A faint, stylized illustration of the Wisconsin State Capitol dome and its surrounding portico, serving as a background for the title text.

WISCONSIN LEGISLATOR
BRIEFING BOOK
2017-18

**CHAPTER 5 –
ADMINISTRATIVE
RULEMAKING**

The Legislature has conferred on state agencies the authority to promulgate administrative rules, while retaining oversight of the rulemaking process. Standing committees in each house of the Legislature and the Joint Committee for Review of Administrative Rules, as well as the Legislative Council's Administrative Rules Clearinghouse, play a significant role in the review of proposed administrative rules. In addition to the requirements for legislative review of rules, the Governor has broad authority to review and approve or disapprove proposed rules.

Scott Grosz, Principal Attorney; and Margit S. Kelley, Senior
Staff Attorney
Wisconsin Legislative Council

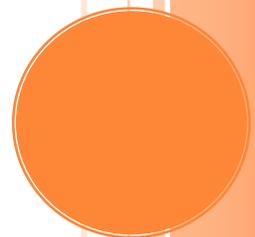


TABLE OF CONTENTS

ADMINISTRATIVE RULEMAKING	1
Agency Rulemaking Authority	1
Executive Order #50	2
Rule Promulgation Process	3
Committee Review Process	6
Emergency Rules.....	9
Treatment of Rules by Legislative Initiative	9
Judicial Review of Validity of Rule.....	10
Treatment of Rules in Effect.....	10
Action on Current Rules and Guidelines.....	11
ADDITIONAL REFERENCES	11
GLOSSARY	12
RULE PROMULGATION FLOWCHART	13

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

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

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. 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.

An agency undertakes rulemaking when it seeks to create new rules or to amend or repeal existing rules. Administrative rules have the force and effect of law.

[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. The agency is limited to rulemaking authority that is explicitly conferred by the Legislature.

[ss. 227.10 and 227.11, Stats.]

Furthermore:

- An agency may not impose any standard, requirement, or threshold, in a rule or as a license condition, unless the standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by another properly-promulgated rule.

- With respect to a specific standard, requirement, or threshold, an agency may not promulgate a rule that is more restrictive than a statute.

Executive Order #50

By executive order, the Governor has prescribed guidelines to ensure that rules are promulgated in compliance with the requirements of the statutes. On November 2, 2011, Governor Walker issued Executive Order #50, which sets forth requirements for agency rulemaking in addition to those specified in the

Executive Order #50 contains rulemaking requirements in addition to those specified in the statutes.

statutes, as well as detailed rule promulgation instructions to agencies. The order also establishes an Office of Regulatory Compliance in the Governor's office as the point of contact for administrative rulemaking. The Office of Regulatory Compliance in the Governor's office may be contacted at 267-3672 or at: administrativerules@wisconsin.gov.

Publication of Administrative Rules

For questions about the rulemaking process or specific Clearinghouse Rules, contact the Legislative Council Rules Clearinghouse staff:

Scott Grosz, Director (266-1307)

Margit S. Kelley, Assistant Director (266-9280)

Administrative rules are published in the Wisconsin Administrative Code. The Legislative Reference Bureau (LRB) publishes and edits the 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. The Administrative Code and Administrative Register are published online at: <http://docs.legis.wisconsin.gov/code>. As of January 2015, printing and distribution of the Code and Register was discontinued, but the Code and

Register continue to be available in a printer-friendly PDF format online.

[ss. 227.20 and 227.21, Stats.]

For questions about the Administrative Code and Register, and rule promulgation and publication, contact: Bruce Hoesly, Senior Revising Attorney and Code Editor, LRB (266-7590).

Rule Promulgation Process

Agencies typically promulgate **permanent** rules, which are subject to the rule promulgation and legislative review procedures discussed throughout this chapter. 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 chapter.

Preparation and Approval of Scope Statement

The first step in the rule promulgation process is preparation of a scope statement that sets forth information about the agency's 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 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 Wisconsin Administrative Register. Executive Order #50 provides that an agency must submit an approved scope statement to the LRB for publication within 30 days of the Governor's approval, or else the scope statement will be considered to have been withdrawn. Following publication, the scope statement must be approved by the individual or body with policy-making powers for the agency.

The Governor has specific authority to approve or disapprove most agency scope statements and final draft rules.

The requirement for the Governor's approval of a scope statement does not apply to rules promulgated by the Department of Public Instruction (DPI). The Wisconsin Supreme Court has held that the duties conferred on the Superintendent of Public Instruction by the Wisconsin Constitution, art. X, s. 1, includes supervisory power over public instruction that cannot be superseded by other authorities. [*Coyne v. Walker*, 2016 WI 38.]

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*

The *Rules Manual* is available online at:

<http://www.legis.wisconsin.gov/lc>

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.]

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. 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.]

