**Report From Agency**

**STATE OF WISCONSIN**
**DEPARTMENT OF TRANSPORTATION**

**REPORT FROM AGENCY**

**CLEARINGHOUSE RULE 20-020**

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In the matter of rulemaking proceedings before the Department of Transportation Wisconsin Administrative Code Ch. Trans 313 relating to: Breath Alcohol Ignition Interlock Devices (BAIIDs)

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## I. THE PROPOSED RULE:

The proposed rule revisions and the analysis are attached.

## II. REFERENCE TO APPLICABLE FORMS:

No forms are newly required by these rule revisions.

## III. FISCAL ESTIMATE AND EIA:

The Fiscal Estimate and EIA are attached.

## IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

Wis. Stat. s. 110.10 charges the Department of Transportation with the responsibility of promulgating rules for the implementation of an ignition interlock device program that will be conveniently available to persons throughout this state. This purpose of this rulemaking is to implement a comprehensive state ignition interlock program consistent with the statutory directive. The statute also mandates that the rules include, and this rulemaking does include. provisions regarding all of the following:

(1) Selecting persons to install, service and remove ignition interlock devices from motor vehicles.

(2) Periodically reviewing the fees charged to a vehicle owner for the installation, service and removal of an ignition interlock device.

(3) Requiring ignition interlock device providers operating in this state to establish pilot programs involving the voluntary use of ignition interlock devices.

(4) Requiring ignition interlock device providers operating in this state to provide the department and law enforcement agencies designated by the department with installation, service, tampering and failure reports in a timely manner;

(5) Requiring ignition interlock device providers operating in this state to accept, as payment in full for equipping a motor vehicle with an ignition interlock device and for maintaining the ignition interlock device, the amount ordered by the court under s. 343.301(3)(b), if applicable.

(6) Requiring ignition interlock device providers to notify the department of any ignition interlock device tampering, circumvention, bypass or violation resets, including all relevant data recorded in the device's memory.

(7) Requiring the department, upon receiving notice from a device provider related to an event described in (6), to immediately provide the notice and data from that event to the assessment agency that is administering the violator's driver safety plan.

Wis. Stat. s. 85.16 provides authority for the department to make reasonable and uniform orders and rules deemed necessary to the discharge of the powers, duties and functions vested in the department. It also allows the department to prescribe forms for applications, notices and

reports required by law to be made to the department or which are deemed necessary to the efficient discharge of all powers, duties and functions, and to prescribe the format and content of the forms and the mechanism or manner by which those applications, notices and reports may be filed or submitted to the department.

Wis. Stat. s. 227.10(1) requires all state agencies to promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. This rulemaking sets forth general policies and interpretations of statutes related to the ignition interlock program in this state.

Wis. Stat. s. 343.02 directs the department to administer and enforce chapter 343, Stats., and provides authority for the department to promulgate rules the secretary considers necessary for that purpose. Any rules promulgated may not conflict with and must be at least as stringent as standards set by the federal commercial motor vehicle safety act, 49 USC 31301 to 31317 and the regulations adopted under that act. The statute also documents that the state of Wisconsin assents to the provisions of those federal laws and regulations, and declares that the state will make provisions to implement and enforce those laws and regulations so as to ensure receipt by this state of any federal highway aids that have been or may be allotted to the state under 23 USC 104 (b) (1), (2), (5) and (6), including all increased and advanced appropriations. This rulemaking is consistent with the requirements of these federal laws and is intended to be applied and interpreted in a manner consistent with the continued receipt of federal aid.

## V. SUMMARY OF PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSES, AND EXPLANATION OF ANY RESULTING MODIFICATIONS TO THE PROPOSED RULES:

Public comments and the department's responses, with explanation of any modifications, are provided in the Part 4 report below.

**PART 4**
CR 20-020

ANALYSIS OF FINAL DRAFT OF TRANS 313

(d) **Summary of Public Comments and Agency Response to those Comments**. The persons testifying at the hearing and commenting on the rule provisions were all affiliated with ignition interlock providers doing business in Wisconsin. As their comments were specific and detailed, each suggestion will be reviewed and addressed below.

Several IID providers expressed concerns about implementation of the new breath alcohol ignition interlock device (IID) requirements that would be established under this proposed rule. The providers all have devices meeting current standards deployed in vehicles across the state. Commenters urged the department to not require immediate replacement of currently-in-service devices on the effective date of the rule. The department shares these concerns and has proposed that existing approved devices will be permitted to be used for one year beyond the effective date of the rule. Additionally, the Department proposes to have authority to extend this grace period beyond one year for a device if good cause exists. The Department believes that one year is ample time to convert customer equipment with minimal impacts to the customer, service provider, and vendor.

