviews the rule and forwards it to the Governor for approval in writing. If the scope statement is approved by the Governor, it is then submitted to the LRB for publication in the Wisconsin Administrative Register. Executive Order #50 provides that an agency must submit an approved scope statement to the LRB for publication within 30 days of the Governor's approval, or the scope statement will be considered to have been withdrawn. Following publication, the scope statement must be approved by the individual or body with policy-making powers for the agency. Additionally, prior to this approval, on its own initiative or as directed by the co-chairs of JCRAR, the agency may hold a preliminary public hearing and comment period on the rule. Once a scope statement is published, an agency has 30 months to submit a proposed rule for legislative review.

The requirement that the Governor approve a scope statement does not apply to rules promulgated by the Department of Public Instruction (DPI). The Wisconsin Supreme Court has held that the duties conferred on the Superintendent of Public Instruction by the Wisconsin Constitution, art. X, s. 1, include supervisory power over public instruction that cannot be superseded by other authorities. [*Coyne v. Walker*, 2016 WI 38.]

Rule Drafting

Once the scope statement is approved, agency staff may then begin drafting the rule. Agencies are directed, to the extent possible, to adhere to the format and drafting style of bills prepared for the Legislature and to draft rules in concise, simple sentences, using plain language that can be easily understood.

[s. 227.14 (1), Stats.]

The Legislative Council staff and the LRB jointly publish an *Administrative Rules Procedures Manual* to provide agencies with information on the drafting and promulgation of rules. The *Manual* provides detailed instructions regarding the format and style to be used by agencies in drafting rules.

The *Rules Manual* is available online at:
http://www.legis.wisconsin.gov/lc

[ss. 227.15 (7) and 227.25 (1), Stats.]

Preparation of Economic Impact Analysis

An agency must prepare an economic impact analysis (EIA) for every rule before the rule is submitted to the Legislative Council staff for review. This requirement does **not** apply to emergency rules. The EIA must include information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole and must estimate the total implementation and compliance costs of the rule as a single dollar figure. It must also explain: the policy problem the rule is intended to address; the approach to the problem the rule takes; a comparison to approaches taken by the federal government and by Iowa, Illinois, Michigan, and Minnesota; and any reasons for the agency choosing a different approach. [s. 227.137, Stats.]

In the EIA, an agency must specifically determine whether, over a two-year period, a total of $10 million or more in implementation and compliance costs are reasonably expected to be incurred or passed along to businesses, local governmental units, and individuals as a result of the proposed rule. Upon such a determination, the agency must stop work and may not continue promulgating the proposed rule unless one of two things occur: (1) enactment of a bill specifically authorizing the promulgation of the rule; or (2) adoption of germane modifications to the proposed rule that reduce the economic impact below the $10 million threshold.

All agencies must prepare an economic impact analysis for every proposed permanent rule.

Executive Order #50 requires that, in preparing an EIA, agencies must accept public comments for a specified time period based on the degree of economic impact the rule is likely to have locally or statewide. The comment period is 14 days for a rule with no or

minimal economic impact, 30 days for a rule with moderate economic impact, and 60 days for a rule with significant economic impact.

The EIA and a fiscal estimate must be submitted to the Legislative Council Administrative Rules Clearinghouse at the same time that a rule is submitted to the Clearinghouse for review. DOA has developed a template for agency use that combines the EIA and fiscal estimate in a single form.

Through action by either the co-chairs of JCRAR or JCRAR as a body, an independent EIA may also be requested, with costs of the estimate paid based on the result of the independent EIA in comparison to the agency's estimate.

Review by Legislative Council Administrative Rules Clearinghouse

Each proposed rule, Clearinghouse Report, and other documents related to the rule are available online at:
http://docs.legis.wisconsin.gov/code

When the agency has completed its work on an initial draft rule, the rule is submitted to the Legislative Council staff for review. This requirement does **not** apply to emergency rules. By statute, the Legislative Council staff functions as the Administrative Rules Clearinghouse. Upon receipt of a proposed administrative rule, the Clearinghouse staff assigns the rule a Clearinghouse Rule number, records the date of submission of the rule in the Bulletin of Proceedings of the Wisconsin Legislature, and prepares two numbered rule jackets (similar to bill jackets), one for the Assembly and one for the Senate. [s. 227.15 (1), Stats.]

