



***2016 ANNUAL REPORT
LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE***

WISCONSIN LEGISLATIVE COUNCIL

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April 2017

State of Wisconsin
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April 2017

TO: THE HONORABLE SCOTT WALKER, GOVERNOR, AND THE WISCONSIN
LEGISLATURE

This report of the calendar year 2016 activity of the Legislative Council Rules
Clearinghouse is submitted to you pursuant to s. 227.15 (5), Stats.

Sincerely,

A handwritten signature in blue ink that reads 'Terry C. Anderson'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Terry C. Anderson
Director

TCA:jal



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WISCONSIN LEGISLATIVE COUNCIL STAFF
2016 ANNUAL REPORT ON THE
LEGISLATIVE COUNCIL RULES CLEARINGHOUSE*

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* This Report was prepared by Scott Grosz, Director, and Margit Kelley, Assistant Director, Legislative Council Rules Clearinghouse.

FUNCTIONS OF THE LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

REVIEW OF RULES

Legislative review of proposed permanent administrative rules begins with the submission of a rule to the Legislative Council Rules Clearinghouse. Section 227.15, Stats., requires that, prior to any public hearing on a proposed rule or prior to notification of the chief clerk of each house of the Legislature if no hearing is held, an agency must submit the proposed rule to the Legislative Council Rules Clearinghouse for staff review. [See the *Administrative Rules Procedures Manual* (December 2014), prepared jointly by the Legislative Council and the Legislative Reference Bureau, for more information on drafting, promulgating, and reviewing administrative rules. The Manual is available online at: <http://lc.legis.wisconsin.gov/administrative-rules/>.]

The Legislative Council has 20 working days, following receipt of a proposed rule, to prepare a report on its review of the rule. However, with the consent of the Director of the Legislative Council, the review period may be extended for an additional 20 working days.

Upon receipt of a proposed rule, a Clearinghouse Rule number is assigned and submission of the rule is recorded in the *Bulletin of Proceedings* of the Wisconsin Legislature. Two numbered rule jackets, one for the Assembly and one for the Senate, are prepared.

The Director and Assistant Director of the Rules Clearinghouse assign the rule to a Legislative Council staff member for review and preparation of the statutorily required report. The staff member generally prepares the report within 10 working days and transmits the report to the Director and Assistant Director for final review. When the report on the proposed rule is completed, the staff returns the rule jackets and the Clearinghouse report containing the results of the review to the agency. [See *Appendix I* for a sample Clearinghouse report.]

In accordance with s. 227.15, Stats., the Clearinghouse report:

1. Reviews the statutory authority under which the agency intends to adopt the proposed rule.
2. Reviews the proposed rule for form, style, and placement in the Wisconsin Administrative Code.
3. Reviews the proposed rule for conflict with, or duplication of, existing rules.
4. Reviews the proposed rule to ensure that it provides adequate references to related statutes, rules, and forms.

5. Reviews the language of the proposed rule for clarity, grammar, and punctuation and to ensure the use of plain language.

6. Reviews the proposed rule to determine potential conflicts and to make comparisons with related federal statutes and regulations.

7. Reviews the proposed rule to determine whether the agency has specified the number of business days within which the agency will review and make a determination on an application for a business permit.

As part of this review process, staff of the Legislative Council is directed to ensure that procedures for the promulgation of the rule are followed, as required by ch. 227, Stats., and to streamline and simplify the rulemaking process.

OTHER RELATED RESPONSIBILITIES

Other primary rule review responsibilities of the Legislative Council include:

1. Working with and assisting the appropriate legislative committees throughout the rulemaking process.

2. Notifying the Joint Committee for Review of Administrative Rules (JCRAR) and appropriate committees of the Legislature whenever the rulemaking authority of an agency is eliminated or significantly changed by the repeal, amendment, or creation of a statute, by the interpretive decision of a court of competent jurisdiction, or for any other reason.

3. Creating and maintaining an Internet site that includes a copy of each proposed rule in a format that allows the site to be searched using keywords.

4. Assisting the public in resolving questions related to administrative rules. This function includes providing information, identifying agency personnel who may be contacted in relation to rulemaking functions, describing locations where copies of rules, proposed rules, and forms are available, and encouraging and assisting participation in the rulemaking process.