One provider recommended changing the definition of the alcohol setpoint in s. Trans 313.03(3) to a level not supported in the law. The definition proposed by the department in s. Trans 313.03(3) is the prohibitive alcohol concentration level for offenders with multiple OWI offenses and is used for all IIDs in Wisconsin. The proposed creation of this definition would codify a long-standing practice in this state of using the prohibited alcohol concentration level established in s. 340.01(46m)(c), Stats., for all IIDs in this state. While it might be legally possible to have different setpoints by offender, vendors have in the past noted the impracticality of such a solution. Vendors cannot know from their records what legal limit any particular person is subject to under s. 340.01(46m), Stats. The customer should know but is not a reliable source of that information. Accordingly, vendors and the department concluded that using the alcohol concentration limit for repeat offenders makes the most sense as an alcohol setpoint for all devices. Using that limit simplifies software and installation for vendors and prevents any IID-equipped vehicle from being operated by a driver with a prohibited alcohol concentration.

IID providers were divided in their opinions of the proposed definition of alert mode in s. Trans 313.03(3m), Some expressed concern about the difficulty of integrating IID devices with newer vehicle horn and emergency light systems. One provider supported the definition of alert mode as set forth in the hearing draft of this rulemaking. The Department considered all of these comments and has drafted the definition to include provisions for alternative audible and visual signals used during alert mode rather than requiring use of a vehicle's horn and emergency lights, if appropriate. The department has had reports of IIDs in alert mode providing the basis for law enforcement officers stopping and arresting intoxicated drivers in the past. Additionally, the department believes that the possibility of an alert mode provides a disincentive to drivers from operating a vehicle with a prohibitive alcohol concentration. Because the drafted rule permits vendors and the market to determine and create new alert mode mechanisms and does not mandate use of lights

and horn in vehicles where that is impractical, no changes to the definition from the hearing draft are proposed.

One provider suggested that the department limit “applicant” to manufacturers in s. Trans 313.03(4m). This rule is drafted to allow the market to determine the distribution mechanism for devices in this state. The department wishes to leave room in the marketplace for manufacturers of devices to develop alternative distribution systems and does not wish to compel manufacturers to directly distribute devices, so long as the overall program for a device used in this state meets state criteria.

One provider suggested that failing to service an IID not be included in the definition of the term “circumvention” in proposed s. Trans 313.03(9)(d). The commenter observed that s. Trans 313.10(5)(b) requires a customer’s failure to service a device be reported to law enforcement. The department believes that including nonservice as a type of circumvention makes clear that law enforcement may cite a driver under Wis. Stat. s. 347.417 if a vehicle is driven after required service has not been performed which would trigger issuance of a s. Trans 313.10(5)(b) noncompliance report. Accordingly, the suggestion was not adopted.

Several commenters and legislative clearinghouse questioned the departments use of the words “person”, “customer”, and “driver” throughout the proposed rule text. The Department heeded these comments and revised various provisions to clarify the applicability of relevant provisions. In general, where “customer” is used, it refers to the person who entered into a contract with a IID provider to install a device in a vehicle. “Driver”, in contrast, means the person driving the vehicle regardless of whether that person is the “customer” or the person that is subject to a IID restriction. “Person” is used to refer to any individual or entity encompassed in the Wis. Stat. s. 990.01(26) statutory definition. The language of s. Trans 313.03(intro) was amended to make clear that the statutory definitions in ss. 110.01, 340-349, and 990.01, Stats., have the same meaning in this chapter except as expressly provided in the proposed rule.

One provider commented that the definition of mobile service centers should include the requirement that they be associated with a fixed location as described in s. Trans 313.10(2). The department proposes to allow mobile service centers as the market demands. The department believes such operations may improve access to IIDs in rural communities. The department has adopted this suggestion by inserting the substantive requirement in proposed s. Trans 313.10(11)(c). The substantive requirement is inappropriate for inclusion in the definition.

One provider commented that the definition of permanent lockout in s. Trans 313.03(17) should be revised. It was pointed out that the IID cannot absolutely prevent a vehicle from being started. The department concurs with the comment and has revised the definition of permanent lockout to make clear that when the device is in a permanent lockout condition, it will not initiate a start sequence and therefore not permit the vehicle to be started using the normal ignition or starting system as modified by the IID.

Multiple providers commented that the definitions of service provider and service center, s. Trans 313.03(22m), may be duplicative and that the terms were used inconsistently throughout the chapter. The department re-evaluated the use of service center and service provider throughout the

rule and changed proposed provisions to make clear whether each requirement applied only to service centers or to the broader list of entities included in the definition of service provider.