The rule is assigned to a Legislative Council attorney or analyst for review and preparation of a Clearinghouse Report containing comments about the rule. The rule is then given a secondary review by the Clearinghouse director or assistant director. The Legislative Council staff reviews the rule for form, style, and technical adequacy. The staff also specifically:

- Reviews the rule to determine whether there is statutory authority for the agency to adopt the rule.
- Reviews the text of the rule for clarity and use of plain language.

The Legislative Council staff review may indicate whether an agency is attempting to regulate matters beyond its legal authority or whether a lack of clarity and precision in the rule language could inappropriately affect persons regulated by the rule.

The Legislative Council Administrative Rules Clearinghouse reviews all proposed permanent rules and prepares a Clearinghouse Report containing comments about the proposed rule.

The period for Legislative Council review is 20 working days following receipt of the proposed rule. A Clearinghouse Report

containing the staff comments is sent to the agency. [s. 227.15 (2), Stats.]

Agency Public Hearing

Generally, following Clearinghouse review, an agency must provide notice and hold a public hearing on a proposed rule. Notice of the hearing may be posted before the agency receives the Clearinghouse Report, but the hearing cannot take place until the agency has the Clearinghouse Report in hand or until the end of the 20-working day Clearinghouse review period, whichever comes first. There are some exceptions to the hearing requirement. For example, a public hearing is not required prior to promulgation of an emergency rule or if the rulemaking is undertaken to bring an existing rule into conformity with a statute or judicial decision. The agency's notice of public hearing must include, among other things, the text of the proposed rule, a plain language analysis of the rule, and the EIA and fiscal estimate.

[ss. 227.16 to 227.18, Stats.]

For rulemaking purposes, "small business" is defined as a business entity that is independently owned and operated, that is not dominant in its field, and that employs 25 or fewer full-time employees or that has gross annual sales of less than $5 million.

Initial Regulatory Flexibility Analysis

If a proposed rule will have **any effect** on small business, the agency must prepare an initial regulatory flexibility analysis describing the types of small businesses that will be affected by the rule, the proposed reporting, bookkeeping, and other procedures required for compliance with the rule, and a description of the types of professional skills necessary for compliance with the rule. The agency's initial regulatory flexibility analysis must be included in the notice of public hearing. If the rule **may have an economic impact** on small business, the agency must submit the rule to the Small Business Regulatory Review Board (SBRRB) on the same day the rule is submitted to the Legislative Council staff for Clearinghouse review. [s. 227.14 (2g), Stats.]

The SBRRB must determine whether the rule will have a significant economic impact on a substantial number of small businesses. Unless the SBRRB determines that the rule will **not** have a significant impact on a substantial number of small businesses, the agency must also prepare a final regulatory flexibility analysis for submission to the Clearinghouse on any suggested changes.

The Governor must approve most final draft permanent rules before their submission to the Legislature for committee review, as well as final draft emergency rules.

Submission of Final Draft Rule to Governor

Following the public hearing on a proposed rule, the agency prepares a final draft rule. Before the rule may be submitted to the Legislature, the agency must submit the final draft rule to the Governor for written approval and provide notice to JCRAR of the submission. This approval requirement also applies to emergency rules, but does not apply to any proposed rules of the DPI. [s. 227.185, Stats.]

