

## Modifications From Agency

# WISCONSIN DEPARTMENT OF CORRECTIONS PROPOSED RULEMAKING ORDER

## INTRODUCTORY CLAUSE

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The statement of scope for this rule was approved by the Governor on October 23, 2017, published as Scope Statement No. SS 117-17 in Register No. 742B on October 30, 2017, and approved by Secretary Jon Litscher on December 8, 2017.

The Wisconsin Department of Corrections proposes an order to repeal DOC 328.10 (4), DOC 328.17 (4); amend DOC 328.04 (2) (i), DOC 328.14 (1), DOC 328.17 (2), DOC 328.27 (7); repeal and recreate DOC 328.07, DOC 328.11, DOC 328.17 (1); and create DOC 328.17 (1m), and DOC 328.27 (7) (d), relating to adult field supervision.

## RULE SUMMARY

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**1. Statutes interpreted:** ss. 304.074, 304.16 (1) (b) 1, 20.410 (1) (gn), 301.48 (2g), 301.48 (2) (d), 301.03 (3), 301.03 (3) (a), 973.013 (2), 302.11 (6), Stats., and 28 CFR Part 115.

**2. Statutory authority to promulgate the rule:** ss. 227.11 (2) (a) – (c), 301.03 (3), 301.03 (3m), 301.03 (7m), 302.11 (8), 302.113 (10), 302.114 (10), 302.19, 302.31 (5) and (6), 939.615 (5) (a), 961.47 (1), and 973.01 (2) (intro), Stats.

### 3. Explanation of agency authority:

**Section 227.11 (2) (a) – (c):** Rule – making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any 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 the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or non-statutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

(b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

(c) Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating policies as rules which the agency shall follow until they are amended or repealed. A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule.

**Section 301.03 (3):** Administer parole, extended supervision, and probation matters, except that the decision to grant or deny parole to inmates shall be made by the parole commission and the decision to revoke probation, extended supervision, or parole in cases in which there is no waiver of the right to a hearing shall be made by the division of hearings and appeals in the department of administration. The secretary may grant special action parole releases under s. 304.02. The department shall promulgate rules establishing a drug testing program for probationers, parolees and persons placed on extended supervision. The rules shall provide for assessment of fees upon probationers, parolees and person placed on extended supervision to partially offset the costs of the program.

**Section 301.03 (3m):** Monitor compliance with deferred prosecution agreements under s. 971.39.

**Section 301.03 (7m):** Supervise criminal defendants accepted into the custody of the department under s. 969.02 (3) (a) or 969.03 (1) (a). The department shall charge the county that is prosecuting the defendant a fee for providing this supervision. The department shall set the fee by rule.

**Section 302.11 (8):** The department may promulgate rules under ch. 227 establishing guidelines and criteria for the exercise of discretion under this section [mandatory release].

**Section 302.113 (10):** The department may promulgate rules establishing guidelines and criteria for the exercise of discretion under this section [release to extended supervision for felony offenders not serving life sentences].

**Section 302.114 (10):** The department may promulgate rules establishing guidelines and criteria for the exercise of discretion under this section [petition for release and release to extended supervision for felony offenders serving life sentences].

**Section 302.19:** Temporary detention of inmates: The department may use any of its facilities for the temporary detention of persons in its custody.

**Section 302.31 (5) and (6):** The county jail may be used for any of the following purposes:

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(5) The detention of persons participating in the intensive sanctions program.

(6) The temporary detention of persons in the custody of the department.

**Section 939.615 (5) (a):** A person placed on lifetime supervision under this section [lifetime supervision of serious sex offenders] is subject to the control of the department under conditions set by the court and regulations established by the department that are necessary to protect the public and promote the rehabilitation of the person placed on lifetime supervision.

**Section 961.47 (1):** Whenever any person who has not previously been convicted of any offense under this chapter, or of any offense under any statute of the United States or of any state or of any county ordinance relating to controlled substances or controlled substance analogs, narcotic drugs, marijuana or stimulant, depressant or hallucinogenic drugs, pleads guilty to or is found guilty of possession or attempted possession of a controlled substance or controlled substance analog under s. 961.41 (3g) (b), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him or her on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him or her. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for 2nd or subsequent convictions under s. 961.48. There may be only one discharge and dismissal under this section with respect to any person.

