STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

114 East, State Capitol
PO Box 7857
Madison WI 53707-7857
(608) 266-1221
TTY 1-800-947-3529

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OAG–04–20

The Honorable Tony Evers
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Evers:

¶ 1. You have requested an Attorney General opinion regarding certain provisions enacted by 2011 Wis. Act 21 ("Act 21" or "the Act"), and how those provisions apply to an agency's ability to promulgate and enforce administrative rules. Specifically, you have asked (1) whether, in light of Wis. Stat. § 227.11(2)(a)2., state agencies may promulgate administrative rules pursuant to a statute providing explicit, broad rulemaking authority; and (2) whether, in light of Wis. Stat. § 227.11(2)(a)3., state agencies may rely on explicit, broad statutory grants of authority to promulgate standards, requirements, or thresholds in administrative rules.[1] Your request also implicates an additional issue regarding the enforceability of existing rules after Act 21, particularly its enactment of Wis. Stat. § 227.10(2m) and Wis. Stat. § 227.11(2)(a)1.–3. Your request relates to this office's previous opinion regarding Act 21, OAG–04–17 (Dec. 8, 2017), and raises the question whether that opinion incorrectly interpreted these statutory provisions.

¶ 2. As to your first question, I conclude that the plain language of Wis. Stat. § 227.11(2)(a)2. does not alter explicit grants of rulemaking authority, regardless of whether the rulemaking provision in which the authority is granted could be characterized as broad or "general."

[1] As shorthand, this opinion will use the term "standards" to refer to the statutory phrase "standard, requirement, or threshold" used in Wis. Stat. §§ 227.10(2m) and .11(2)(a)3.

¶ 3. As to your second question, I conclude that the plain language of Wis. Stat. § 227.11(2)(a)3. does not alter explicit grants of rulemaking authority to prescribe standards. The fact that the Legislature mandates a specific standard in one statute does not, in itself, alter the agency's ability to promulgate, enforce, or administer a different standard enacted pursuant to a second statutory source of rulemaking authority. This holds true even where the second standard could be characterized as "more restrictive" than the first. *See* Wis. Stat. § 227.11(2)(a)3.

¶ 4. Finally, regarding the enforceability of existing rules after Act 21, I conclude that nothing in the language of Act 21 alters existing, properly promulgated rules. Under Wis. Stat. § 227.10(2m), agencies may continue to implement and enforce existing rules, including standards therein, provided the rule was "promulgated in accordance with" the rulemaking procedures in place at the time the rule was adopted.

¶ 5. Because OAG–04–17 reached several conclusions contrary to the plain language of the governing statutes, as explained herein, that opinion is withdrawn.

PROVISIONS AT ISSUE

¶ 6. 2011 Wis. Act 21 was enacted in a special legislative session in early 2011 and took effect on June 8, 2011. Relevant here, Act 21 made the following changes to Wis. Stat. §§ 227.10 and .11. First, the Act created Wis. Stat. § 227.10(2m), which reads:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . . . The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. § 227.10(2m). Next, Wis. Stat. § 227.11(2)(a) (2009–10) was amended to read:

> Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by ~~it~~ the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if ~~it~~ the rule exceeds the bounds of correct

> interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

Act 21, § 2. The Act then created three new subdivisions of Wis. Stat. § 227.11(2)(a), which read:

> 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule–making authority on the agency or augment the agency's rule-making authority beyond the rule–making authority that is explicitly conferred on the agency by the legislature.
>
> 2. A statutory provision describing the agency's general powers or duties does not confer rule–making authority on the agency or augment the agency's rule–making authority beyond the rule–making authority that is explicitly conferred on the agency by the legislature.
>
> 3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Wis. Stat. § 227.11(2)(a).

