
Wisconsin Legislative Council

INFORMATION MEMORANDUM



IM-2021-08

ADMINISTRATIVE RULEMAKING

State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature. The Legislature retains oversight of the rulemaking process through the review of proposed rules by the Legislative Council's Administrative Rules Clearinghouse, legislative standing committees in each house, and the Joint Committee for Review of Administrative Rules (JCRAR).

Statutes governing the rulemaking process are contained in subch. II of ch. 227, Stats. An agency undertakes rulemaking when it seeks to create new rules or to amend or repeal existing rules.

The statutes define an administrative rule as a regulation, standard, policy statement, or order of general application promulgated by a state agency:

- To implement or interpret provisions of statutes that are enforced or administered by the agency; or
- To establish procedures for the agency to follow in administering its programs.

Administrative rules are promulgated by state agencies to implement or interpret statutes enforced or administered by the agency.

In order to have the force and effect of law, a regulation, standard, or order of general application must be promulgated as a rule. [s. 227.01 (13), Stats.]

AGENCY RULEMAKING AUTHORITY

All authority for administrative rulemaking is conferred by statute. An agency may promulgate rules interpreting the provisions of a 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 it exceeds the bounds of correct interpretation. An agency may not promulgate a rule that conflicts with state law. Likewise, an agency may not find rulemaking authority in a legislative statement of intent, purpose, findings, or policy, or in a statutory provision describing the agency's **general** powers or duties. [ss. 227.10 and 227.11, Stats.]

Furthermore:

- An agency may not impose any standard, requirement, or threshold, including as a license condition, unless the standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a properly promulgated rule. [s. 227.10 (2m), Stats.]
- With respect to a specific standard, requirement, or threshold, an agency may not promulgate a rule that is more restrictive than a statute. [s. 227.11 (2) (a) 3., Stats.]

PUBLICATION OF ADMINISTRATIVE RULES

Administrative rules are published in the Wisconsin Administrative Code. The Legislative Reference Bureau (LRB) publishes and edits the Administrative Code, as well as the Wisconsin Administrative Register. The Register is published every Monday. All final administrative rules are initially published in the Register and are then compiled, maintained, and updated in the Administrative Code. Each issue of the Register contains a section with notices and other items that are required to be published during the rulemaking process. [ss. 227.20 and 227.21, Stats.]

For questions about the rulemaking process or specific Clearinghouse Rules, contact the Legislative Council Rules Clearinghouse staff: Scott Grosz, Director (504-5715), and Margit Kelley, Assistant Director (504-5717).

For questions about the Administrative Code and Register, and rule promulgation and publication, contact the LRB (266-3561).

The Administrative Code and the Register are published online at: <http://docs.legis.wisconsin.gov/code>. As of January 2015, printing and distribution of the Administrative Code and the Register was discontinued, but the Code and the Register continue to be available in a printer-friendly PDF format online.

RULE PROMULGATION PROCESS

Agencies typically promulgate **permanent** rules, which are subject to the rule promulgation and legislative review procedures discussed throughout this information memorandum. On occasion, however, preservation of the public peace, health, safety, or welfare necessitates placing a rule into effect prior to the time it could take effect as a permanent rule, in which case the agency may initially adopt the rule as an **emergency** rule. Some of the rule promulgation steps discussed in this section pertain only to proposed permanent rules, while others, where indicated, also apply to emergency rules.

A flowchart describing the rulemaking process is located at the end of this information memorandum.

Preparation and Approval of Scope Statement

An agency's first step in the rule promulgation process is preparation of a scope statement that provides information about its intended rulemaking, including the objective of the proposed rule, the statutory authority for the rule, and a description of all entities that may be affected by the rule. Scope statements must be prepared for both proposed permanent rules and emergency rules. [s. 227.135, Stats.]

Before work may commence on actual rule drafting, the agency must submit the scope statement to the Department of Administration (DOA), which reviews the rule and forwards it to the Governor for approval in writing. If the scope statement is approved by the Governor, it is then submitted to the LRB for publication in the Register. Following publication, the scope statement must be approved by the individual or body with policy-making powers for the agency. Additionally, prior to this approval, on its own initiative or as directed by the co-chairs of JCRAR, the agency may hold a preliminary public hearing and comment period on the rule.

Once a scope statement is published, an agency has 30 months to submit a proposed rule for legislative review.

