



# THE CITIZEN'S GUIDE

To the Wisconsin  
Administrative State

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BY LUCAS VEBBER & ERIC SEARING

# Introduction



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The Wisconsin Institute for Law & Liberty (“WILL”) exists to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

Through this Citizen’s Guide we hope to spur an interest in greater civic engagement and involvement in the processes of government, namely in oversight of the administrative state in Wisconsin.

The administrative state has grown considerably since its “Progressive Era” inception. Here in Wisconsin progressive intellectuals conceived the “Wisconsin Idea,” which laid the groundwork for a robust centralized bureaucracy in state government. A core philosophy behind the “Wisconsin Idea” was that our elected representatives should defer to the intelligentsia, like the professors of the University of Wisconsin.\*

This element of progressivism, that “experts” should be held above elected officials, has moved beyond deference to academics, but has expanded to agency officials and bureaucrats. Over the years, the Wisconsin Legislature enacted new laws much like Congress – delegating ever-increasing powers

to the bureaucracy of agencies housed within the executive branch of government. These agencies, as we now know, eventually took on quasi-legislative and judicial functions antithetical to the separation of powers and our Founders’ intent.

As the administrative state has become increasingly ascendant in all aspects of our lives, there is a greater need than ever before to fight back. As a result, it has become more important than ever for everyday citizens to get involved, demand transparency, and provide the necessary oversight to hold bureaucrats accountable to the very law which created them in the first instance. This guide is intended to help Wisconsin citizens do just that.

Over the past decade, the Wisconsin Legislature began to re-assert its primary constitutional role as lawmaker in Wisconsin. Through various regulatory reform acts, the Legislature began the process of re-asserting its control over the administrative state in Wisconsin,

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\* “The “Wisconsin Idea” was put forth as an example to other reformers of how to achieve authentic democracy. Elected representatives had a role to play, but the real architects of legislation were the academic experts.” Michael S. Joyce, “The Legacy of the “Wisconsin Idea:” Hastening the Demise of an Exhausted Progressivism” *Wisconsin Interest*, Volume 3, Number 2 (Fall/Winter 1994), p. 11.



especially through the elimination of “implied” agency power.

At one time, courts in Wisconsin broadly interpreted grants of authority to agencies. This led to agencies claiming “implied” power, meaning they claimed powers that were not explicitly given to them, but that they said were “implied” from their enabling statutes. But those days are now, thankfully, behind us. Agencies now must have explicit authority to take regulatory action. This change has significantly altered the power dynamic in state government. No longer can agency bureaucrats claim plenary authority over every issue.

While the Wisconsin Supreme Court\* recently determined that explicit authority may be broadly delegated, agency power may still not be “implied.” Administrative agencies in Wisconsin are creations of state law. They exist solely because the people of Wisconsin, acting

through the Legislature, have willed them to exist. They have only those powers which are explicitly granted to them by their creators in state law, and nothing more.

The Legislature stepping up is not enough – indeed the sheer size of the administrative state requires more oversight than legislators alone can provide. In order to truly pull back on the massive power that the administrative state wields over all of us, everyday citizens must actively participate in the regulatory process.

This short guide is intended to provide an overview of the constitutional and statutory underpinnings of the administrative state, an overview of the rulemaking process, and an overview of how the Legislature and the public at large are empowered to hold agencies accountable to the law, and what to do if an agency does not play by the rules.

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\* See *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 71, 961 N.W.2d 346.



*“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”*

*- James Madison, Federalist No. 47*

## CHAPTER 1

# The Separation of Powers



Fundamental to understanding the importance of vigorous oversight of the administrative state is our constitutional separation of powers, and so that is where this guide begins.

The separation of powers is fundamental to American government, and is vital to the protection of liberty. Every child in America learns about our system of government and the basic separation of powers in the U.S. Constitution: the legislative branch writes laws, the executive branch enforces laws, the judicial branch interprets laws. What we do not teach our children is that the executive branch has also been empowered to write and interpret law as part of the ever-growing administrative state. No one ever learns about how agency bureaucrats get to make decisions that impact all of our lives despite never being elected and facing little accountability to the people they regulate.

The Wisconsin Constitution, like its federal counterpart, separates the powers of government amongst the three primary branches: the legislative power is vested in a senate and assembly (Wis. Const. Article IV, Section 1), the executive power is vested in the governor (Wis. Const. Article V, Section 1), and the judicial power is vested in the courts (Wis. Const. Article VII, Section 2) with the Supreme Court as the administrative head of all courts (Wis. Const. Article VII, Section 3).

Lawmaking is inherently a legislative function. This means that lawmaking is vested by our constitution in the senate and assembly, which together form our state legislature. It is well settled as a matter of constitutional law that the Legislature may not simply give that lawmaking power away.\*

In order to protect liberty, we must protect the separation of powers in government, and to accomplish that, each branch must “jealously guard” and exercise its constitutional responsibilities.†

Over time, however, the state legislature has delegated part of its lawmaking function to administrative agencies (e.g., the Department of Natural Resources, the Department of Revenue, the Department of Public Instruction, etc.), granting them the power to write laws called “administrative rules” which are also known colloquially as “regulations.” This transfer of power to administrative agencies here at the state level mirrors similar actions to empower agency staff at the federal level.

There is a legal case to be made that delegation of legislative power is unconstitutional—it is a core function of the legislative branch after all. However, this guide is written based on the current state of the law in Wisconsin, which allows the Legislature to delegate some of its lawmaking powers to administrative agencies, provided that they continue to maintain some oversight on the exercise of that power.

