NOTICE OF HEARINGS
Health and Family Services
(Health, Chs. HFS 110 -)

Notice is hereby given that, pursuant to ss. 254.47 (4) and 254.68, Stats., the Department of Health and Family Services will hold public hearings to consider the amendment of chs. HFS 172, 175, 178 and 195 to 198, Wisconsin Administrative Code, relating to an increase in permit and related fees for the operation of public swimming pools, recreational and educational camps, campgrounds, hotels and motels, tourist rooming houses, restaurants, bed and breakfast establishments and food and beverage vending operations and commissaries.

Hearing Information

The public hearings will be held:

Date & Time	Location
March 19, 2001 Monday Beginning at 1 p.m.	Public Health Regional Office 1853 N. Stevens Street **Rhinelander, WI 54501**
March 20, 2001 Tuesday Beginning at 1 p.m.	Green Bay City Hall Room 604 100 N. Jefferson Street **Green Bay, WI**
March 21, 2001 Wednesday Beginning at 1 p.m.	DHFS Regional Office Room 123 610 Gibson Street **Eau Claire, WI**
March 22, 2001 Thursday Beginning at 1 p.m.	State Office Building Room B145 1 West Wilson Street **Madison, WI**

The hearing sites are fully accessible to people with disabilities.

Analysis Prepared by the Department of Health and Family Services

The department and agent local health departments regulate all campgrounds, camps, the operation of swimming pools that serve the public, restaurants, hotels and motels, tourist rooming houses, bed and breakfast establishments and food vending operations in the state under the authority of ss. 254.47 and 254.61 to 254.88, Stats., to ensure that these facilities comply with the department's health, sanitation and safety standards set out in administrative rules. The department's rules for these facilities are found in chs. HFS 172, 175, 178, 195, 196, 197 and 198 of the Wisconsin Administrative Code. None of the facilities may operate without having a permit issued by the department or an agent local health department. A permit is evidence that a facility complies with the department's rules. Under the department's rules, facilities are charged permit and related fees. Fee revenue supports the department's expenses in providing statutorily required regulatory oversight of these entities.

This rulemaking order amends the department's rules for operation of these facilities to increase permit fees an average of 40% for all program areas, and to increase the preinspection fee for new hotels and motels, tourist rooming houses, restaurants, bed and breakfast establishments and vending machine commissaries.

The fee increases will enable the department to fully staff existing position regulatory program vacancies, allowing the department to increase its frequency of routine inspections, ability to promptly respond to public complaints, and undertake necessary enforcement action.

This order does not affect facilities regulated by local health departments granted agent status under s. 254.69(2), Stats. Permit fees for those facilities are established by local health departments pursuant to s. 254.69 (2)(d), Stats.

Contact Person

To find out more about the hearings or to request a copy of the rulemaking order and the full fiscal estimate, write or phone:

Greg Pallaske
Environmental Sanitation Section
Division of Public Health
P. O. Box 2659
Madison, WI 53701-2659
608-266-8351 or, if you are hearing impaired, 608-266-1511 (TTY)

If you are hearing or visually impaired, do not speak English, or have other personal circumstances which might make communication at a hearing difficult and if you, therefore, require an interpreter, or a non-English, large print or taped version of the hearing document, contact the person at the address or phone number above. A person requesting a non-English or sign language interpreter should make that request at least 10 days before the hearing. With less than 10 days notice, an interpreter may not be available.

Written comments on the proposed rules received at the above address no later than March 29, 2001, will be given the same consideration as testimony presented at a hearing.

Fiscal Estimate

This order changes the department's fee schedule for the permit of restaurants, hotels, motels, tourist rooming houses, bed and breakfast establishments, camps, campgrounds and food vending operations. Annual permit fees will be increased to fund the department's food and facility safety programs. It is estimated that the increase in facility permit fees will generate an additional $693,800 in annual revenues.

The proposed rule change would generate an additional $393,600 from 5,788 licensed restaurants; the average annual increase in the permit fee would be $68. It is estimated that increased permit fees would generate $125,061 additional revenue annually from 3,396 lodging facilities; the average annual increase would be $37. It is estimated that increase to pre-inspection fees for restaurant and lodging facilities would generate an additional $44,439 annually; the average pre-inspection fee would increase by approximately $48. Increased permit fees for camps, campgrounds and swimming pools would generate $64,966 from 1,828

facilities annually; the average permit fee increase would be $36. The increased permit fees to food vending commissaries would generate $3,447 annually; the average permit fee would increase by $28.

Local public health departments in the state may act as agents for the department. These agents return 10% of the state permit fee for each establishment to the Department for training and technical support services. It is estimated that the proposed changes will increase fees from the agent health departments by $62,312 per year. Currently there are 32 state agents. As a result the average impact on each local unit of government will be approximately $1,947 annually.

Initial Regulatory Flexibility Analysis

Many of the 11,000 facilities licensed by the department are small businesses as defined in s. 227.114 (1) (a), Stats. These facilities will be impacted by an increase in annual permit fees. The department has attempted to minimize the economic impact on small businesses by scaling fee increases according to the complexity of the operation and the amount of time required by department staff to perform a safety inspection/consultation. Facilities with greater complexity in food preparation facilities, or greater numbers of lodging rooms or campsites, will experience greater fee increases than smaller facilities.

This rule order does not place additional recordkeeping, reporting or bookkeeping requirements on small business owners. The facilities will benefit by an increase in the number of compliance inspections by department staff; this will result in safer operations for the consuming public.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING, AMENDING, AND CREATING RULES

To repeal HFS 172.04(1m)(d), ~~175.04(1m)(d)~~, 178.05(1m)(d), 195.04(1m)(e)1. and 2., 197.04(1m)(e), and 198.04(1m)(f); to amend HFS 172.04(1m)(a), 175.045(~~1m~~3)(a), 178.05(1m)(a)2., 195.04(1m)(a)2. and (d)1. and 2., 197.04(1m)(a) and (d), and 198.04(1m)(a) and (e); to repeal and recreate HFS 196.04(2)(b) to (fe) and 198.04(1) and (1m), and to create HFS 196.04(2m)(a) to (eb) and Note, relating to permit fees for the operation of public swimming pools, recreational and educational camps, campgrounds, hotels and motels, tourist rooming houses, restaurants, bed and breakfast establishments and food and beverage vending operations and commissaries.

Analysis Prepared by the Department of Health and Family Services

The department and agent local health departments regulate all campgrounds, recreational and educational camps, the operation of swimming pools that serve the public, restaurants, hotels and motels, tourist rooming houses, bed and breakfast establishments and food vending operations in the state under the authority of ss. 254.47 and 254.61 to 254.88, Stats., to ensure that these facilities comply with the department's health, sanitation and safety standards set out in administrative rules. The department's rules for these facilities are found in chs. HFS 172, 175, 178, 195, 196, 197 and 198 of the Wisconsin Administrative Code. None of the facilities may operate without having a permit issued by the department or an agent local health department. A permit is evidence that the facility complies with the department's rules. Under the department's rules, facilities are charged permit and related fees. Fee revenue supports the department's expenses in providing statutorily-required regulatory oversight of these entities.

This rulemaking order amends the department's rules for operation of these facilities to increase permit fees an average of 40% for all program areas and to increase the pre-inspection fee for new hotels and motels, tourist rooming houses, restaurants and bed and breakfast establishments.

The fee increase will enable the department to fully staff existing position regulatory program vacancies, allowing the department to increase its frequency of routine inspections, ability to promptly respond to public complaints, and undertake necessary enforcement action.

This order does not affect facilities regulated by local health departments granted agent status under s. 254.69(2), Stats. Permit fees for those facilities are established by local health departments pursuant to 254.69(2)(d), Stats.

The department's authority to repeal, amend, repeal and recreate, and create these rules is found in ss. 254.47(4) and 254.68, Stats. The rules interpret ss. 254.47 and 254.68, Stats.

SECTION 1. HFS 172.04(1m)(a) is amended to read:

HFS 172.04(1m)(a) *Annual permit fee.* Beginning July 1, ~~1998~~ 2001, the operator of a public swimming pool shall pay an annual permit fee of $~~130~~175 to the department.

SECTION 2. HFS 172.04(1m)(d) is repealed.

SECTION 3. HFS 175.045(~~1m~~3)(a) is amended to read:

HFS 175.045(~~1m~~3)(a) *Annual permit fee.* Beginning July 1, ~~1998~~2001, the operator of a camp shall pay an annual permit fee of $~~77~~125 to the department.