The final responsibility of the Legislative Council is the submission of an annual report to the chief clerk of each house of the Legislature and to the Governor summarizing any action taken by the staff and making recommendations to streamline the rulemaking process and to eliminate obsolete, duplicative, and conflicting rules. This report is the 37th *Annual Report* submitted by the Legislative Council and covers the staff's activities during calendar year 2016. It has been preceded by an initial report to the 1979 Legislature, which covered the staff's activities from November 2, 1979 to April 1, 1980 (i.e., from the effective date of Ch. 34, Laws of 1979, which initiated the omnibus rule review process, to the end of Floorperiod IV of the 1979 Session) and annual reports for calendar years 1980 to 2015.

RECORDKEEPING SYSTEM

The Legislature's *Bulletin of Proceedings* is used for recording actions relating to the review of administrative rules. The Legislative Council, the Senate and Assembly Chief Clerks, and the Legislative Reference Bureau cooperate in a computerized recordkeeping system. Commencing with the 1979 Session, action on administrative rules has been shown in a separate part of the *Bulletin of Proceedings*.

Under this system, each proposed rule is assigned a Clearinghouse Rule number and entered in the computer system by the staff of the Legislative Council. A copy of the Clearinghouse report is placed in a Senate rule jacket and an Assembly rule jacket (similar to bill jackets) and the two rule jackets are then transmitted to the agency promulgating the rule. After transmittal, all legislative actions taken on the rule are entered on the face of the respective jacket and are reported to the chief clerk of each house. The chief clerk enters the actions in the computer system, thereby compiling a history of all legislative actions taken on the rule.

At the beginning of each biennial session, the administrative rule portion of the *Bulletin of Proceedings* is updated by deletion of all records relating to rules which, in the preceding session, have become effective, have been withdrawn, or have been permanently objected to by law. Also removed from the *Bulletin of Proceedings* annually and withdrawn from the rulemaking process is any proposed rule that, in accordance with s. 227.14 (6) (c), Stats., has been pending for at least four years, but no more than five years, after the date of its receipt by the Legislative Council under s. 227.15 (1), Stats. The final *Bulletin of Proceedings* printed for the preceding session then serves as the permanent record of the disposition of those rules. The remaining rules, which are still in the promulgation process, are carried over into the new *Bulletin of Proceedings* for the following biennial session.

Access to rules and agency reports over the Internet became available in 2001 for all rules initiated after the year 2000. These materials may be found at the Legislative Council's website, www.legis.wisconsin.gov/lc.

2016 ACTIVITIES OF THE RULES CLEARINGHOUSE

REVIEW OF RULES

During 2016, 94 proposed administrative rules were submitted to the Legislative Council by 29 state agencies and boards.

As of December 31, 2016, Clearinghouse reports had been completed on 83 of the 94 proposed rules and 11 rules were in the process of review. In addition to the 83 rule reports completed on 2016 rules, reports were prepared in 2016 on 7 rules received in late 2015. Of the 90 reports completed in 2016, no rule required an extension of the review process by the Director of the Legislative Council. Clearinghouse reports completed in 2016 are summarized below:

Rules Received in 2016	94	
Withdrawn	0	
No report required	0	
Reports pending on December 31, 2016	-11	
<i>Total 2016 Reports Completed in 2016</i>	83	
2016 Reports Completed in 2016		83
2015 Reports Completed in January 2016		7
Total Reports Completed in 2016		90

The table below shows that, from November 2, 1979 (the beginning of the omnibus rule review process) through December 31, 2016, the Clearinghouse has received 6,534 rule submissions and completed reviews on 6,430 proposed rules. Of the total rule submissions, 93 were exempt from the reporting process for various reasons and 11 remained under review at the end of 2016.

<i>Year</i>	<i>Received</i>	<i>Completed</i>	<i>Exempt</i>
1979	70	45	12
1980	252	227	24
1981	252	234	9
1982	251	254	3
1983	222	220	4
1984	255	247	2
1985	213	206	4
1986	251	252	4
1987	182	186	1
1988	219	216	5
1989	212	208	1
1990	264	254	3
1991	199	205	2
1992	225	228	0
1993	241	232	1
1994	225	234	0
1995	236	224	2
1996	194	201	1
1997	158	159	1
1998	208	200	2
1999	170	177	1
2000	189	176	1
2001	157	158	1
2002	155	160	1
2003	126	127	2
2004	142	142	0
2005	122	123	0
2006	139	139	3
2007	117	114	0
2008	114	118	0
2009	123	108	3
2010	151	159	0
2011	53	57	0
2012	55	54	0
2013	118	106	0
2014	78	82	0
2015	102	108	0
2016	94	90	0
Total	6,534	6,430	93

