

STATEMENT OF SCOPE

Department of Transportation

Rule No.: **Chapter Trans 313**

Relating to: **Breath Alcohol Ignition Interlock Devices**

Rule Type: **Permanent**

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Detailed description of the objective of the proposed rule: The purpose of this rulemaking is to propose modifications to the regulations related to breath alcohol ignition interlock devices (“IIDs”).

Chapter Trans 313 was created in 1993, following the passage of 1991 Wis. Act 277. That legislation required one of various sanctions be applied to vehicles owned by a repeat drunk driver. For example, the act allowed judges to impose a requirement that driver’s operate only IID equipped vehicles as a condition of occupational licensing, and allowed a sentencing court to order an IID be installed in a vehicle owned by a repeat offender. That enactment also created Wis. Stat. s. 347.413(2), which required the State of Wisconsin Department of Transportation (“WisDOT”) to promulgate administrative rules establishing specifications and requirements for approved types of ignition interlock devices and their calibration, installation and maintenance. This rulemaking authority was subsequently rewritten into Wis. Stat. s. 110.10 by 1999 Wis. Act 109, but Ch. Trans 313 was not amended following that change. The rule has remained static since 1993.

Since 1993, however, there have been many improvements in the design, performance and programming capability of ignition interlock devices. In this rulemaking, WisDOT proposes to update Ch. Trans 313 consistent with current ignition interlock programs, and to revise existing requirements for device operation, performance, programming and data reporting. WisDOT will also review its processes and procedures related to application for manufacturers to seek and maintain approval for sale, lease, installation and repair in this state, financial responsibility requirements, and manufacturer, service provider and vendor responsibilities. WisDOT may also update and revise administrative provisions related to IID warning labels, court and DMV processes and procedures, IID device removal and audit authority and procedures. WisDOT will examine the requirement that courts make the list of authorized service providers that the State Patrol currently maintains available to IID users. The list is currently published on the internet and there is no need for courts to distribute the list, as may have been the case in 1993.

The current regulation requires that IIDs used in Wisconsin “meet or exceed the standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, identified as ‘Model Specifications for Breath Alcohol Ignition Interlock Devices’ 57 Fed. Reg. 67, pp. 11772-11787 (April 7, 1992).” s. Trans 313.04(5)(a). This proposed rulemaking will examine and potentially adopt updated model specifications promulgated by the National Highway Traffic Safety Administration on and published May 8, 2013, at 78 Fed. Reg. 89, pp. 26849 – 26867.

This rulemaking will also consider changes made to Wisconsin law by 2015 Wisconsin Acts 55 and 389, and changed federal laws related to ignition interlock programs in 23 U.S.C. s. 164 and 405 and in 23 C.F.R. part 1275.

The rulemaking will consider interpreting the provisions of s. 343.301(3)(b), which provide that if a court finds that the person who is subject to an IID order has a household income that is at or below 150 percent of the nonfarm federal poverty line, “the court shall limit the person’s liability... to one-half of the cost of equipping each motor vehicle with an ignition interlock device and one-half of the cost per day per vehicle of maintaining the ignition interlock device.” WisDOT will consider requiring vendors to accept payment at the rate of one-half their ordinary and usual installation and service rates from persons who qualify for the exemption.

Finally, WisDOT will consider whether Wisconsin’s ignition interlock program is consistent with federal Constitutional requirements that generally require equal treatment under the law of Wisconsin residents and residents of other jurisdictions. The interpretation would be consistent with federal constitutional decisions involving the right of citizens to travel between states without discriminatory treatment.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The existing regulation establishes procedures to be used for the approval of IIDs for use in Wisconsin. WisDOT intends to examine these procedures, retain procedures that are beneficial, remove any that are no longer needed, and add requirements consistent with the evolution of IID programs. For example, in 1993, IIDs were primarily installed by device manufacturers; today they are often installed and serviced by third parties, such as mechanics. WisDOT expects to evaluate the usefulness of evaluating a manufacturer’s system of installation and service, statewide, as part of its authorization process for IIDs. WisDOT also expects to update evaluation criteria for devices, including criteria related to anti-circumvention devices and systems, alcohol concentration testing and computation, system security and anti-tampering mechanisms, customer data security, and other IID functions.