~~SECTION 4. HFS 175.04(1m)(d) is repealed.~~

SECTION 5. HFS 178.05(1m)(a)2. is amended to read:

HFS 178.05(1m)(a)2. Beginning July 1, ~~1998~~2001, the annual permit fee shall be as follows:

a. For a campground with 1–25 sites, $~~106~~125;

b. For a campground with 26–50 sites, $~~130~~150;

c. For a campground with 51–100 sites, $~~153~~175; and

d. For a campground with over 100 sites, $~~171~~200.

SECTION 6. HFS 178.05(1m)(d) is repealed.

SECTION 7. HFS 195.04(1m)(a)2. is amended to read:

HFS 195.04(1m)(a)2. Beginning July 1, ~~1998~~2001, the annual permit fee shall be as follows:

a. For a hotel or motel with 5 to 30 rooms, $~~124~~160;

b. For a hotel or motel with 31 to 99 rooms, $~~165~~205;

c. For a hotel or motel with 100 or more rooms $~~212~~250; and

d. For a tourist rooming house, $~~59~~100.

SECTION 8. HFS 195.04(1m)(d)1. and 2. is amended to read:

HFS 195.04(1m)(d) *Preinspection fee.* 1. 'Hotel and motel'. The operator of a hotel or motel shall pay to the department a preinspection fee. The preinspection fee shall be as follows:

a. For a hotel or motel with 5 to 30 rooms, $~~125~~160;

b. For a hotel or motel with 31 to 99 rooms, $~~200~~250; and

c. For a hotel or motel with 100 or more rooms, $~~275~~340;

2. 'Tourist rooming house'. The operator of a tourist rooming house shall pay to the department a preinspection fee of $~~125~~160.

SECTION 9. HFS 195.04(1m)(e)1. and 2. is repealed.

SECTION 10. HFS 196.04(2)(b) to (e) is repealed and recreated to read:

HFS 196.04(2)(b) *Annual permit fee.* The operator of a restaurant that serves meals prepared from raw, canned, dried, packaged or frozen foods shall pay an annual permit fee to the department. Except as provided in subds. 4. to 6., the annual permit fee shall be based on the permit category assigned to the restaurant under par. (d). Beginning July 1, 2001, the restaurant permit fee structure is as follows:

1. For a restaurant in the simple permit category, an annual permit fee of $160 and, in addition, $80 per area for any physically separate food holding, serving or preparation area.

2. For a restaurant in the medium permit category, an annual permit fee of $230 and, in addition, $80 per area for any physically separate food holding, serving or preparation area.

3. For a restaurant in the complex permit category, an annual permit fee of $300 and, in addition, $80 per area for any physically separate food holding, serving or preparation area.

4. For a restaurant that serves only individually wrapped, hermetically sealed single food servings supplied by a licensed processor, an annual permit fee of $95.

5. For a temporary restaurant, an annual permit fee of $110.

6. For a mobile restaurant base with no food preparation, an annual permit fee of $95.

(c) *Preinspection fee.* The operator of a restaurant shall pay to the department a preinspection fee before issuance of the initial permit or when there is a change of operator except when the new operator is an immediate family member. The preinspection fee shall be based on the permit category assigned under par. (d). Beginning July 1, 2001, preinspection fees are as follows:

1. For a restaurant in the simple permit category, the preinspection fee shall be $150.

2. For a restaurant in the medium permit category, the preinspection fee shall be $250.

3. For a restaurant in the complex permit category, the preinspection fee shall be $350.

(d) *Restaurant permit category assignment.* 1. A restaurant permit category shall be determined by the total number of points assigned to a restaurant based on the criteria specified in Table 196.04.

2. A restaurant whose total score is 0 or 1 shall be included in the simple permit category.

3. A restaurant whose total score is 2 to 5 shall be included in the medium permit category.

4. A restaurant whose total score is 6 to 11 shall be included in the complex permit category.

TABLE 196.04
Determination of Restaurant Permit Category

DESCRIPTION OF FACILITY OR OPERATION	Point(s)
The restaurant contains a self-service salad or food bar.	2
The restaurant handles raw chicken, meat, poultry, seafood, or shell eggs, frozen raw hamburger patties or frozen non-breaded raw chicken.	2
The seating capacity is 40 or more or there is a drive-through window for food pickup.	1
Potentially hazardous foods are cooled or reheated.	2
Food is prepared in one location and then transported to be served in another location.	2
The kitchen contains more than one deep fryer, or more than one grill or more than 2 hot-holding units.	1
The most recent inspection revealed 2 or more critical item violations.	1
The restaurant currently implements ~~an~~ HACCP plan approved by the department.	-1

(e) *Penalty fee.* Beginning July 1, 1998, if the annual permit fee is not paid within the first 15 days of the permit period, the department shall require the operator of the restaurant to pay a penalty fee of $75, in addition to the annual permit fee, for renewal of the permit.

(f) *Fee for duplicate permit.* The department shall charge a restaurant operator $10 for a duplicate permit.

SECTION 13. HFS 196.04(2m)(a) to (b~~c~~) is created to read:

HFS 196.04(2m) RECONSIDERATION OF PERMIT CATEGORY ASSIGNMENTS. (a) The operator of a restaurant may request reconsideration of the restaurant permit category assignment made under sub. (2)(d).

(b) A request made under par. (a) shall be made to the department within 30 days of the category assignment.

Note: To request reconsideration of permit category assignment call the Bureau of Environmental Health at 608-266-2835 or send your written request to the Bureau of Environmental Health, P.O. Box 2659, Madison, WI 53701-2659.

SECTION 14. HFS 197.04(1m)(a) and (d) is amended to read:

HFS 197.04(1m)(a) *Permit fee.* Beginning July 1, ~~1998~~2001, the operator of a bed and breakfast establishment shall pay a biennial permit fee of $~~106~~125 to the department.

HFS 197.04(1m)(d) *Preinspection fee.* Beginning July 1, ~~1998~~2001, the operator of a bed and breakfast establishment shall pay to the department a preinspection fee of $~~125~~160 before issuance of the initial permit.

SECTION 15. HFS 197.04(1m)(e) is repealed.

SECTION 16. HFS 198.04(1) and (1m) are repealed and recreated to read:

198.04 Permit to operate. (1) APPLICATION. No person may conduct, maintain, manage or operate one or more vending machines or a vending machine commissary who has not been issued a permit by the department. Application for a permit shall be made on a form furnished by the department. An application for a permit submitted to the department shall be accompanied by the fees required under sub. (1m)(a) to (d), as applicable.

(1m) DEPARTMENT FEES. (a) *Annual permit fee for the operator of a vending machine.* The operator of a vending machine shall pay an annual permit fee to the department. The annual permit fee shall be as follows:

1. For the vending machine operator, $100 beginning July 1, 2001; and

2. For each vending machine, $6.

(b) *Annual permit fee for the operator of a vending machine commissary.* The operator of a vending machine commissary shall pay an annual permit fee to the department. Beginning July 1, 2001, annual permit fees are as follows:

1. For a vending machine commissary where food is prepared, an annual permit fee of $175.

2. For a vending machine commissary where food, transport equipment and vending supplies are only stored, an annual permit fee of $85.

(c) *Preinspection fee.* Beginning July 1, 2001, the application for an initial permit to operate a vending machine commissary, shall be accompanied by a preinspection fee of $150.

(d) *Penalty fee.* Beginning July 1, 1998, if the annual permit fee is not paid within the first 15 days of the permit period, the operator of the vending machine or vending machine commissary shall pay the department a penalty fee of $75, in addition to the annual permit fee, for renewal of the permit.

(e) *Fee for duplicate permit.* 1. The department shall charge the operator of a vending machine $1 for a duplicate permit for the vending machine.

2. The department shall charge the operator of a vending machine $10 for a duplicate vending machine operator permit.

3. The department shall charge the operator of a vending machine commissary $10 for a duplicate permit.

The rules included in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Wisconsin Department of Health and Family Services

Dated:

By:_____
Thomas E. Alt
Deputy Secretary

SEAL:

The department's rules found in chs. 172, 175, 178, 195, 196, 197, and 198 stipulate that none of the facilities listed in these rules may operate without a permit from the department or an agent local health department, and furthermore that these facilities be charged a permit fee. It is estimated that the proposed rule changes will generate an additional $693,800 in annual revenues.

Currently the annual permit fee for all food service facilities is $148. The proposed rule change restructures facility fees based on the relative risk of operation for each individual establishment. After an evaluation of the facility and operation restaurants will be assigned to either a simple, medium or complex permit category with annual fees of $160, $230, and $300 respectively. It is estimated that approximately 2,315 facilities will be assigned to the simple permit category, 2,315 will be assigned to the medium permit category, and 1,158 will be assigned to the complex permit category. As a result, it is estimated that approximately $393,600 will be generated annually from changes in annual permit fees from food service facilities.