**Section 973.01 (2) (intro):** Structure of bifurcated sentences. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision. A order imposing a bifurcated sentence under this section shall comply with all of the following:

**Section 973.10, Control and supervision of probationers:**

(1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers, parolees and persons on extended supervision.

(1m)

(a) The department may order that a probationer perform community service work for a public agency or a nonprofit charitable organization. An order may apply only if agreed to by the probationer and the organization or agency. The department shall ensure that the probationer is provided a written statement of the terms of the community service order and shall monitor the probationer's compliance with the community service order. Compliance with this subsection does not entitle a probationer to credit under s. 973.155.

(b) Any organization or agency acting in good faith to which a probationer is assigned under an order under this subsection has immunity from any civil liability in excess of \$25,000 for acts or omissions by or impacting on the probationer. The department has immunity from any civil liability for acts or omissions by or impacting on the probationer regarding the assignment under this subsection.

(2) If a probationer violates the conditions of probation, the department of corrections may initiate a proceeding before the division of hearings and appeals in the department of administration. Unless waived by the probationer, a hearing examiner for the division shall conduct an administrative hearing and enter an order either revoking or not revoking probation. Upon request of either party, the administrator of the division shall review the order. If the probationer waives the final administrative hearing, the secretary of corrections shall enter an order either revoking or not revoking probation. If probation is revoked, the department shall:

(a) If the probationer has not already been sentenced, order the probationer brought before the court for sentence which shall then be imposed without further stay under s. 973.15; or

(b) If the probationer has already been sentenced, order the probationer to prison, and the term of the sentence shall begin on the date the probationer enters the prison.

(2g) Upon demand prior to a revocation hearing under sub. (2), the district attorney shall disclose to a defendant the existence of any audiovisual recording of an oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the statement. If, after compliance with this subsection, the state obtains possession, custody or control of such a statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the statement.

(2m) In any administrative hearing under sub. (2), the hearing examiner may order that a deposition be taken by audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to (10).

(3) A copy of the order of the department of corrections in the case of a waiver or the division of hearings and appeals in the department of administration in the case of a final administrative hearing is sufficient authority for the officer executing it to take the probationer to court or to prison. The officer shall execute the order as a warrant for arrest but any officer may, without order or warrant, take the probationer into custody whenever necessary in order to prevent escape or enforce discipline or for violation of probation.

(4) The division of hearings and appeals in the department of administration shall make either an electronic or stenographic record of all testimony at each probation revocation hearing. The division shall prepare a written transcript of the testimony only at the request of a judge who has granted a petition for judicial review of the revocation decision. Each hearing notice shall include notice of the provisions of this subsection and a statement that any person who wants a written transcript may record the hearing at his or her own expense.

**4. Related statute or rule:** s. 301.03 (3), Stats.

**5. Plain language analysis:** This rule:

a. Amends par. DOC 328.04 (2) (i), to include explicit language regarding the ability to utilize electronic methods of supervision, such as Global Positions System bracelets, at the department's discretion. The use of electronic methods of supervision is not otherwise mentioned in the department's administrative rules. The rule is not specific to methods or devices due to consistently changing technologies.

b. Repeals and recreates s. DOC 328.07, impacting supervision fees charged to offenders due to statutory changes resulting from 2015 Act 55. Previous statute and code were written with substantial specificity in relation to the amounts charged to offenders, exemptions, and fee increases tied to the Consumer Price Index. 2015 Act 55 amended WI statute s.304.074 (2) allowing for flexibility in fee structure, which is reflected in this recreation.

c. Repeals sub. DOC 328.10 (4) because the statutory authority for the provisions related to Emergency Loans no longer exists.

d. Repeals and recreates s. DOC 328.11, Purchase of Goods and Services, to include Federal Prison Rape Elimination Act (PREA) language into DOC Administrative Code. In the department's Division of Community Corrections the PREA law applies to community-based residential facilities, therefore the