In 2016, rules were received from the following 29 state agencies and boards:

Number of Proposed Rules, by Submitting Agency

Administration	1
Agriculture, Trade and Consumer Protection	8
Board of Nursing	2
Children and Families	6
Controlled Substances Board	3
Corrections	2
Dietitians Affiliated Credentialing Board	1
Employee Trust Funds	2
Funeral Directors Examining Board	2
Health Services	5
Hearing and Speech Examining Board	1
Insurance	2
Kickapoo Reserve Management Board	1
Labor and Industry Review Commission	1
Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board	2
Medical Examining Board	2
Natural Resources	8
Pharmacy Examining Board	6
Psychology Examining Board	1
Public Defender Board	1
Public Instruction	16
Public Service Commission	1
Radiography Examining Board	2
Real Estate Examining Board	1
Revenue	6
Safety and Professional Services	4
Transportation	4
Veterinary Examining Board	1
Workforce Development	2
Total number of rules submitted:	94

Although the statistics presented in this report give some indication of the workload of the Legislative Council staff in reviewing proposed administrative rules, it should be noted that rules vary in length. Similarly, Clearinghouse reports vary from completion of a simple checklist to large reports. In summary, for all rule reports completed in 2016, the Legislative Council staff commented on:

1. The *statutory authority* of proposed administrative rules in 25 reports.
2. The *form, style and placement* of proposed administrative rules in 73 reports.
3. A *conflict with, or duplication of*, existing rules in 6 reports.
4. The *adequacy of references* of proposed administrative rules to related statutes, rules and forms in 30 reports.
5. *Clarity, grammar, punctuation and use of plain language* in proposed administrative rules in 69 reports.
6. The *potential conflicts* of proposed administrative rules with, and their comparability to, related federal statutes and regulations in 2 reports.¹
7. The *permit action deadline requirement* in no reports.

ASSISTING COMMITTEES

A Legislative Council staff attorney or analyst works with each standing committee and statutory committee, except the Joint Finance Committee. When a committee has a proposed rule referred to it by the presiding officer of the house, the staff member will participate in the committee's oversight.

During 2016, no legislative standing committees held hearings, requested meetings, or waived their jurisdiction over any proposed rules. Germane modifications were received in the legislative review of two proposed rules. Legislative standing committees did not request modifications to any other proposed rules during the year. Legislative standing committees did not object to any rules during the year.

Pursuant to 2011 Wisconsin Act 21, all proposed permanent rules must be referred to JCRAR.² In 2016, JCRAR held hearings and objected, in whole or in part, to three proposed rules. The committee did not request meetings or waive its jurisdiction over any other proposed permanent rules.

The Legislative Council staff also responded to individual legislator questions concerning the rulemaking process and the laws governing legislative and gubernatorial review of proposed rules.

The table below reviews legislative committee activity in the review of proposed administrative rules beginning on November 2, 1979 and ending on December 31, 2016.

¹ In addition, the Legislative Council staff has adopted a policy of noting when proposed rules are based on federal "*guidelines*," which do not have the force of law, as opposed to rules based on federal "*regulations*," which do have the force of law and with which the state may have a legal obligation to comply.

² Prior to Act 21, only rules receiving a standing committee objection had to be referred to JCRAR. Act 21 requires that all rules be referred to JCRAR, but only requires that JCRAR take action on rules that received a standing committee objection.