In addition, when a restaurant changes ownership, or when a new restaurant is opened, a pre-inspection fee is charged. Currently, this is determined by a sliding scale based on the seating capacity, with fees of $125, $200, and $275. The proposed rule change restructures facility pre-inspection fees based on the relative risk of operation for each individual establishment. Using the same method of evaluation as in the annual permit fee, facilities will be assigned to either a simple, medium, or complex permit category with their pre-inspection fees being $160, $260, and $360, respectively. It is estimated that the changes in pre-inspection fees will result in a revenue increase of $31,834.

Currently, fees for lodging facilities are based on the number of rooms available for rent within the establishment. The proposed changes increase annual permit fees by an average of 35%. Presently 3,396 of these facilities will be affected by the rule change. The estimated increased revenue from this proposed change is $125,061. In addition, the proposed changes increase pre-inspections fees for these facility types by an average of 27%. Approximately 10% (340) of lodging facilities change ownership each year. It is estimated that these changed pre-inspection fees will result in a revenue increase of $12,605.

Permit fees for recreational facilities are based on the number of camping spaces or beds available. The exception is that swimming pools have a single rate regardless of size. The proposed changes increase fees in the recreation category by an average of 28%. Presently 1,828 of these recreational facilities will be affected by the rule change. The estimated increased revenue from this proposal is $64,966.

Fees for vending commissaries are based on the complexity of the establishment's business operation. The proposed changes increase fees by an average of 36%. The estimated increased revenue from this proposal is $3,447.

Fiscal Impact

Local public health department in the state may act as agents for the department. These agents return 10% of the maximum state-licensing fee for each establishment to department. It is estimated that the proposed changes will increase fees from agents to department by approximately $62,312 per year. Currently, there are 32 state agents. As a result, the average impact on each local government unit will be approximately $1,947 annually.

DIVISION OF

Date:

To: John Kiesow
Executive Assistant
Office of the Secretary

From:

Re: RULE NUMBER AND TITLE:

Action ☐ Create ☐ Repeal and Recreate ☐ Amend ☐ Repeal
Statement of Scope Attached ☐ (Required only for Permanent Rules)

This memo contains the information required for the rule and action named above.

1. Reason for rule action.

2. Statutory authority.

3. Who is affected.

4. Major policy considerations.

5. Costs to the department and industry.

6. Plan to ensure input in rulemaking from users of service.

7. Plan to ensure input in rulemaking from regulated entities (other agencies and other affected/interested organizations).

8. Proposed timeframe for rule promulgation.

9. Name and telephone number of Project leader and any major sub-project leaders.

INSTRUCTIONS FOR PREPARING STATEMENT OF SCOPE

1. **RULE NUMBER(S):** Use the HFS number or numbers. If the number is for a new chapter of rules or if you have any other question about what number or numbers to use, check with OLC Central Rules Unit at 266-5602.

2. **RELATING TO:** State the subject or a working title. Be descriptive but succinct.
   Example: Rights of mental disability patients/clients, & standards for grievance procedures.

3. **ACTION(S):** Indicate one or more of the following rulemaking actions: repeal, renumber, amend, repeal and recreate, create.
   Example: To be repealed, amended, repealed and recreated, and created.

4. **STATUTORY AUTHORITY:** Show the statute or statutes that specifically give the Department authority to promulgate these rules. Show also the session law if a statute giving the Department rulemaking authority is not yet incorporated in Wisconsin Statutes. If there is no statute that specifically directs or permits the Department to promulgate the rules, show the statute that gives the Department authority to operate the program and then add s.227.11(2), Stat., which gives an agency the authority to make rules which are necessary to operate the program.
   Example Section 51.61(5)(b) and (9), Stats.

5. **DESCRIPTION OF OBJECTIVES:** State why rules or rule changes are needed, that is, why the Department will draft them.

6. **DESCRIPTION OF POLICIES:** If these rules will replace current rules, describe current policies that will be or may be changed. Then describe new policies proposed to be included in the rules and include an analysis of policy alternatives. If these rules are all-new, describe the proposed policies and alternatives considered, if any, when policy decisions were made.

7. **ESTIMATES OF STAFF TIME AND OTHER RESOURCES NEEDED TO DEVELOP THE RULES:** Include an estimate of the number of hours of staff time at various levels that it will take to develop draft rules for Department-level review. Also indicate if you will use an advisory group drawn from outside the Department to help draft the rules.

8. **ORIGINATING DIVISION AND PREPARER:** Indicate the division responsible for drafting the Statement of Scope and the division staff member who drafted it. For division, use standard abbreviation. For staff member, show initial for first name and spell out last name.
   Example: DCTF, C. Smith.

9. **ADMINISTRATOR APPROVAL.** Include full signature of the Division Administrator (not initials) and the date in numbers with slashes -- e.g., 4/12/98.

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Office of Legal Counsel
EXS-261 (10/98)

STATE OF WISCONSIN
s.227.135, Wis. Stats.

STATEMENT OF SCOPE OF PROPOSED RULES

RULE NUMBER(S)

RELATING TO

ACTION(S)

STATUTORY AUTHORITY

DESCRIPTION OF OBJECTIVE(S)

DESCRIPTION OF POLICIES - RELEVANT EXISTING POLICIES, PROPOSED NEW POLICIES AND POLICY ALTERNATIVES CONSIDERED

ESTIMATES OF STAFF TIME AND OTHER RESOURCES NEEDED TO DEVELOP THE RULES

Originating Division	Preparer- First Initial and Last Name	Date Prepared
APPROVAL SIGNATURES Administrator		Date Signed
Secretary		Date Signed

to residents' health and safety. All foods shall be protected from cross contamination during storage, preparation and service."

2. *"A handwashing sink shall be conveniently located in the kitchen. Sinks shall be accessible for staff use at all times."*

As you can see, these rules require particular structures and practices that, if adhered to, are deemed to promote the desired (implicit or explicit) outcome of no resident getting ill from tainted food.

In summary, "keep your eyes on the prize," i.e., be very cognizant of the outcome (actions) your rules are trying to promote. Second, talk to your field staff and OLC attorneys about how readily your rules can be enforced. Lastly, don't lose sight of the balance between the interests of consumers and those you are responsible for regulating.

2.2.6 Who to Involve in the Rule Development Effort?

At the outset, you need to determine the persons both from within your agency and other agencies that need to be involved in the rule's development. Depending on the magnitude of the rule effort, the number of involved persons can range from several persons to several dozens. For example, revision of an entire chapter of rules covering a variety of substantive areas could easily involve a dozen or more staff, particularly if the rules affect other state agency programs. At the other extreme, revision of a few paragraphs of one section of existing rules may simply require some brief discussions among a few program agency staff and their supervisor. There are no hard-and-fast rules regarding who to involve. However, you should anticipate and involve agencies that may be affected by the proposed rule change. If you don't at the start, you risk delaying and possibly needing to modify the rules later on. That, of course, will only reflect poorly on you.

2.2.7 Regulatory Relief to Small Businesses

While at this very early point in considering the need for rules and initially conceptualizing the rules, you need to consider some issues that will bear later on when you specify what's known under s. 227.114, Stats., as *Regulatory Relief to Small Businesses*. Under s. 227.114, Stats., a "small business" means a business entity, including its affiliates, that is independently owned and operated and not dominant in its field, and that employs fewer than 25 full-time employees or that has gross annual sales of less than $2.5 million. If any of the entities that your proposed rules are going to affect are classified as "small businesses" under s. 227.114, Stats., you must consider each of 5 methods for reducing the impact of the proposed rules on small businesses. You must then incorporate into the proposed rules any of these methods that you find are feasible unless doing so will conflict with the objectives for the program which are set out in the statute under which the rules are made. The 5 methods for giving regulatory relief to small businesses are:

- Establishing less stringent compliance or reporting requirements for them.
- Establishing less stringent schedules or deadlines for compliance or reporting by them.
- Consolidating or simplifying compliance or reporting requirements for them.

At this preliminary stage, it is good practice to discuss your plans with someone from the Department's OLC Rules Unit and the OLC Rules Attorney. Such discussions can serve as a sounding board for your preliminary ideas about your intended approach and may alert you to issues you should consider. Best of all, its FREE!

- Substituting performance standards for them in place of design or operational standards.
- Exempting them from any or all requirements of the rules.