Code recreation requires the department contracted vendors to comply with this Federal law.

e. Creates par. DOC 328.14 (3) (am) due to WI 2015 Act 55 which allowed the department to apply a fee to offenders applying to the Federal Interstate Compact for Adult Supervision. As the statute 20.410 (1)(gn) provided the department's ability to apply a fee for offender out of state transfer requests, DOC 328.14 (3) (am) is put forth to allow in DOC Code.

f. Repeals and recreates sub. DOC 328.17 (1) as the result of 2011 Act 38. The department no longer has the authority to grant an early discharge to those on probation supervision. If an offender meets statutory criteria and the department believes an early discharge may be appropriate, 2011 Act 38 places the early discharge authority with the Circuit Court. The criteria listed in DOC 328.17 (1) is found in statute 973.09(3)(d). The present s. DOC 328.17 includes provisions regarding the early discharge of offenders on extended supervision, authority which 2011 Act 38 eliminated. Accordingly, those provisions in this section are repealed.

g. Creates sub. DOC 328.17 (1m) specifying the early discharge criteria for parolees which is found in statute 302.11 (6).

h. Amends sub. DOC 328.17 (2) to comport with sub. 973.013 (2), Stats., which provides the Governor's authority to discharge parolees.

i. Repeals sub. DOC 328.17 (4), which currently pertains to the early discharge abilities by the department under extraordinary circumstances because this provision is no longer supported by statutory authority.

j. Amends sub. DOC 328.27 (7), due to the statutory change necessitated by 2013 Act 196. The previous statute s. 302.27 allowed for the department to implement jail sanctions on Extended Supervision offenders, which 2013 Act 196 expanded to include those under probation and parole supervision; therefore, the amendment alters the name from Extended Supervision Sanctions to Short Term Sanctions, noting the applicability to probationers and parolees.

k. Creates par. DOC 328.27 (7) (d), because WI 2013 Act 196 directs the department to adopt an evidence-based response to violations.

**6. Summary of, and comparison with, existing or proposed federal regulations that are intended to address the activities to be regulated by the proposed rule:**

a. The Federal Prison Rape Elimination Act (PREA) applies to community-based residential facilities, the proposed code updates include language to explicitly require the contracted vendors to comply with this Federal Law. (Code of Federal Regulations: 28 CFR Part 115)

b. GPS Monitoring: Under 18 U.S.C. § 3563(b) (19), the court may provide that the defendant "remain at his place of residence during non-working hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration." Under 18 U.S.C. § 3563(b) (6), the court may provide that the defendant "refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons." GPS monitoring is used at the federal level, just as in Wisconsin's state system.

c. Supervision Fees: It does not appear that federal probationer or parolees are charged a supervision fee. This is in stark contrast to Wisconsin law. Restitution and court fees exist at the federal level, but not supervision fees.

d. Interstate Compact Fee: The Federal Interstate Compact for Adult Supervision is an agreement between individual states, including Wisconsin. This type of fee would not be applicable at the federal level.

e. Early Discharge: The U.S. Parole Commission can determine if a parolee qualifies for early discharge after serving a determined amount of his/her sentence. Under Rule 32.1(c) (2), the court may modify the conditions of probation or supervised release without a hearing if the defendant waives the hearing; or the modification is “favorable to the [defendant]” and does not extend the term of probation or of supervised release, and the U.S. Attorney has received notice of the modification sought and has had a reasonable opportunity to object and has not done so. Although the court must satisfy these procedural requirements and ensure that any modified condition meets statutory sentencing objectives (see: Chapter 1, Section II (A) (3)), no specified quantum of evidentiary proof is required to justify the modification, and there is no requirement that the modification of conditions be predicated upon a violation of an existing condition or a change in the defendant’s circumstances. In Wisconsin, the court can provide for early discharge of a probationer. The State Department of Corrections can provide for early discharge of a parolee, when certain conditions are met.

f. Evidence-Based Response to Violations: The Federal Probation and Supervised Release conditions contain “Principles of Supervision.” These principles include risk-based supervision, being responsive to changes, and implementing a proportional response to the individual’s needs and circumstances. Evidence-based correctional principles are integrated, including risk, need, and responsibility. These principles are consistent with the principles upon which Wisconsin’s law instructs the Department of Corrections to base an evidence-based response to violations. In general, it appears that the evidence-based response to violations being implemented by Wisconsin mirrors what is happening with probationers at the Federal level.