DISCUSSION

¶ 7. Your request presents questions of statutory interpretation, which begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language [will be] given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* The statutory language will be "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Additionally, insofar as a statute's scope, context, and purpose are "ascertainable from the text and structure of the statute itself," those factors may also be relevant to the interpretive inquiry. *Id.* ¶ 48. If this textual analysis "yields a plain, clear statutory meaning, then there is no ambiguity," and the statute should be applied according to that plain meaning.

Id. ¶ 46 (quoting *Bruno v. Milwaukee County,* 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). When interpreting statutes, the Attorney General, just like a court, "is not at liberty to disregard the plain, clear words of the statute." *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)).

¶ 8. Applying these principles, I conclude that neither Wis. Stat. § 227.11(2)(a)2. nor 3. alters any legislative grants of agency rulemaking authority outside of Wis. Stat. ch. 227. Thus, where a statute explicitly authorizes agency rulemaking, that ends the inquiry—that explicit authority must be given effect.

I. Wisconsin Stat. § 227.11(2)(a)2. does not alter explicit legislative grants of rulemaking authority.

¶ 9. Your first question asks whether, in light of Act 21, "state agencies may promulgate rules pursuant to a statute that provides for explicit, broad rulemaking authority." As examples, you point to Wis. Stat. § 85.16(1), which authorizes the Secretary of Transportation to "make reasonable and uniform . . . rules deemed necessary to the discharge of the powers, duties and functions vested in the department"; Wis. Stat. § 16.004(1), which mandates that the Secretary of Administration "shall promulgate rules for administering the department and performing the duties assigned to it"; and Wis. Stat. § 150.03, which requires the Department of Health Services to "adopt rules and set standards to administer [certain statutory subchapters]."

¶ 10. As you also note, OAG–04–17 interpreted a provision of this sort, Wis. Stat. § 101.02(1)(b), in the context of analyzing the so-called "Sprinkler Rule."[2] That statute mandates that the Department of Safety and Professional Standards (DSPS) "shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities." Wis. Stat. § 101.02(1)(b). Notwithstanding the statute's direct instruction to adopt rules, OAG–04–17 concluded that the statute "'does not confer rule–making authority' under Wis. Stat. § 227.11(2)(a)2.," because section 102.02(1)(b) "is best read as 'describing [DSPS's] general powers or duties.'" OAG–04–17, ¶ 22. Your request therefore requires analysis of Wis. Stat. § 227.11(2)(a)2., as well as the reasoning of OAG–04–17.

[2] At the time, the Sprinkler Rule was codified at Wis. Admin. Code SPS § 362.0903(5) (Feb. 2017). Following OAG–04–17 (Dec. 8, 2017), the Sprinkler Rule was repealed.

A. Interpretation of Wis. Stat. § 227.11(2)(a)2.

¶ 11. Agencies have historically exercised "those powers which are expressly conferred or which are necessarily implied by the statutes under which [the agency] operates." *Wis. Ass'n of State Prosecutors v. Wis. Emp't Relations Comm'n* (*WASP*), 2018 WI 17, ¶ 37, 380 Wis. 2d 1, 907 N.W.2d 425 (quoting *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612). Therefore, to understand the impact of Act 21 on the questions presented, it is useful to examine the text of Wis. Stat. § 227.11(2)(a), much of which predates Act 21.

¶ 12. As noted above, in Wis. Stat. § 227.11(2), the Legislature has "expressly conferred" rulemaking authority on agencies to "promulgate rules interpreting the provisions of any statute enforced or administered by the agency," so long as the agency "considers it necessary to effectuate the purpose of the statute." Wis. Stat. § 227.11(2)(a).