2.2.8 Summarizing Your "Plan of Attack"

If you have adequately and thoroughly considered the factors discussed in subsections 2.2.1 through 2.2.7, you should be able to specify a clear, initial working concept of *generally* what the rules need to accomplish. Exact words are not important at this stage. However, you should develop some concrete idea of the following:

- A succinct statement of:
  - *Why* the rules are needed;
  - *What* the rules are going to accomplish; and
  - From a programmatic standpoint, *how* the rules are going to accomplish what needs to be done.
- *What* the *general* contents of the rule are going to be.
- *What* approximate effort (staff resources) you anticipate being required.
- *What* you anticipate the timeframe for rule development is going to be.
- From an administrative standpoint, *what* needs to be done through rules. You can do any of the following:

  - Create a new chapter of rules.
  - Create new rules in an existing chapter of rules.
  - Amend existing rules (the easiest way to handle extensive amendments is by repeal and recreation).
  - Renumber an existing rule or rules.
  - Repeal an existing rule or an entire chapter of rules.

You could, and frequently do, have some combination of creation, repeal and recreation, amendment, renumbering and repeal in the same rulemaking order.

In the course of conceptualizing the rules, you need to note major policy questions, including the scope of rules that will need to be brought to the attention of the Secretary by your Division Administrator ***before*** rulemaking begins. Such major policy issues need to be addressed and resolved at the divisional or departmental level in the course of rules development.

As a practical matter, in the course of discussing the content of your proposed Statement of Scope within your agency, your Division and, especially, the Department Secretary's Office, a variety of changes will be made to it. Furthermore, if any of the preceding have insurmountable problems with your Statement of Scope, it'll never get to the point of being published and review by external entities will be a moot point.

2.3 Developing the "Statement of Scope"

After you have considered the factors in subsections 2.2.1 through 2.2.8, you should be adequately prepared to develop the ***Statement of Scope***. When you want to create or modify permanent rules, you need to prepare a ***Statement of Scope*** that summarizes and justifies your proposed rule. The Statement of Scope (of proposed rulemaking) is the first formal, relatively public document you need to prepare. (You do not need to develop a Statement of Scope if you are developing emergency rules.)

2.3.1 Why a "Statement of Scope"?

The statutory requirement that agencies prepare a Statement of Scope is relatively new insofar as it was enacted in 1995. Strangely, the purpose of the Statement of Scope is

not explained in s. 227.135, Stats. Assumedly, it serves as a "notice of rulemaking intent" to a limited external audience, most likely, the legislature and organized interest groups (and their legal watchdogs) likely to be affected by the proposed rule. (Since the Statement of Scope is only published in the Wisconsin Administrative Register, and not the Wisconsin State Journal, the general public is unlikely to know of your agency's intent.) Another audience for the Statement of Scope is the Department of Administration. Finally, properly drafted, the Statement of Scope provides a useful, succinct summary for our Department of your agency's intent in its proposed rule development efforts. The Legislature has required agencies to give these limited audiences forewarning of agency intent most likely to facilitate early attempts by these parties to shape and influence rulemaking efforts. The Department also encourages you to publicize your agency's intent to draft rules by sending the Statement of Scope to parties you anticipate would be interested in knowing so. The Rules Unit will do its part by posting your Statement of Scope on the DHFS website.

You can begin drafting your rules that are the subject of the Statement of Scope as soon as the Secretary approves the Statement of Scope. As stated in s. 227.135 (3), Stats., "The individual or body with policy-making powers over the subject matter of a proposed rule may not take action on a statement of scope of the proposed rule until at least 10 days after publication of the statement in the register." "Taking action" has been interpreted as meaning that the Department shouldn't send rules to the Legislative Council Rules Clearinghouse until at least 10 calendar days have passed after the Statement of Scope is published in the Register.

2.3.2 What is a "Statement of Scope?"

By law (s. 227.135(1), Stats.), the Statement of Scope contains certain information the Legislature deems necessary to adequately describe the proposed rule.

- A description of your rule's broad objective.
- A description of existing policies relevant to your rule and of new policies you propose to be included in the rule and your analysis of policy alternatives.
- The statutory authority for your rule.
- Estimates of both the amount of time state employees will spend developing the rule and of other resources necessary to develop the rule.

The Statement of Scope you develop is beneficial in several respects. First, your agency gives the public and, indeed, all interested parties, a view of its intentions, so that commentary can be aired for and against your rulemaking proposal. Second, your agency disarms criticism that it has failed to act. Third, the Statement of Scope can probe the real concerns of your agency's likely opponents without consuming much time for the actual rule drafting. In so doing, you are in a much better position to efficiently draft the rules (from a productivity and political standpoint) once you start.

You are far more likely to provoke friendly, possibly helpful comments with the relatively nebulous request for ideas contained in the Statement of Scope than with a specific set of words in administrative rules requiring responses.

2.3.3 Developing the DHFS "Statement of Scope Memo"

The DHFS "Statement of Scope Memo" is related to, but different than, the Statement of Scope. The information *statutorily* required in an agency Statement of Scope for the purposes of publishing and external review is *not sufficiently detailed* for meaningful review by the DHFS Secretary's Office. The Secretary's Office usually has the following concerns:

- Are the rules you're proposing to promulgate really needed and are they likely to have (and be perceived as having) merit?
- Are your proposed rules a relatively high priority for your agency and the Department?
- Should other agencies be involved in the rules' development?
- What *specifically* are the rules trying to do?
- What are the likely ramifications (political, policy and otherwise) of the rules' promulgation?

Hence, before you expend significant time and effort on rulemaking, your agency needs to gain the support of the Secretary's Office and, when needed, broad department involvement for the proposed rule creation, amendment, or repeal. The *Statement of Scope Memo* is the vehicle that initiates what the Secretary's Office calls the *Pre-Scoping Process*. The Statement of Scope Memo is directed to the Executive Assistant in the Office of the Secretary and should contain the following types of information:

- Why your agency wants the department to create, amend, or repeal the rule.
- The statutory authority for significant items in your proposed rule.
- Who is affected by creating, amending or repealing the rule.
- Major policy considerations and costs to the department and industry (organized, affected business groups) entailed by your rule's development.
- Your proposed process for developing the rules.
- Your plan to ensure input in the rule drafting process from the users of the service.
- Your plan to ensure input in the rule drafting process from regulated entities, other agencies, and other affected/interested organizations.
- Your estimated timeframe for promulgation of the proposed rule.
- The name of the project leader for the rule's development and any major sub-project leaders.

If you provide the Secretary's Office these types of information in the Statement of Scope Memo, the Secretary's Office will be in a better position to evaluate, influence and shape your agency's decision-making at an early stage in the rulemaking process. Given this early support and understanding, the Secretary's Office is **much** more likely to support your rulemaking efforts throughout the promulgation process and not delay your rule drafts when they subsequently reach the Department as they initially move to the review stage of the promulgation process.

Given that the information required by the Secretary's Office in the Statement of Scope Memo is more detailed than that required in the Statement of Scope, you should consider drafting the DHFS Statement of Scope Memo first and the statutorily-required, official Statement of Scope subsequently. You can view and copy a Word template of the DHFS Statement of Scope Memo that allows you to simply enter the pertinent information by clicking on File and then New. The template is under the "General" tab and is the file labeled "Exs0262." Copy the file to your own directory and then complete it. A directive from the Secretary's Office on the use of "Exs0262" and an example of a completed DHFS Statement of Scope Memo is included as Appendix 1.

The Department has also developed a Word template for completing the public Statement of Scope. You can view and copy the template of the Statement of Scope

that allows you to simply enter the pertinent information by clicking on File and then New. The template is under the "General" tab and is the file labeled "Exs0261." Copy the file to your own directory and then complete it. An example of a completed Statement of Scope is included as Appendix 2.

Note to DHFS Reviewers: **Should we provide detailed instructions on how to complete the Statement of Scope and Statement of Scope Memo?**

Once you've completed a draft of both the *internal* DHFS Statement of Scope Memo and the *external* Statement of Scope, you should consider circulating them to appropriate parties within your agency for review and comment. At this stage, you want to make sure the documents are accurate and reflect your agency's best estimate of what it wants to accomplish through the rules and what resources it will likely take to both develop and promulgate the rules. At a minimum, you want the head of your agency to review and approve the documents. Following this level of review and approval, your agency head will want to have your Division Administrator review and approve the documents. While all of these reviews and approvals may take some time and effort, they are necessary and useful prerequisites in the DHFS Pre-Scoping Process.

2.3.4 The DHFS Pre-Scoping Process

Once you have a Statement of Scope and Statement of Scope Memo that's been approved by your Division Administrator, your division needs to schedule a meeting with the Executive Assistant to discuss the two documents. It is through this meeting and any necessary subsequent meetings that your Division attempts to secure the Department's blessing to issue the Statement of Scope to the Department of Administration and the Revisor of Statutes for publication in the Register. Therefore, your Division should submit a copy of the documents to the Executive Assistant at least several days prior to the meeting.