## **7. Comparison with similar rules in adjacent states:**

### **a. Illinois.**

Definitions: Chapter 20 of the Illinois Administrative Code uses the terms “probation,” “parole,” and “supervision” while Wisconsin’s ch. DOC 328 employs the broader term “community supervision” to encompass “the control and management of offenders on probation, parole, extended supervision or other statuses as authorized by court order or statute.” In Illinois “supervision” means the release of a person upon set conditions after an adjudication of guilt but prior to entry of conviction under the supervision of a county probation officer. In Wisconsin offenders under community supervision are supervised by Department of Corrections’ Probation and Parole Agents.

Supervision Procedures: Chapter DOC 328 codifies rules pertaining to the control and management of offenders under community supervision. Rules related to standard rules of supervision offenders must abide by, offender fees, housing of offenders in the community, enforcement options and related matters, and eligibility for discharge from supervision are contained within ch. DOC 328. Chapter 20 part 1610 of Illinois Administrative Code addresses offender rules of supervision, as well as eligibility for discharge from supervision. Part 800 addresses Transitional Housing Licensure for sex offenders on supervision.

Illinois standard rules of supervision are similar to those specified under ch. DOC 328, including a requirement to comply with instructions provided by the agent, obey all laws and ordinances, obtain permission prior to leaving the state, notify the agent prior to any change in residence or employment, submit written reports to the agent, report all arrests to the agent, and not own, possess, use, sell or have under his control any firearms or dangerous weapons (20 ILADC 1610.120). DOC 328.04 (2) (b) specifies standard rules of supervision including those listed above as well as additional rules including “avoid all conduct which is not in the best interest of the public welfare or the offender’s rehabilitation,”

and “submit to searches ordered by the agent under s. DOC 328.22.”

Unlike the Illinois Administrative Code, Wisconsin provides rules concerning supervision fees, identifying agent responsibilities, department responsibilities, provisions for refunds, and indicates the fee shall be reasonable as determined by the department established pursuant to department policy.

Illinois rules include a licensure process for Transitional Housing for Sex Offenders on Parole, Probation, or Supervision (20 ILADC 800). "Transitional Housing" means a Department licensed community based facility where a limited number of sex offenders on parole, probation, or supervision are temporarily placed and reside for monitoring, counseling, and treatment. This section applies to the Department of Corrections and any person, group of persons, corporations, or entity that intends to develop, establish, maintain, or operate Transitional Housing for sex offenders on parole, probation, or supervision. Illinois code defines transitional housing, treatment, referral criteria, licenses required, grounds for revocation or termination of a license, requirements pertaining to background investigations, operating standards such as security and emergency procedures, as well as authority for Department-directed closure of a facility. Code relating to these facilities are under Title 20: Corrections, Criminal Justice, and Law Enforcement.

Unlike Illinois, such facilities are regulated under code promulgated by the Department of Health Services, DHS 83 Community Based Residential Facilities. “Community-based residential facility” means a place where 5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board but that include no more than 3 hours of nursing care per week per resident. The chapter defines licensing categories, application requirements, limitations on admissions and retentions, rules relating to personnel management, orientation and training, admission, retention and discharge, program services, building design, facility closing as well as emergency and fire safety requirements.

Illinois rules indicate several enforcement options (20 ILADC 120.100). Failure to comply with any of the foregoing rules of conduct may result in discipline, termination of services, or restriction from entering all or some Department facilities. Chapter DOC 328 Subchapter III enumerates several enforcement options in detail, providing guidance concerning use of force, search and seizure, contraband, absconding, tolled time, reinstatement, as well as custody and detention. Section DOC 328.27 specifies the circumstances in which an offender may be detained in county jail while on supervision, along with limited time frames permissible to be in jail pending disciplinary or investigation. Corresponding detail concerning length of and reasons for custody are not found in Illinois Administrative Code.