¶ 13. Wisconsin Stat. § 227.11(2)(a) then continues that an agency's rule "is not valid if the rule exceeds the bounds of correct interpretation." Wis. Stat. § 227.11(2)(a). This clause makes clear that even where an agency determines that a rule is "necessary," that determination alone is not sufficient to allow the agency to promulgate any rule the agency might prefer. Rather, a rule must be "within the boundaries of enabling statutes passed by the legislature." *Koschkee v. Taylor*, 2019 WI 76, ¶ 15, 387 Wis. 2d 552, 929 N.W.2d 600. Wisconsin Stat. § 227.11(2)(a) thus confirms the "elemental" approach for agency rules, which provides that the elements of a rule must correspond to those in the enabling statute. *WASP*, 380 Wis. 2d 1, ¶¶ 38–39. While an agency must stay within the boundaries that the Legislature has provided, this does not require that "the exact words used in an administrative rule appear in the statute." *Id.* ¶ 38 (quoting *Wis. Hosp. Ass'n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 706, 457 N.W.2d 879 (Ct. App. 1990)).

¶ 14. The statutory language just discussed predates Act 21. The fact that the Legislature did not modify these principles provides useful context for interpreting the language the Legislature added as part of Act 21. *See Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581.

¶ 15. The first provision that Act 21 added to Wis. Stat. § 227.11(2)(a) (2009–10) is an additional sentence in the introduction, prefacing three provisos added by the Act: "All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency."

¶ 16. The first question raised here relates to one of those provisos, Wis. Stat. § 227.11(2)(a)2., which reads, "A statutory provision describing the agency's general powers or duties does not confer rule–making authority on the agency or augment the agency's rule–making authority *beyond the rule–making authority that is explicitly conferred on the agency by the legislature*." Wis. Stat. § 227.11(2)(a)2. (emphasis added).

¶ 17. The first clause of Wis. Stat. § 227.11(2)(a)2. (un-italicized above) provides that "general powers or duties" provisions in the statutes do not confer or augment rulemaking authority. Read in isolation, this clause could be read to suggest that if a statute could be characterized as a "general powers or duties" provision, the provision would not confer rulemaking authority.

¶ 18. But the second clause of Wis. Stat. § 227.11(2)(a)2. makes clear that this provision does not alter existing, explicit rulemaking authority. Specifically, the second clause clarifies that "general powers or duties" provisions do not confer *additional* rulemaking authority "*beyond* the rule–making authority that is explicitly conferred on the agency by the legislature." Wis. Stat. § 227.11(2)(a)2. (emphasis added). This means that if the Legislature explicitly confers rulemaking authority in a statute—such as by stating that an agency "shall adopt reasonable and proper rules and regulations," *see* Wis. Stat. § 101.02(1)(b)—section 227.11(2)(a)2. does not alter that authority.

¶ 19. Thus, read as a whole, Wis. Stat. § 227.11(2)(a)2. explains that a statutory provision merely describing an agency's general powers or duties does not confer additional rulemaking authority on the agency beyond what the statutes explicitly provide. Nonetheless, if a statute explicitly confers rulemaking powers on the agency, that language must be given reasonable effect.

¶ 20. Closely related statutes confirm that Wis. Stat. § 227.11(2)(a)2. does not alter other statutory grants of explicit rulemaking authority. For example, as noted previously, in the same statutory section, the Legislature "expressly confer[s]" rulemaking authority on agencies to "promulgate rules interpreting the provisions of *any statute enforced or administered by the agency*," dependent on the agency determining that a rule would be "necessary to effectuate the purpose of the statute" and application of the elemental test summarized above. Wis. Stat. § 227.11(2)(a) (emphasis added). Act 21 did not alter this "general grant of [rulemaking] authority." Kirsten A. Koschnick, Comment, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority,* 2019 Wis. L. Rev. 993, 1030–31.

¶ 21. The Legislature also has explicitly directed agencies to engage in rulemaking through various agency-specific statutes. For example, as you note, Wis. Stat. § 101.02(1)(b) provides that DSPS "shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities." On its face, this provision explicitly permits the agency to engage in rulemaking. Because nothing in the text of Wis. Stat. § 227.11(2)(a)2. alters this type of explicitly conferred rulemaking authority, agency-specific grants of rulemaking authority like that in Wis. Stat. § 101.02(1)(b) continue to provide rulemaking authority after Act 21.