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2016)*						
Year	Rules Submitted to Rules Clearinghouse	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
11/2/79-80	322	18	5	1	0	No bill introduced, rule withdrawn
1981	252	29	10	4	4	Chapters 20 (SEC. 1561), 26, 31 and 180, Laws of 1981
1982	251	31	4	1	1	1983 Wisconsin Act 94
1983	222	30	5	0	0	—
1984	255	26	2	2	2	1983 Wisconsin Act 310 and 1985 Wisconsin Act 29 (SEC. 826)
1985	213	37	8	3	2	◆ 1985 Wisconsin Act 29 (SECS. 1059r and 2238ng to 2238or) ◆ 1985 Assembly Bill 460, passed and vetoed; override failed
1986	251	30	1	0	0	—
1987	182	30	5	0	0	—
1988	219	38	4	0	0	—
1989	212	22	6	2	0	◆ 1989 Senate Bill 89 and 1989 Assembly Bill 171 (failed to pass) ◆ 1989 Senate Bill 248 and 1989 Assembly Bill 457 (failed to pass)
1990	264	29	2	1	0	◆ 1991 Senate Bill 24 and 1991 Assembly Bill 71 (failed to pass)
1991	199	19	5	1	0	◆ 1991 Senate Bill 442 and 1991 Assembly Bill 840 (failed to pass after rule objected to withdrawn by agency)
1992	225	33	3	2	1	◆ 1993 Wisconsin Act 9 ◆ 1993 Senate Bill 3 and 1993 Assembly Bill 17 (failed to pass)
1993	241	24	1	0	0	—
1994	225	29	3	0	0	—
1995	236	19	0	0	0	—
1996	194	19	1	1	1	◆ 1997 Assembly Bill 5 and 1997 Senate Bill 20 (failed to pass) ◆ 1997 Wisconsin Act 237 (SECS. 320s, 322d and 322e)
1997	158	19	6	0	0	—
1998	208	15	0	0	0	—
1999	170	18	2	1	0	—
2000	189	20	2	1	1	◆ 1999 Wisconsin Act 178
2001	157	14	5	2	0	◆ 2001 Assembly Bill 18 and Senate Bill 2 (failed to pass); ◆ 2001 Assembly Bill 524 and Senate Bill 267 (failed to pass) ◆ 2001 Assembly Bill 697 and Senate Bill 361 (failed to pass)
2002	155	35	2	1	0	◆ 2003 Assembly Bill 25 and Senate Bill 19 (failed to pass)
2003	126	20	2	2	0	◆ 2003 Assembly Bill 253 and Senate Bill 123 (failed to pass)

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2016)*						
Year	Rules Submitted to Rules Clearinghouse	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
2004	142	21	4	2	1	◆ 2003 Wisconsin Act 240
2005	122	20	4	3	0	◆ 2005 Assembly Bill 8 and Senate Bill 8 (failed to pass) ◆ 2005 Assembly Bill 12 and Senate Bill 12 (failed to pass) ◆ 2005 Assembly Bill 401 and Senate Bill 200 (failed to pass) ◆ 2005 Assembly Bill 404 and Senate Bill 201 (failed to pass) ◆ 2005 Assembly Bill 442 and Senate Bill 220 (failed to pass)
2006	139	21	8	4	0	◆ 2005 Assembly Bill 1225 and Senate Bill 732 (failed to pass, late introduction in 2005 Session and reintroduction in 2007 session as Assembly Bill 37 and Senate Bill 9) ◆ 2005 Assembly Bill 1226 and Senate Bill 733 (failed to pass; late introduction in 2005 Session and reintroduction in 2007 session as Assembly Bill 27 and Senate Bill 10)
2007	117	16	2	0	0	—
2008	114	13	1	0	0	—
2009	123	4	0	0	0	—
2010	151	16	1	0	0	—
2011	53	6**	2	1	0	◆ 2011 Assembly Bill 196 and Senate Bill 139 (failed to pass)
2012	55	3**	0	0	0	—
2013	118	5	0	0	0	—
2014	78	3	0	0	0	—
2015	102	6	0	0	0	—
2016	94	2	0	3	0***	◆ 2015 Assembly Bill 1024 and Senate Bill 797 (failed to pass; late introduction in 2015 Session and reintroduction in 2017 Session as Assembly Bill 30 and Senate Bill 6) ◆ 2015 Assembly Bill 1025 and Senate Bill 798 (failed to pass; late introduction in 2015 Session and reintroduction in 2017 Session as Assembly Bill 31 and Senate Bill 4) ◆ 2017 Assembly Bill 29 and Senate Bill 5
TOTAL	6,534	740	106	38	13 (PLUS ONE BILL PASSED AND VETOED; VETO NOT OVERRIDDEN)	

* The general system of legislative review of proposed administrative rules, primarily embodied in ss. 227.15 and 227.19, Stats., took effect on November 2, 1979, as part of Ch. 34, Laws of 1979.

** Includes rules modified by JCRAR.

*** Status of bills introduced in the 2017 Session remains pending as of April 2017.

NOTICE OF CHANGES IN RULEMAKING AUTHORITY

Section 227.15 (4), Stats., instructs the Legislative Council staff to identify instances when the rulemaking authority of an agency is eliminated or significantly changed by the repeal, amendment, or creation of a statute, by the interpretive decision of a court of competent jurisdiction, or for any other reason.

