



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 23-046

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. For various changes throughout the proposed rule, consider elaborating on the explanation of agency authority for the substantive rule changes. For example, for s. DHS 102.03 (3) (d) in SECTION 47 of the proposed rule, consider elaborating on the explanation of agency authority to create categories of individuals not required to provide a Social Security number in relation to s. 49.82 (2), Stats. The same comment applies to SECTIONS 51 and 52 of the proposed rule. Additionally, for SECTIONS 63, 65, 68, and 99 of the proposed rule, consider elaborating on the explanation of agency authority for substantive changes to financial thresholds.

b. In the rule summary’s listing of statutes interpreted, consider removing the citation to s. 227.29, Stats., and referring instead to chs. 46, 49, 50, 51, 146, 250, 253, 254, and 256, Stats., or to specific sections within those chapters. Section 227.29, Stats., requires only a process, and does not identify the substantive statutory provisions that are the subject of the underlying rules. The list should identify the substantive statutory provisions that are interpreted in the department’s rulemaking.

2. Form, Style and Placement in Administrative Code

a. In the caption for the proposed rule, the department should review the introductory clause to ensure consistency with the proposed rule. Revise the introductory clause to reflect the provisions affected in the proposed rule. For example, consider the following:

- (1) The introductory clause indicates that the proposed rule only renumbers s. DHS 10.62 (3) (intro.) when the proposed rule both renumbers and amends s. DHS 10.62 (3) (intro.).
- (2) In the introductory clause, the proposed rule indicates it repeals s. DHS 10.36 (2) (b) and (Note), but that change does not appear in the proposed rule text.

b. In the introductory clause, all amended rules should be separated by a comma. For example, add a comma between ss. DHS 10.74 and 13.05 (4) (c).

c. In a number of provisions, it appears that the proposed rule may be incorporating standards or policies from federal law. The department should review the proposed rule and consider whether to obtain the approval of the Attorney General or to revise how the material is incorporated. [s. 1.14 (7), Manual.]

d. Throughout the proposed rule, ensure that the treatment clauses accurately reflect all revisions in that SECTION. For example, consider the following:

- (1) In SECTION 51 of the proposed rule, the treatment clause indicates that s. DHS 102.033 is created. However, the text of the proposed rule identifies the new provision as s. DHS 103.035.
- (2) In SECTION 66 of the proposed rule, the treatment clause indicates that s. DHS 103.03 (1) (f) 3. a. and b. are repealed and recreated. The proposed rule itself also creates s. DHS 103.03 (1) (f) 3. c. Insert a new SECTION to create the new subunit.
- (3) In SECTION 130 of the proposed rule, the treatment clause indicates that s. DHS 103.11 (1) (a) to (c) is renumbered s. DHS 103.11 (1d) (a) to (c). However, the text of the proposed rule identifies itself as sub. (1m), rather than sub. (1d).

e. Throughout the proposed rule, rule sections should be subdivided into subsections and smaller subunits whenever feasible. Consider whether any lists created in the proposed rule could be organized as smaller subunits. For example, consider the following: in SECTION 141 of the proposed rule, s. DHS 107.11 (2) (intro.) lists covered services. A colon should be used only when introducing a list of subunits. This list may be addressed more clearly using subunits.

f. The department should review the use of acronyms in the proposed rule. For example, consider the following:

- (1) In SECTION 9, the proposed rule revises s. DHS 10.33 (2) (c) (intro.). The list following that provision in the current rule includes undefined acronyms, ADLs and IADLs, used interchangeably with the full terms. Consider revising the rule to define or remove those acronyms. [s. 1.08 (2), Manual.]
- (2) In SECTION 77 of the proposed rule, s. DHS 103.03 (2) (d) refers to an IMD without defining the term in the chapter. Is an IMD an institution for mental disease? Acronyms should be used only to improve readability. [s. 1.08 (2) (a), Manual.]