The statutory process by which administrative agencies create administrative rules is contained in Chapter 227 of the Wisconsin Statutes and outlined in Chapter 2 of this guide. For purposes of discussion related to the separation of powers, however, it is important to underscore that administrative rulemaking is essentially lawmaking, which is a core power of the legislative branch of government. This power has been delegated out to various administrative agencies to exercise, but only subject to legislative oversight.

With this background on separation of powers and the nature of agency rulemaking power, we turn to an overview of the administrative rulemaking process in the next chapter.

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\* *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931).

† *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶31.



*“Agencies in Wisconsin have no inherent authority to make rules. Their rulemaking authority comes from the Legislature, and may be limited, conditioned, or taken away by the Legislature.”*

*- Wisconsin Supreme Court, Koschkee v. Taylor, 2019 WI 76, ¶ 33*

## CHAPTER 2

# How Bureaucrats Write Law



As discussed in Chapter 1, over time the state legislature has created various administrative agencies and delegated certain powers to them, including limited powers to write laws in the form of administrative rules.

In order to create a new administrative rule, or modify or repeal an existing rule, the agency must go through the statutory rule promulgation process which was created by the Legislature and which is contained in Chapter 227 of the Wisconsin Statutes.

As mentioned earlier, administrative agencies are nothing more than creations of statute. They have no inherent constitutional powers. They only exist because the people of Wisconsin willed them to exist by creating them in state law through the Legislature. As a result, they have only those limited powers explicitly given to them by the people of Wisconsin. Because the power to write laws is inherently a legislative function, when agencies engage in a rulemaking, they must strictly abide by the statutory process and be subject to all of the transparency and oversight measures contained therein. This chapter will outline the basic steps in that process.

A “rule” is a defined term under Wisconsin law. Under Wis. Stat. § 227.01(13): a “rule” is “a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” The Legislature has created a number of “exemptions” to the rulemaking process

(i.e., things that agencies can do which would otherwise meet the definition of a rule, but do not have to be promulgated as rules), which are also listed under the statute.

There are two types of “rules” in Wisconsin: emergency and permanent. They both have the full force of law, and some of the steps are the same for both, except that emergency rules may be adopted quicker and with less formalities and public involvement. In exchange for being able to skip some of the permanent rulemaking procedures, emergency rules are only able to be in force for 150 days, unless extended by the Legislature (and even then, they may only be extended for up to an additional 120 days, for 270 total days).

An emergency rule may be necessary in certain limited situations (namely, emergencies). In order to promulgate an “emergency” rule, an agency must determine that “preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the [additional, permanent rulemaking] procedures.”\*

A typical permanent rulemaking can take a year or longer to complete the promulgation process in some cases. An emergency rule can be promulgated in as little as 11 days.

For an agency to write a rule, they must first have been given the authority to write rules by the Legislature in a statute. That is, the Legislature must have explicitly granted to the agency the ability to regulate a particular topic before the agency can even consider writing rules.

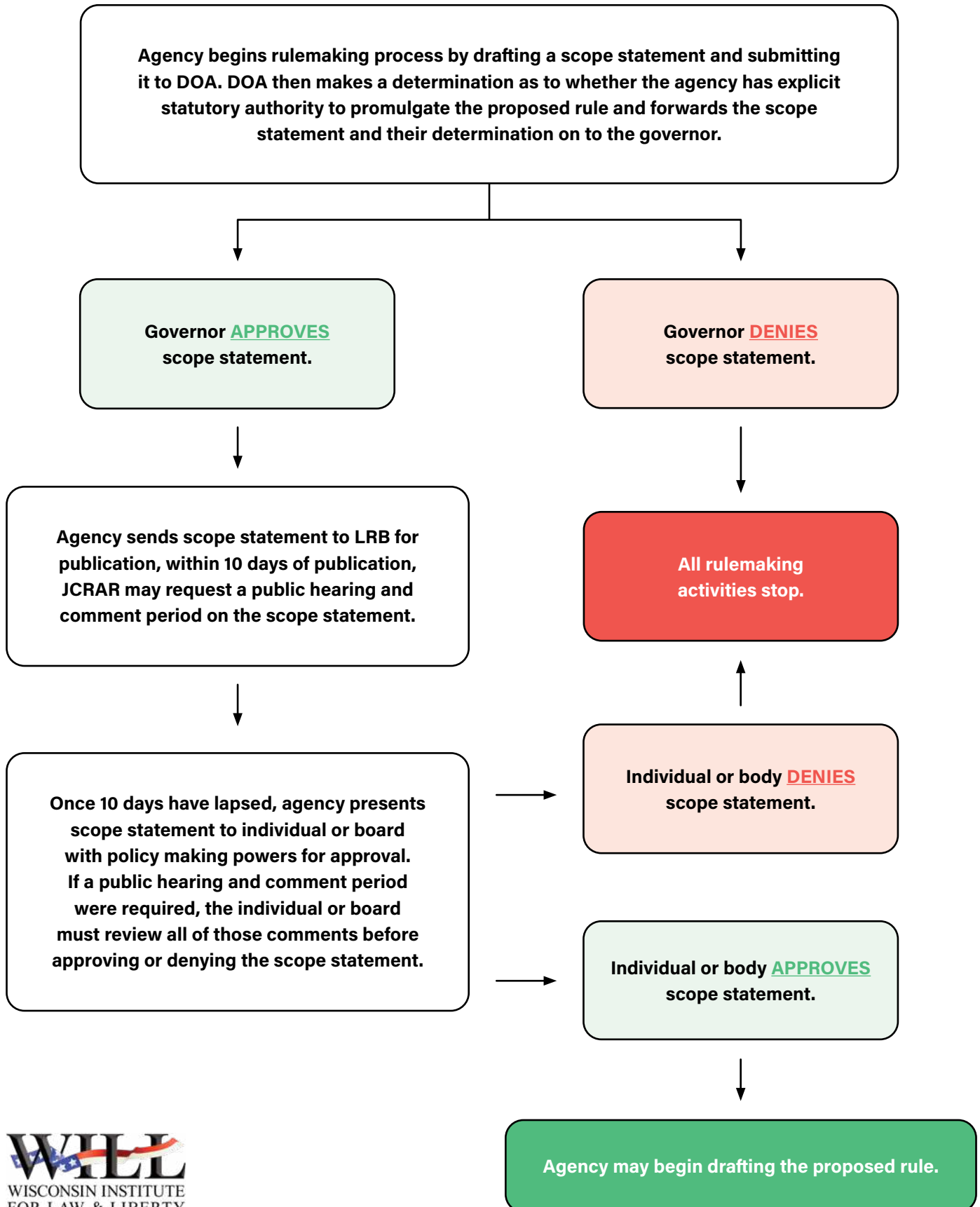
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\* Wis. Stat. § 227.24(1)(a).