¶ 22. This interpretation of Wis. Stat. § 227.11(2)(a)2. not only gives full effect to all of the statutory language, it avoids multiple unreasonable results that would arise if the dispositive inquiry for rulemaking authority was whether a statutory provision "is best read as 'describing [an] agency's general powers or duties.'" OAG–04–17, ¶ 22. Most notably, that approach would nullify numerous explicit grants of rulemaking authority. As Justice Scalia recognized in the opinion for the Court in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), the Legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."

¶ 23. Thus, all of the tools of statutory construction point in one direction. The plain language of Wis. Stat. § 227.11(2)(a)2. mandates that a statute that "explicitly confer[s]" rulemaking authority on the agency continues to provide such authority following Act 21. This is confirmed in Wis. Stat. § 227.11's longstanding language that remained unchanged after Act 21, as well as surrounding and closely related statutes, which demonstrate that Act 21's language did not alter explicit grants of rulemaking authority. Moreover, this reading of Wis. Stat. § 227.11(2)(a)2. avoids the unreasonable result of potentially nullifying a wide variety of statutes explicitly authorizing agency rulemaking. The dispositive inquiry, as always, must be based on the plain language of the applicable rulemaking statute. If it explicitly authorizes rulemaking, that ends the inquiry.

B. OAG–04–17 did not correctly interpret the language of Wis. Stat. § 227.11(2)(a)2. and did not meaningfully examine the applicable statutes authorizing agency rulemaking.

¶ 24. Although OAG–04–17 interpreted parts of Wis. Stat. § 227.11(2)(a)2., the opinion did not analyze the full statute and did not give effect to the statute's second clause. As discussed, that clause confirms that agencies continue to possess all "rule–making authority that is explicitly conferred on the agency." Wis. Stat. § 227.11(2)(a). In failing to give effect to that second clause, the opinion also did not meaningfully examine the full extent of "rule–making authority that [the statutes] explicitly conferred" on DSPS relative to the "Sprinkler Rule" at issue in the opinion. *See* Wis. Stat. § 227.11(2)(a)2. Instead, OAG–04–17 concluded that various statutory provisions (which mandated that the agency *shall promulgate rules* on various topics) were merely "general powers or duties" provisions, and that Wis. Stat. § 227.11(2)(a)2. therefore prohibited DSPS from relying on those provisions to support the Sprinkler Rule's ongoing validity. OAG–04–17, ¶¶ 22–23.

¶ 25. The opinion's focus on whether a provision can be characterized as a "general powers or duties" provision was mistaken. Instead, to ascertain whether an agency possesses rulemaking authority on the topic at issue, OAG–04–17 should have interpreted *all* of the relevant statutes authorizing rulemaking, while adhering to traditional canons of statutory interpretation. These include, most simply, starting with the statutory text and applying that text as written whenever reasonably possible. *See State v. Neill*, 2020 WI 15, ¶ 21, 390 Wis. 2d 248, 938 N.W.2d 521. The relevant statutory language should be read in context with related statutes, giving effect to all the statutory terms in a coherent, cohesive manner. *See Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68. And "[i]f possible, every word and every provision is to be given effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012); *see also Westmas*, 379 Wis. 2d 471, ¶ 19.

¶ 26. Likewise, "[r]epeals by implication are disfavored—'very much disfavored.'" Scalia & Garner, *supra*, at 327 (quoting James Kent, *Commentaries in American Law* *467 n.(y1) (Charles M. Barnes ed., 13th ed. 1884)). If the Legislature intends to alter or amend a statute, it does so explicitly and directly, not by amending a separate statute. *See State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994). Unless there is an irreconcilable conflict between statutes, "every attempt" should be made "to give effect to both by construing them together . . . to be consistent with one another." *Id*.