Committee Review Process

Submittal of Rule to Legislature

Once the Governor has approved a final draft rule, the agency may submit the rule, accompanied by a report, to the Chief Clerk of each house of the Legislature for referral by the presiding officer to a standing committee in each house. The report must contain a number of items, including:

- A plain language analysis of the rule.
- An explanation of the basis and purpose of the proposed rule, including how it advances relevant statutory goals or purposes.
- The fiscal estimate, the EIA, and any DOA report regarding the EIA.
- Any recommendations or other material submitted to the agency by the SBRRB and the agency's response.
- A copy of the Clearinghouse Report and a response to the Clearinghouse recommendations, including the specific reasons for rejecting any recommendation.
- A summary of public comments on the rule, the agency's response to those comments, and an explanation of modifications made to the rule as a result of public comments or testimony.
- A list of persons who appeared or registered for or against the rule at any public hearing held by the agency.
- A final regulatory flexibility analysis, unless the SBRRB determined that the rule will **not** have a significant economic impact on a substantial number of small businesses.

  [s. 227.19 (1) to (3), Stats.]

Standing Committee Review

When a rule is referred to a standing committee, the committee chair notifies the committee members of the referral and the date on which the committee's jurisdiction ends.

Generally, the standing committee review period extends for 30 days after referral of a proposed rule by the presiding officer. However, a committee review period may be extended for an additional 30 days if the committee chair, within the initial 30-day period, takes either of the following actions:

A standing committee may let its jurisdiction expire without taking any action or may waive its jurisdiction over the rule during the 30-day review period. The committee may request modifications to the rule or may, for specified reasons, object to the rule.

- Requests in writing that the agency meet with the committee to review the proposed rule.
- Publishes or posts a notice that the committee will hold a meeting or hearing to review the proposed rule and immediately sends a copy of the notice to the agency.

If a committee, by majority vote of a quorum of the committee, requests modifications to a proposed rule and the agency, in writing, agrees to **consider** making modifications, the review period is extended for both standing committees for 10 days from the time the modifications are received from the agency. An agency may also submit germane modifications on its own. Modifications are accepted under passive review.

A committee may object to all or part of a rule **only** for one or more of the following reasons:

- Absence of statutory authority.
- Emergency relating to public health, safety, or welfare.
- Failure to comply with legislative intent.
- Conflict with state law.
- Change in circumstances since enactment of the earliest law on which the proposed rule is based.
- Arbitrariness or capriciousness, or imposition of an undue hardship.
- For a proposed rule of the Department of Safety and Professional Services establishing standards for dwelling construction, that the

All proposed permanent rules are referred to JCRAR, not just those receiving a standing committee objection. JCRAR is not required to take any action unless a rule received a standing committee objection.

rule would increase the cost of constructing or remodeling a dwelling by more than $1,000.

[s. 227.19 (4), Stats.]

JCRAR Review

When a standing committee's jurisdiction over a proposed rule ends, the rule is referred to JCRAR.

As with the initial reviewing committee, the review period for JCRAR is 30 days, but may be extended for an additional 30 days. If a proposed rule received an objection in a standing committee, JCRAR is required to meet and take executive action and may either nonconcur in the objection, object to the proposed rule, or seek modifications to the rule in the same manner as the initial reviewing committee. JCRAR may, but is not required to, take executive action with respect to any proposed rule that passed a standing committee. JCRAR may request modifications to a rule and may object to a proposed rule for the same reasons for which the initial reviewing committee may object.

JCRAR may object to a rule or part of a rule using one of two methods. Under the first method, it must meet and take executive action within 30 days regarding introduction in each house of a bill to support the objection. If either bill becomes law, the agency may not promulgate the rule, or part of the rule, that was objected to, unless a later law specifically authorizes promulgation of the rule.

Rules submitted to the Legislature after the last day of the final general business floorperiod in a biennium generally will not be considered until the next legislative session.

Alternatively, JCRAR may choose to indefinitely object to a proposed rule. Under this method, an agency may not promulgate the rule or part of the rule, unless the Legislature specifically authorizes the promulgation through enactment of new legislation.

[s. 227.19 (5), Stats.]

Late Submission of Rules to Legislature

If the Legislature receives a proposed rule for committee review after the last day of the Legislature's final general business floorperiod in the biennial session, the rule will be considered received on the first day of the next regular session of the Legislature. However, the presiding officers of both houses may direct referral of the rule before that day. In 2018, the last day of the final general business floorperiod was March 22. [s. 227.19 (2), Stats.]

