



State of Wisconsin
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931
1-877-533-5020 (toll free)
Fax 608-267-4549
etf.wi.gov

Correspondence Memorandum

DATE: July 31, 2015
TO: Group Insurance Board
FROM: David H. Nispel, General Counsel
Dan Hayes, Attorney
SUBJECT: Status of Proposed Administrative Rules

This memo is for informational purposes only. No Board action is required.

Administrative Rules

This memorandum lists administrative rules that staff are working on and the status of those rules. The memorandum also discusses recently introduced legislation that would affect the administrative rule promulgation process if enacted.

As of July 31, 2015, there are no rules pending that require the approval of the Board. The recently promulgated technical rule, which has been discussed in memos for several prior board meetings, was published on May 26 with an effective date of June 1, 2015. That rule related to technical updates to existing ETF rules deleted obsolete language in ETF rules, created consistency with provisions in 2013 Wisconsin Act 20 related to rehired annuitants and made other minor substantive changes.

Senate Bill 168 / Assembly Bill 251

A bill was introduced in the State Senate on May 21, 2015 that proposes several changes to the process of promulgating administrative rules. A companion bill was introduced in the Assembly on June 4, 2015. Senate Bill 168 and Assembly Bill 251 would make changes in the following areas:

- Role of Office of Business Development and Small Business Regulatory Review Board, impacts on small businesses.
- Scope statements, preliminary public hearing and comment period on scope statements.
- Passage of bill required for certain rules.
- Independent economic impact analyses, duties of secretary of revenue.
- Approval of germane modifications to proposed rules.

Reviewed and approved by Robert J. Conlin, Secretary

Electronically signed:
8/10/15

Board	Mtg Date	Item #
GIB	8.25.15	8D

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- Statements of policy and interpretations.
- Emergency Rules.

Details are set forth in the Analysis by the Legislative Reference Bureau of SB 168 (attached).

SB 168 was referred to the Joint Committee for Review of Administrative Rules, and AB 251 was referred to the Assembly Committee on State Affairs and Government Operations. To date, no action has been taken by either committee.

Staff will be available at the Board meeting to answer questions.

ATTACHMENT: Analysis by the Legislative Reference Bureau of SB 168



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-2170/2
MED:cjs

2015 SENATE BILL 168

May 21, 2015 - Introduced by Senators LEMAHIEU, NASS, GUDEx, LASEE, ROTH, STROEBEL, TIFFANY and VUKMIR, cosponsored by Representatives NEYLON, CZAJA, CRAIG, JARCHOW, QUINN, EDMING and BRANDTJEN. Referred to Joint Committee for Review of Administrative Rules.

1 **AN ACT to repeal** 227.137 (6) and (7), 227.17 (3) (em), 227.19 (3) (h), 227.19 (3m),
2 227.24 (3m) (title) and 227.26 (2) (b) (title); **to renumber** 227.10 (2), 227.11 (2)
3 (e) and 227.14 (2g) (a) and (b); **to renumber and amend** 16.28 (1), 227.14 (2g)
4 (intro.), 227.16 (6), 227.185, 227.24 (2) (a), 227.24 (3m) and 227.26 (2) (b); **to**
5 **amend** 13.56 (3), 73.16 (2) (b), 227.11 (title), 227.114 (6), 227.12 (4), 227.13,
6 227.135 (1) (intro.), 227.135 (2), 227.137 (3) (intro.), (a) and (b), 227.137 (4),
7 227.14 (2g) (title), 227.14 (2m), 227.14 (4m), 227.15 (1), 227.15 (1m) (intro.),
8 227.15 (1m) (bm), 227.15 (1m) (c), 227.15 (4), 227.16 (1), 227.16 (2) (d), 227.17
9 (1) (intro.), 227.17 (3) (f), 227.185 (title), 227.19 (2), 227.19 (3) (intro.), 227.19
10 (3) (c), 227.19 (3) (e) (intro.), 227.19 (5) (b) 1. (intro.), 227.22 (2) (e), 227.24 (1)
11 (a), 227.24 (1) (e) 1d., 227.24 (1) (e) 1g., 227.24 (2) (am), 227.24 (3), 227.24 (4)
12 and 227.26 (2) (k); and **to create** 16.28 (1) (b) to (e), 20.505 (1) (ks), 35.93 (2) (b)
13 3. bm., 35.93 (2) (b) 3. gr., 73.17, 227.10 (1m) (b), 227.136, 227.137 (3m), 227.137
14 (4m), 227.139, 227.14 (2) (a) 3m., 227.14 (2g) (c), 227.17 (3) (eg), 227.185 (2),

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- 1 227.19 (5) (b) 3., 227.24 (1m) (intro.) and 227.24 (2) (a) 2. of the statutes;
- 2 **relating to:** various changes regarding administrative rules and rule-making
- 3 procedures; time limits for emergency rules; and making an appropriation.