Rule Drafting

Once the scope statement is approved, agency staff may then begin drafting the rule. Agencies are directed, to the extent possible, to adhere to the format and drafting style of bills prepared for the Legislature and to draft rules in concise, simple sentences, using plain language that can be easily understood. [s. 227.14 (1), Stats.]

The Legislative Council staff and the LRB jointly publish an *Administrative Rules Procedures Manual* to provide agencies with information on the drafting and promulgation of rules. The manual provides detailed instructions regarding the format and style to be used by agencies in drafting rules. [ss. 227.15 (7) and 227.25 (1), Stats.]

The *Administrative Rules Procedures Manual* is available online at:
https://legis.wisconsin.gov/lc/media/1597/20adminrules_manual.pdf.

Preparation of Economic Impact Analysis

An agency must prepare an economic impact analysis (EIA) for every rule before the rule is submitted to the Legislative Council staff for review. This requirement does **not** apply to emergency rules. The EIA must include information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole and must estimate the total implementation and compliance costs of the rule as a single dollar figure. It must also explain: the policy problem the rule is intended to address; the approach to the problem the rule takes; a comparison to approaches taken by the federal government and by Iowa, Illinois, Michigan, and Minnesota; and any reasons for the agency choosing a different approach. [s. 227.137, Stats.]

In the EIA, an agency must specifically determine whether, over a two-year period, a total of \$10 million or more in implementation and compliance costs are reasonably expected to be incurred or passed along to businesses, local governmental units, and individuals as a result of the proposed rule. Upon such a determination, the agency must stop work and may not continue promulgating the proposed rule unless one of two things occur: (1) enactment of a bill specifically authorizing the promulgation of the rule; or (2) adoption of germane modifications to the proposed rule that reduce the economic impact below the \$10 million threshold.

The EIA and a fiscal estimate must accompany any rule that is submitted to the Rules Clearinghouse for review. DOA has developed a template for agency use that combines the EIA and fiscal estimate in a single form.

Through action by either the co-chairs of JCRAR or JCRAR as a body, an independent EIA may also be requested, with costs of the estimate paid based on the result of the independent EIA in comparison to the agency's estimate.

Review by Legislative Council Administrative Rules Clearinghouse

When the agency has completed its work on an initial draft rule, the rule is submitted to the Legislative Council staff for review. This requirement does **not** apply to emergency rules. By statute, the Legislative Council staff functions as the Rules Clearinghouse. [s. 227.15 (1), Stats.]

Upon receipt of a proposed administrative rule, the Rules Clearinghouse staff assigns the rule a Clearinghouse Rule number, records the date of submission of the rule in the Bulletin of Proceedings of the Wisconsin Legislature, and prepares two numbered rule jackets (similar to bill jackets), one for the Assembly and one for the Senate.

Each proposed rule, Clearinghouse Report, and other documents related to the rule are available online at:
<http://docs.legis.wisconsin.gov/code>.

The rule is assigned to a Legislative Council attorney or analyst for review and preparation of a Clearinghouse Report containing comments about the rule. The rule is then given a secondary review by the Clearinghouse director or assistant director. The Legislative Council staff reviews the rule for form, style, and technical adequacy. The staff also specifically:

- Reviews the rule to determine whether there is statutory authority for the agency to adopt the rule.
- Reviews the text of the rule for clarity and use of plain language.

The Legislative Council staff review may indicate whether an agency is attempting to regulate matters beyond its legal authority or whether a lack of clarity and precision in the rule language could inappropriately affect persons regulated by the rule.

The period for Legislative Council review is 20 working days following receipt of the proposed rule. A Clearinghouse Report containing the staff comments is sent to the agency. [s. 227.15 (2), Stats.]

Agency Public Hearing

Generally, following Clearinghouse review, an agency must provide notice and hold a public hearing on a proposed rule. Notice of the hearing may be posted before the agency receives the Clearinghouse Report, but the hearing cannot take place until the agency has the Clearinghouse Report in hand or until the end of the 20-working day Clearinghouse review period, whichever comes first. [ss. 227.16 to 227.18, Stats.]

There are some exceptions to the hearing requirement. For example, a public hearing is not required prior to promulgation of an emergency rule or if the rulemaking is undertaken to bring an existing rule into conformity with a statute or judicial decision. [s. 227.16, Stats.]