g. In SECTION 4 of the proposed rule, the affected provisions should be treated in separate SECTIONS. Subunits of a rule section may be treated together, if there are not interrupting subunits with different treatments, but subunits from different rule sections cannot be treated together. Accordingly, SECTION 4 should be divided into three SECTIONS, to treat the provisions within s. DHS 10.11, 10.12, and 10.13 separately from each other. [s. 1.03 (2) (c) 2., Manual.] The same comment applies to the treatment in SECTIONS 9, 22, 23, 158, 173, and 175. The proposed rule should be reviewed for any other instances.

h. SECTION 17 proposes to amend s. DHS 10.71, but that rule section does not exist. Also, it is treated in a single SECTION with s. DHS 10.74, although current rule s. DHS 10.73 would be an intervening number and is not treated in the proposed rule. [s. 1.03 (2) (b) 1., Manual.]

i. In SECTION 18 of the proposed rule, terms with hyperlinks in the administrative code are underscored. When amending a current rule provision, new material is to be underscored.

Consider revising the proposed rule to remove the underscore from hyperlinks to avoid confusion. [s. 1.04 (4), Manual.]

j. In SECTION 71 of the proposed rule, amending s. DHS 103.03 (1) (f) 5. (intro.), the stricken abbreviation “subds.” should be revised to appear as “subd.”, to match the current text of the rule.

k. In SECTION 81 of the proposed rule, the underscored reference to “s. DHS 103.03 (1) (a)” should be moved to appear after all of the stricken material.

l. In SECTION 86 of the proposed rule, s. DHS 103.04 (7) (a) defines MAGI, modified adjusted gross income, for the subsection. The term MAGI is also used outside of that subsection, for example in s. DHS 103.09 (2) (c) 2. Consider relocating the definition of MAGI to apply more broadly.

m. In SECTION 119 of the proposed rule, the treatment of s. DHS 103.087 (1) (f) 1. should be moved into a separate SECTION to repeal and recreate the provision, rather than to amend the provision, as the current text is amended in its entirety. The same comment applies to the treatment of s. DHS 103.11 (2) (a) 1., in SECTION 134, and s. DHS 104.01 (12) (a) 1. a. and b., in SECTION 136.

n. In SECTION 133 of the proposed rule, s. DHS 103.11 (1d) refers to “the following requirements:” that do not appear in the proposed rule. The applicable requirements should be added as a list of subunits.

o. In SECTION 134 of the proposed rule, s. DHS 103.11 (2) (a) 1. appears to have a typographical error in the digit 9 following the period.

p. In SECTION 148 of the proposed rule, the amendment of s. DHS 108.02 (9) (d) alternates between stricken and underscored text. The amendment should be revised to show all of the stricken text together, followed by all of the underscored text. Also, in subd. 3. a., the underscored phrase “or prosecuting authorities” should be moved to appear after the stricken phrase.

q. In SECTION 150 of the proposed rule, it is not necessary to renumber s. DHS 108.02 (9) (d) 3. c. Renumbering to eliminate a gap and reusing the gap number may impair the ability to trace a provision’s history and can lead to confusion and error. [s. 1.10 (3) (a), Manual.]

r. In SECTION 152 of the proposed rule, the text of s. DHS 108.02 (10) (d) should be shown with any intended strike-throughs and underscoring to indicate the amended text. The same comment applies to s. 108.02 (12) (b) c., in SECTION 155. If no amendments are intended, the text should be removed and the treatment clause should be updated to reflect that change.

s. In SECTION 175, it appears that the stricken and underscored phrases are inadvertently repeated. The repeat should be removed.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Throughout the proposed rule, ensure that all references to Wisconsin Statutes are accurate. If the proposed rule intends to refer to an archived statute, the year of the statute must be included in the citation (as is done in SECTIONS 153 and 155 of the proposed rule). For example, consider the following:

- (1) In SECTION 20 of the proposed rule, s. DHS 82.06 (2m) is amended to change a statutory reference to refer residents to an aging and disability resource center as required under ss. 50.034 (5m) to (5p), 50.035 (4m) to (4p), and 50.04 (2g) to (2i). There are no current Wisconsin Statutes ss. 50.034 (5p), 50.035 (4p), or 50.04 (2i). Consider revising the amendment to refer to ss. 50.034 (5n), 50.035 (4n), and 50.04 (2h), Stats.
- (2) In SECTION 152, proposed s. DHS 108.02 (10) moves the reference to s. 46.27 (7g), Stats., and should include the archived year. Section 46.27, Stats., and the other sections referenced in s. DHS 108.02 (10) are not in the current Wisconsin Statutes.
- (3) In SECTIONS 155 and 157, the proposed rule retains references to ss. 49.496 and 49.849, Stats. Both statutes are not in the current Wisconsin Statutes.

b. Throughout the proposed rule, ensure that cross references to other administrative rules are accurate. For example, consider the following: in SECTION 17 of the proposed rule, s. DHS 10.74 is amended to add requirements for options counseling under s. DHS 10.23 (2) (b). However, s. DHS 10.23 (2) (b) refers to advocacy. Instead, s. DHS 10.23 (2) (c) provides requirements for long-term care options counseling. Consider revising the amendment to refer to par. (c).

c. In SECTION 163 of the proposed rule, s. DHS 116.04 (3) (Note 2) references a form by website only. The note should also indicate the address that a person may write to, or the telephone number that a person may call, in order to obtain the form. [s. 1.12 (3), Manual.]

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

a. Consider revising the proposed rule to use the active voice. For example, the current proposed rule uses the passive voice in the SECTION 29 amendment to s. DHS 101.03 (41) (a) and the SECTION 32 amendments to ss. DHS 101.03 (149f) and 101.03 (149j). [s. 1.05 (1) (d), Manual.]

b. Throughout the proposed rule, for example in SECTION 63 and SECTION 64, the proposed rule references a “reasonable driving distance”. What is a reasonable driving distance? Consider clarifying what constitutes a reasonable driving distance or how the department will determine whether a driving distance is reasonable.

c. In SECTION 4 of the proposed rule, s. DHS 10.13 (3) replaces references to “infirmities of aging” with “degenerative brain disorder”. The latter term appears to be an uncommon phrase in medical literature but appears elsewhere in Wisconsin Statutes. “Neurodegenerative disorder” appears more common in medical literature. Consider aligning the administrative rule language with broader medical literature. Degenerative brain disorder also appears to be a significantly narrower term than the infirmities of aging; is this intended? This issue also appears in SECTIONS 18 and 29 of the proposed rule.

d. In SECTION 22 of the proposed rule, both ss. DHS 83.24 (3) (a) and 83.30 appear to have an errant extra period at the end of the provisions.

e. In SECTION 31 of the proposed rule, s. DHS 101.03 (95) removes BadgerCare Plus from the definition of Medical Assistance. However, BadgerCare Plus remains in the statutory subchapter on Medical Assistance in s. 49.471, Stats. Consider explaining or resolving this inconsistency.

f. In SECTION 37 of the proposed rule, amending s. DHS 102.01 (1), does the department intend to explicitly permit applications made via the department's "internet website over the telephone"? The lack of a comma between "internet website" and "over the telephone" makes this ambiguous. It appears that a comma may have been intended between those phrases.

g. In SECTION 54 of the proposed rule, s. DHS 102.04 (3) (c) refers to "Medicadi". Did the proposed rule intend to refer to Medicaid? Consider referring instead to "medical assistance" as defined in s. DHS 101.03 (95).

h. In SECTION 73 of the proposed rule, the department could clarify the change the proposed rule intends to make in creating s. DHS 103.03 (1) (f) 5m. The proposed change is an exception within a list of requirements. Consider moving the exception to a more appropriate location. Also, consider reviewing par. (f) generally and revise and reorganize as needed to provide a clear structure.

i. In SECTION 144 of the proposed rule, the amendment to s. DHS 107.113 (1) (intro.) appears to require, for coverage, that the recipient has adequate social support in, for example, nursing facilities. Does the department intend to require adequate social support for coverage in these settings?