Under Illinois rules the Prisoner Review Board may enter an order releasing and discharging a parolee or mandatory supervised releasee from supervision (with court approval for juveniles) and his commitment to the Department when it determines that he is likely to remain at liberty without committing another offense (20 ILADC 1610.130). The order of discharge for adults becomes effective upon entry of an order of the Board. When approved by the Governor, said order operates as a commutation of sentence. Offenders sentenced or adjudicated under the provisions of the Unified Code of Corrections prior to February 1, 1978 are eligible for these provisions. Illinois code does not have provisions relating to discharge of probationers or those released from prison after February 1, 1978.

In contrast, s. DOC 328.13 states that parolees in Wisconsin may be granted discharge when there is a reasonable probability that supervision is no longer necessary for the rehabilitation and treatment of the offender and for the protection of the public. The offender must have reached their mandatory release date pursuant to s. 302.21, Stats. or have been under supervision for two years.

In Wisconsin the department may petition the sentencing court for early discharge of a probationer when there is a reasonable probability that supervision is no longer necessary for the rehabilitation and treatment of the offender and for the protection of the public. The department may only proceed if all of the following apply: (a) The rules and conditions of supervision set by the department have been satisfied; (b) The offender has served at least fifty percent of the term of probation; (c) All conditions of probation set by the sentencing court have been satisfied; (d) All financial obligations to the court, victim (s), and the department have been fulfilled including any fine, forfeiture, fee or surcharge, or order of restitution; and (e) The probationer is not required to register under s. 301.45, Stats.

b. Iowa.

Definitions: The Iowa Administrative Code uses the terms “probation” and “parole.” DOC 328 uses the term “community supervision” to encompass “the control and management of offenders on probation, parole, extended supervision or other statuses as authorized by court order or statute.”

Supervision Procedures: The Iowa Code does not provide detailed enforcement rules for offenders on parole and probation, as does ch. DOC 328. Iowa rules indicate “The district department shall establish conditions of probation which meet the approval of the chief judge of the judicial district, which apply to each person under probation supervision, and shall have written procedures for assuring that each client receives those conditions in writing which include written documentation of receipt by the probationer.” (IAC 201.42.1(12))

Iowa rules indicate the department shall have written policies and procedures governing the preparation, submission, review, modification, collection, retention, and waiver of fees for those on probation or parole (IAC 201.42.1 (13)). Wisconsin provides rules concerning supervision fees, identifying agent responsibilities, department responsibilities, provisions for refunds, and indicates the fee shall be reasonable as determined by the department established pursuant to department policy (s. DOC 328.07).

Pursuant to IAC 201.45.4(2) a parole officer, with supervisory approval, may arrest a parolee when there is probable cause to believe the parolee has violated conditions of parole which may result in parole revocation. The arresting agent may request temporary detention of the parolee in a local detention facility. A parole officer may also proceed without arrest by filing a complaint with the Iowa board of parole pursuant to Iowa Code section 908.8. When a parolee is arrested the agent shall immediately notify the board of parole. Under IAC 201.45.4(3), upon receipt of information that a parolee has absconded from supervision, preliminary parole violation information shall immediately be filed with a judge, an associate judge, or a magistrate and a warrant for arrest requested. Chapter DOC 328 has similar provisions for the arrest and temporary detention of a parolee, outlined in s. DOC 328.27. However, Wisconsin includes more detailed provisions and limitations on the duration of detentions for such arrests.

Discharge from Parole: Pursuant to IAC 205.13.1, an offender released on parole will be discharged when the person’s sentence expires. However, discharge from parole may be granted earlier, if appropriate. There are some exceptions: a person convicted of a violation of the Iowa Code section 709.3, 709.4, or 709.8 committed on or with a child, or a person serving a sentence under section 902.12, shall not be discharged until expiration of maximum sentence (IAC 201.45.6).