If an EIA indicates that a total of \$20 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, the Department of Administration (DOA) must review the rule and issue a report. The agency may not submit the rule to the Legislature for review until the agency receives a copy of the DOA's report and the approval of the DOA secretary. DOA's approval is not required for an EIA prepared by the DPI.

All agencies must prepare an economic impact analysis for every proposed permanent rule.

Executive Order #50 requires that, in preparing the EIA, agencies must accept public comments for a specified time period based on the degree of economic impact the rule is likely to have locally or statewide. The comment period is 14 days for a rule with no or minimal economic impact, 30 days for a rule with moderate economic impact, and 60 days for a rule with significant economic impact.

The EIA and a fiscal estimate must be submitted to the Legislative Council Administrative Rules Clearinghouse at the same time a rule is submitted to the Clearinghouse for review. The DOA has developed a template for agency use that combines the EIA and fiscal estimate in a single form.

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

Each proposed rule, Clearinghouse Report and other documents related to the rule are available online at:

<http://docs.legis.wisconsin.gov/code>

rules. By statute, the Legislative Council staff functions as the Administrative Rules Clearinghouse. Upon receipt of a proposed administrative rule, the 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. [s. 227.15 (1), Stats.]

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. In particular, 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 show 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.]

The Legislative Council Administrative Rules Clearinghouse reviews all proposed permanent rules and prepares a Clearinghouse Report containing comments about the proposed rule.

Agency Public Hearing

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.

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. 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. 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.

[ss. 227.16 to 227.18, 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. If the rule **may have an economic impact** on small business, the agency must submit the rule to the Small Business Regulatory Review Board (SBRRB) on the same day the rule is submitted to the Legislative Council staff for Clearinghouse review. [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 also must prepare a final regulatory flexibility analysis for submission to the Legislative Council Staff on any suggested changes.

Submission of Final Draft Rule to Governor

Following the public hearing on a proposed rule, the agency prepares a final draft rule. The agency must submit the final draft rule to the Governor for written approval before the rule may be submitted to the Legislature. This approval requirement also applies to emergency rules, but does not apply to any proposed rules of the DPI. [s. 227.185, Stats.]

The Governor must approve most final draft permanent rules before their submission to the Legislature for committee review, as well as final draft emergency rules.

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:

- 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.

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.

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.

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.

All proposed permanent rules are referred by JCRAR, not just those receiving a standing committee objection. JCRAR is not required to take any action unless a rule received a standing committee objection.

If JCRAR objects to a rule or part of a rule, 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.

[s. 227.19 (5), Stats.]

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. In 2016, the last day of the final general business floorperiod was April 7. [s. 227.19 (2), Stats.]

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.

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.

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. 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.

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

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.

[s. 227.24, Stats.]

Treatment of Rules by Legislative Initiative

During the 2015-16 Legislative Session, several bills were enacted that modified 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 by legislative initiative may be subject to future agency-initiated treatment in the same manner as other administrative rules. [s. 227.265, Stats.]

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.

Challenges to the validity of a rule are brought in the county where the challenging party lives or establishes a principal place of business.

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.

[s. 227.40, Stats.]

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.

JCRAR may suspend an existing rule for specified reasons.

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 and JCRAR may not suspend it 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.

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

[s. 227.26, 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 issuing 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.]

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.

The SBRRB may review all current rules and guidelines for an unnecessary burden on small business.

[s. 227.30, Stats.]

ADDITIONAL REFERENCES

1. Information Memorandum 11-15, *Changes to Laws Relating to Administrative Rules*, at: <http://www.legis.wisconsin.gov/lc>. The Memo provides a detailed description of 2011 Wisconsin Act 21 and other legislation making changes to the rulemaking process.
2. The Legislature’s administrative rules website: <http://docs.legis.wisconsin.gov/code>. This site provides a link to the entire Administrative Code and current and past issues

of the Administrative Register. It also provides a notification service and has links to emergency rules in effect and final administrative rule orders filed for publication, as well as to proposed rules, Clearinghouse Reports, and agency reports, searchable by Clearinghouse Rule number.

3. 2015 Annual Report of the Legislative Council Rules Clearinghouse, March 2016: <http://www.legis.wisconsin.gov/lc>. This statutorily required Annual Report to the Governor and Legislature explains the rule review functions and related responsibilities of the Rules Clearinghouse, and activities of the Clearinghouse in 2015. It also includes a sample Clearinghouse Report and rule processing instructions for agency heads.
4. Executive Order #50, relating to guidelines for the promulgation of administrative rules, Governor Scott Walker, November 2011: https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-50.pdf.

GLOSSARY

Economic Impact Analysis (EIA): An analysis prepared by an agency during the rulemaking process that describes the policy addressed by the rule and the economic effect of the rule on business, local government, and the state economy as a whole.