¶ 27. OAG–04–17 did not apply these traditional tools of statutory interpretation when analyzing the rulemaking provisions at issue there. Instead, the opinion presupposed that numerous grants of rulemaking authority were null, without undertaking the required analysis. That was erroneous. Because the opinion failed to apply the correct analytical framework, that opinion is withdrawn.

II. Wisconsin Stat. § 227.11(2)(a)3. does not alter explicit legislative authorization for agencies to promulgate "standard[s], requirement[s], or threshold[s]."

¶ 28. Your second question asks "[w]hether an agency may rely on explicit, broad rulemaking authority to prescribe standards, requirements, or thresholds in an administrative rule." This request relates to Wis. Stat. § 227.11(2)(a)3. and OAG– 04–17's interpretation of it. *See* OAG–04–17, ¶¶ 18–29.

¶ 29. Wisconsin Stat. § 227.11(2)(a)3. states, "*A statutory provision* containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than *the* standard, requirement, or threshold contained in *the statutory provision*." Wis. Stat. § 227.11(2)(a)3. (emphasis added). On its face, the statute speaks only about the effect of a single statute: "*A* statutory provision" does not confer more rulemaking authority than what is contained in "*the* statutory provision." *Id.* (emphasis added). Wisconsin Stat. § 227.11(2)(a)3. thus simply codifies a principle of administrative common law: when the Legislature in one statute directs an agency to promulgate a specific standard, the agency may not rely on that statutory authority to promulgate a different standard. *See WASP*, 380 Wis. 2d 1, ¶ 37 (evaluating rulemaking authority under specific enabling statute requires "ascertain[ing] whether the statute grants express or implied authorization for the rule" (quoting *Wis. Citizens Concerned for Cranes & Doves*, 270 Wis. 2d 318, ¶ 14)); *see also* Koschnick, *supra*, at 1016 (recognizing that Act 21 simply "restat[ed] and clarif[ied] the constitutional principles that necessarily govern agency rulemaking").

¶ 30. Importantly, Wis. Stat. § 227.11(2)(a)3. does not purport to alter explicit rulemaking authority found in *other* statutes. Wisconsin Stat. § 227.11(2)(a)3. refers only to the effect of "[*a*] statutory provision" that contains a standard; however, that provision has no effect on *other* statutes that also authorize rulemaking on the same topic. Wis. Stat. § 227.11(2)(a)3. (emphasis added). Thus, Wis. Stat. § 227.11(2)(a)3. does not prohibit an agency from promulgating a standard that could be characterized as "more restrictive" than a statutory standard, provided that the agency's standard is authorized by another statute's

explicit authorization of rulemaking. *See WASP*, 380 Wis. 2d 1, ¶ 42 (recognizing that "statutory mandates are also statutory authorizations" (citing Scalia & Garner, *supra*, at 192 (discussing Predicate-Act Canon))).

¶ 31. To illustrate, where the Legislature establishes a statutory floor to ensure *minimum* safety standards while separately directing an agency to promulgate rules on a broad range of topics encompassing the minimum standards, the existence of the minimum statutory standards will not alter the agency's explicit statutory authority to promulgate rules in accordance with the broader grant of authority. *See Wis. Builders Ass'n v. Dep't of Comm.*, 2009 WI App 20, ¶¶ 11–12, 316 Wis. 2d 301, 762 N.W.2d 845; *see also Mallo v. DOR*, 2002 WI 70, ¶ 26, 253 Wis. 2d 391, 645 N.W.2d 853 (holding that a statutory grant of authority permitted agency to take action necessarily included in non-exclusive statutory terms). In each instance, determining whether the agency may promulgate a "more restrictive" standard will require evaluation of the relevant statutory provisions, applying the traditional tools of statutory interpretation discussed above.

¶ 32. To be sure, there may be instances in which the specific language that the Legislature uses to grant rulemaking authority in one statute *does* alter rulemaking authority on the same topic under another statute. The Legislature may do so explicitly, or the alteration may be called for by necessary construction of two conflicting statutes. *See State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 904 N.W.2d 773 ("Where conflict between statutes is *unavoidable*, specific statutes take precedence over general statutes." (emphasis added)).