From the Department's perspective, the purpose of the meeting is to consider whether to proceed with rule drafting, what the rules should cover, and any issues that must be resolved before rule-drafting can proceed. Ideally, the meeting should involve program staff from your agency, the DHFS rules manager, legislative liaison, the OLC Rules Attorney and, as appropriate, staff with relevant expertise from other divisions. Participants at the meeting will discuss any outstanding questions concerning the proposed rule change. They will also decide whether the proposed rule change should be brought to an executive staff meeting for discussion of issues that cross divisions or otherwise affect the Department as a whole.

These efforts described thus far in steps one through four will result in either the Secretary's Office approving, rejecting or modifying your Statement of Scope. Frequently, the Secretary's Office will approve proceeding with publishing the Statement of Scope after giving your program agency either specific suggestions or things to bear in mind in developing the rules.

After revising the Statement of Scope, you should submit it to the DHFS Rules Unit. The Rules Unit will assume responsibility for distributing and publishing the Statement of Scope in the Wisconsin Administrative Register.

2.4 Rule Drafting (Writing Rules)

Assuming the Department of Administration does not object to our Department developing your rules, you can proceed to develop the rules 10 days after the Statement of Scope has been published in the Wisconsin Administrative Register.

2.4.1 Drafting Preliminaries

Beyond the requirements and suggestions provided in section 2.2, how you develop your rules is up to you and your agency. Basically, you must draft proposed rules in accordance with s. 227.14(1), Stats., and follow the rule construction and style conventions described in chapter 5. Section 227.14(1), Stats., directs agencies to prepare rules that "adhere substantially to the form and style used by the Legislative Reference Bureau in the preparation of bill drafts and the form and style specified in the manual prepared by the Legislative Council Staff and the Revisor under s. 227.15(7), Stats. To the greatest extent possible, an agency shall prepare proposed rules in plain language which can be easily understood." Chapter 5 of this Guide has combined the pertinent contents of these two sources with the style directives in the existing DHFS *Administrative Rulemaking Handbook.* Therefore, **reading chapter 5 prior to drafting rules and refer to it, as needed, during rule drafting is essential.**

As you begin drafting, it is less important for you to draft perfect rules from a stylistic perspective than it is for you to increasingly add substance to what begins as the logically organized skeletal framework of the rule chapter. Obviously, it is more efficient to draft your rules correctly the first time you commit them to paper (or cyberbits) than to add additional layers of editing later in the process. However, initially, it is most important to capture the essential substantive concepts that you want your rules to contain.

Like it or not, rules usually involve complex writing. As a rule drafter, the best job you can do is to take a long and complicated set of facts and organize and relate them in such a way that the facts are easily understood by readers. In addition, you must reduce all of the possible issues to the fewest, each of which can be set forth in a statement of the question presented. The statement should include the key facts in one sentence of reasonable length, which is easily understandable on the first reading. The whole purpose is to take what appears long and complicated and reduce it to what is concise and clear. Every provision you draft should result in action or have a legal effect.

2.4.2 Establish the Rule's Framework

One of the last steps before beginning the actual drafting rules is to draft and critically analyze a framework for your rules. If, for example, you need to draft an entire chapter of rules, it is very useful to first develop a series of working drafts of the chapter's outline. ***The importance of composing a working outline of the rules you need to draft cannot be overemphasized.*** A good outline or framework of a chapter, subchapters and sections within each subchapter will be characterized by its ability to logically reflect every subject you will need to reflect in the rules.

Group similar rule topics and provisions together, probably under a subchapter or section that clearly identifies what is common about the rule sections in that subchapter. For example, a variety of rules that pertain to your agency's administration of the program, i.e., definitions applicable throughout the rule chapter, licensure requirements and related provisions, penalties for noncompliance, and so forth, should be grouped in a subchapter titled "Administrative." Clearly grouping and organizing your rules in a manner that allows the reader to go to the subchapter that pertains to the subject of their immediate interest and, within that subchapter, clearly and sequentially specifying rule topics and provisions, should be your overriding goal.

Do not share rule drafts with the public unless and until you obtain your supervisor's approval to do so.

2.4.3 The Rule Drafting Process

From a process standpoint, there are essentially two ways to draft rules. Typically, a small group of agency staff with sufficient technical expertise to transform statutory language and a policy directive into a rule will do the initial drafting. The group will first compile the available factual and technical data. As it evaluates the data, it develops for agency policymakers a set of options that can be supported by either the data or logic. Gradually, your group should develop a consensus on the substance of a proposed rule. The next step is to persuade your agency's decision-makers to accept that consensus and seek the views of representatives of other interested and affected agencies. In some instances, your agency will seek public comment before choosing one of the options. To obtain public comment, some agencies give advance notice of proposed rulemaking or establish an advisory committee. If you are developing significant new rules or amending widely used existing rules, you may want to hold informational meetings on the rules to gather and discuss the opinions of persons likely to be affected by your rules. Give adequate notice of these meetings and let interested parties know that if they cannot attend you would welcome their comments in writing. At such meetings, your agency normally outlines what it is considering and solicits comments on alternatives. A variation of informational meetings is what might be called "negotiated rulemaking" under which an agency convenes a meeting of representatives of various interest groups to get a sense of what the various representatives see as problems suitable for addressing through administrative rule, possible language and so forth. By bringing major participants into the development of the rule prior to proposing a rule, the agency seeks to expedite the process, hear all viewpoints in a give-and-take forum, and limit potential challenges to the final draft rule.

Do not surprise people at public hearing time, lest you be forced to drastically revise the proposed rules and start the review phase all over again.

If, at any time in the rule drafting process, the content of your rule varies from what you specified in the Statement of Scope approved by the Secretary's Office, you should apprise the OLC Rules Attorney of the change. Although such changes may occur more than once, the Rules Attorney should be notified as soon as possible to avoid any subsequent wasted effort. However, you do not need to suspend rule development efforts pending Secretary Office approval of the changes.

Sometimes an inside-outside work group is formed to think through what should be in the rules, prepare a first draft, and later refine that draft. It is, for example, legitimate for you to use members of the affected community as sources of ideas, whether proactively through suggestions or reactively through informal responses. Commonly, the thinking and drafting will be done by assigned DHFS staff who may or may not work with a standing or ad hoc advisory committee but, in any case, will search out the expertise and views of others. It is prudent to let all interested parties look at an early draft of the rules so that their concerns can be considered before public hearing or, at least, a well thought-out defense of a proposed course of action can be developed.

A word about your "pride of authorship." Since you and your agency are part of the DHFS bureaucratic hierarchy, you should, of course, pay attention to the sifting and winnowing of good ideas from bad ones within the hierarchy. However, the ultimate determination of whether your agency's ideas for rule language are "good" is defined by Unit, Bureau, Division and Department agency managers, with the *goodness* determination made at several stages of the rulemaking process. An idea can be *killed* at any of those levels in the Department, but you also need to be prepared to *save* it from an inertia-bound demise at any of those levels of the Department. The rationale used at a lower level to justify a rule may drop away as the Department management applies the idea in a different context or supplies a newer, politically more acceptable rationale. However, because each proposed rule is an institutional product of the Department, only the last version of the idea, and its publicly expressed rationale, will carry legal weight. In summary, you need to understand that not all changes to *your*

rules are going to be to your liking. Your role is to advocate your agency's position, should it have one, while accepting and defending the ultimate version of the rules.

A final suggestion. By approving your Statement of Scope, the Secretary's Office has given your agency the "green light" to proceed with rule development. However, if the Secretary's Office has difficulty reviewing your rules when you have completed the rule draft, you may face additional weeks or months delay. Therefore, regardless of whether you are creating new rules or revising existing rules, it is important for you to indicate in a draft for Secretary Office review the following items:

- which existing rules you propose to delete; do this through ~~striking outs~~ text;
- which rules you propose to add; do this through underlining text;
- following each proposed addition or deletion, an explanation *in footnotes* of why you are proposing deleting or adding those particular provisions; and
- which provisions are likely to be controversial.

2.4.4 General Rule Construction and Layout Advice

As stated in subsection 2.3.1, for direction on the proper language, form, and organization of rules, you should consider chapter 5 of this Guide to be the authoritative source of information and guidance. However, if chapter 5 does not address your specific question, feel free to contact someone in the Rules Unit for guidance.

Notwithstanding the preceding advice, you may find that some general "pointers" may help jump-start your rule-writing efforts. Toward that end, the following general suggestions are provided.

1. New proposed rules should be given a title that is both *descriptive* and *succinct*. Do not use the words "rules," "law," or "program" in the title of your rules.

2. A table of contents by chapter section should precede the rules to facilitate review. (For proper layout of the table of contents, consult a recently issued chapter of rules.)