One provider suggested the department adopt the definition of tampering in s. Trans 313.03(24) suggested by AIIPA. The AIIPA definition does not include unauthorized IID removal or adjusting or altering IID settings, which the department considers prohibited tampering. Additionally, the AIIPA definition does not make clear that removal of the handset is permitted. The department has elected to retain its proposed definition.

Multiple providers suggested modifications to the definition of violation in s. Trans 313.03(26m) to make clear that a violation occurs when a breath sample is measured at or above 0.020 g/210L. The department is establishing that the alcohol set point is any measurement above 0.020 g/210L, consistent with the definition of PAC in s. 340.01(46m), Stats. and the definition of IID in s. 340.01(23v), Stats. The latter definition defines an IID in terms of applying the definition of PAC. Additionally, it was suggested that a violation should include detection of tampering with the IID or circumvention of the device. The department believes that the prohibitions on tampering and circumvention are sufficient as they are drafted. Accordingly, the proposed definition of violation was unchanged.

Multiple providers commented on the proposed changes to device approval requirements in s. Trans 313.04(1)(a). Commenters wanted clarification that provisions in this section applied to device functionality and associated device firmware or software. The department adopted these suggestions and added language to clarify that it generally tests device software and firmware by assessing device functionality.

One provider suggested that the device approval should remain in place notwithstanding a transfer of ownership, contrary to language proposed in s. Trans 313.04(1)(b). The department rejects this suggestion. The department is not creating a property right of any kind in device approval and having approval remain personal to the applicant is essential to avoid inadvertently creating property rights. Approval of a device is revocable by the department.

One provider believed the department’s proposed requirement in s. Trans 313.04(2)(b)3. that the application for device approval include complete instructions for installation, operation, service, repair, and removal was overly broad. This provider suggested we limit documentation to that which is used for service center installation and maintenance. During the department’s approval testing process, we may open, disconnect, and test individual components within the device. To ensure that any such actions are done in accordance with the manufacturer’s specifications, manuals for internal device repair are needed. Confidentiality of proprietary information may be provided upon request. Accordingly, the suggested changes to s. Trans 313.04(2)(b)3. were not adopted.

One provider suggested that independent laboratories performing device certification be accredited to ISO/IEC 17025:2017. The department has not adopted this suggestion in as much as accreditation standards change over time and the department believes it is able to assess the validity of independent laboratory data quality through careful inspection of the report. Additionally,

aspects of the independent laboratory certification device testing is repeated by the department as part of our thorough device approval testing process.

The providers disagreed on device calibration stability periods defined in s. Trans 313.04(2)(b)5.(note). One provider suggested 67-days and another recommended 97-days. In contrast, some vendors supported a 37-day service interval due to increased customer interaction for education purposes. Department testing of devices has determined that across the industry, 67-days is a reliable length of time that devices maintain alcohol concentration measurement accuracy. We believe shortening the service period would be unjustified in that it would potentially double the annual inconvenience and expenses to the customers. Devices go into a service countdown for seven-days after expiration of the 60-day service period before they lock the driver out. This service countdown allows the customer a seven-day grace period to get their device serviced, making the service period a maximum of 67 days before the device enters a permanent lockout mode. The department has elected to leave the calibration stability window at 67 days as is currently set forth in s. Trans 313.10(5)(b).

One provider recommended that a device approval application not be required to include a provider's list of authorized service providers as described in s Trans 313.04(2)(b)6 if that applicant already had a device approved in Wisconsin. The department has not adopted this suggestion because it perceives that an applicant may seek to introduce a device that is serviced by a different group of service centers than the group for the prior-approved device. Moreover, the department believes that providing the list of service centers contractually engaged with the applicant to perform installation, service, and removal of a new device is not burdensome. Finally, without a complete list of these centers, auditing their performance would become difficult.

Several suppliers expressed concern over proposed requirements that the qualification and background of third-party device repair facilities be included with the application. The department adopted many of these suggestions and revised section s. Trans 313.04(2)(b)8. to make clear that qualification and background criteria for repair technicians not directly employed by the manufacturer need not be disclosed. Additionally, the identity of individual repair technicians need not be included.

One provider believed that proposed requirements in s Trans 313.04(2)(b)10. that an application include a list of all jurisdictions in which the applicant applied for approval of a device and a statement attesting to the application outcome was irrelevant after five years and therefore should not be required. Additionally, this provider believed that the department's proposed requirements in s. Trans 313.04(2)(b)12. that all test information from other jurisdictions be released to the department was overly broad and potentially proprietary. Another provider wished to have the opportunity to contextualize unfavorable results of testing. The department is not adopting these suggestions because devices change very little over time. Therefore, all prior testing of that device done by other jurisdictions, and the outcomes of those tests, is relevant to the department and should be considered as part of the application. It should be noted that the department is not interested in information related to semiconductor sensor devices distributed by the manufacturer in the 1990s. The department is only interested in information relating to devices being proposed for use in Wisconsin. Furthermore, Wisconsin's neighboring states of Illinois and Iowa have

similar provisions in their IID programs. The department proposes to address some of these concerns by notifying applicants of requests for information made to other jurisdictions and providing applicants the opportunity to identify information they may consider proprietary or confidential and to comment on the results of that jurisdiction's evaluation. See rule draft s. 93r proposing to create s. Trans 313.04(8) concerning the exercise of release of information.