Analysis by the Legislative Reference Bureau

CURRENT LAW

Permanent rules

Current law sets forth the procedure for promulgating administrative rules. Generally, that procedure consists of the following steps:

1. The agency planning to promulgate the rule prepares a statement of the scope of the proposed rule (scope statement), which must be approved by the governor and the agency head before any state employee or official may perform any activity in connection with the drafting of the proposed rule.

2. The agency drafts the proposed rule, together with an economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, and submits those materials to the Legislative Council Staff for review. The agency must also submit a proposed rule that may have an economic impact on small businesses to the Small Business Regulatory Review Board (SBRRB), which must determine whether the proposed rule will have a significant economic impact on a substantial number of small businesses and may make certain other recommendations.

3. Subject to certain exceptions, the agency holds a public hearing on the proposed rule.

4. The final draft of the proposed rule is submitted to the governor for approval who, in his or her discretion, may approve or reject the proposed rule.

5. The final draft of the proposed rule, together with the economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, are submitted to the legislature for review by one standing committee in each house and by the Joint Committee for Review of Administrative Rules (JCRAR).

6. The proposed rule is filed with the Legislative Reference Bureau (LRB) for publication in the Wisconsin Administrative Register (register), and, subject to certain exceptions, the rule becomes effective on the first day of the first month beginning after publication.

Emergency rules

Under current law, an agency may promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements for permanent rules if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the requirements for permanent rules. An agency must prepare, and obtain approval of, scope statements for emergency rules in the same manner as for permanent rules and must obtain final approval of emergency rules by the governor. In addition, an agency must submit a copy of an emergency rule it promulgates to the SBRRB, which must determine whether it will have a significant

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economic impact on a substantial number of small businesses and make certain other recommendations.

An emergency rule may only remain in effect for 150 days, except that, at the request of an agency, JCRAR may extend the effective period for an emergency rule for one or more periods of up to 60 days each, not to exceed a total of 120 additional days beyond the 150-day period.

THE BILL

The bill makes various changes regarding the rule-making procedures established under current law. Significant changes regarding those procedures are described below.

Role of Office of Business Development and Small Business Regulatory Review Board; impacts on small businesses

The bill requires scope statements for proposed rules, and proposed rules in final draft form, to be submitted to OBD instead of to the governor. Following either submission, the bill requires the OBD to make a determination as to the agency's authority to promulgate the proposed rule and report its determination to the governor, who may then approve or reject the statement of scope or proposed rule as under current law.

The bill also requires proposed rules that under current law must be submitted to the SBRRB to instead be submitted to the OBD. Following the submission, the OBD must make a determination as to whether the proposed rule may have an economic impact on small businesses, and if the OBD so determines, the OBD must submit the proposed rule to the SBRRB for an assessment of the extent of the economic impact.

The bill makes changes regarding the duties of the SBRRB, including requiring the SBRRB to determine whether a proposed rule will have any economic impact on small businesses. The bill requires any determination, notice, or report that the SBRRB is required to submit to an agency to be submitted within 45 days after receipt of the proposed rule from the OBD, except that the bill allows the SBRRB and the agency to extend that time by mutual agreement. The bill also makes other changes regarding the requirements for agencies to complete initial and final regulatory flexibility analyses for proposed rules.

Scope statements; preliminary public hearing and comment period on scope statements

Current law prohibits an agency head from approving a scope statement until at least ten days after publication of the scope statement in the register. The bill eliminates that prohibition.

The bill requires an agency, following approval of a scope statement by the governor, to submit to the LRB a notice of a preliminary public hearing and comment period to allow for public comment and feedback on the scope statement. The agency must hold the preliminary public hearing no sooner than the third day after publication of the notice in the register. The preliminary public hearing and comment period under the bill is in addition to the public hearing required under current law for certain rules.

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The bill provides that if an economic impact analysis, a revised economic impact analysis, or an independent economic impact analysis for a proposed rule indicates that \$10 million or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals over any two-year period as a result of the proposed rule, the agency proposing the rule must stop work on the proposed rule and do one of the following:

1. Submit a request for JCRAR to introduce a bill authorizing promulgation of the proposed rule, which JCRAR may introduce in its discretion. The agency may resume the rule-making procedure for the proposed rule upon enactment of such a bill.

2. Modify the proposed rule to address the implementation and compliance costs of the proposed rule. If a revised economic impact analysis, as approved by the secretary of revenue, prepared following the modification indicates that \$10 million or more in implementation and compliance costs are not reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals over a two-year period as a result of the proposed rule, the agency may then resume the rule-making procedure for the proposed rule.