3. Begin the rules with a section citing the statutory authority you have to make the rules and clearly stating their purpose. The statutory authority under which the rules are based is of primary importance to all persons affected by a rule. Therefore, the first section of every DHFS rules chapter begins with the title, "**Authority and purpose**" and begins: "This chapter is promulgated under the authority of s. _____, Stats., to _____ (do one thing or another)." To ensure that you make all of the appropriate references, you should search the authorizing statute(s) for the word "rule." Every time the authorizing statute(s) either direct or permit the Department to specify something in rules (and we do it), you need to include reference to that statute provision. In addition, in the event your rules also address things beyond those things specifically authorized in statute, you should cite s. 227.11 (2), Stats. Section 227.11 (2) gives the Department broad authority to promulgate rules. With respect to the rule's *purpose*, try to draft the rule's purpose from the standpoint of how the rule benefits the public.

While in the body of rules for explanatory purposes, definitions are not themselves rules, so never specify a substantive (one which must be enforced) directive in any definition.

4. Follow this section with a section on the rule's applicability, i.e., who the rules apply to. The section should have the title, "**Applicability**" and must begin: "This

In the course of rule drafting, you will frequently be adding and subtracting terms that need definition and moving particular terms to specific

chapter applies to...." To develop this section, you should review the rule to determine who or what entities the rule (or any parts of the rule) applies to or who is going to be affected by the rule.

5. A section containing definitions comes next. The section must have the title, "**Definitions**" and must begin: "In this chapter:..." Definitions are listed alphabetically. Every term you propose to use in the body of the rules that isn't commonly used, but is used in a technical sense, must be defined. Every name or title such as Department, division, agency, or Secretary must be defined, or otherwise you must write it out in full every time you use it.

6. After "Definitions," the sections of a chapter should be arranged in ***some logical order***. As previously discussed, you should give substantial consideration to how your rule is organized. Consider organizing it with the following things in mind:

   - Are there steps to be taken? A sequence of events?
   - Can you glean from the authorizing statute a list of rulemaking requirements that, taken together, suggest a particular order of subchapters and sections within each subchapter?
   - Are there administrative elements or aspects to the rules that could be grouped in an "administrative" subchapter?

Composing rules so that they are comprised of logical and sequential sections, subsections, paragraphs, subdivisions and subdivision paragraphs is sort of like running a maze. If you find that you can't fit your thought into the structure of, at most, subdivision paragraphs (running into the dead end of a maze),you simply need to back up and reorganize your ideas in an understandable way within the constraints of the preceding organizational hierarchy. In many cases, it helps to make an outline of what you need to convey in the rule.

Besides being organized in a logical manner, all rule chapters must be organized in a ***uniform*** manner. In all rules contained in the Wisconsin Administrative Code, major divisions of rule chapters and subchapters are called "sections." For instance, s. HFS 132.45 is a *section* of chapter HFS 132. Sections may be, in turn, divided into "*subsections*." Within s. HFS 132.45 is subsection "(5)." Subsections may be further divided into "*paragraphs*." Continuing this example, within s. HFS 132.45(5) is paragraph "(b)." Paragraphs may be further divided into "*subdivisions*." Within s. HFS 132.45(5)(b) is subdivision "1." Subdivisions may, in turn, be divided into "*subdivision paragraphs*." Within s. HFS 132.45(5)(b)1. is subdivision paragraph "d." ***That's as far as you should break down your chapter's organization.***

Chapter
- Subchapters
  - Sections
    - Subsections
      - Paragraphs
        - Subdivisions
          - Subdivision paragraphs

As a rule drafter, you should appreciate the proper use of shortcuts (i.e., techniques) you may use in drafting. One of these relates to when you want to insert some new provisions between existing provisions. Although this holds true at any level of the preceding hierarchy, if you want to insert a new provision between sub. (3) and (4) of some existing rules. To add a new subsection between sub. (3) and (4) (without having to renumber all the other subsections), always label it as (3**m**). To add a new subsection between (3) and (3m), always designate it as (3**g**). To add a new subsection between (3m) and (4), always use (3**r**), (3**s**) or (3**t**).

7. Number pages for ease of reference. Readability of the rules is important. Use plain English. Leave out nonessential material.

8. Single-space rule drafts and indent the first line of every section, subsection, paragraph, subdivision and subdivision paragraph.

9. If you are creating or repealing and recreating a whole chapter of rules, include a table of contents, showing the titles of all sections of the chapter, to be included after the chapter number and chapter title and before the first section. The table of contents may be in one column or two columns.

10. For rulemaking orders that entail amendments to existing rules, you should show the deleted words ~~lined out~~ and the new words underlined with replacement words following those that have been deleted. (This convention also works well with the innumerable drafts you will be creating.)

11. A frequent issue is whether and how much of an authorizing statute's provisions and requirements should be reflected in the rules you're drafting. There are no hard and fast rules on the subject. However, you should generally seek to draft rules that ***do not*** require the reader to meld the statute and the rule. It is***your*** job to do that so the reader doesn't have to. Avoid drafting rules that reflect only part of the pertinent statutory provisions. While not all of a statute is normally appropriate for repeating or reflecting in rule, try to incorporate aspects of the statute that pertain to the subjects you are addressing in the rules.

Beyond the text of the rule itself, perhaps the most important part of rulemaking is the statement of the basis and purpose in the rule preamble. The preamble is the key document the public and the courts will use to construe the rule. A court will look first to the preamble to determine whether your agency has rationally explained the relationship between the underlying statute, the purpose of the rule, and the language of the rule itself. In the statement of basis and purpose, you must provide an adequate explanation of your reasons for adopting the rule. You must examine the relevant data and articulate an explanation of your agency's actions, including a rational connection between the facts found and the choices your agency has made.

It is important that decision-makers at the Division and Department levels are informed about the ramifications of your rule's provisions. A useful means of providing this internal audience of readers and reviewers with such requisite information is through the use of footnotes referencing provisions that are likely to be controversial or highlight changes and explain the reasons for those changes. Of course, you must be mindful in seeing that such footnotes be inserted only on internally circulated copies of your proposed rules.

2.4.5 Use of Notes

If you want to explain or illustrate a rule, cross-reference other standards, or provide a mailing address for a form, you should do it through a note after a rule. ***Notes are published with the rule but are not considered to be part of the rule.*** As you will see by perusing most chapters of rules, notes are printed in smaller type, usually right after the requirement is stated. A note can be changed simply by notifying the Rules unit which will work with the Revisor to accomplish those changes. In this manner, notes can be changed without going through the formal rulemaking process.

To the extent possible, limit your use of notes. Notes add to the bulk of rules. If your rules are clear, they shouldn't need many notes.

2.4.6 Incorporation of Standards by Reference

If you want to incorporate into the rules by reference standards that have been established by technical societies and organizations of recognized national standing without reproducing the standards in full, you must get the consent of the attorney general and the Revisor of Statutes. They will normally give their consent only if the rule is of limited public interest and the incorporated standards are readily available in published form. The analysis of the rule shall indicate that consent has been given.

If you want to incorporate standards by reference in a rule, you should notify the Rules Unit, which, in turn, will submit a written request to the attorney general and the Revisor of Statutes. You can assist the Rules Unit by providing a copy of the proposed rule, the standards in question and all of the following information:

- Whether the rule is of limited public interest. (Consider who is interested in the rule.)
- The extent of unwarranted expense, if permission to incorporate the standards by reference is not granted.
- Whether a technical society or organization of recognized national standing established the standards.
- Whether the standards are readily available in published form.

You should initiate your request early in the rulemaking process so that permission is granted prior to submitting the proposed rules to the legislature under s. 227.19, Stats. Moreover, if you need to change standards that have previously been adopted by reference (because the standards have changed), you may adopt the changed version only with the written consent of the attorney general and the Revisor of Statutes. The changes cannot be adopted prospectively or automatically.
If a standard you want to incorporate by reference contains secondary standards, i.e., standards within the broader standard you're proposing to incorporate by reference, you must expressly delete or adopt the secondary standard by rule or make a separate request for incorporation of the secondary standards by reference.

The question of incorporating by reference provisions of the United States code or federal regulations is discussed in 59 Atty. Gen. 31 and 68 Atty. Gen. 9. Factors affecting the incorporation decision are whether the federal material is substantive law, whether you are attempting to incorporate future amendments of the federal material, whether the material is of limited public interest and whether the material is readily available to the public. If you are planning to incorporate federal laws or regulations in the administrative code, you should also work with the Rules Unit who may first contact the attorney general's office for an opinion on the validity of your intended action.

2.4.7 Estimate of Fiscal Impact

You must prepare an estimate of the impact of the proposed rules on state and local government expenditures and revenues by the time the rules are ready for Departmental review. To do so, you need to complete a fiscal estimate form (DOA-2048). A copy of the form you must use is available as Appendix 3. If your rule has a fiscal effect, you also need to complete the fiscal estimate worksheet (DOA-2047). This worksheet is also available in **Appendix 3**.