One provider suggested that s. Trans 313.04(2)(b)14. be amended to make clear that requests for testimony be in writing. The department adopted that suggestion. They also recommended that teleconferencing be used for such testimony when permitted. The department lacks the authority to require courts to act as the department might direct but has included a note to the provision making clear that remote testimony would be acceptable if the court permits.

Some commenters were confused as to the meaning of the words "registered agent" in s. Trans 313.04(2)(b)15. All corporate entities are required to designate a person who will accept service of process on their behalf in this state. A corporate entity's agent for service of process can be found on the website of the Department of Financial Institutions as the following URL: https://www.wdfi.org/apps/CorpSearch.aspx. For more information, see the Wisconsin corporation regulation statutes, Ch. 180-183, Stats.

The department received comments from both the legislative council and providers that the proposed language of s. Trans 313.04(2)(b)16. should be more specific regarding the information and materials to aid in the department's assessment of the applicant's proposed IID program. The department has rewritten the section to clarify that it is interested in qualification requirements for manufacturer-approved authorized service providers and in training materials given to those service providers. Training materials would be used by the department to evaluate devices. Service provider qualification criteria would be evaluated to ensure that the persons employed in this field have sufficient training, experience, and responsibility to be a service provider. The department has intentionally not mandated specific background requirements to allow applicants and the marketplace to work. To date, this area has not been a regulatory problem and the department sees no reason to further regulate this arena.

One provider suggested the department use the word "affirmation" in lieu of "explanation" in s. Trans 313.04(2)(b)19. The department believes the word "explanation" sufficiently describes the information the department seeks. The department intends to implement the use of an application form which will require an affirmation of the truth and accuracy of the entire application.

One provider suggested that in s. Trans 313.04(3) the department approve or disapprove a device not later than 30 days after receipt of an application, regardless of whether the department's testing of the device is complete. Additionally, the commenter opposes the department testing devices to determine whether they perform in the manner required for protection of the public in Wisconsin's environment. The department has rejected these suggestions. First, the department is required to develop a reliable IID program and knowing that devices function in the manner required is essential to that task. Second, it makes no sense to approve or disapprove a device before completion of the department's testing.

The department received comments from the legislative council and a provider regarding s. Trans 313.04(4)(e) creating a waiting period before re-applying for device approval. The department's intent in the proposed provision is to keep serial applications from draining testing resources and to make device testing and processing as quick as possible given limited resources. The department adopted the provider's suggestion that the department be permitted to waive the waiting period for retesting if an applicant can show that it has corrected an earlier-detected problem.

One provider requested that the department require more specific means of demonstrating compliance with NHTSA Model Specifications called out in s. Trans 313.04(5)(a). The department believes this provision of the law has functioned adequately since 1993 and perceives of no need for additional requirements as to form of proof. The department's intent in amending s. Trans 313.04(5)(a) is simply to adopt more recent federal standards for Wisconsin's evaluation program.

One provider suggested that the language "cease operation" in s. Trans 313.04(5)(b) defining the IID retest feature be changed to reflect the time the engine or motor stops running. This suggestion is rejected because some modern vehicles have engines that stop running while the vehicle is 'idling' during operation. The department does not intend for such fuel economy measures to impact the retest feature. Similarly, electric vehicles do not cease operation when their electric motors halt during a vehicle stop.

One provider was concerned that the five-minute testing window described in s. Trans 313.04(5)(c) may not be sufficient time to clear extremely high alcohol concentrations. The department typically tests for compliance using alcohol concentrations no higher than 0.100 g/210L and no approved devices have shown difficulty complying with this requirement to date. Accordingly, this suggestion was not adopted.

One provider recommended the department reword s. Trans 313.04(5)(cm) to better reflect how the department wants the IID permanent lockout feature to work. The department has adopted this suggestion making clear that the device, not the vehicle, enters a permanent lockout mode. Entering a permanent lockout mode prevents initiation of a start sequence for the IID, see proposed s. Trans 313.03(17).