Wisconsin’s discharge requirements differ slightly from Iowa’s. In Iowa, the recommendation for discharge from parole as submitted by the supervising officer shall include, but not be limited to, the following: (a) Parolee’s attitude and adjustment to parole supervision; (b) Public offenses committed by the parolee while under supervision; (c) Violation of any parole conditions set by the board of parole; (d) Abuse of alcohol or drugs while on parole (e) Restitution accomplished by the parolee.



In contrast, s. DOC 328.13 states that parolees in Wisconsin may be granted discharge when there is a reasonable probability that supervision is no longer necessary for the rehabilitation and treatment of the offender and for the protection of the public. The offender must have reached their mandatory release date pursuant to s. 302.21, Stats. or have been under supervision for two years.

Iowa rules provide that the district department shall have written policies and procedures for requesting a discharge from probation and shall require a recommendation for discharge when it is clear that the client has met court obligations, is no longer a threat to the community or cannot benefit substantially from further supervision (IAC 201.42.1(7)).

In Wisconsin the department may petition the sentencing court for early discharge of a probationer when there is a reasonable probability that supervision is no longer necessary for the rehabilitation and treatment of the offender and for the protection of the public. The department may only proceed if all of the following apply: (a) The rules and conditions of supervision set by the department have been satisfied; (b) The offender has served at least fifty percent of the term of probation; (c) All conditions of probation set by the sentencing court have been satisfied; (d) All financial obligations to the court, victim (s), and the department have been fulfilled including any fine, forfeiture, fee or surcharge, or order of restitution; and (e) The probationer is not required to register under s. 301.45, Stats. (s. DOC 328.17).

c. Michigan.

Definitions: Pursuant to Chapter R 791.9901 of the Michigan Administrative Code, "offender" means a person convicted of a felony or misdemeanor. Wisconsin has a more expansive definition of offender: "a person who is committed to the custody of the department for correctional purposes and is under community supervision of the department." Unlike Michigan, Wisconsin's code does not include definitions of probationer, probation agent, or probation plan. Wisconsin has the term "community supervision" which encompasses the control and management of offenders on probation, parole, extended supervision or other statuses as authorized by court order or statute.

Supervision Procedures: Pursuant to R 791.9920, when an offender is placed on probation, the supervising probation agent provides the offender with a copy of the order and informs the offender of the statutory conditions, as well as all of the terms and conditions contained in the order, and the possible consequences of a failure to adhere to the conditions of probation. For the purpose of monitoring the probationer's adjustment while on probation, the probation agent may 1) inquire into the probationer's employment status, including, but not limited to, the probationer's performance on the job, relationships with fellow employees, and relationships with supervisors 2) conduct interviews with probationer, members of the probationer's family, and acquaintances, 3) make other reasonable inquiries to determine whether the objectives of probation are being met. Section DOC 328.04 includes a similar, but more expansive list of individualized supervision duties, including the responsibility to collect restitution and other court ordered financial obligations, and fees as and to report suspected child abuse cases to the appropriate authorities. Unlike Michigan, s. DOC 328.07 sets forth responsibilities for the agent and department relating to supervision fees.

In Michigan, if it appears to the probation agent that a modification of the terms or conditions of probation is necessary to achieve the objectives of probation, the agent may petition the sentencing court for a modification of the probation order (Mich. Admin. Code R. 791.9920(s)). The petition must contain a clear statement of the requested modification and the reason for the change. The agent must provide the probationer with a copy of the modified order of probation and shall explain the changes made by the modified order to the probationer.

The Michigan Parole Board considers a variety of factors when deciding if parole is appropriate in a

particular case, such as family and community ties, pending charges, and education level. A prisoner being considered for parole shall receive psychological or psychiatric evaluation before the release decision is made if the prisoner has been hospitalized for mental illness within the past two years, has a history of predatory or assaultive sexual offenses, or a history of serious or persistent assault within the investigation. The board may also consider the prisoner's marital history and prior arrests that did not result in conviction or adjudication of delinquency. However, denial of parole cannot be based solely on either of these factors.