Current Ch. Trans 313 requires manufacturers to make limited representations as to a device’s capabilities as part of the application process, such as whether the device will prevent persons with prohibited alcohol concentration levels from operating a vehicle, that it does not impede safe operation of the vehicle, and that it minimizes inconvenience to vehicle operators, s. Trans 313.04(2)(a). WisDOT will examine whether to expand the certification requirement to include other relevant information, such as:

- Identifying the manufacturer, manufacturing facility, and device.
- Identifying states where the device has been evaluated, and whether the device was approved or not approved for use in each state.
- Describing the manufacturer’s procedures for device installation, calibration, data collection, and data handling.
- Providing data and results produced by any independent laboratory evaluating whether a device meets or exceeds the U.S. Department of Transportation, National Highway Traffic Safety - Administration’s model specifications for IIDs published May 8, 2013, at 78 Fed. Reg. 89, pp. 26862–26867.
- Explaining service provider procedures for device installation, calibration, inspection and tamper detection, customer training, and data collection, downloading, inspection, and removal.
- Providing WisDOT with copies of customer forms, customer training materials, and all materials provided to customers at the time of installation.

- Providing WisDOT with copies of all manuals and materials related to quality, installation and repair of the device.
- Providing the fee schedule(s) used in this state by manufacturer's service providers.
- Describing anti-circumvention features employed by the device.
- Describing any pre-warming process that may be utilized to ensure the device is operational in extreme cold weather conditions.
- Setting forth the manufacturer's plans for providing service of the device in all areas of the state together with a list of all Wisconsin service provider locations.
- Providing complete data logs for evaluation of whether device programming meets all state and federal standards and requirements.
- Consumer contract provisions.
- Obtaining periodic or relevant updates of the above information.

WisDOT also proposes to evaluate whether specific devices or systems should be installed on IIDs used in this state, such as:

- Whether approved devices must utilize an alcohol-specific detector to determine alcohol concentration, such as an electrochemical fuel cell or other pre-approved advanced technology.
- Whether devices must utilize a pre-warming feature to reduce start times in cold temperatures.
- Whether device anti-circumvention features are sufficient to ensure only human breath is accepted as a valid sample.
- The minimum sample volume that should be required for testing.
- Whether security features in the devices adequately detect and prevent tampering and circumvention.
- Whether electronic anti-tampering features must be included on devices such as recording power disruptions, disconnections and reconnections of the device, detecting tampering and retaining data when disconnected from the vehicle power supply.
- Whether IIDs should include a camera that is capable of producing a digital image in all lighting conditions, so that it will be possible to capture an image of the individual using the device, any passenger assistance being provided, and to determine whether a circumvention device is being used.
- If image capture is required, to establish storage requirements for the images captured, and provisions permitting the sharing of said data with law enforcement, treatment officials, parole or probation officers, courts, hearing officers, and the department.
- Whether to require devices to incorporate an automatic adjustment for daylight savings time or to report time in some standardized fashion.
- Whether to restrict emergency access codes so that they may only be used within a certain period after being provided and limited to short term or single use.
- Whether any device accommodations may be required by customers under the Americans with Disabilities Act and if so, the nature of those accommodations and procedures related to implementing accommodations.
- Whether to permit or require GPS and immediate data transfer via cellular telephone technology.

- Whether to incorporate standardized reporting language to simplify data interpretation by the courts, law enforcement, parole and probation officers, treatment officials and WisDOT.

The federal specifications require that all devices be ready for sampling within three minutes of activation at -40°C (-40°F). A pre-warming feature will help to reduce this time, which may be important in the northern areas of the state. Some ignition interlock programs require pre-warming or a warning that the vehicle could be inoperable below certain temperatures.

Successful use of GPS and immediate data transmittal may be ineffective in many areas of the state, particularly away from the interstate system and in the northern regions. Without uniform cellular coverage, WisDOT does not expect to propose requiring use of GPS technology.