Many providers commented on the camera requirements in s. Trans 313.04(5)(f), asking for clarification on where the camera is to be pointed and when the camera is to capture an image. The department has re-written this proposed provision to make clear that the camera is to capture a clear and accurate image of the entire front seat and pass through area. Language requiring the camera to capture an image of the driver was removed as the driver could chose to circumvent the camera and stand outside of the vehicle. Additionally, the department included avoiding or altering the field of view of the camera as a form of circumvention is s. Trans 313.03(9). Furthermore, the department clarified that the camera is to activate and capture an image when the device user is providing a sample or if no sample is provided at test expiration. Additionally, some providers opposed language to capture images randomly while the vehicle is being operated. Therefore, the department removed the requirement to capture random images while the vehicle is being operated.

One provider commented on the lockout code proposed provisions in s. Trans 313.04(5)(i), stating that their system works in such a way that any lockout code generated for a customer would expire at midnight that day. Proposing that the lockout code expire in 24 hours would be difficult for them to comply with and require extensive re-working of their system for little gain. The department understands this constraint and therefore adopted more inclusive language that the lockout code must expire at midnight or within 24 hours. This will allow the use of a midnight limit if the provider desires.

Providers commented that as-written proposed provision s. Trans 313.04(5)(m) concerning data reporting requirements is more accurately titled "near-real time" as we require data to be transmitted upon connection to cellular or wireless service. This provision was written in consideration of the fact that some rural areas of Wisconsin have limited cellular service where it may prove burdensome or impossible for providers to connect and transmit data. The department has adopted this suggestion throughout the rule text when data transmission is referenced. Providers also suggested that this proposed provision eliminate any requirement for duplicative data transmittal upon serial violations. This suggestion was also adopted by the department and the proposed provision now states that once a violation or preceding sample sequence has been reported that the violation or preceding sample sequence need not be re-reported with subsequent violation reports.

Various comments requested clarification on the language used to refer to the IID "control box" or "vehicle module" as the terms were used inconsistently throughout the text. This suggestion was adopted, and the department converted language throughout the proposed rule text to "vehicle module" which is defined in s. Trans 313.03(25).

Multiple providers commented in opposition to the proposed requirements for a motorcycle IID in Section 91. These comments requested that IIDs installed on motorcycles not have a hands-free requirement as no technology currently exists to make this possible. The department feels strongly that use of a IID on a motorcycle is profoundly dangerous. Some providers argued that the five-minute retest window allows ample time for the rider to pull over to the side of the road to provide a sample to the device. The department disagrees with this argument and holds the belief that pulling over to the side of the road would not be safe for the rider or other drivers. First, non-paved or loose-gravel covered shoulders would present a crash hazard particularly as the driver's attention is divided in complying with the IID device and navigating a safe motorcycle stop. Second, the stopped motorcyclist would become a potential roadway hazard that other drivers may strike. Since no manufacturer suggested it could comply with the proposed safety-related provisions suggested in the hearing draft, the department has now removed the option of installing a IID on a motorcycle. This will be an efficiency for state courts which can simply exempt all motorcycles by s. 343.301(1m)(b), Stats. This is also more efficient for the Wisconsin DMV which will no longer be required to note IID restrictions on vehicle records related to motorcycles. IID restrictions for vehicle operators generally extend only to class D vehicles, see s. 343.301(1g)(am)1., Stats. It is worth noting that the motorcycle IID installation prohibition does not extend to autocycles which are steering-wheel controlled and do not present the same safety-related issues as motorcycles.

The department proposed in s. Trans 313.04(6)(f) of the hearing draft to require customer permission or a search warrant as a pre-condition to accessing location retrieved from devices. The department received many comments surrounding the complexity of making location data unavailable as the hearing draft proposed. Additionally, because the location data is always needed for prosecution of a violation in order to identify jurisdiction in which the violation occurred, the requirement may have obstructed enforcement of IID requirements. Accordingly, the par. (f) provision has been withdrawn from the proposed rule.

One provider suggested that the term "manufacturer" be replaced with a more general term "applicant" in s. Trans 313.07, 313.08, and 313.12. This provision describes the department's power to deny, suspend, or revoke approval of a device and therefore the term "applicant" is inappropriate. At this point the device has already been approved, but the department concurs that some of the provisions need to apply to a manufacturer or a vendor if the manufacturer was not the original applicant for approval. Accordingly, the rule text was amended to include vendors and manufacturers, where appropriate.

One provider recommended that department action to deny, suspend, or revoke device approval in s. Trans 313.07(1)(i) include the language "after failing to resolve the issue or after working with the department to resolve the deficiencies…" The department believes that this suggestion would impair the agency's enforcement discretion which must be applied to each situation individually. Trans 313.07(1)(intro) makes clear that the revocation of device approval is discretionary for all of the provisions of the subsection by use of the term "may". The department does not intend to take such drastic action, however, based on a single event. Accordingly, the proposed provision is amended to make clear that repeated failure to provide notice can result in revocation of approval.