The Legislative Council staff have identified the following 2015 Wisconsin Acts, enacted in 2016, that were determined to relate to changes in agency rulemaking authority, categorized as follows:

- Acts that grant, eliminate, or require the exercise of rulemaking authority, as identified in the Act's relating clause:
 - **Act 128**, regarding placement of a child in out-of-home care. The Act directs the Department of Children and Families (DCF) to promulgate rules regarding the use of the reasonable and prudent parenting standard for decisions concerning a child placed in out-of-home care.
 - **Act 129**, regarding successor guardianship of a child. The Act directs DCF to promulgate administrative rules governing the payment of monthly subsidized guardianship payments to a successor guardian of a child.
 - **Act 143**, regarding subsidized guardianship payments during child placement. The Act requires DCF to promulgate rules regarding a guardian's qualifications for guardianship payments.
 - **Act 151**, regarding family planning and preventive health services grants. The Act grants rulemaking authority to the Department of Health Services (DHS) to administer the grants.
 - **Act 170**, regarding off-highway motorcycles. The Act grants authority to the Department of Natural Resources (DNR) to promulgate rules regarding registration, trail passes, rental, public education, and operation associated with off-highway motorcycles.
 - **Act 180**, regarding worker's compensation. Under the Act, the Department of Workforce Development must promulgate rules relating to self-insurance for public employer worker's compensation costs and rules relating to permanent partial disability ratings.
 - **Act 204**, regarding hazardous substances cleanup and voluntary party liability exemptions for contaminated sediments. The Act requires DNR to revise and create rules related to the application of the voluntary party liability exemption program to contaminated sediments.
 - **Act 211**, regarding building permit forms. The Act directs the Department of Safety and Professional Services (DSPS) to establish by rule a system for electronic submission of building permits and to make the standard building permit form available in electronic form.

- **Act 237**, regarding cemeteries. The Act transfers certain rulemaking functions to the Cemetery Board from DSPS and the Department of Financial Institutions (DFI).
- **Act 242**, regarding dairy and food processing plant licensing. The Act grants the Department of Agriculture, Trade and Consumer Protection (DATCP) rulemaking authority to exempt places from the definition of food processing plant.
- **Act 243**, regarding regulation of slaughtering and meat processing. The Act provides DATCP with rulemaking authority relating to licensure, recognition of federal requirements, and other aspects of the regulation of slaughtering and meat processing.
- **Act 257**, regarding standing joint review boards for tax incremental districts. The Act directs the Department of Revenue (DOR) to provide by rule for the electronic submission of tax incremental district annual reports.
- **Act 258**, regarding the laws governing real estate practice, including several modifications to the rulemaking authority of the Real Estate Examining Board.
- **Act 261**, regarding electronic voter registration and election administration. Generally, the Act provides for transfer of rulemaking authority from the Government Accountability Board to the Ethics Commission and Elections Commission, and grants rulemaking authority to establish a fee for the subscription service for absentee voting information.
- **Act 265**, regarding pain clinic certification and requirements. The Act authorizes DHS, after consulting with the Medical Examining Board, to promulgate administrative rules to govern the operation of pain clinics as DHS finds necessary to provide safety to the public.
- **Act 266**, which relates to the prescription drug monitoring program (PDMP), and expands the list of entities to which the Controlled Substances Board must allow permit disclosure of PDMP records.
- **Act 276**, which requires DHS to establish a dietetic internship program under the supplemental food program for women, infants, and children. The Act grants DHS rulemaking authority to administer the program.
- **Act 277**, which extends the current law regulation of professional mixed martial arts to all “unarmed combat sports” and grants DSPS explicit rulemaking authority to implement and enforce those laws.
- **Act 295**, regarding revisions to the uniform partnership law, including revisions to the rulemaking authority of DFI as part of the repeal and recreation of ch. 178, Stats.
- **Act 356**, which creates an address confidentiality program for victims of child abuse, domestic abuse, sexual abuse, stalking, and human trafficking, and grants rulemaking authority to the Department of Justice to administer the program.