Some state ignition interlock programs rely on breath sample parameters, such as temperature and humidity alone, to detect possible circumvention. Approved devices in Wisconsin today use techniques like changing breath flow direction and humming to prevent circumvention. WisDOT will evaluate whether changes to current requirements should be considered.

WisDOT will also consider providing more specificity with regard to the manner in which approved devices must function and their programming. For example, WisDOT will consider whether to require or permit addition of a retest sample warning, which would allow the user three minutes to prepare for the breath sample. (Three minutes being deemed sufficient time for a driver to pull out of traffic if necessary.) WisDOT will consider eliminating the current practice of permitting a “free” restart, where no sample was required if a driver is attempting to restart a vehicle within two minutes of stopping the engine. Many other states do not allow a “free” restart, and the likelihood of a vehicle stalling has been greatly reduced with electronic ignition systems.

Other items to be considered for inclusion as required programming features are:

- Verification of failed breath sample results.
- Emergency lights and horn activation after any aborted, failed or refused breath retest sample.
- Violation resets after a certain number of failed vehicle start attempts, or breath samples that exceed the device’s alcohol concentration set point.
- Temporary lockout after failed or refused retest samples.
- Alternate time intervals for retest samples.
- Other items recommended in the rulemaking process by interested parties.

Most IIDs require servicing after a given number of testing protocol violations (called a “early recall” or “violation reset” by the industry). Wisconsin does not consider a single defective, inadequate or failed test to be a protocol violation that should trigger a violation reset requiring device service. Other states include failed start samples in the violation reset scheme. WisDOT is skeptical of including start samples in the violation reset scheme because of the likelihood of problems for consumers. It is unlikely that incorporating additional lockouts after failed or refused samples will deter alcohol consumption by convicted offenders. During the winter months, these lockouts could actually create a dangerous situation. When a start sample in Wisconsin prevents a vehicle from starting, WisDOT views the event as the device serving its intended function - to keep a convicted offender off the road after consuming alcohol. Nonetheless, WisDOT will evaluate violation reset protocol and propose changes to it if WisDOT determines such changes are prudent for Wisconsin’s program.

Consistent with Wis. Stat. s. 227.10(3)(a), WisDOT will consider adding express provisions applicable to manufacturers and service providers to prohibit discrimination on the basis of race, color, religion (creed), gender, gender expression, age, national origin (ancestry), disability, marital status, sexual orientation, or military status, in any of its activities or operations. WisDOT will also consider whether discrimination on the basis of economic status, eligibility for low cost devices under s. 343.301(3)(b), or participation in a 24/7 program should be permitted.

Section 110.10(6) mandates that WisDOT include provisions in IID related rulemaking “[r]equiring 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. Upon receiving notice described in [Section 110.10(6)], the department shall immediately provide the notice and data to the assessment agency that is administering the violator’s driver safety plan.” WisDOT has never implemented this requirement because alcohol assessment agencies have consistently expressed disinterest in the data. Probation and parole officers, in contrast, have expressed interest in obtaining this data. WisDOT will consider possible implementation of the provision and changing the current notification program as part of this rulemaking.

WisDOT will also consider exempting motorcycles from any IID installation requirement imposed pursuant to Wis. Stat. s. 343.301(1g)(am)1., unless a manufacturer produces, and its service agencies will install an approved product that will operate on a motorcycle. This would be consistent with the driving restriction imposed under Wis. Stat. s. 343.301(1g)(am)1., which applies only to Class D vehicle operation and not to motorcycle operation.

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The rulemaking will consider interpreting the provisions of s. 343.301(3)(b), which provide that if a court finds that the person who is subject to an IID order has a household income that is at or below 150 percent of the nonfarm federal poverty line, “the court shall limit the person’s liability... to one-half of the cost of equipping each motor vehicle with an ignition interlock device and one-half of the cost per day per vehicle of maintaining the ignition interlock device.” WisDOT will consider prohibiting vendors from discriminating against persons who qualify for this program and requiring vendors to accept payment at the rate of one-half their ordinary and usual installation and service rates from persons who qualify for the exemption.