# WISCONSIN ADMINISTRATIVE RULEMAKING

## Part One: Preliminary Requirements/Drafting



Assuming the agency has the authority to write rules on a particular topic, they can choose to do so at any time. When an agency seeks to write rules, whether emergency or permanent, the first thing they have to do is prepare and adopt a “scope statement.”

The scope statement is a particular type of document prepared by agency staff and approved by agency leadership which serves as an “outline” or a “roadmap” of the rule. By law, it has to contain things like a description of the rule, the statutory authority to write the rule, a list of people or entities who will be impacted by the rule, and more. The purpose of the scope statement is to give the public notice that the agency is going to be attempting to write laws which will be binding on them.

Once the agency prepares a scope statement, which they can do at any time, they are required to then send it off to the Department of Administration who reviews the scope statement and makes a recommendation to the governor as to whether or not they believe the agency has the authority to promulgate the rule which is proposed by the scope statement. The governor in his or her sole discretion can either approve or deny the scope statement.

If the scope statement is approved, it goes back to the agency, and gets published in the state’s administrative register. Once published, the agency must wait 10 days before it can begin writing the actual text of the rule. During this 10-day period, the Legislature may require the agency to hold a public hearing on the scope statement.

After the 10-day period, or after holding any required public hearing and considering the comments therein, the agency head can issue a

final approval and the agency can begin drafting the rule. Once published in the administrative register, a scope statement is valid for 30 months – and any final rule must be submitted to the Legislature before the scope expires.

Importantly, the agency may not change the scope of the proposed rule in any way during the rulemaking process – doing so would require the agency to begin anew, and get a new scope statement approved.

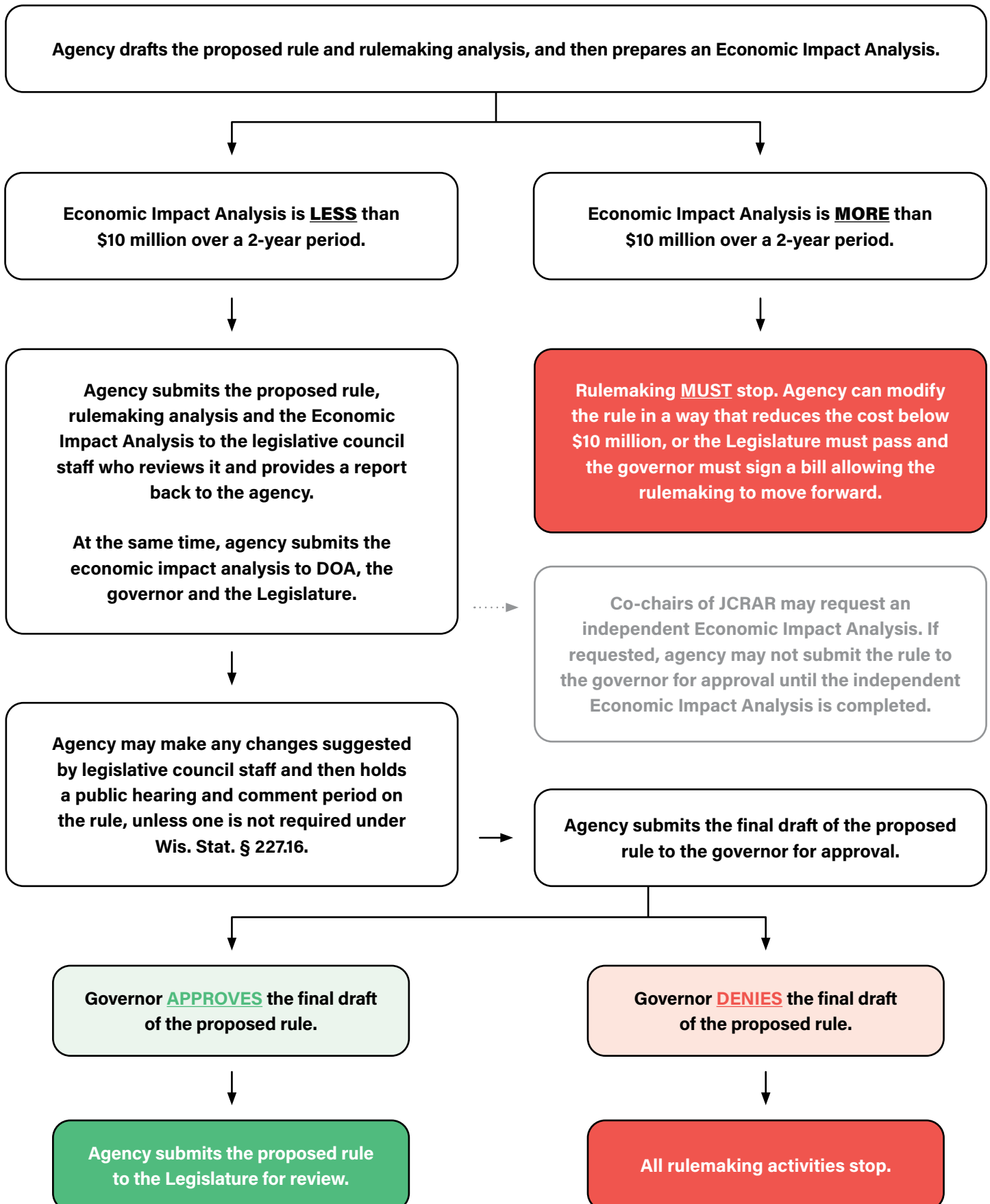
With an approved scope statement in hand, the agency can begin drafting the text of their proposed rule. Besides just the text of the draft rule, the agency must prepare an analysis which must include things like a summary of the rule, a comparison with similar rules in neighboring states, a comparison with similar federal rules, and more.