- **Act 358**, regarding the managed forest law program. The Act grants DNR additional rulemaking authority under the program relating to the definition of improvements and procedures regarding damage to land.
- **Act 368**, regarding notifications with respect to certain missing children. The Act exempts certain types of guidance from rule promulgation procedures and grants rulemaking authority to DCF, the Department of Corrections (DOC), and DHS to implement the requirements of the bill relating to notifications with respect to certain missing children.
- **Act 375**, regarding x-ray orders by physical therapists. The Act grants rulemaking authority to the Physical Therapy Examining Board to determine the qualifications a physical therapist must satisfy in order to order x-rays.
- **Act 385**, regarding a veteran's employment and entrepreneurship grant program. The Act requires the Department of Veterans Affairs (DVA) to promulgate rules to implement the grant program.
- Acts that directly modify the Wisconsin Administrative Code:
 - **Act 132**, which modifies DCF administrative rules, including rules regarding child placing agencies, transitional jobs for low-income adults, public assistance record retention, child care certification, child care quality standards and grants, family child care centers, and group child care centers.
 - **Act 163**, regarding charitable organizations, the solicitation of funds for charitable purposes, and professional employer organizations. The Act permits DFI to make changes to filing thresholds using a passive review process with JCRAR and modifies rules promulgated by DFI.
 - **Act 217**, which modifies rules of the Accounting Examining Board relating to professional code of conduct, reporting of criminal conviction, peer review, attest services, work experience, and renewal and reinstatement of licenses.
 - **Act 304**, which directly modifies DFI rules regarding credit union operations.
 - **Act 329**, which directly modifies rules of the Wisconsin Technical College System, including the repeal of rules relating to the technical college instructor occupational competency program and faculty development grants.
 - **Act 330**, which directly modifies the University of Wisconsin System rules relating to service of process and the update and removal of obsolete provisions.
 - **Act 372**, regarding alcohol beverages recordkeeping and local options to prohibit its sale. The Act amends DOR administrative rules to authorize a licensed retailer to retain invoices in electronic form only.
- Acts that limit or prohibit rulemaking on specific subject matter:
 - **Act 159**, regarding the repeal of the interstate compact on juveniles. As part of the repeal, the Act eliminates rulemaking authority associated with the interstate compact on juveniles.

- **Act 222**, regarding back tag requirements. The Act limits DNR authority regarding hunting regulations in conjunction with the Act's repeal of back tag requirements for the hunting of deer, elk, and bear.
- **Act 240**, which limits DSPS authority to require automatic fire suppression systems at certain buildings on fairgrounds.
- **Act 247**, which specifies that DATCP may not promulgate or enforce a rule that requires the owner or operator of a motor vehicle fueling facility to have a telephone or other means for contacting emergency services available to the public.
- **Act 279**, regarding exemption from underage alcohol beverages violations for bystanders assisting victims of sex-related crimes. The Act limits the authority of public universities and colleges to impose certain disciplinary sanctions against a student for an underage alcohol beverages violation if the person is exempt from issuance of a citation under the Act.
- **Act 303**, regarding emissions from residential and commercial wood heaters. Under the Act, the DNR may not promulgate a rule, or enforce a federal regulation, that specifies a new source performance standard or other emission standard for residential or commercial wood heaters that is more stringent than any new source performance standard in effect on December 31, 2014.
- **Act 333**, regarding seasonal placement of Christmas trees. The Act prohibits DSPS from promulgating or enforcing a rule related to fire safety that prohibits the seasonal placement of a Christmas tree in the rotunda of the State Capitol building or in a church.
- Other Acts that affect agency authority to promulgate rules:
 - **Act 150**, regarding state civil service laws. Certain standards that have been the subject of rulemaking under chs. ER and ER-MRS are revised in the Act, such as probationary periods, grievance procedures, and layoff and reinstatement procedures.
 - **Act 205**, regarding water quality standard and variance review. The Act exempts from the requirement to promulgate rules certain actions of DNR and the Department of Administration (DOA) relating to the statewide water quality variance for phosphorus.
 - **Act 250**, regarding lake monitoring and protection grants and contracts. The Act modifies DNR rulemaking regarding the contracts to specify that qualified participants shall include counties and public or private entities that manage aquatic invasive species under a management plan approved by DNR.
 - **Act 290**, which relates to injections of prescribed drugs by pharmacists and amends the Pharmacy Examining Board's rulemaking authority regarding the administration of drug products and devices.

- **Act 312**, regarding ABLE accounts. The Act repeals certain provisions under the 2015-16 Biennial Budget Act authorizing the creation of ABLE accounts in the state and requiring DOA to promulgate rules to implement and administer the program.