Repeal of Unauthorized Rules

As an alternative to the general rulemaking process described above, an agency may use a petition process to repeal unauthorized rules. Under this process, which applies to rules

that an agency may not enforce due to repeal or amendment of law, an agency must submit a petition for repeal to JCRAR and the Clearinghouse. Following Clearinghouse review and issuance of a report to JCRAR, the committee may vote to approve the petition, allowing the agency to submit the repeal of the rule to the LRB for publication. [s, 227.26 (4), Stats.]

Emergency Rules

As noted, certain requirements that apply to permanent rules also apply to emergency rules, including the requirement for gubernatorial approval of the scope statement and of the final draft rule.

Once the Governor has approved a final draft emergency rule in writing, the agency may publish the rule in the official state newspaper, at which time the rule takes effect, unless the rule specifies another effective date. The agency must also file a certified copy of the rule with the LRB in order for the rule to be valid. On the day an agency files an emergency rule with the LRB that may have an economic impact on small business, the agency must also submit the rule to the SBRRB. Just as for proposed permanent rules, the SBRRB must determine whether the emergency rule will have a significant economic impact on a substantial number of small businesses. If it determines that the rule will have such an impact, the board may submit suggested changes to the agency to minimize the economic impact of the rule.

The Governor must approve final draft emergency rules before they may be published and filed with the LRB.

An agency must hold a public hearing on an emergency rule within 45 days after the adoption of the rule. An emergency rule remains in effect only for 150 days, unless JCRAR grants an extension for up to an additional 60 days. The total period for all extensions granted may not exceed 120 days.

[s. 227.24, Stats.]

Treatment of Rules by Legislative Initiative

During the 2017-18 Legislative Session, several bills were enacted that modified administrative rules through legislation rather than by the traditional agency-initiated process. The statutes recognize the treatment of rules by legislative initiative and reconcile this treatment with other aspects of the rulemaking process. For example, the statutes specify that rules treated by legislative initiative may be subject to future agency-initiated treatment in the same manner as other administrative rules. [s. 227.265, Stats.]

Challenges to the validity of a rule are brought in the county where the challenging party lives or establishes a principal place of business.

Review of Current Rules

Wisconsin has a number of mechanisms that provide oversight of existing rules and agency policies. These include court actions, JCRAR review, retrospective EIAs, biennial reporting by agencies, and SBRRB review.

Judicial Review of Validity of Rule

The exclusive means of judicial review of the validity of a rule is an action for declaratory judgment brought in the circuit court for the county where the party asserting the invalidity of the rule resides or establishes a principal place of business. If that party is a nonresident or does not have its principal place of business in Wisconsin, venue is in the circuit court in the county in which the dispute arose.

When a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. The LRB must publish a notice of that determination in the Administrative Register and insert an annotation of that determination in the Administrative Code.

[s. 227.40, Stats.]

JCRAR Treatment of Rules in Effect

Suspension of Existing Rules

JCRAR may suspend an existing rule for specified reasons.

JCRAR may, by a majority vote of a quorum of the committee, suspend a permanent rule or emergency rule that has been promulgated and is in effect if JCRAR has first received testimony about the rule at a public hearing and the suspension is based on one or more of the reasons a committee may cite when objecting to a proposed rule.

If JCRAR suspends a rule, it must, within 30 days, introduce a bill in each house to repeal the suspended rule. If both bills are defeated or fail to be enacted in any other manner, the rule remains in effect and JCRAR may not suspend it again. If either bill is enacted, the rule is repealed and may not be promulgated again by the agency unless a subsequent law specifically authorizes such action.

[s. 227.26, Stats.]

Retrospective Economic Impact Analysis

JCRAR may direct an agency to prepare a retrospective EIA for any of an agency's existing rules. Requests for such an analysis may be made with respect to one or more chapters, sections or other subunits of the Administrative Code that are administered by the agency. Following a request, the agency must prepare the retrospective EIA in the same manner it would prepare an EIA on a proposed rule, described above.