Once the draft of a rule is ready, the agency also must prepare what is called an “Economic Impact Analysis” document, or “EIA” for short. The EIA has to contain information on the cost or expected fiscal impact of the rule on government and members of the public. This document is very important because if the cost of a proposed rule exceeds \$10 million over a two-year period, state law requires the rulemaking to immediately stop and the agency cannot continue unless they modify the rule to reduce the costs, or until the Legislature affirmatively approves of the expensive rule.

Once a draft rule and an EIA have been prepared the agency submits those documents to the Legislative Council Staff to review and make sure they followed the statutory requirements. They also must, at this time, send the EIA to the Legislature and others.

# WISCONSIN ADMINISTRATIVE RULEMAKING

## Part Two: Agency Review





At any point after receiving the EIA, but before receiving the final draft rule, the Legislature can request an independent EIA to be prepared by someone outside of the agency. This is an important check on the agency. If the independent EIA shows a cost that exceeds \$10-million over a two-year period, the same restrictions apply.

The agency is required to take public comments on proposed rules, and has to respond to those comments as well. In most cases, the agency

is also required to hold a public hearing on a proposed rule draft.

Once all of this is complete, the agency can make any final changes to the proposed rule and then must send the final proposed rule off to the governor for approval. If the governor approves, the agency then submits the rule and all the related documents to the Legislature for passive review. If the governor does not approve, the rulemaking must stop.

## CITIZEN ENGAGEMENT OPPORTUNITY #1

**Participate in Public Hearings:** A great opportunity to be heard is by showing up to hearings, submitting comments, or both. Agencies must read and respond to your comments. There may be opportunities to testify at legislative reviews as well which helps hold government accountable.

While the level of public interaction may differ for each rule depending on a number of factors, generally these are the opportunities for a citizen to submit comments or testify on a proposed rule:

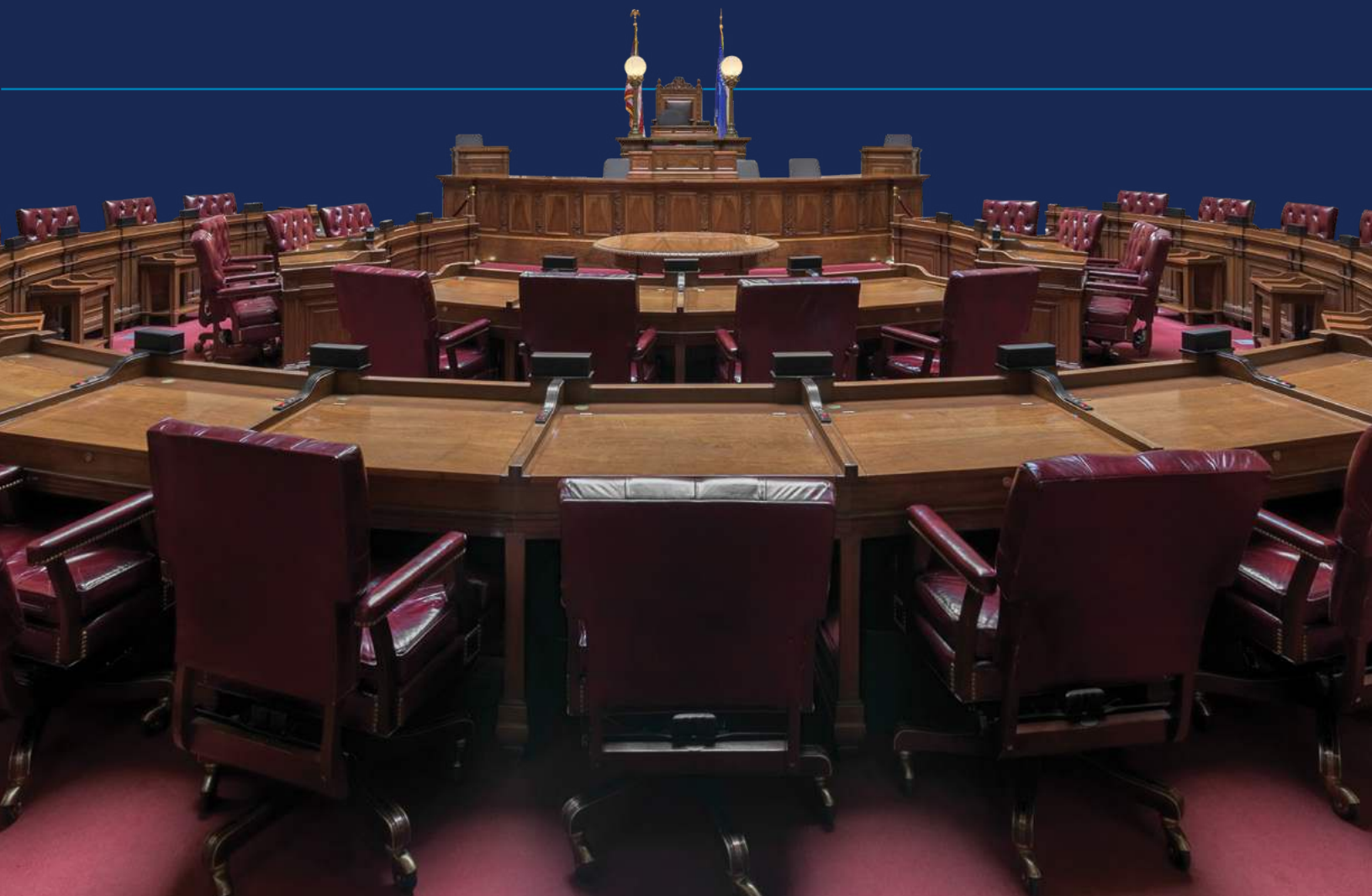
- **Scope Statement** – Scope statements are not always subject to public comment or hearing requirements, but when they are citizens have the opportunity to submit comments or testify.
- **Comment Period/Hearings on Draft Rule** – Typically, agencies have public hearings around the state and also offer a virtual option for citizens to testify. Alternatively, agencies must have a period of public comment, where citizens can submit comments on a rule that agencies must respond to.
- **Standing Committee Hearing** – Once a proposed rule reaches the Legislature, it is referred to the appropriate standing committee. Committee chairs have the discretion on whether or not to hold a hearing on a rule. If you would like to request a hearing, contact the chair of the committee.
- **Joint Committee for Review of Administrative Rules Hearing** – JCRAR is the final step before a rule is fully implemented, and co-chairs in both the Senate and Assembly must agree to hold a hearing on a proposed rule.

*“Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.”*

*- Justice Antonin Scalia, Mistretta v. United States*

## CHAPTER 3

# Legislative Oversight



The lawmaking powers being exercised by agencies during a rulemaking are inherently legislative powers which have been delegated to those agencies. Wisconsin's Supreme Court has stated for such a delegation to be constitutional, the Legislature must maintain oversight and control of agencies when they engage in rulemaking.

The Legislature has some incredible powers when it comes to rules. This makes sense, since rulemaking is inherently legislative power. These powers are often exercised by the Joint Committee for Review of Administrative Rules ("JCRAR").

## HISTORY OF LEGISLATIVE OVERSIGHT

The expansive role of JCRAR's oversight powers, in some way, runs parallel to the growth of the administrative state in Wisconsin.

Until 1953, the Legislature had no real mechanism to maintain control of administrative agencies. With the passage of 1953 Wisconsin Act 331, the Legislature gave itself the power to disapprove of any rule by joint resolution at any time.

However, it quickly became clear that this power was not enough to control agencies. To help them exercise their oversight functions the Legislature adopted 1955 Wisconsin Act 221, which created a 5-member legislative committee tasked with reviewing complaints on rulemaking and advising the whole Legislature.

Ten years later, with the passage of 1965 Wisconsin Act 659, that committee evolved into

JCRAR, and was given the power to suspend rules on its own.

With 1973 Wisconsin Act 162, JCRAR was given the power to determine if agency action constituted rulemaking outside of the rulemaking process. That is, where an agency was determined to have taken some action to avoid the rulemaking process, JCRAR could declare that action to be a rule, and require the agency to engage in a rulemaking.

Within the last decade or so, JCRAR has additionally been given other oversight powers including the ability to suspend rules indefinitely, and the ability to request an independent EIA.

One thing that is clear is that over time, as the administrative state has grown in Wisconsin, the Legislature has continually tried to increase its own oversight powers to keep up.