One provider suggested that any failure to maintain a system of repair or inventory of parts described in s. Trans 313.07(1)(j) be tied to an actual failure to effectively repair or replace a model of device. The department has not adopted this suggestion because it intends that issues be dealt with before customers are inconvenienced by unrepairable or obsolete devices. Moreover, the department is concerned that replacement parts used in repair are those intended for use in the model of device being repaired and therefore is concerned than an inventory of acceptable replacement components be maintained.

One provider recommended that no provider be compelled to provide more than 10% of its statewide installation and service per court order under s. 343.201(3)(b), Stats. at the indigent rate. Section 110.10(4m), Stats. requires the department, as part of the state IID program, compel "ignition interlock device providers operating in this state to accept, as payment in full for equipping a motor vehicle with an ignition interlock device and for maintaining the ignition interlock device, the amount ordered by the court under s. 343.301(3)(b), if applicable". The department lacks the authority to place limits on statutory enactments of the legislature and therefore cannot and does not adopt the suggestion. Only the legislature can amend the provisions of the statute and limit its applicability.

The department received comments on proposed provisions to suspend or revoke device approval described in s. Trans 313.07(2). Commenters asked the department to clarify whether the

suspension or revocation is effective 15 calendar or business days after notification is sent to the registered agent. The department clarified that the period would be counted via calendar days. Another commenter suggested that the 15-day period start once the registered agent receives the notice. The department did not adopt this suggestion because registered agent receipt of mail is outside of department control and could be used as a method to stall consequences for prolonged non-conformity. Additionally, there was a suggestion that the provider being notified of suspension or revocation be given an additional 30-day period to work with the department on a solution to the issue. Wisconsin's IID program involves a great deal of communication between the provider and the department, so any proposal to suspend or revoke approval of a device will not be a surprise to a provider. In the 27 years since Ch. Trans 313 was initially promulgated, the department has not suspended or revoked approval of a device and has worked with providers whose programs had deficiencies to get them corrected. Accordingly, the department does not believe changes suggested are necessary or appropriate.

One provider recommended that the department require providers carry a $100,000 performance bond to ensure that provisions of s. Trans 313.07(4) be met upon suspension or revocation of device approval. The department concurs in the concern for protection of consumers. However, the department believes that it is unlikely to be needed and that if implemented the size of the bond would need to be scaled to the size of the provider's operations in the state. Additionally, a bond requirement could be anti-competitive or exclude small businesses from applying for approval in Wisconsin. In consideration of all these factors, the department has not adopted the suggestion of requiring a bond at this time.

One provider commented that manufacturer responsibilities described in s. Trans 313.08(1)(a) is "overly broad" and should be limited to "modifications which would affect the analytical or metrological features of Wisconsin-specific settings of the device". The department does not believe the provision is overly broad nor does the department believe the suggested language improves the provision. The department is concerned that all material changes to devices, device components, and installation or operation instructions be communicated to the department so that is can assess whether the change may impact approval of the device.

The department received a comment on manufacturer requirements to supply mouthpieces to service centers described in s. Trans 313.08(3). This comment suggested that the long-standing provision in the current rule implied that contractual agreements between the vendor or manufacturer be nullified by the language of the provision. The proposed language was changed to make clear that a vendor or manufacturer must make mouthpieces available to the service centers without specifying the terms under which the items are distributed.

One provider commented on manufacturer responsibilities surrounding training described in s. Trans 313.08(5)(a), to ensure that virtual training is an option. The department has allowed remote or virtual training in appropriate situations in the past but believes that certain hands-on training is difficult or impossible to conduct remotely. The department has not codified the suggestion that remote instruction be an acceptable substitute for any required instruction and believes that determination of the type of instruction needed will vary depending on the training content.

Various providers commented on the proposed provisions surrounding statewide service in s. Trans 313.09(1). One provider suggested that mobile service centers may not provide adequate coverage to an area and instead the department should require fixed, permanent service centers statewide. The department believes that the market will determine whether a fixed, permanent, or mobile service center is appropriate for a location. The number of areas in the state that are not within 75 miles of a fixed, permanent facility is currently limited to rural parts of the state where permanent facilities may not be economically viable. Another provider urged the department to make statewide service be determined in increments of driven miles. The department does not believe that using highway miles would be workable from an administrative standpoint. Accordingly, these suggestions were not adopted.