Requirement to Promulgate Policy as a Rule

If JCRAR determines that an agency's statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days of JCRAR's action. Further, by a majority vote of a quorum of the committee, JCRAR may require any agency promulgating rules to hold a public hearing with respect to general recommendations of JCRAR and to report its actions to JCRAR within a specified time. [s. 227.26 (2) (b) and (3), Stats.]

JCRAR may require agencies to promulgate their policies or statutory interpretations as emergency rules.

Agency Review of Rules and Enactments

Agencies must submit biennial reports to JCRAR that identify unauthorized, restricted, obsolete, and duplicative rules, as well as rules that are in conflict with other rules, statutes, federal statutes or regulations, or judicial rulings. In addition to identification of such rules, each agency must describe the actions taken to address the rules identified by the report. Similarly, each agency must review enactments to determine whether an enactment affects the agency's rulemaking authority and must address the consequences of such enactments and notify JCRAR of its actions on affected rules within six months of the effective date of the enactment. [s. 227.29, Stats.]

SBRRB Action on Current Rules and Guidelines

The SBRRB is authorized to review any **current** agency rule or guideline to determine whether it places an unnecessary burden on small businesses. If the board so determines, it must submit a report and recommendations regarding the rule or guideline to JCRAR. JCRAR may refer the report to the presiding officer of each house of the Legislature for referral to a committee, or JCRAR may itself undertake a review of the rule or guideline.

If JCRAR reviews the report, it must consider all of the following:

- The continued need for the rule or guideline.
- The nature of the complaints and comments received from the public regarding the rule or guideline.
- The complexity of the rule or guideline.
- The extent to which the rule or guideline overlaps, duplicates, or conflicts with federal regulations, other state rules, or local ordinances.

The SBRRB may review all current rules and guidelines for an unnecessary burden on small business.

- The length of time since the rule or guideline has been evaluated.
- The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule or guideline since it was promulgated.

[s. 227.30, Stats.]

Additional References

1. Information Memorandum 16-08, *Glossary of Rule Promulgation Documents*, at: http://www.legis.wisconsin.gov/lc. The Memo provides a glossary of the various documents and reports that must be prepared by an agency in the rulemaking process.
2. The Legislature's administrative rules website: http://docs.legis.wisconsin.gov/code. This site provides a link to the entire Administrative Code and current and past issues of the Administrative Register. It also provides a notification service and has links to emergency rules in effect and final administrative rule orders filed for publication, as well as to proposed rules, Clearinghouse Reports, and agency reports.
3. 2017 Annual Report of the Legislative Council Rules Clearinghouse, May 2018: http://www.legis.wisconsin.gov/lc. This statutorily required Annual Report to the Governor and Legislature explains the rule review functions and related responsibilities of the Rules Clearinghouse, and activities of the Clearinghouse in 2017. It also includes a sample Clearinghouse Report and rule processing instructions for agency heads.
4. Executive Order #50, relating to guidelines for the promulgation of administrative rules, Governor Scott Walker, November 2011: https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-50.pdf.

Glossary

Economic Impact Analysis (EIA): An analysis prepared by an agency during the rulemaking process that describes the policy addressed by the rule and the economic effect of the rule on business, local government, and the state economy as a whole.

JCRAR: The Joint Committee for Review of Administrative Rules is a joint legislative committee that plays a key role in reviewing administrative rules, including emergency rules. Among other functions, JCRAR may grant extensions for emergency rules and suspend current emergency or permanent rules in specified circumstances.

Legislative Council Administrative Rules Clearinghouse: The Clearinghouse is housed at the Legislative Council and reviews all proposed permanent rules for statutory authority, clarity, and use of plain language, form, and style.

SBRRB: The Small Business Regulatory Review Board is comprised of seven representatives of small business, and a Senator and a Representative involved with legislative committees relating to small business. Agencies must refer rules that may have an economic impact on small business to the SBRRB for review. The board also has authority to review **current** agency rules to determine whether they place an unnecessary burden on small businesses.