## OVERSIGHT OF PROPOSED RULES

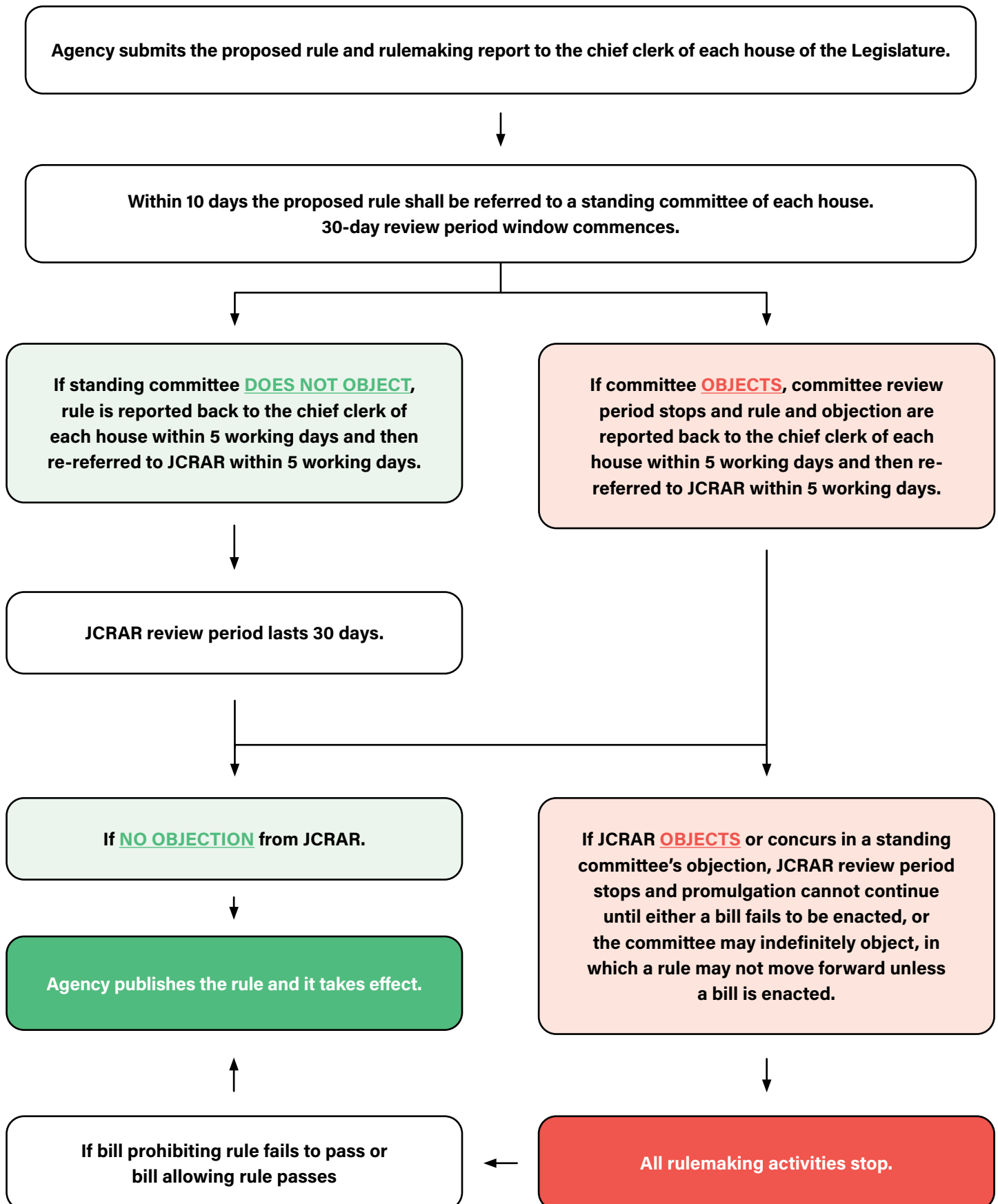
For proposed rules (rules drafted by agencies that are not yet in force), the legislature conducts a "passive review" (can be promulgated unless the Legislature acts to stop them) period, with the exception of the costliest of rules, which must go through "active review" (may not be promulgated until the legislature acts to approve).

When an agency first submits a proposed rule to the Legislature a copy of all the rulemaking documents goes to each house. They are then referred to the respective standing committee of the Assembly and Senate which have jurisdiction



# WISCONSIN ADMINISTRATIVE RULEMAKING

## Part Three: Legislative Review



over the subject matter of the rule. For example, a rule regarding deer hunting would likely be referred to the Natural Resources committees in each house. This decision is made by the Speaker of the Assembly and the President of the Senate. Once in those standing committees, they stay for 30 days.

During that thirty-day period, the committee's jurisdiction can be extended for another 30 days if they request the agency make changes, or request a meeting with the agency. The committee may also object to the proposed rule.

After thirty-days (or after any extension, if one is allowed), or following an objection from the standing committee, the rule gets referred to JCRAR for another thirty-day passive review period. JCRAR can vote to sustain the objection of a standing committee, or may vote to object in its own right.

If JCRAR objects to a proposed rule (or concurs in a standing committee's objection), then the

rule is suspended, and the Legislature must introduce legislation which would prohibit the rule from passing. While that legislation is pending, the rule may not be promulgated. This means, in effect, an objection to a proposed rule under this process only lasts until the end of the legislative session.

Under a recently adopted power, JCRAR may instead choose to "indefinitely suspend" a rule. If they go that route, the rule itself may not be promulgated in the future unless the Legislature adopts legislation allowing it.

In any event, the Legislature may suspend a rule in whole or in part – even emergency rules.

Additionally, as mentioned earlier, where an EIA, or an independent EIA, shows that the expected cost of a proposed rule is to exceed \$10 million over a two-year period, the agency may not promulgate the rule until the Legislature passes a resolution allowing them to do so.

## CITIZEN ENGAGEMENT OPPORTUNITY #2

**Contact Public Officials:** You do not have to be an expert to review administrative rules. Are you having trouble with an existing regulation? Is a proposed rule confusing? Reach out to your state representatives and ask them to take a closer look. Remember, they work for you. Alternatively, you can also contact WILL for assistance.