Specific rules are not present in Michigan Department of Corrections code related to standard rules of supervision offenders must abide by, offender fees, or housing of offenders in the community. S791.236a of the Michigan Compiled Laws does include provisions for a parole oversight fee, which is referenced in Mich. Admin. Code R. 791.7730(3) (b) Conditions of Parole. The fee varies based upon income, not to exceed \$135 per month for not more than 60 months.

d. Minnesota.

Definitions: The Minnesota Administrative Code employs the terms “probation” and “parole,” while Wisconsin uses “community supervision” to encompass the control and management of offenders on probation, parole, extended supervision or other statuses as authorized by court order or statute.

Supervision Procedures: Minnesota Code includes detailed provisions regarding conditions or rules of supervision. MN ADC 2940.1800 provides “conditions of parole or supervised release shall be based on the need for public safety. Surveillance with optional treatment programming shall be utilized when consistent with case planning in order to achieve maximum public safety.” Minnesota code provides 9 standards rules or requirements of release including reporting, informing agent of residence changes and activities, maintaining contact with the agent, submitting reports as needed, following agent’s instructions concerning intoxicants, adhering to prohibitions against possessing firearms, remaining in the state unless approved by the agent, not engaging in any subsequent criminal behavior, and complying with probable cause to hold an offender in custody until the releasee is found not guilty. Authority to apply special conditions of release are also provided.

In Wisconsin, conditions of supervision are typically ordered by the court while rules of supervision are imposed by the department. Minnesota refers to conditions of release similarly to the way Wisconsin refers to rules of supervision. Section DOC 328.04 (2) (b) specifies standard rules of supervision including those listed above as well as additional rules including “avoid all conduct which is not in the best interest of the public welfare or the offender’s rehabilitation,” and “submit to searches ordered by the agent under s. DOC 328.22.”

Concerning enforcement options, Minnesota code provides that apprehension and detention orders may be issued by the executive officer of the hearings and release unit or a district supervisor upon written reasons submitted by a supervising agent under authority of Minnesota Statutes, section 243.05. No releasee shall be detained under an apprehension and detention order for more than 72 hours unless revocation proceedings have been initiated by the supervising agent (MN ADC 2940.3400). Wisconsin rules similarly provide for time limits concerning detention. Wisconsin rules provide that for an investigation of an alleged violation of a rule or condition of supervision or to determine whether to commence revocation proceedings, an agent may authorize the detention of an offender for a maximum of 5 working days (sub. DOC 328.27 (2)). Extensions to this time period may be granted subject to supervisor or administrator approval.

Similar to Illinois, Minnesota Department of Corrections Administrative code includes rules concerning the licensure, use, inspection, organization, and administration of community-based residential correctional facilities (MN ADC 2920). Unlike Minnesota and Illinois, such facilities in

Wisconsin are regulated under code promulgated by the Department of Health Services, ch. DHS 83 Community Based Residential Facilities. "Community-based residential facility" means a place where 5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board but that include no more than 3 hours of nursing care per week per resident. The chapter defines licensing categories, application requirements, limitations on admissions and retentions, rules relating to personnel management, orientation and training, admission, retention and discharge, program services, building design, facility closing as well as emergency and fire safety requirements. Section DOC 328.11(b) provides "the department shall require any vendors contracted for community-based residential facilities that are licensed under HFS 83 to comply with the Federal Prison Rape Elimination Act of 2003.

Unlike Wisconsin, no rules are present in Minnesota administrative code regarding discharge from probation or parole prior to the expiration of the parolee or probationer's supervision end date. Limited provisions are provided allowing for review of release dates for those who are incarcerated to correct for mathematical errors or policy changes established by the commissioner with affects the term of imprisonment (MN ADC 2940). However, this does not extend to the offender's discharge date.