One provider had various comments on requirements in s. Trans 313.09(3) regarding required notification of the department when a service center closes. One suggestion was to include language that the department be notified "as soon as reasonably possible" in an emergency and allow for service center location change in an emergency. These recommendations were adopted by the department and the section now reflects an allowance for delayed notification of the department during an unforeseen or unknown closure situation. In reviewing the text of the provision, the department also concluded that reports of service center changes should come from the manufacturer or vendor that is responsible for maintaining statewide coverage rather than from a myriad of service providers. According, the provision is amended to require notice be provided by the limited number of manufacturers or vendors rather than by a large number of independent service providers.

One provider recommended revision to the provision in s. Trans 313.09(4) prohibiting abandonment of an assigned service area by a provider unless it can show IID service is available in the area from another provider. The suggested change to the wording of the provision is inconsistent with statutory and rule drafting style and was therefore not adopted.

One provider suggested that tamper inspections described in s. Trans 313.10(1)(b)1. be limited to areas of the vehicle that are easily accessible. Some vehicles require partial disassembly to access sealed connections. The department recognizes that inspections may be difficult, but our experience is that tampering generally is concealed under the dash or in inconspicuous hard-to-reach locations in order to conceal the tampering. This provision is consistent with AAMVA, AIIPA, and NHTSA recommendations regarding detection of tampering and in therefore not changed.

One provider expressed concern surrounding installation timing requirements in s. Trans 313.10(4), suggesting that the rule include language stating that the device must be scheduled for installation within 10 days. This would provide a mechanism for accommodating customers who do not make their cars available for installation within 10 days. The department concurs that a service provider cannot install a device within 10 days if a customer will not make their vehicle available or requests a later scheduling date and has amended s. Trans 313.10(4) accordingly.

The providers disagreed on device calibration intervals defined in s. Trans 313.10(5)(b). One provider suggested 67-days and another recommended 90-days. In constast, some vendors

supported a 30-day service interval due to increased customer interaction for education purposes. Department testing of devices has determined that across the industry, 60-days is a reliable length of time that devices maintain alcohol concentration measurement accuracy. We believe shortening the service period would be unjustified in that it would potentially double the annual inconvenience and expenses to the customers. Devices go into a service countdown for seven-days after expiration of the 60-day service period before they lock the driver out. This service countdown allows the customer a seven-day grace period to get their device serviced, making the service period a maximum of 67 days before the device enters a permanent lockout mode.

One provider suggested that we adopt emergency procedures allowing for recalibration service interval alterations by WisDOT. The department proposes to create s. Trans 313.17 to address ignition interlock emergencies and provide a basis for waiving requirements of this Chapter or extending time limits as an emergency may require.

Many providers strongly opposed proposed requirements that a certain number of mouthpieces be provided to the customer, free of charge, as the hearing draft proposed in s. Trans 313.10(8). The department has removed language that proposed to require a certain number mouthpieces or equivalent be given to the customer free of charge. Fees for mouthpieces, breath receptors, and other sample components must be disclosed in any customer contract under proposed s. Trans 313.10(12).

One provider suggested that only dry gas samples on the NHTSA conforming products list be authorized for use in calibrating devices. Because dry gas standards are created for evidentiary devices measuring alcohol at a much higher concentration than BAIIDs must, this suggestion is not adopted. The department's primary concern is that the device meets the required performance standard.

Multiple providers had various comments on mobile service center provisions in s. Trans 313.10(11) including a requirement that the service provider indicate whether service was completed via mobile service center. Another provider suggested that they maintain records for three-years and that they be available in 24-hours' notice to the department. Another provider suggested that paragraph (d), requiring advanced department notification of mobile service schedules, impairs provider ability to give emergency or same-day service when requested. The department believes that advance notice of normal mobile service is a necessary cost of providing such service so that the department may observe and audit mobile service procedures to ensure compliance with program requirements. The department agrees, however, that in emergency situations such notice should not be required. Accordingly, the proposed paragraph is amended to limit advanced notice to scheduled installations or calibration appointments. Additionally, a provision was added to make clear that emergency service is not subject to the advance notice requirement.

One provider recommended deleting "permanently" in requirements for a custom warning label in s. Trans 313.105(4)(c)2. They suggested the language be amended to reflect the intent that tampering with the label or device will be readily observable. The department has adopted this suggestion as labels are inherently removable.

The department received comments suggesting that some of the required customer disclosures relating to fees be removed from s. Trans 313.12. The department believes that customers should know, in advance, of all charges and fees that may be imposed by service providers, vendors, or manufacturers for use of their IID. Therefore, this suggestion was not adopted.