## OVERSIGHT OF EXISTING RULES

The Legislature's power over existing rules is similar to the power they maintain over proposed rules. JCRAR may temporarily suspend any rule after conducting a public hearing on it. If they do this, they must again introduce legislation to suspend the rule. If that legislation fails to pass, the rule may be enforced.

JCRAR may also, as mentioned earlier, determine that some agency action meets the definition of a rule, and may then direct the agency to promulgate that action as an emergency rule within 30 days of the committee's decision. For example, agencies often issue "orders" or release "guidance" to the public on how they will enforce certain requirements—these orders or guidance can meet the definition of a "rule" and would have to be promulgated.

Recall that at the start of the COVID-19 pandemic, the Wisconsin Department of Health Services issued the "Safer at Home" order, which imposed significant restrictions on Wisconsinites. That order was not promulgated as a rule. The Legislature, in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, challenged the agency's action on the grounds that it was actually a "rule," and should have been promulgated as such. The Supreme Court agreed and struck down the order.

The Legislature, acting through JCRAR, alternatively could have ordered DHS to promulgate the order as an emergency rule, and then could have decided whether or not to suspend that emergency rule. When an emergency rule is suspended, the agency

may not re-promulgate the substance of the rule during the time that the emergency rule is suspended.

## ECONOMIC IMPACT OVERSIGHT

The Legislature also has tools at their disposal to ensure that rules are not having any unintended consequences. First, during the rule promulgation process either the Assembly or Senate co-chairperson of JCRAR may request an independent EIA. There is a statutory process to get approval. Depending on what the difference is between the independent EIA and the agency's EIA, the agency may be required to pay for the cost of the independent EIA.

Additionally, JCRAR may request the preparation of a retrospective EIA by an agency. This document essentially has them "look back" to see how much a rule actually cost, and then requires the agency to compare the actual cost with what they originally estimated and explain why they may be different.

These two tools help ensure that agencies stay accurate during the rulemaking process when it comes to estimating costs.



*“As in other areas of our jurisprudence concerning administrative agencies, we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency “interpretations” of federal statutes.”*

*- Justice Thomas, Michigan Et Al. V. Environmental Protection Agency Et Al.*

## CHAPTER 4

# Public Involvement



The rulemaking process is designed to ensure agencies act transparently to maximize oversight and opportunities for public involvement. Indeed, public participation in the rulemaking process is a vital component to hold the administrative state accountable. This booklet is designed to inform the public about the various steps in the process, specifically so that members of the public can help hold government accountable. This chapter outlines some of the key opportunities for public involvement.

First, as a general matter, if you are interested in government regulations, you can sign up to receive alerts directly from the state.\* The Legislature's website will send you updates on any administrative action that you would like – from scope statements to rule publications.

During the rulemaking process, the most obvious way to participate is at a public hearing. Either on a scope statement at the front end, or a draft rule at the back end – show up or submit comments, or both! The agency is required to read your comments and respond to them. This is a great opportunity to be heard. The Legislature may also hold public hearings, and individuals who testify at the agency level may be asked to show up and testify at the legislative review level as well – this is a great opportunity to help hold government accountable.

If there is a rulemaking topic that you have particular interest or expertise in – you can track it even closer. Look at the EIA and if something doesn't look right, contact lawmakers. You can reach out to JCRAR, or to your own Assembly Representative or Senator. With all that Legislators have going on, this type of oversight assistance can be vital to ensure that rules get a close look.

It is important to note though, you don't need expertise though to provide oversight for regulations in a particular area. Look at scope statements, see what statutory authority the agency is relying on, read the statutes and see what they say. If something does not look right, reach out to your representatives in Madison and let them know or use the contact form on the WILL website to let us know. We are always happy to take a closer look or answer any questions you might have.

Where an agency is not following the law, legal remedies are also available, and those are discussed in Chapter 5.

## STEP-BY-STEP REVIEW OF A RULE

If you see an agency rule, and are wondering if it's legal or not, the first step is to start with the underlying statute. Take a look at the rule itself, which must contain a line regarding its "statutory authority." Double check that the statute actually allows this rule to be promulgated.

The rule must contain an "analysis" which is prepared by the agency. This analysis contains a summary of the rule, a summary of the authority for the rule, a comparison with federal regulations and those of other states, and more. Reviewing this information will give you insight into why the agency promulgated the rule, and also give you a starting point for alternative regulatory paths (for example, you can look at how the federal regulations may address this issue, or how a neighboring state does so).

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\* <https://notify.legis.wisconsin.gov/>

After reviewing the analysis document, you can review the Economic Impact Analysis, which contains additional information about the costs of the proposed rule and can contain additional information about who will be impacted by it.

With that background information, it is important to read the text of the rule itself in order to make certain that the agency is actually doing what it says (or what it believes) that it is doing.

If you see any irregularities in this review process, reach out to your legislators and let them know, and also be sure to get in touch with us. We are always happy to review any potential irregularity, or work with you to understand what a proposed regulation might be trying to do.

## REQUESTING AN AGENCY RULEMAKING

Aside from simply tracking agency actions, the public may also request an agency engage in a rulemaking. This can be to create a new rule,

but also to repeal or modify an existing rule.

This can be a powerful tool that is rarely used.

Under state law, “a municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in a rule may petition an agency requesting it to promulgate a rule.” Wis. Stat. § 227.12(1).

While the process is slightly different for petitions sent to the Department of Revenue, each other agency must respond to the petition, in writing, in a “reasonable period of time.” State law does not define what is “reasonable” in this context. The agency must either proceed with the rulemaking or deny the rulemaking and say why.