**8. Summary of the factual data and analytical methodologies:** The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

**9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis:** Not Applicable.

**10. Effect on small businesses:** Not Applicable.

**11. A copy of any comments and opinion prepared by the Board of Veterans Affairs.** Not Applicable.

**12. Agency contact person:** Katharine Ariss, Administrative Rules Committee, 3099 East Washington Avenue, P.O. Box 7925, Madison, WI, 53707-7925; by phone: (608) 240-5039; or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

**13. Place where comments are to be submitted and deadline for submission:** Written comments on the proposed rule will be accepted and receive consideration if they are received by October 1, 2018. Written comments should be addressed to: Administrative Rules Committee, c/o Glen Mercier II, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

## TEXT OF RULE

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**SECTION 1.** DOC 328.04 (2) (i) is amended to read:

DOC 328.04 (2) (i) Monitor the offender's compliance with the conditions and rules including through the use of monitoring and tracking technology at the discretion of the department.

**SECTION 2.** DOC 328.07 is repealed and recreated to read:

**DOC 328.07 Supervision fees.**

- (1) SUPERVISION FEE. An offender shall pay a supervision fee.
- (2) ESTABLISHMENT OF FEE. The department shall charge a fee not to exceed \$60 per month to probationers, parolees, and persons on extended supervision to partially reimburse the department for the costs of providing supervision and services.
- (3) AGENT ACTION. The assigned agent shall do all of the following:
  - (a) Establish the offender's supervision fee or exemption.
  - (b) Provide the offender with a copy of the fee schedule.
- (4) REPORTING AND VERIFICATION OF SUPERVISION FEE. The department shall do all of the following:
  - (a) Record all supervision fees paid by the offender.
  - (b) Provide the offender access to a copy of the record of payments to verify receipt of payment.
- (5) REFUNDS OF SUPERVISION FEES. The department shall refund supervision fees only when the offender has paid in advance for a month that the offender was not under supervision.

**SECTION 3.** DOC 328.10 (4) is repealed.

**SECTION 4.** DOC 328.11 is repealed and recreated to read:

**DOC 328.11 Purchase of goods and services.**

- (1) If an offender requires assistance or materials that cannot reasonably be provided through any other available resource, the department may provide assistance in accordance with s. 301.08, Stats. The department shall approve the expenditure for the assistance before services may be provided.
- (2) The department shall require any vendors contracted for community-based residential facilities that are licensed under ch. DHS 83 to comply with the federal prison rape elimination act of 2003.

**SECTION 5.** DOC 328.14 (1) is amended to read:

**DOC 328.14 (1)** If the department determines that transfer to another jurisdiction is in the best interests of an offender and consistent with the goals of this chapter, an interstate transfer may be initiated upon payment of an application fee authorized under s. 20.410 (1) (gn), Stats. The fee shall not exceed \$150 per application.

**SECTION 6.** DOC 328.17 (1) is repealed and recreated to read:

**DOC 328.17 (1)** Offenders may be eligible for discharge as provided by s. 973.09 (3) (d), Stats.

**SECTION 7.** DOC 328.17 (1m) is created to read:

**DOC 328.17 (1m)** The department may grant a parolee early discharge when there is a reasonable probability that supervision is no longer necessary for the rehabilitation and treatment of the offender and for the protection of the public. The offender must have reached his or her mandatory release date or have been under supervision for two years under s. 302.11 (6), Stats.

**SECTION 8.** DOC 328.17 (2) is amended to read:

**DOC 328.17 (2)** Offenders ~~servicing a life sentence~~ are eligible for discharge by the governor as provided by s. 973.013 (2), Stats.

**SECTION 9.** DOC 328.17 (4) is repealed.

**SECTION 10.** DOC 328.27 (7) (title) and (a) (intro.) is amended to read:

**DOC 328.27 (7)** ~~DETENTION OF OFFENDER ON EXTENDED SUPERVISION~~ SHORT-TERM SANCTIONS. (a) The department may confine an offender on probation, parole, or extended supervision beyond the time limits provided under sub. (3) as a sanction when both of the following occur:

**SECTION 11.** DOC 328.27 (7) (d) is created to read:

**DOC 328.27 (7) (d)** Consistent with goals and requirements set forth in s. 301.03 (3) (b), Stats., the department will adopt an evidence-based response to violations.

**SECTION 12.** EFFECTIVE DATE: The proposed rules contained in this order shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register, as provided in sub. 227.22 (2) (intro.), Stats.