WisDOT will consider whether Wisconsin’s ignition interlock program is consistent with federal Constitutional requirements that generally require equal treatment under the law of Wisconsin residents and residents of other jurisdictions. Wis. Stat. s. 343.301 provides that IID restrictions upon a person’s operating privilege begin, “on the date the department issues any license...” Because DMV does not issue licenses to nonresidents, the result of that provision is that nonresidents remain subject to a court order indefinitely. WisDOT will consider whether it should interpret s. 343.301 to permit out-of-state residents who do not obtain licenses from DMV to begin serving IID orders when they reinstate their Wisconsin operating privilege and thereby make operation on their out-of-state license in Wisconsin

permissible. The interpretation would be consistent with federal constitutional decisions involving the right of citizens to travel between states without discriminatory treatment.

As part of this rulemaking, WisDOT will evaluate and consider provisions of ignition interlock programs in states bordering Wisconsin, Wis. Stat. s. 227.137(3)(a). WisDOT will consider any policies of those states that it believes may be beneficial to adopt as part of the Wisconsin program.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language): The statutory authority for Ch. Trans 313, Wisc. Admin. Code is detailed in s.110.10, Stats., which provides:

110.10 Ignition interlock device program. The department shall promulgate rules providing for the implementation of an ignition interlock device program that will be conveniently available to persons throughout this state. The rules shall include provisions regarding all of the following:

- (1) The selection of persons to install, service and remove ignition interlock devices.
- (2) Periodic review of fees charged 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 to provide the department and law enforcement agencies with reports detailing failures, installation, service, and tampering in a timely manner.
- (5) Requiring ignition interlock device providers to accept, as payment in full, the amount ordered by the court under s. 343.301 (3) (b) for installing and maintaining an ignition interlock device, 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. Upon receiving notice described in this subsection, the department shall immediately provide the notice and data to the assessment agency that is administering the violator's driver safety plan.

Additional authority for promulgation of this rule is found in s. 343.02(1), Wis. Stats., which requires the department to administer and enforce the driver licensing statutes in Ch. 343, Stats., and to promulgate rules the Secretary believes are needed for that purpose. Various provisions related to ignition interlock devices are found in ss. 343.10, 343.13, 343.301, 343.305, 343.38, and 343.44, Stats. Wis. Stat. ss. 85.16(1) and 227.11 provide general authority for WisDOT rulemaking as well.

5. Estimate the amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

1000 hours.

6. List with description of all entities that may be affected by the proposed rule :

- Drivers who are convicted of violating any of Wisconsin's impaired driving laws or who refuse chemical tests.

- Wisconsin circuit and municipal courts.
- Ignition interlock device manufacturers.
- Ignition interlock device service providers.
- Local law enforcement agencies.
- Probation and parole officers, Wis. Dept. of Corrections.
- Court-ordered alcohol and drug abuse counselors and assessment agencies.
- WisDOT Division of Motor Vehicles.
- WisDOT Division of State Patrol.
- Department of Health Services.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

The 2013 model specifications (78 Fed. Reg. 89, pp. 26849-26847, May 8, 2013) are not intended to take the place of state certification requirements, do not have the force of regulations and are not binding. States are encouraged to adopt specifications at least as stringent as the NHTSA model and may set their own standards and conduct their own tests following state procedures and specifications. Ignition interlock devices approved for use in Wisconsin would be required to meet minimum data quality standards, including the 2013 model specifications, be properly programmed and provide data reports issued by the manufacturer that are easily understood by all applicable parties.

WisDOT intends to examine the federal standard, to compare it with existing state standards, and to amend state standards to meet or exceed the federal standards consistent with modern program requirements.

8. Anticipated economic impact of implementing the rule (Note if the rule is likely to have a significant impact on small businesses):

This proposed rulemaking is unlikely to have a significant effect on small businesses in Wisconsin. WisDOT does not anticipate that any change made in this rulemaking will change the economic structure of the industry in this state, or result in disqualification of devices or current manufacturers and vendors that are authorized to operate in this state.

9. Contact Person:

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