Any five individuals can petition for a rule change. This tool is especially valuable when individuals have specialized knowledge in an area, as they can often have a better understanding than the agency bureaucrats do as to the impact of regulations. Those individuals can petition for a change, and are entitled to a response, which can help craft future policy decisions, or perhaps even aid in legal action against the agency in the future.

## CITIZEN ENGAGEMENT OPPORTUNITY #3

**Petition for a Rule Change:** Any five individuals can petition for a rule change and the agency must respond within a reasonable amount of time. It can also aid in future policy decisions or possible future legal action.



*"It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"*

- James Madison - Federalist 62

## CHAPTER 5

# Legal Remedies



State agencies are required to follow this process when they adopt a general policy or an interpretation of a statute. Failure to follow the process, or failure to engage in the process at all, is unlawful. Courts in Wisconsin are required to strike down such unlawfully adopted rules. WILL has successfully represented plaintiffs in these types of agency actions, and will continue to do so in the future.

Under state law, the exclusive way to challenge the validity of a rule is to bring a lawsuit seeking a declaration from the court that the agency action is unlawful. Unlike virtually all other lawsuits against the state, which can be filed in any county a plaintiff chooses, these suits are more limited in where they can be filed, and often must be brought in the county where the plaintiff resides.

As discussed herein, agencies sometimes take actions which meet the definition of a rule, but were not promulgated as such (as the Department of Health Services did when they issued the “Safer at Home” order discussed earlier). When this happens, those agency actions may be invalidated. Courts will look to determine if the agency action meets the definition of “rule” under state law, and they do this by applying a five-part test. Specifically, the Court will look to see if the agency action is:

- (1) a regulation, standard, statement of policy or general order; (2) of general

application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency [or] to govern the interpretation or procedure of such agency.”

*Citizens for Sensible Zoning, Inc. v. DNR*,  
90 Wis. 2d 804, 814, 280 N.W.2d 702  
(1979) (citing § 227.01(13)).

Each of those five elements has to be met for an agency action to be struck down as an unpromulgated rule. Where an agency action has all five elements present, the court should declare that action to be a rule, and then invalidate that rule because it was not promulgated as required by law. This means the agency can no longer enforce it.

Another way to challenge rules is if the agency promulgated them, but did not strictly follow the rulemaking process as outlined herein (for example, if steps were missed or requirements were ignored). Often times, WILL can point out an irregularity in a rule, or will otherwise be looking to challenge some agency action, and we will seek out a plaintiff to bring a lawsuit. Plaintiffs are never charged for our services, but taking part allows you to play a vital role in holding our government accountable. Let us know if you're interested.

## CITIZEN ENGAGEMENT OPPORTUNITY #4

**File a Lawsuit:** If an agency fails to follow or engage in this process at all, a rule would not be lawfully adopted, and the Wisconsin courts would be required to strike it down. A lawsuit is the only way to challenge the validity of a rule, and WILL can represent you in this type of agency action.

# WILL Regulatory Wins

## **TANKCRAFT V. OSHA**

WILL sued the Biden administration in federal court, on behalf of two Wisconsin businesses, challenging the Occupational Safety and Health Administration's (OSHA) sweeping new vaccine-or-test mandate for businesses with 100 or more employees. OSHA's emergency rule, issued November 4, that required businesses of a certain size to require proof of vaccination or regular COVID-19 tests for their employees. Companies that did not comply would have faced penalties of over \$13,000 per violation, or over \$136,000 for a willful violation.

All challenges were consolidated and appealed to the U.S. Supreme Court. The U.S. Supreme Court blocked the rule on January 13, 2022.

## **HUNTER NATION V. DNR (2021)**

WILL filed a lawsuit against Wisconsin DNR Secretary Preston Cole, the Wisconsin DNR, and the Wisconsin Natural Resources Board, for ignoring a state law requirement to schedule a wolf hunt season for the winter of 2021.

On February 11, 2021 Jefferson County Judge Bennett J. Brantmeier issued a writ of mandamus compelling the DNR to hold a wolf hunt before March 2021. In November 2021, Judge Brantmeier issued a summary judgment decision that said the DNR decision to not immediately establish a hunting and trapping season for wolves in 2021 violated state statute and the state constitutional right to hunt.

## **BARTLETT V. EVERS**

When Governor Tony Evers signed the Wisconsin budget in 2019, he used his partial veto authority to create new laws and pay for new projects the Legislature never approved. WILL believed that the practice usurped the Legislature's authority to write laws, and filed an original action in the Wisconsin Supreme Court in order to enforce limits on the power.

On July 10, 2020 the Wisconsin Supreme Court held that three of Governor Tony Evers' budget vetoes, challenged by WILL, were unconstitutional.

## **KOSCHKEE V. TAYLOR**

In 2017 the Wisconsin Legislature passed the REINS Act. The REINS Act requires state agencies to submit proposed regulations to the governor for approval. The Department of Public Instruction refused to follow that law, so WILL filed an original action in the supreme court asking it to resolve the issue.

On June 25, 2019 the Wisconsin Supreme Court ruled that the Department of Public Instruction must follow REINS Act and other rulemaking requirements.

## **DATCP POOL REGULATIONS**

When the state began interpreting its old regulations in a way that harmed an entrepreneurial start up and prohibited people from renting out their own pools to private parties, WILL stepped in. We sent a letter to DATCP explaining how their interpretation was incorrect and illegal. The agency quickly backed down – this was a great example of how results can be obtained short of litigation or legislative involvement through public oversight.



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