The agency's notice of public hearing must include, among other things, the text of the proposed rule, a plain language analysis of the rule, and the EIA and fiscal estimate. [s. 227.17, Stats.]

Initial Regulatory Flexibility Analysis

If a proposed rule will have **any effect** on small business, the agency must prepare an initial regulatory flexibility analysis describing the types of small businesses that will be affected by the rule, the proposed reporting, bookkeeping, and other procedures required for compliance with the rule, and a description of the types of professional skills necessary for compliance with the rule. The agency's initial regulatory flexibility analysis must be included in the notice of public hearing. [s. 227.17 (3) (f), Stats.]

If the rule **may have an economic impact** on small business, the agency must submit the rule to the DOA Small Business Regulatory Review Board (SBRRB) on the same day the rule is submitted to the Rules Clearinghouse. [s. 227.14 (2g), Stats.]

The SBRRB must determine whether the rule will have a significant economic impact on a substantial number of small businesses. Unless the SBRRB determines that the rule will **not** have a significant impact on a substantial number of small businesses, the agency must also prepare a final regulatory flexibility analysis for submission to the Rules Clearinghouse on any suggested changes.

For rulemaking purposes, “small business” is defined as a business entity that is independently owned and operated, that is not dominant in its field, and that employs 25 or fewer full-time employees or that has gross annual sales of less than \$5 million.

Submission of Final Draft Rule to Governor

Following the public hearing on a proposed rule, the agency prepares a final draft rule. Before the rule may be submitted to the Legislature, the agency must submit the final draft rule to the Governor for written approval and provide notice to JCRAR of the submission. This approval requirement also applies to emergency rules. [s. 227.185, Stats.]

Committee Review Process

Submittal of Rule to Legislature

Once the Governor has approved a final draft rule, the agency may submit the rule, accompanied by a report, to the Chief Clerk of each house of the Legislature for referral by the presiding officer to a standing committee in each house. The report must contain a number of items, including:

- A plain language analysis of the rule.
- An explanation of the basis and purpose of the proposed rule, including how it advances relevant statutory goals or purposes.
- The fiscal estimate, the EIA, and any DOA report regarding the EIA.
- Any recommendations or other material submitted to the agency by the SBRRB and the agency’s response.
- A copy of the Clearinghouse Report and a response to the Clearinghouse recommendations, including the specific reasons for rejecting any recommendation.
- A summary of public comments on the rule, the agency’s response to those comments, and an explanation of modifications made to the rule as a result of public comments or testimony.
- A list of persons who appeared or registered for or against the rule at any public hearing held by the agency.
- A final regulatory flexibility analysis, unless the SBRRB determined that the rule will **not** have a significant economic impact on a substantial number of small businesses.

[s. 227.19 (1) to (3), Stats.]

Standing Committee Review

When a rule is referred to a standing committee, the committee chair notifies the committee members of the referral and the date on which the committee’s jurisdiction ends.

Generally, the standing committee review period extends for 30 days after referral of a proposed rule by the presiding officer. However, a committee review period may be extended for an additional 30 days if the committee chair, within the initial 30-day period, takes either of the following actions:

A standing committee may let its jurisdiction expire without taking any action or may waive its jurisdiction over the rule during the 30-day review period. The committee may request modifications to the rule or may, for specified reasons, object to the rule.

- Requests in writing that the agency meet with the committee to review the proposed rule.
- Publishes or posts a notice that the committee will hold a meeting or hearing to review the proposed rule and immediately sends a copy of the notice to the agency.

If a committee, by majority vote of a quorum of the committee, requests modifications to a proposed rule and the agency, in writing, agrees to **consider** making modifications, the review period is extended for both standing committees for 10 days from the time the modifications are received from the agency. An agency may also submit germane modifications on its own. Modifications are accepted under passive review.

A committee may object to all or part of a rule **only** for one or more of the following reasons:

- Absence of statutory authority.
- Emergency relating to public health, safety, or welfare.
- Failure to comply with legislative intent.
- Conflict with state law.
- Change in circumstances since enactment of the earliest law on which the proposed rule is based.
- Arbitrariness or capriciousness, or imposition of an undue hardship.
- For a proposed rule of the Department of Safety and Professional Services establishing standards for dwelling construction, that the rule would increase the cost of constructing or remodeling a dwelling by more than \$1,000.