Legislative Council staff also conducted a case law review of judicial decisions published in 2016. It was determined that two decisions issued in 2016 affected the rulemaking authority of an agency:

- ***Papa v. Wisconsin Department of Health Services***, regarding policy-making authority. The Waukesha County Circuit Court held that DHS’s policy of recouping payments for noncompliance with Medicaid program requirements exceeded a specific statutory grant of authority, and imposed a rule that was not properly promulgated. DHS has appealed the circuit court’s decision and the case is pending before the Wisconsin Court of Appeals. [Case No. 2016AP002082.]
- ***Wisconsin Association of State Prosecutors v. Wisconsin Employment Relations Commission*** (WERC), regarding rulemaking authority. The Wisconsin Court of Appeals held that WERC’s administrative rules requiring the filing of an election petition in order to qualify for a recertification election exceeded the specific statutory requirement to hold a recertification election. WERC has appealed the Court of Appeals’ decision and the case is pending before the Wisconsin Supreme Court. [Case No. 2015AP002224.]

INTERNET ACCESS

In 2001, the Legislature, through its service agencies, began providing electronic access to all proposed administrative rules submitted to the Clearinghouse. The system mirrors the process already in place for legislative proposals. That is, interested persons are able to use the Internet to search for proposed rules directly or to link to them from the Legislature’s Bulletin of Proceedings, and review a full “rule history” for each proposed rule. The site holds the initial version of the proposed rule, the Clearinghouse report on the proposed rule, all modified versions of the proposed rule submitted to the Legislature, and the final agency report to the Legislature. Each rule history page also includes the economic impact analysis and fiscal estimate prepared by the agency, as well as any report prepared by the Small Business Regulatory Review Board.

Database access is available for proposed rules submitted to the Clearinghouse after the year 2000, with scanned documents available for many prior years. The proposed rules are available at: <https://docs.legis.wisconsin.gov/code/>.

ASSISTING STATE AGENCIES

In 2016, the Legislative Council staff responded to agency questions concerning the rulemaking process and the laws governing legislative and gubernatorial review of proposed rules.

PUBLIC LIAISON

In 2016, the Legislative Council staff received a number of requests from the public for information about aspects of the rulemaking process or the status of specific rules.

SG:MSK:jal

APPENDIX 1
SAMPLE CLEARINGHOUSE REPORT



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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Margit S. Kelley
Clearinghouse Assistant Director

Jessica Karls-Ruplinger
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **16-039**

AN ORDER to amend ATCP 20.01 (1), (5) and (33), 20.04 (1) (intro.), 20.06 (2) (a) 1. and (b), and 20.14 (1), (4) (intro.) and (5) (intro.); and to create ATCP 20.01 (23m) and 20.04 (6), relating to non-commercial distribution of seed.

Submitted by **DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

06-14-2016 RECEIVED BY LEGISLATIVE COUNCIL.

07-02-2016 REPORT SENT TO AGENCY.

SG:AH

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

- 1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]
Comment Attached YES NO

- 2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]
Comment Attached YES NO

- 3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]
Comment Attached YES NO

- 4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]
Comment Attached YES NO

- 5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]
Comment Attached YES NO

- 6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]
Comment Attached YES NO

- 7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]
Comment Attached YES NO



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 16-039

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

a. A thorough legal analysis should be completed to ensure that the department’s authority extends to the distribution of seeds for non-commercial purposes. The order cites s. 94.45 (6), Stats., as a source of specific statutory authority for the rule change. It seems likely that a court would interpret the scope of the rule promulgation authority authorized under that subsection in the context of corresponding prohibitions and definitions in ss. 94.38 through 94.46, Stats. Assuming that is the case, is it clear that those statutes are intended to cover distributions that are not made for the purpose of an eventual sale? “Distribution” is not defined in the relevant statutory sections. However, in various statutory provisions, the term appears to be used in the context of distribution to sellers. For example, s. 94.385 (1), Stats., provides that: “[n]o person may sell, distribute, or offer or expose for sale in this state a container of agricultural seed or vegetable seed for seeding or sprouting purposes unless the container bears or has attached to it in a conspicuous place a label containing the information required by the department by rule.”. Likewise, the department’s authority to enforce the seed act by taking samples, set forth in s. 94.45 (1) (a), Stats., appears to be limited to places in which seed is “stored, transported, sold, or exposed for sale”. In those provisions, it is not immediately clear whether the phrase “for sale” modifies only “expose” or also other terms, including “distribute”. Other, related provisions appear to contemplate an application only to seeds intended to be sold. For example, the term “agricultural seed” is defined under s. 94.38 (2), Stats., to include specified types of seeds “sold within this state”.

b. Because the phrase “distributed for sowing purposes”, as it appears in s. ATCP 20.04 (6) (a) (intro.), is not defined or otherwise directly limited in the proposed rule, it appears that it is possible that several requirements enumerated in s. ATCP 20.04 (6) could be interpreted to apply to very informal seed sharing, for example, to sharing by a gardener who shares a few

flower seeds with a friend or neighbor. Similar comments apply to the term “non-commercial seed sharing”, which is defined relatively broadly in the proposed rule, and to the undefined term “distribution”, as it is used in several other provisions of the rule. Does such an application (i.e., to relatively informal seed sharing) match the department’s intent? If so, consider whether that scope is authorized under ss. 94.38 through 94.45, Stats. [See related comments above.] If not, consider modifying the rule to specify a more limited scope.