¶ 33. But the language of Wis. Stat. § 227.11(2)(a)3. does not support a blanket rule abrogating explicit rulemaking authority in other statutes. Instead, that statute provides that when *one statute* dictates a specific standard, an agency may not rely on *that standard* to promulgate another, more restrictive standard. Because Wis. Stat. § 227.11(2)(a)3. says nothing about agencies' ability to rely on other grants of rulemaking authority, the statute does not alter those other sources of authority.

¶ 34. As discussed above, OAG–04–17 analyzed how Wis. Stat. § 227.11(2)(a)2. and 3. affected an agency's authority to promulgate rules. For the reasons discussed *supra*, § I.B., the opinion also erred in its interpretation of Wis. Stat. § 227.11(2)(a)3. In particular, OAG–04–17 stated that agencies may "no longer impose a standard . . . 'more restrictive than the standard . . . contained in *the* statutory provision.' Wis. Stat. § 227.11(2)(a)3." OAG–04–17, ¶ 28 (emphasis added). The opinion thus seemed to suggest that *any* statutory standard would preclude an agency from promulgating a standard "more restrictive" than *that*

statute, regardless of whether another statute "explicitly conferred" rulemaking authority on the agency on the regulatory subject. *See* OAG–04–17, ¶¶ 16, 28, 31–32.

¶ 35. As explained, that methodology was incorrect. If a statute provides explicit rulemaking authority, that statute's language must be given effect. Whether a grant of rulemaking authority is precluded by a specific statutory standard will require comparison of the relevant statutory and rule provisions and will be resolved on a case-by-case basis. This is an additional reason OAG–04–17 is withdrawn.

III. Act 21 did not alter the enforceability of standards promulgated before the Act's effective date.

¶ 36. The preceding analyses resolve your questions regarding agencies' authority to promulgate rules after Act 21. Your inquiry, however, also implicates another issue addressed in OAG–04–17—namely, the ability of agencies to implement, enforce, and administer rules promulgated *before* Act 21's effective date.[3] As discussed below, Act 21 did not alter agencies' ability to enforce those rules.

A. Act 21 did not alter the enforceability of existing, properly promulgated rules.

¶ 37. As relevant here, the enforceability of existing rules is governed by one non-statutory provision and two statutes: Act 21's initial-applicability provision, section 9355(1); Wis. Stat. § 227.11(2)(a)2.; and Wis. Stat. § 227.10(2m).

¶ 38. Act 21's initial-applicability provision is included in a non-statutory section of the Act. It states, "The renumbering and amendment of section 227.11 (2) (a) of the statutes and the creation of section 227.11 (2) (a) 1. to 3. of the statutes *first apply to a proposed administrative rule submitted* to the legislative council staff . . . *on the effective date of this subsection*." Act 21, § 9355(1) (emphasis added). Act 21's effective date was June 8, 2011.

[3] As shorthand, this discussion occasionally uses "enforcement" or "enforceability" to refer collectively to implementation, enforcement, and administration of rules.

¶ 39. The effect of that language on Wis. Stat. § 227.11(2)(a)3. is clear. That section limits an agency's ability to rely on a statutory standard "to promulgate, enforce, or administer a rule that contains a standard . . . that is more restrictive than the standard . . . contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3. The initial-applicability provision is explicit that Wis. Stat. § 227.11(2)(a)3.'s limits on "promulgat[ing], enforc[ing], or administer[ing]" rules "first apply" to rules proposed on or after June 8, 2011. *See* Act 21 § 9355. Stated plainly, Wis. Stat. § 227.11(2)(a)3. has no bearing on the promulgation, enforcement, or administration of a rule promulgated before June 8, 2011. The creation of Wis. Stat. § 227.11(2)(a)3. thus did not alter the enforceability of pre-Act 21 rules.