[s. 227.19 (4), Stats.]

JCRAR Review

When a standing committee's jurisdiction over a proposed rule ends, the rule is referred to JCRAR. All proposed permanent rules are referred to JCRAR, not just those receiving a standing committee objection. [s. 227.19 (5), Stats.]

As with the initial reviewing committee, the review period for JCRAR is 30 days, but may be extended for an additional 30 days. If a proposed rule received an objection in a standing committee, JCRAR is required to meet and take executive action and may either nonconcur in the objection, object to the proposed rule, or seek modifications to the rule in the same manner as the initial reviewing committee.

JCRAR may, but is not required to, take executive action with respect to any proposed rule that passed a standing committee. JCRAR may request modifications to a rule and may object to a proposed rule for the same reasons for which the initial reviewing committee may object.

JCRAR may object to a rule or part of a rule using one of two methods. Under the first method, it must meet and take executive action within 30 days regarding introduction in each house of a bill to support the objection. If either bill becomes law, the agency may not promulgate the rule, or part of the rule, that was objected to, unless a later law specifically authorizes promulgation of the rule.

Alternatively, JCRAR may choose to indefinitely object to a proposed rule. Under this method, an agency may not promulgate the rule or part of the rule, unless the Legislature specifically authorizes the promulgation through enactment of new legislation.

Rules submitted to the Legislature after the last day of the final general business floorperiod in a biennium generally will not be considered until the next legislative session.

Late Submission of Rules to Legislature

If the Legislature receives a proposed rule for committee review after the last day of the Legislature's final general business floorperiod in the biennial session, the rule will be considered received on the first day of the next regular session of the Legislature. However, the presiding officers of both houses may direct referral of the rule before that day. For the 2021-22 biennial session, 2021 Senate Joint Resolution 1 specifies the last day of the final general business floorperiod as March 10, 2022. [s. 227.19 (2), Stats.]

Repeal of Unauthorized Rules

As an alternative to the general rulemaking process described above, an agency may use a petition process to repeal unauthorized rules. Under this process, which applies to rules that an agency may not enforce due to repeal or amendment of law, an agency must submit a petition for repeal to JCRAR and the Rules Clearinghouse.

Following Clearinghouse review and issuance of a report to JCRAR, the committee may vote to approve the petition, allowing the agency to submit the repeal of the rule to the LRB for publication. [s. 227.26 (4), Stats.]

Emergency Rules

As noted, certain requirements that apply to permanent rules also apply to emergency rules, including the requirement for gubernatorial approval of the scope statement and of the final draft rule. [s. 227.24, Stats.]

Once the Governor has approved a final draft emergency rule in writing, the agency may publish the rule in the official state newspaper, at which time the rule takes effect, unless the rule specifies another effective date. The agency must also file a certified copy of the rule with the LRB in order for the rule to be valid.

The Governor must approve final draft emergency rules before they may be published and filed with the LRB.

On the day an agency files an emergency rule with the LRB that may have an economic impact on small business, the agency must also submit the rule to the SBRRB. Just as for proposed permanent rules, the SBRRB must determine whether the emergency rule will have a significant economic impact on a substantial number of small businesses. If it determines that the rule will

have such an impact, the board may submit suggested changes to the agency to minimize the economic impact of the rule.

An agency must hold a public hearing on an emergency rule within 45 days after the adoption of the rule. An emergency rule remains in effect only for 150 days, unless JCRAR grants an extension for up to an additional 60 days. The total period for all extensions granted may not exceed 120 days.

Direct Treatment of Rules Through Legislation

Occasionally bills are enacted that directly modify administrative rules through legislation rather than by the traditional agency-initiated process. The statutes recognize the treatment of rules by legislative initiative and reconcile this treatment with other aspects of the rulemaking process. For example, the statutes specify that rules treated directly by legislation may be subject to future agency-initiated revision in the same manner as other administrative rules. [s. 227.265, Stats.]

REVIEW OF CURRENT RULES

Wisconsin has a number of mechanisms that provide oversight of existing rules and agency policies. These include court actions, JCRAR review, retrospective EIAs, biennial reporting by agencies, and SBRRB review.

Judicial Review of Validity of Rule

The exclusive means of judicial review of the validity of a rule is an action for declaratory judgment brought in the circuit court for the county where the party asserting the invalidity of the rule resides or establishes a principal place of business. If that party is a nonresident or does not have its principal place of business in Wisconsin, venue is in the circuit court in the county in which the dispute arose. [s. 227.40, Stats.]