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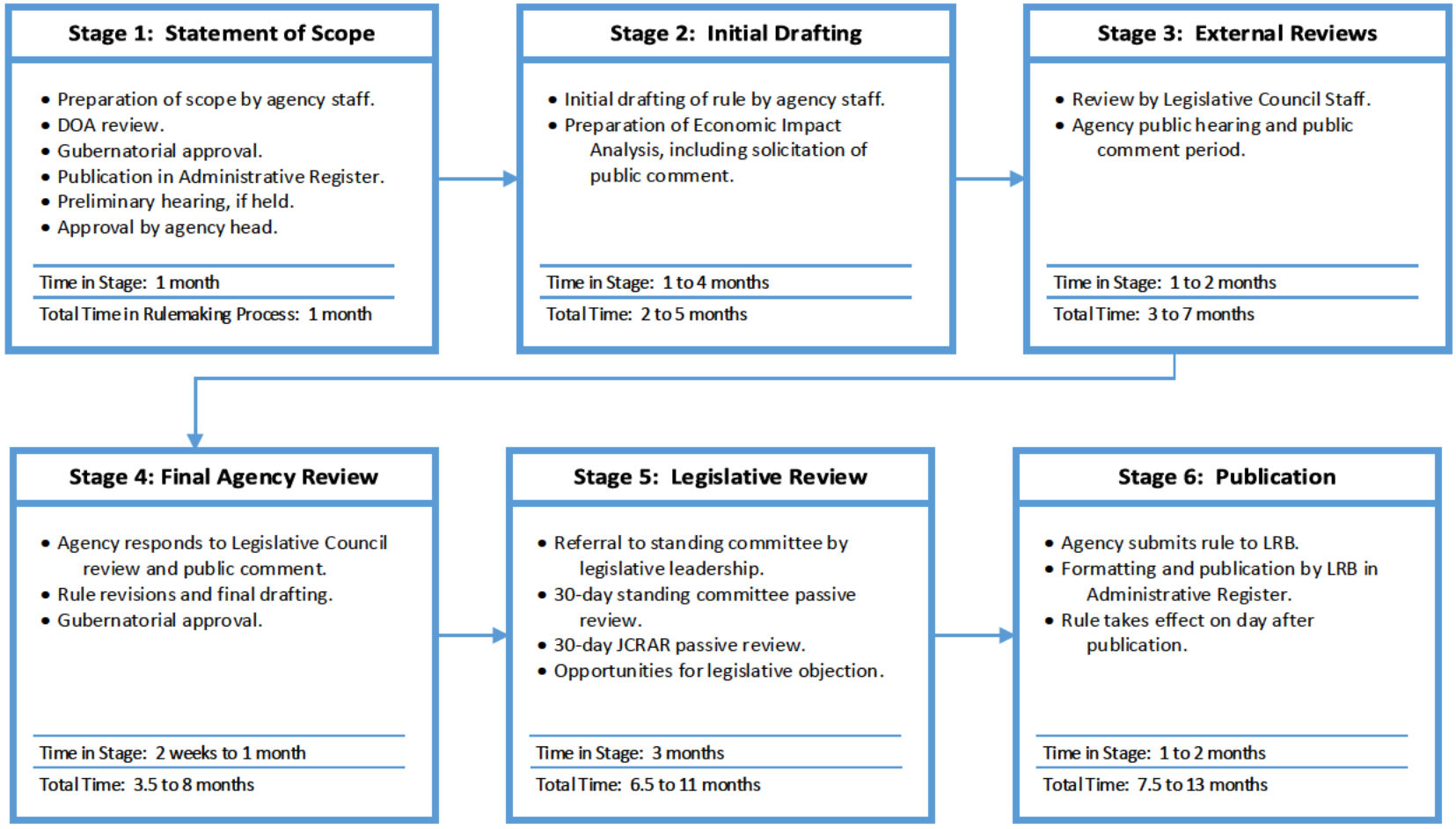
Overview of Administrative Rulemaking Process



Prepared by: Wisconsin Legislative Council, November 2018

Please note this overview describes the process for a "typical" rulemaking. Rules developed using extraordinary processes, such as citizen-initiated rulemaking or internal board approvals, may require additional time.