¶ 40. Analyzing Wis. Stat. § 227.10(2m) leads to the same result.[4] That provision states, "No agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Wis. Stat. ch. 227, subch. II]." Wis. Stat. § 227.10(2m). As relevant here, Wis. Stat. § 227.10(2m)'s limitation on "implement[ing] or enforc[ing]" a standard in an existing rule turns on whether the rule at issue "*has been promulgated in accordance with"* Wis. Stat. ch. 227's rulemaking procedures. Wis. Stat. § 227.10(2m) (emphasis added). Restated, if a standard is required or permitted by a rule "promulgated in accordance with" ch. 227's rulemaking procedures, the agency may enforce that standard. *See* Wis. Stat. § 227.10(2m). Reasonably read, this provision and Act 21's initial-applicability provision mean that rules promulgated *after* Act 21's effective date must be promulgated in compliance with the Act's updated rulemaking procedures, including Wis. Stat. § 227.11(2)(a)1.–3. *See* Act 21, §§ 1r–61, 9355(1).

[4] Although certain applications of Wis. Stat. § 227.10(2m) may be addressed in two cases currently pending before the Wisconsin Supreme Court, *see Clean Wisconsin, Inc. v. DNR*, No. 2016AP1688; and *Clean Wisconsin, Inc. v. DNR*, No. 2018AP0059, this opinion's limited discussion of Wis. Stat. § 227.10(2m) does not implicate "an issue that is the subject of current or reasonably imminent litigation," which this office has previously instructed may be a basis to decline a request for an opinion. *See* 77 Op. Att'y Gen. Preface (1988). This opinion addresses agencies' rulemaking authority under various provisions in Wis. Stat. § 227.11(2)(a), and the discussion of Wis. Stat. § 227.10(2m) concerns only whether that statute nullified previously promulgated rules. The two *Clean Wisconsin* cases do not involve that issue.

¶ 41. But for rules promulgated *before* Act 21, Wis. Stat. § 227.10(2m) requires only that the rule was promulgated in accordance with the rulemaking procedures in place at the time. This reading rests on the text of Wis. Stat. § 227.10(2m), which makes no reference to any specific version of Wis. Stat. ch. 227's rulemaking procedures. For example, there is nothing in the statute to suggest that the version of Wis. Stat. ch. 227 in place immediately after Act 21 would be the operative version by which to evaluate all rules. This makes sense because rules necessarily are promulgated based on the statutes in force at the time of promulgation. Further, the contrary reading—requiring that the enforceability of pre-Act 21 rules be analyzed under post-Act 21 rulemaking procedures—could cast doubt on the validity of nearly every page of the Wisconsin Administrative Code. *See, e.g.*, OAG–04–17, ¶ 13 (asserting "far-reaching" consequences of opinion's interpretation of Act 21). Such a result would be absurd, a classic "elephant[ ] in [a] mousehole[ ]." *Whitman*, 531 U.S. at 468; *see also Black*, 188 Wis. 2d at 645 (disfavoring statutory construction that results in implied repeal of another law).

¶ 42. Reading Wis. Stat. § 227.10(2m) as requiring compliance with contemporaneous rulemaking procedures also comports with the statutory presumption of validity for published administrative rules. Wisconsin Stat. § 227.20 provides, "Filing a certified copy of a rule with the legislative reference bureau creates a presumption . . . [t]hat the rule was duly promulgated by the agency," and that "all of the rule–making procedures required by this chapter were complied with." Wis. Stat. § 227.20(3)(a), (c). Notably, this includes a presumption that the rule was promulgated in compliance with the legislative review provisions under Wis. Stat. § 227.19, and that the Legislature was satisfied with the rule.[5] *See* Wis. Stat. § 227.19(2)–(3), (4)–(6). All of this naturally contemplates an evaluation of the rule in light of the contemporaneous statutes.