When a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. The LRB must publish a notice of that determination in the Administrative Register and insert an annotation of that determination in the Administrative Code.

JCRAR Treatment of Rules in Effect

Suspension of Existing Rules

JCRAR may, by a majority vote of a quorum of the committee, suspend a permanent rule or emergency rule that has been promulgated and is in effect if JCRAR has first received testimony about the rule at a public hearing and the suspension is based on one or more of the reasons a committee may cite when objecting to a proposed rule. [s. 227.26, Stats.]

JCRAR may suspend an existing rule for the same reasons it may object to a proposed rule, as described on page 6.

If JCRAR suspends a rule, it must, within 30 days, introduce a bill in each house to repeal the suspended rule. If both bills are defeated or fail to be enacted in any other manner, the rule remains in effect, but JCRAR may suspend the rule again. If either bill is enacted, the rule is repealed and may not be promulgated again by the agency unless a subsequent law specifically authorizes such action.

Retrospective Economic Impact Analysis

JCRAR may direct an agency to prepare a retrospective EIA for any of an agency's existing rules. Requests for such an analysis may be made with respect to one or more chapters, sections, or other subunits of the Administrative Code that are administered by the agency. Following a request, the agency must prepare the retrospective EIA in the same manner it would prepare an EIA on a proposed rule, described above. [s. 227.138, Stats.]

Requirement to Promulgate Policy as a Rule

If JCRAR determines that an agency's statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days of JCRAR's action. Further, by a majority vote of a quorum of the committee, JCRAR may require any agency promulgating rules to hold a public hearing with respect to general recommendations of JCRAR and to report its actions to JCRAR within a specified time. [s. 227.26 (2) (b) and (3), Stats.]

JCRAR may require agencies to promulgate their policies or statutory interpretations as emergency rules.

Agency Review of Rules and Enactments

Agencies must submit biennial reports to JCRAR that identify unauthorized, restricted, obsolete, and duplicative rules, as well as rules that are in conflict with other rules, statutes, federal statutes or regulations, or judicial rulings. In addition to identification of such rules, each agency must describe the actions taken to address the rules identified by the report. [s. 227.29, Stats.]

Similarly, each agency must review enactments to determine whether an enactment affects the agency's rulemaking authority and must address the consequences of such enactments and notify JCRAR of its actions on affected rules within six months of the effective date of the enactment.

SBRRB Action on Current Rules and Guidelines

The SBRRB is authorized to review any **current** agency rule or guideline to determine whether it places an unnecessary burden on small businesses. If the board so determines, it must submit a report and recommendations regarding the rule or guideline to JCRAR. JCRAR may refer the report to the presiding officer of each house of the Legislature for referral to a committee, or JCRAR may itself undertake a review of the rule or guideline.

If JCRAR reviews the report, it must consider all of the following:

- The continued need for the rule or guideline.
- The nature of the complaints and comments received from the public regarding the rule or guideline.
- The complexity of the rule or guideline.
- The extent to which the rule or guideline overlaps, duplicates, or conflicts with federal regulations, other state rules, or local ordinances.
- The length of time since the rule or guideline has been evaluated.

- The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule or guideline since it was promulgated.

[s. 227.30, Stats.]