2. Form, Style and Placement in Administrative Code

a. In the introductory clause, “(c)” should be replaced with “(a)” following “20.06 (2)”. Also, for consistency, the introductory clause should be modified to include the same format for “to amend” and “to create”. In addition, the phrase “and to create” should be preceded with a semicolon. [See s. 1.02 (1), Manual.]

b. In the summary of the proposed rule, the department should use the headings prescribed in s. 1.02 (2), Manual, and should include the deadline for submission of comments on the proposed rule. Additionally, it would be helpful if the sections regarding federal statutes and the statutes in adjacent states were modified to address whether the relevant federal and state statutes apply to non-commercial distribution.

c. The department should review the proposed rule to ensure that added text is underscored in amended provisions throughout the rule. For example, “(6)” should be underscored in s. ATCP 20.04 (1) (intro.) and “distribution or” should be underscored in s. ATCP 20.06 (2) (b).

d. It appears that the definition of “non-commercial seed sharing” appears in only one other instance in the rule text (other than a title). If that is the case, consider whether the definition is unnecessary. Alternatively, consider incorporating that defined phrase elsewhere in the rule, for example in s. ATCP 20.04 (6) (a) (intro.).

e. Section ATCP 20.04 (b) should be substantially revised to ensure that all requirements are listed in a clear manner. For example, the second sentences in s. ATCP 20.04 (6) (a) 1. and 2. appear to be independent requirements; if so, they should be listed separately. Likewise, s. ATCP 20.04 (6) (a) 4., 5. and 6. do not appear to be information to be contained on a label, as suggested by the introductory language; instead, it appears that those provisions include requirements that should be listed separately from the requirements regarding the contents of labels.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. ATCP 20.04 (6) (a) (intro.), the phrase “agricultural, vegetable, and flower seed” should be amended to read “agricultural, vegetable, or flower seed”. In s. ATCP 20.04 (6) (a) 6., punctuation such as a period or semicolon should be placed between “required” and “however”.

b. In the enumeration of provisions treated by the proposed rule and the treatment clause for SECTION 6, references to s. ATCP 20.06 (2) (a) 1. should include a period after “1”.

c. To ensure clarity and consistency, consider using either “distribution or sale” or “sale or distribution” throughout the rule, rather than a mix of those two phrases.

APPENDIX 2

PROCESSING INSTRUCTIONS TO AGENCY HEADS



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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PROCESSING INSTRUCTIONS TO AGENCY HEADS

[ENCLOSED ARE THE SENATE AND ASSEMBLY RULE JACKETS CONTAINING THE LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT. AN ADDITIONAL COPY OF THE CLEARINGHOUSE REPORT IS ENCLOSED FOR YOUR FILES.]

PLEASE NOTE: Your agency must complete the following steps in the legislative process of administrative rule review:

1. On the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Report Received by Agency."
2. On the appropriate line or lines on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date or dates and, in column 2, "Public Hearing Held" OR "Public Hearing Not Required."
3. Enclose in both clearinghouse rule jackets, in triplicate, the notice and report required by s. 227.19 (2) and (3), Stats. [The report includes the rule in final draft form.]
4. Notify the presiding officer of the Senate and Assembly that the rule is in final draft form by hand delivering the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk. At the time of this submission, on the appropriate line on the face of the clearinghouse rule jacket, each Chief Clerk will enter, in column 1, the appropriate date and, in column 2, "Report Received from Agency." Each clearinghouse rule jacket will be promptly delivered to each presiding officer for referral of the notice and report to a standing committee in each house.
5. If the agency does not proceed with the rulemaking process on this rule, on the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Rule Draft Withdrawn by Agency" and hand deliver the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk.

FOR YOUR INFORMATION: A record of all actions taken on administrative rules is contained in the Bulletin of Proceedings of the Wisconsin Legislature. The clearinghouse rule jackets will be retained by the Legislature as a permanent record.

[See reverse side for jacket sample.]