3. Withdraw the proposed rule.

Independent economic impact analyses; duties of secretary of revenue

The bill allows the secretary of revenue, or his or her designee (secretary), or a cochairperson of JCRAR, after an agency submits a copy of an economic impact analysis for a proposed rule to the legislature, but before the proposed rule is submitted to the OBD for final approval, to request that an independent economic impact analysis be prepared for the proposed rule. If the secretary requests an independent economic impact analysis, the request must be submitted to the Department of Administration (DOA), which must then contract for the preparation of the independent economic impact analysis. If a cochairperson of JCRAR requests an independent economic impact analysis, the cochairperson must contract for the preparation of the independent economic impact analysis. The person preparing the independent economic impact analysis must complete the independent economic impact analysis within 60 days after contracting with DOA or the cochairperson and must include most of the same information and analysis that is required for an economic impact analysis prepared by an agency. If an independent economic impact analysis is requested for a proposed rule, an agency may not submit the proposed rule to the OBD for final approval until the agency receives the completed independent economic impact analysis.

Upon completion of an independent economic impact analysis, the person preparing the analysis may submit a request to DOA or JCRAR, whichever is applicable, for reimbursement of its actual and necessary costs of completing the analysis. DOA must assess the agency that is promulgating the proposed rule, in the case of a request by the secretary, for the costs of the independent economic impact analysis. In the case of a request by a cochairperson of JCRAR, the legislature must pay the costs of the independent economic impact analysis.

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In addition, the bill allows JCRAR, when a proposed rule is before JCRAR for final review, to request an independent economic impact analysis for the proposed rule. If JCRAR requests an independent economic impact analysis at that time, the analysis must similarly be completed within 60 days after JCRAR contracts for the analysis, and JCRAR's review period is extended to the 10th working day following receipt by JCRAR of the completed analysis.

The bill also requires the secretary to do all of the following:

1. Review and approve each initial economic impact analysis prepared by an agency, including by reviewing the economic data and analyses used by the agency in preparing the analysis. If the secretary determines that the agency's analysis does not accurately gauge the economic impact of a proposed rule, the secretary must recommend any modifications to the economic impact analysis that the secretary considers necessary and direct the agency to prepare a revised economic impact analysis for the proposed rule. An agency may not submit a proposed rule to the OBD for final approval unless the secretary has approved the agency's initial or revised economic impact analysis. The secretary may approve an economic impact analysis only upon determining that the economic impact analysis accurately gauges the economic impact of the proposed rule.

2. Provide training to agencies on appropriate data collection and methods of analysis for purposes of preparing economic impact analyses of proposed rules.

3. Attend JCRAR hearings and present testimony on proposed rules that he or she determines will have an economic impact on specific businesses, business sectors, public utility ratepayers, local governmental units, regulated individuals and entities, or the state's economy as a whole.

Approval of germane modifications to proposed rules

Current law permits an agency to make a germane modification to a proposed rule at certain points during the legislative review process. Under the bill, if an agency makes a germane modification to a proposed rule at any time during the legislative review process, the agency must also submit that modification to the governor for approval. The governor, in his or her discretion, may approve or reject the modification. If the governor does not approve the modification, the agency may not promulgate the proposed rule, except that the agency may resubmit the proposed rule to the legislature without the modification.

Statements of policy and interpretations

Under current law, if JCRAR determines that a 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 after JCRAR's action.

Under the bill:

1. The OBD has the same power as JCRAR to direct an agency to promulgate a statement of policy or interpretation of a statute as an emergency rule.

2. JCRAR or the OBD must, if requiring the agency to promulgate the statement or interpretation as an emergency rule, also require the agency to promulgate the statement or interpretation as a permanent rule, using the permanent rule-making procedure.

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3. JCRAR or the OBD may, in addition to, or instead of, requiring the agency to promulgate the statement or interpretation as a permanent or emergency rule, prohibit the agency from implementing or enforcing the statement of policy or interpretation until the statement or interpretation is promulgated as a rule or until any such prohibition is rescinded.

Emergency rules

Finally, the bill modifies JCRAR's authority under current law to extend the effective period of an emergency rule so that JCRAR may grant only a single extension of up to 120 days and only before the last floorperiod of the biennial legislative session. The bill also permits JCRAR, within 30 days before the last floorperiod of the biennial legislative session, to extend the effective period of an emergency rule for a period not to extend beyond March 31 of the following year. JCRAR may, if applicable, grant both types of extensions for a particular emergency rule.

For further information see the **state** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 13.56 (3) of the statutes is amended to read:

2 13.56 (3) POWERS AND DUTIES. The committee has the powers and duties
3 specified under ss. 227.10 (1m), 227.139, 227.19, 227.24, and 227.26.

4 **SECTION 2.** 16.28 (1) of the statutes is renumbered 16.28 (1) (intro.) and
5 amended to read:

6 16.28 (1) (intro.) The office of business development shall provide do all of the
7 following:

8 (a) Provide administrative support to the small business regulatory review
9 board and ~~shall perform.~~

10 (g) Perform other functions determined by the secretary.

11 **SECTION 3.** 16.28 (1) (b) to (e) of the statutes are created to read:

12 16.28 (1) (b) Consult with and provide assistance to agencies and the small
13 business regulatory review board regarding the promulgation of rules.