Several providers urged the department to remove or substantially alter proposed requirement that the device be removed free of charge by the installing service center as described in s. Trans 313.14(3). The department has adopted one provider's suggestion of limiting the cost of device removal to normal time and materials charges. Additionally, the department added this cost to the disclosures that must be made on the initial contract for installation of an IID under s. Trans 313.10(12). The service center that installs a device must disclose the device removal charge at initial installation. Any service provider is limited to charging ordinary time and materials charges if removing a device installed at a different service center. The initial installer may be further limited by the terms of its contract with the customer.

Some providers suggested reducing the amount of required air in s. Trans 313.16(2) to 1.2 liters of air upon medical recommendation. The department has not adopted this suggestion. Breath alcohol ignition interlock devices are installed on vehicles to prevent known impaired drivers from repeating that behavior. To that end, a reliable test is required as a condition of operating a motor vehicle. An air sample of 1.2 liters of air is less likely to contain the deep lung air needed for a representative measurement of body alcohol concentration. Additionally, the department has found that some devices are easier than others for customers with respiratory ailments to use and encourages those customers to try a different device. There are many persons whose medical infirmities result in their losing their capacity to operate a motor vehicle. If an inability to start a vehicle results from a combination of a individual's impaired driving behavior and a breath-related medical condition, the driver will be unable to operate the vehicle during the applicable ignition interlock restriction. Finally, the Chemical Testing Section is neither qualified to assess medical tests and information provided by doctors nor does it have the resources to manage medical information appropriately. Accordingly, these suggestions were not adopted.

Multiple providers commented objecting to proposed s. Trans 313.16(6) which was intended to allow service providers in remote areas to service more than one type of device. No service providers testified with regard to this provision but IID manufacturers objected to the provision of the grounds that they felt it could adversely impact their quality control processes, result in conflict of interest problems for a provider servicing competing devices, and potential disclosure of proprietary information. Since the opposition seemed unanimous across the providers, the department has removed the provision from the proposed rule.

## VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF COMMENTS:

**Response to Legislative Council Recommendations**.

All of the comments contained in the Legislative Council report have been reviewed and changes related to those comments have been incorporated into the proposed rule except as set forth below:

2.h. The department proposes to repeal the definition of "chief of the chemical testing section" as recommended by the Legislative Council. The department is not defining Chemical Testing Section because the term is readily understood, and structure of executive agencies is defined by statute.

2.n. The department did not change the term "device user" to "customer" generally in Ch. Trans 313. The "device user" is the person actually using the device to provide a sample. "Customer," in contrast is the person who has the device installed in a vehicle. Persons other than the customer who had the device installed may operate the vehicle and would therefore need to use the device.

2.r. The comma after "removal" in Trans 313.04(2)(b)3. is underlined to show its insertion in the provision. The reference to subd. 2. in the Legislative Council Report appears to be a typographical error.

2.w. The reference to "Chapter Trans 313" in proposed Trans 313.04 (2) (b) 18. and 313.105(5)(a) are revised to refer to "this chapter" as recommended by the Legislative Council. The provision in s. Trans 313.04 (2) (b) 18. is now part of Section 48 of the proposed rule.

2.z. The suggestion to move language into a note was adopted.

2rr. The period ends the first sentence. The suggestion to strikethrough "This request" was adopted.

2nn- The term "GPS" was replaced with "location data" throughout the proposed rule because the department does intend for a specific technology to be adopted.

2ggg. The department deleted the note that follows s. Trans 313.16(5) in Section 137 of the proposed rule as recommended.

5b. Terms were examined for consistency throughout the rule. "Days" was selected as the term for calendar days, and a definition for "business days" was created to represent weekdays that are not legal holidays.

5d(4). The department determined that s. Trans 313.10(11)(a) is necessary to provide clarity, therefore the section was not removed from the proposed rule.

5h. In the second sentence of Section 21 of the proposed rule, the department pluralized "centers" in each use for consistency as recommended.

5p. The department rewrote proposed Section Trans 313.04(4)(e) consistent with comments received from the Legislative Council and industry commenters.

5v. The department believes that the term "alcohol-specific quantification sensor" will be understood in the scientific community.

5x. The department eliminated the use of "GPS" throughout the proposed rule, in response to comment 2nn.
Added:

5cc. The reference to an alteration of a device was removed from proposed s. Trans 313.08(1)(a) for consistency.

5ee. The department proposed to repeal Section 313.10(4)(d), given that the proposed rule requires proof that installation be transmitted directly to the department under s. Trans 313.10(6)(b) as amended by Section 116 of the proposed rule.

5gg. In response to Legislative Council's comments, proposed Trans 313.105(4)(d) in the pre-hearing draft has been moved to Trans 313.105(4)(b)3. This clarifies that the custom label warning format need not comply with the provisions of par. (b)1. or 2.

## VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS:

The Department did not receive any statement, suggested changes, or other material from the Small Business Regulatory Review Board.