To complete the worksheet, you need to *concisely* and *logically* identify the assumptions underlying your fiscal estimate in plain English. Insert your name and phone number, and insert the name of the Deputy Secretary in the authorized signature box. Leave the date box blank. Send the estimate to the Department Rules Unit for central review along with the proposed rules, the draft rulemaking order, and a sign-off cover letter from your Division Administrator. The Department Rules Unit will refer the fiscal estimate to Office of Strategic Finance (OSF) budget staff for review of its adequacy and for recommendation for signature. If you have any questions about how to complete these forms, contact your OSF Budget Section analyst.

Before drafting your rulemaking order, you should review several rulemaking orders from previously promulgated rules. (You can obtain these from the Rules Unit.) You may also benefit by reviewing your Statement of Scope Memo that was reviewed and approved by the Secretary's Office

2.4.8 The Rulemaking Order

Rules fit into a "promulgation" order which, at the end of the rulemaking process, will be signed by the Secretary. The dictionary defines "promulgation" as "the process of putting a rule into effect through a formal public announcement." The single-spaced rulemaking order itself consists of two parts; the first part *precedes* the body of the rules while the second part *follows* the body of the rules. The first part, known as a *plain language* narrative or "preamble" for the rules is one or two pages that explains what the Department is doing (through the rules), why the Department is making the changes, what the rules do and identifies the Department's statutory authority to make the rules. The second part of the rulemaking order, following the rule, simply states an effective date and contains a standard area for the secretary's signature.

2.4.9 Transmittal to the Department

When your Division Administrator approves your rules, the developmental phase of the rulemaking process ends. At this point, you should transmit two versions of the rules to the Rules Unit for Department review.

1. The first version is a "clean copy" of the proposed rules and rulemaking order, fiscal estimate and a cover memo signed by the Division Administrator to the Department Rules Unit for review. The cover memo should formally propose that the rules be promulgated by the Department and should identify you as the contact person for Department Rules Unit staff. The cover memo should also call attention to any part of the proposed rules that are likely to be controversial.

2. The second version of the proposed rules facilitates and expedites the Secretary Office's familiarization with and review of your rules by highlighting significant substantive changes in the draft. To create this version, start with your "clean copy" draft and modify it in the following manner:

   - Identify in **bold** all provisions of the rules that contain new substantive policies or changes to existing policies.
   - Create a footnote for each of those provisions that explain the significance of the new policy or policy change. The explanation should include any known or possible controversy associated with the provision. (Grammatical changes, sentence restructuring and other minor changes should not be highlighted.)

   In addition, when the Department sends rules over to the Legislative Council Rules Clearinghouse, the rules must be accompanied by copies of any **forms** that are referred to in the rules. Therefore, include 2 copies of every form referred to in the

rules you submit to the Department. The Rules Unit will keep one copy in its files and transmit one copy with the rules it submits to the Clearinghouse.

2.5 Department Review of Rules

2.5.1 Receipt by the Office of Legal Counsel

The Office of Legal Counsel (OLC) in the Department is the focal point for the Department's rule review. It takes at least 30 weeks to get permanent rules into effect from the time the Rules Unit receives them, assuming they are of moderate length (20-30 pages) and are not controversial. In recent years, rulemaking has taken as little as 18 weeks and as long as six years, depending on the rule's length, complexity, controversy and priority. As you may surmise, attorneys responsible for a variety of legal matters comprise OLC's staff. Principal among these responsibilities is advising agencies on statutory and administrative rule interpretations, representing the Department in contested cases and reviewing proposed administrative rules for acceptability. With respect to the latter responsibility, OLC has a Rules Unit and one attorney specifically responsible for reviewing proposed administrative rules. Referred to in this Guide as the "OLC Rules Attorney," the attorney's job is to review proposed DHFS administrative rules from the standpoint of legal correctness and policy ramifications. In so doing, the attorney assists the Executive Assistant to the Secretary who may or may not also review the rules, but normally does so in less depth.

The OLC Rules Unit reviews all proposed rules, all DHFS public hearing notices and all rules in final draft form. All Department rules flow through the conduit of the Rules Unit. Conceptually, the DHFS actors in rules development and promulgation have the following roles:

Rules Unit

Rules Unit staff are responsible for supporting Department rulewriters in all areas of rulemaking that Divisions are responsible for. Such support includes providing information and advice about rule construction and the rulemaking process, furnishing formats and models of rules and required documents, transmitting proposed rules to inside and outside reviewers, obtaining approvals, and filing rules. Rules Unit staff, in addition, are responsible for:

- Coordinating and leading Department-level review of draft rules.
- Performing a prestanding committee check of rules in final draft form.
- Advising the Secretary when rules are ready to be sent to the Legislative Council's Rules Clearinghouse, to be published as emergency rules or to be sent to the presiding officers of the Legislature for standing committee review.
- Handling all official transmittals in the rulemaking process.
- Publishing emergency rules.
- Serving as a clearinghouse of information about the status of proposed DHFS rules.
- Recommending approval of the form and language of such rules, including emergency rules, and the form and language of orders, notices, and the analysis for standing committees.
- Maintain and periodically revise administrative rules resources (such as this Guide) at the DHFS website.

note in the order adopting rules that the rules were adopted under the procedure of s. 227.16 (2), (b), (c), (d) or (e), Stats. (whichever are applicable).

If the Department receives a petition from one or more of the aforementioned groups within the 30 days, it cannot proceed with the proposed rule until it has given notice and held a public hearing under ss. 227.17 and 227.18, Stats.

If the Department does not receive a petition within the 30 days, it submits the proposed rule to the presiding officers of each house of the legislature under s. 227.19 (2), Stats.

Except for emergency rules, once the 30-day period has elapsed, the Rules Unit then continues with the promulgation procedure by notifying the Legislative Council staff and the presiding officers of each house of the legislature under ss. 227.15 and 227.19, Stats., respectively.

You can save 2 to 3 weeks by going this route, but if any controversy **at all** surrounds the rules, the department might be petitioned for a public hearing, in which case, the whole process could be **lengthened** by 2 to 6 weeks.

3.3.2 Scheduling hearings

With the exception of conditions described in section 3.3.1., most proposed rules will require one or more public hearings. ***You*** must decide on how many hearings you are going to hold and where you will hold the hearings. Section 227.16(1), Stats., requires that agencies hold a minimum of one public hearing. Generally, the things that are going to most influence how many hearings you hold and where you hold them will be the following:

- Whether those affected most by the proposed rules are concentrated in one area or dispersed across the state.
- The proportion of the public affected by the proposed rules.
- The anticipated importance of the proposed rules to those affected by them.

Many questions normally arise over where to hold hearings. Normally, you should try to select hearing rooms in public facilities. Before you start calling places regarding space availability, you should have an idea of the maximum number of people you anticipate attending the hearing (at each location) and the date (or possible dates) when you want to hold the hearing. Having those "ideals" in mind, you should consult the Rules Unit listing of public hearing sites in the state. **Generally, you should attempt to secure hearing space that is free before resorting to accommodations that entail costs.** Moreover, you should never commit to holding a hearing in venues that charge more than a hundred dollars or so without securing your supervisor's approval.

Whether you need to have your hearing plans approved by your supervisor depends on the discretion you have in your agency. Even though two people rarely agree on the appropriate number and location of hearings, securing approval from your immediate supervisor is a good idea.

After you have decided how many hearings to hold and generally where they should be held, you need to make specific arrangements for dates, times and locations. Note that you must select hearing sites that are accessible to physically handicapped persons. A list of public and private hearing sites is provided in Appendix 6.

Rules hearings bring those proposing the rules and parties affected by the rules together, face-to-face, in a public place. No hearing may be held until 10 days after the

date of the issue of the Wisconsin Administrative Register in which the hearing notice appears. Therefore, given the bimonthly issuance of the Register as discussed in section 1.4.1., you shouldn't schedule a hearing before the 11th of the month when the Register that announces your hearing is dated the last day of the previous month nor before the 26th of the month following the mid-month issue of the Register.

3.3.3 Hearing notice

If your agency has specific statutory authority for promulgating rules, the general authority granted in s. 227.11, Stats., should not be cited exclusively as statutory authority for your rule.