JCRAR: The Joint Committee for Review of Administrative Rules is a joint legislative committee that plays a key role in reviewing administrative rules, including emergency rules. Among other functions, JCRAR may grant extensions for emergency rules and suspend current emergency or permanent rules in specified circumstances.

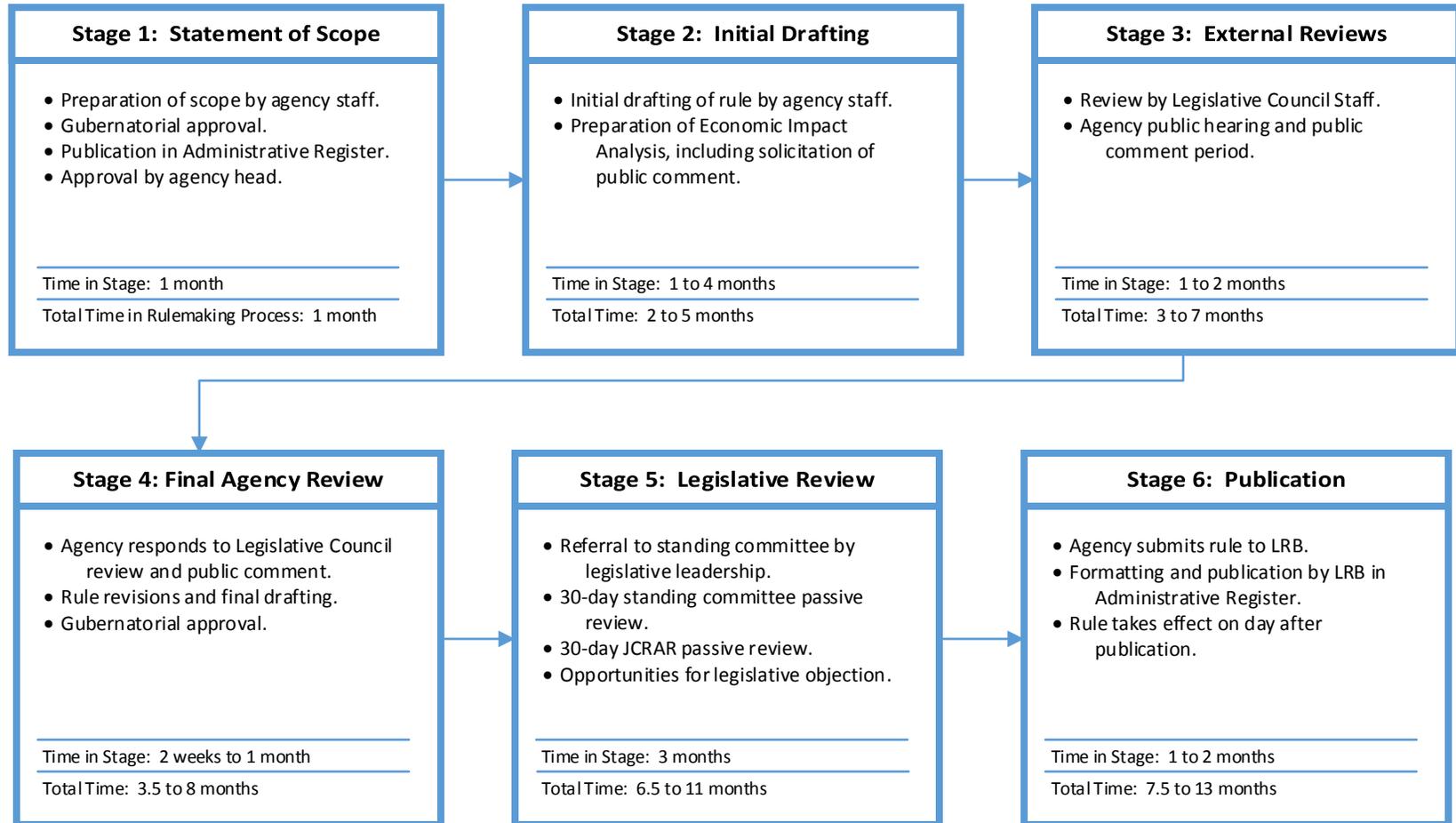
Legislative Council Administrative Rules Clearinghouse: The Clearinghouse is housed at the Legislative Council and reviews all proposed permanent rules for statutory authority, clarity and use of plain language, form, and style.

SBRRB: The Small Business Regulatory Review Board is comprised of seven representatives of small business, and a Senator and a Representative involved with legislative committees relating to small business. Agencies must refer rules that may have an economic impact on small business to the SBRRB for review. The board also has authority to review **current** agency rules to determine whether they place an unnecessary burden on small businesses.

Wisconsin Legislative Council

One East Main Street, Suite 401
Madison, WI 53703-3382
Phone: (608) 266-1304

Overview of Administrative Rulemaking Process



Prepared by: Wisconsin Legislative Council, September 2016

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.