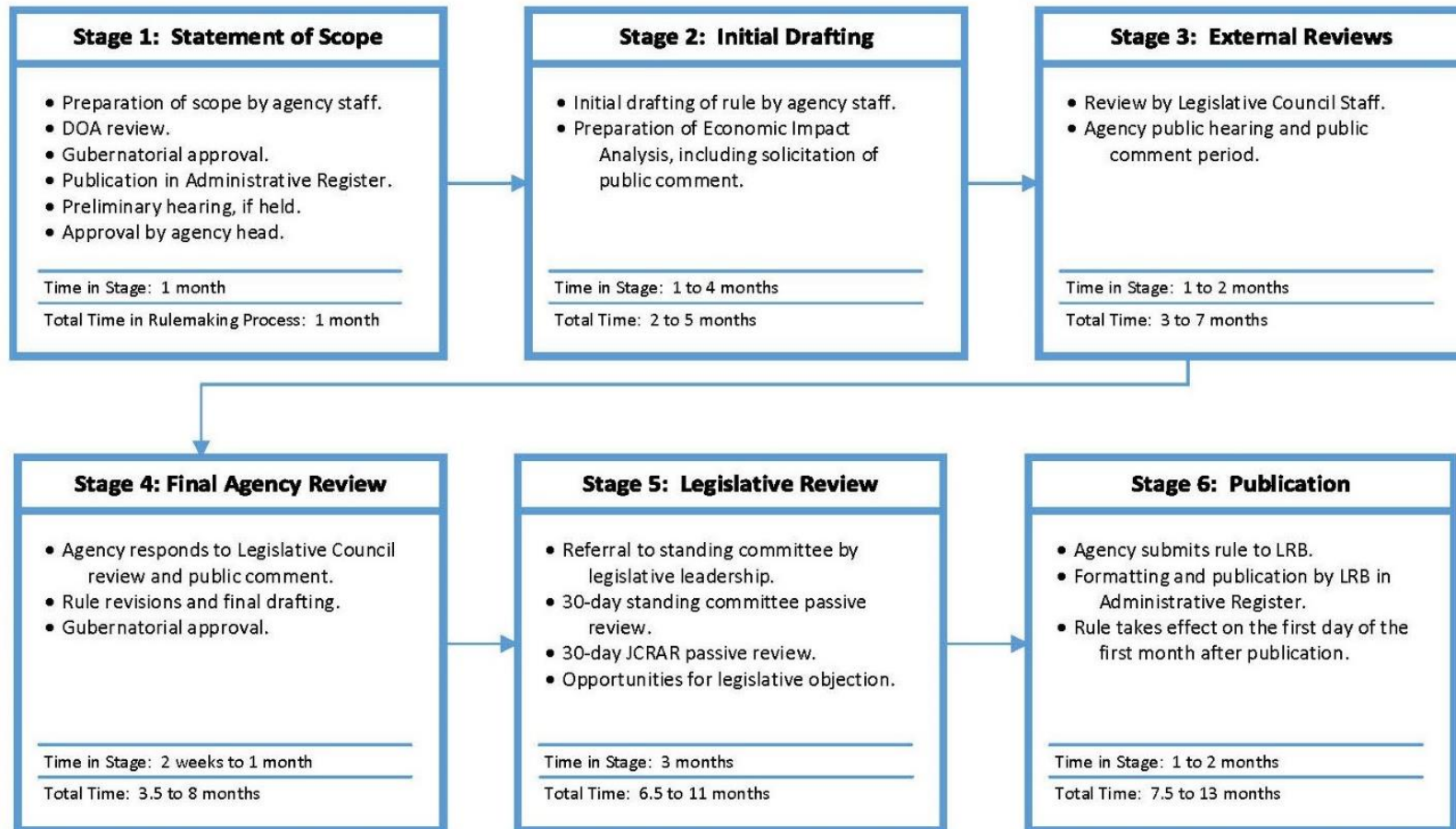
ADDITIONAL REFERENCES

Various Legislative Council publications offer additional discussion on rulemaking procedures, as well as summaries of recent judicial opinions related to administrative rules. For more information, see:

- [*Emergency Rulemaking Process*](#), Issue Brief (May 2020).
- [*Standing Committee Review of Administrative Rules*](#), Issue Brief (October 2019).
- [*Powers of the Joint Committee for Review of Administrative Review*](#), Issue Brief (January 2021).
- [*Economic Impact Analyses and Other Reports in Administrative Rulemaking*](#), Issue Brief (October 2019).
- [*Wisconsin Legislature v. Palm*](#), Issue Brief (May 2020).
- [*Kathleen Papa v. DHS*](#), Issue Brief (July 2020).
- [*SEIU v. Vos*](#), Issue Brief (July 2020).
- [*Glossary of Rule Promulgation Documents*](#), Information Memorandum 16-08.
- [*2019 Annual Report of the Legislative Council Rules Clearinghouse*](#) (May 2020).

This information memorandum was prepared by Scott Grosz, Principal Attorney, and Margit Kelley, Senior Staff Attorney, on March 31, 2021.

Overview of Administrative Rulemaking Process



Please note this overview describes the process for a “typical” rulemaking. Rules developed using extraordinary processes, such as citizen-initiated rulemaking or internal board approvals, may require additional time.