¶ 43. In sum, these provisions make clear that the Act did not alter the enforceability of properly promulgated rules. After Act 21, agencies may "implement or enforce" pre-Act 21 rules that contain standards, provided that the rule was promulgated in accordance with the rulemaking procedures in place when the rule was adopted. *See* Wis. Stat. § 227.10(2m).

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[5] The Wisconsin Supreme Court has confirmed that while these presumptions of validity are rebuttable, they are "similar in operation to the generally recognized rebuttable presumption of the constitutionality of a statute," and a challenger to the rule will bear the burden to overcome the presumption. *See Wis. Realtors Ass'n v. PSC*, 2015 WI 63, ¶ 66, 363 Wis. 2d 430, 867 N.W.2d 364. The court emphasized that in evaluating challenges to rules, the statutes "require[ ] courts to respect the legislature's role in reviewing and approving agency rules by presuming the validity of rules that have survived the legislature's scrutiny." *Id.*

B. OAG–04–17 incorrectly interpreted Act 21 to limit the enforceability of existing, properly promulgated rules.

¶ 44. OAG–04–17 incorrectly interpreted Act 21's initial-applicability provision, section 9355(1); Wis. Stat. § 227.11(2)(a)3.; and Wis. Stat. § 227.10(2m). Contrary to the explanation above, that opinion concluded that Act 21 potentially invalidated existing, properly promulgated rules. *See* OAG–04–17, ¶¶ 13, 24, 31–33.

¶ 45. In reaching that conclusion, OAG–04–17 first pointed to Wis. Stat. § 227.11(2)(a)3. and its limits on "promulgating, enforcing, or administering" certain standards. The opinion acknowledged that Act 21's initial-applicability provision prevented retroactive application of section 227.11(2)(a)3.'s limits on "promulgation," but asserted that "'enforce[ment]' or 'adminis[tration]' of existing rules" should be treated differently. OAG–04–17, ¶¶ 31–32 (alterations in original). It concluded that if a rule "could not be lawfully 'promulgate[d]' now," it "may not be prospectively enforced or administered in light of Act 21." OAG–04–17, ¶¶ 31, 33 (alteration in original).

¶ 46. That view cannot be reconciled with the relevant provisions of Act 21. To begin, there is no textual support in the initial-applicability provision for OAG–04–17's different treatment of limits on the "promulgation" of rules and limits on "enforcement or administration." Instead, as noted above, that provision states that "the creation of" all of Wis. Stat. § 227.11(2)(a)1.–3. first applies starting on the Act's effective date. Act 21, § 9355(1). The initial-applicability provision therefore treats all of Wis. Stat. § 227.11(2)(a)3.'s terms—promulgation, enforcement, or administration—the same. All of them "first apply" to a rule proposed on or after June 8, 2011. Act 21, § 9355(1).

¶ 47. Further, OAG–04–17's premise—that if a rule "could not be lawfully 'promulgated' now" it cannot be enforced—also finds no support in Wis. Stat. § 227.10(2m). OAG–04–17, ¶ 31. As discussed above, application of Wis. Stat. § 227.10(2m) to previously promulgated rules turns on whether the rule was "promulgated in accordance with" the rulemaking procedures in force when the rule was promulgated. Evaluating the enforceability of a pre-Act 21 rule based on the rule's compliance with rulemaking procedures enacted *after* the rule was promulgated contravenes the text of Wis. Stat. § 227.10(2m), defies common sense, and turns the initial-applicability provision on its head. OAG–04–17 therefore is withdrawn for this additional reason.

CONCLUSION

¶ 48. In summary, neither Wis. Stat. § 227.11(2)(a)2. nor 3. alters any explicit legislative grant of agency rulemaking authority. If a statute explicitly authorizes rulemaking, that statutory language continues to control. Likewise, nothing in Act 21 altered an agency's ability to enforce existing, properly promulgated rules.

Sincerely,

Joshua L. Kaul
Attorney General

JLK:GJK:jrs