You should prepare the notice of public hearing following the model found in Appendix 7. Basically, the notice should include all of the following information:

- A statement of the time, date and place of the hearing. **Do not put an ending time for the hearing in the notice unless the hearing will take place in late afternoon or early evening.** Otherwise, you will need to remain at a hearing site for the period between the starting and ending time even when there is no reason to do so.
- Either the text of the proposed rule in the form specified in s. 227.14, Stats., or an informative summary of the effect of the proposed rule.
- An analysis of the proposed rule, including a reference to the statutory authority under which your agency proposes to adopt the rule and to any statute the rule interprets.
- A *fiscal estimate* required under s. 227.14 (4), Stats., or a summary of the fiscal estimate and a statement of the free availability of the full fiscal estimate.
- A description of how copies of the text of the rule may be obtained from your agency at no charge, if you choose to publish an informative summary of a proposed rule rather than the full text.
- Section 227.114, Stats., requires state agencies, as they make rules directly affecting small businesses, to consider giving regulatory relief to these businesses by means of appropriate modification of the rules. Section 227.114 imposes several action-forcing requirements on agencies engaged in rulemaking. They do not, however, apply in the case of rules that do not affect small businesses directly. Small businesses are defined as those that are independently owned and operated, not dominant in their fields, and have either fewer than 25 full-time employees or gross annual sales of less than $2.5 million. Consequently, the hearing notice must also contain an *initial regulatory flexibility analysis* if the proposed rule will have an effect on small businesses as defined in s. 227.114(1), Stats., or a statement indicating that the proposed rule will not have an effect on small business. The initial regulatory flexibility analysis must contain the following:

  - A description of the types of small business that will be affected by the rule.
  - A brief description of the proposed reporting, bookkeeping and other procedures required for compliance with the rule.
  - A description of the types of professional skills necessary for compliance with the rule.

Before sending a hearing notice to the Revisor of Statutes, the Rules Unit will notify the Secretary of the Department of Development and the Small Business Ombudsman Clearinghouse in the Department of Development if the proposed rule in the hearing notice affects small business as defined in s. 227.114(1), Stats. [See s. 227.114(5), Stats.]

The Rules Unit may include in the notice an address to which, and a time period within which, written material may be submitted to your agency in addition to or instead of verbal testimony at the public hearing.

Be sure to include the language on accessibility for people with disabilities and a statement inviting written comments. Single-space the notice and include an analysis of the rule using the analysis the Rules Unit approved for the rulemaking order. Specify the date, time and location information after the first paragraph in the prescribed format. With respect to specifying the time, you may either specify the starting and

ending times for the hearing or only the starting time. If you specify an ending time, you must wait and be available to accept testimony until that specified ending time. If, however, you do not specify an ending time in your hearing notice, you can conclude the hearing and leave about an hour after the last person has testified if no more persons register to testify in that hour.

The notice must be published in the Wisconsin Administrative Register ***at least 10 calendar days prior to the date set for the first public hearing***. Therefore, you should send the draft hearing notice to the Rules Unit for review and approval **at least a month prior to the date of the first hearing**. The Rules Unit will deliver the notice to the Revisor for publication in the Register. The Rules Unit must deliver the notice to the Revisor on or before the 15th of the month if it is to be published in the Register dated the last day of the same month, or on or before the first day of a month if it is to be published in the following month's mid-month issue of the Register. Notice through the Register is deemed to have been given on the first or 15th day of the month upon publication in the Register or, if applicable, on the date prescribed under s. 227.22(4), Stats.

EXAMPLES:

1. The notice is filed on or before August 1, 1995 and published in the mid-month register prior to August 15. The earliest date for the hearing would be August 25.

2. The notice is filed on or before August 15, 1995 and published in the end-of-month register prior to September 1. The earliest date for the hearing would be September 11.

The Department Rules Unit also sends a written copy of the hearing notice to every member of the Legislature who has filed a request for the notice with the Revisor of Statutes.

In addition to the main notice that appears in the Register, you should take whatever steps your agency deems necessary to convey notice to interested persons, including sending press releases to local newspapers, mailing the notice to interested parties and, perhaps, even running radio spots in the area where a hearing will be held. Exactly what you do depends on the nature of the rule and the type of interest your agency expects the rule to engender. As with the Statement of Scope, the Rules Unit will help publicize your proposed rule by posting both it and the hearing schedule on the DHFS website. Consider informing people of the rule's availability at the Department's website and offering to send a copy of it (via either U.S. mail or e-mail), upon request, to those who don't have access to the internet.

3.3.4 Preparing for hearings

Hearings are conducted by two Department representatives. You will need to select a hearing officer and a resource person for each of your hearings. These people do not need to be the same for all hearings, but they usually are. The hearing officer manages, i.e., officiates or "runs" the hearing. The resource person serves as someone who is very familiar with the rule and will be able to recognize the need to intervene in the event that persons giving testimony misstate facts regarding the rules. You also need to decide who will serve as the contact person on the rules. The contact person fields

inquiries about the rules. The contact person's role is normally played by you, the rulewriter.

You can either tape-record your hearings or have notes taken at them.

You will also need some specific supplies for each hearing. Copies of your proposed rules should be available for everyone attending a hearing. In addition, everyone attending the hearing should complete a registration slip. (The Department Rules Unit has a supply of registration slips for administrative rule hearings.) If the hearing is being held in a state office building, it is generally the practice to place a notice of the hearing on the doors to the building. (The notice should be typewritten on 8½ X 11" paper announcing the hearing, the subject of the hearing, the date, the time, and room number.) Finally, the hearing officer will need to prepare a written script for conducting the hearing. A generic script prepared by the Rules Unit is provided as Appendix 9. Anyone serving for the first time as a hearing officer should review the script for conducting hearing, altering it as appropriate to fit the circumstances of the rule and hearing situation.

3.3.5 Conducting a hearing

The statutory procedure to be followed in conducting rulemaking hearings is set forth in s. 227.18, Stats. This procedure does not supersede other statutory procedures relating to the specific agency or to the proposed rule or class of rules. The hearing officer is responsible for calling the hearing to order, making an opening statement covering the significance of administrative rules, the rulemaking process, reasons for the proposed rules, the purpose of the proposed rules, and procedures that will be followed in the hearing. As mentioned in section 3.3.4, a script that persons serving as hearing officers may modify and use for their own particular purposes is found in **Appendix 8**.

*It is **strongly recommended** that you (or someone) tape record each hearing. In addition, in the event that you receive substantial and diverse testimony, consider creating a transcript of the tapes afterwards. In any case, some documentation needs to be developed on the public's reaction to the proposed rules. You will need to draw on this documentation to draft the report to standing committees of the Legislature later in the rulemaking process.*

Following the opening remarks, the hearing officer calls on persons to testify, presides, and closes the hearing. At the outset of each hearing and again just before concluding it, the hearing officer should announce that the hearing record will remain open until a predetermined time and date certain, usually a week, after the last hearing so that interested persons can submit written comments that will receive the same consideration as testimony received at the hearing(s). For mailing list, report, and reference purposes, it is important to compile the name, mailing address, and affiliation of every person attending a hearing, *even if they are attending solely for the purposes of observation*. You can do this either by asking everyone in attendance to fill out a registration slip or by circulating a sign-up sheet. Typically, this is done by having registration slips at the entrance to the room the hearing is being held in. As discussed in section 3.3.3, you have the option of either specifying or not specifying an ending time for a hearing. When no ending time for a hearing is shown in the notice, the hearing officer and resource person are obliged to remain at the site an hour after the last person has testified. If you specify an ending time for the hearing, the hearing officer and resource person are obliged to remain at the site until the ending time.

The hearing officer may also do any of the following, as appropriate:

- Limit oral presentations (e.g., to 10 minutes or so) if the hearing would be unduly lengthened by reason of repetitious testimony;
- Question or allow others present to question persons appearing;

- Administer oaths or affirmations to any person appearing (if the truthfulness of their testimony is critical to the consideration of the proposed rule); and
- Continue or postpone the hearing, as needed, to such time and place as is determined.

In the unlikely event that a representative of your agency or a quorum of the board or commission responsible for promulgating the proposed rule is not present at the hearing, the following procedures from s. 227.18(3), Stats., apply. At the beginning of a hearing, the hearing officer should inform those present that any person who presents testimony at the hearing may present those arguments to your agency, officer, board or commission prior to adoption of the proposed rule, if, at the hearing, the person makes such a request in writing to the hearing officer. If required by your agency, those arguments should be presented to the agency in writing. If oral arguments are permitted by your agency, the agency may impose reasonable limitations on the length and number of appearances to conserve time and preclude undue repetition. If a record of the hearing is being made, then arguments before the agency can be limited to the recording of the hearing. Neither the hearing officer or the resource person needs to respond to comments offered at the hearing. Occasionally, persons giving testimony pose questions to the hearing officer or resource person in the course of their testimony. In such cases, the hearing officer should remind the person posing the question that the purpose of the hearing is not to address questions but to simply accept written and verbal testimony on the proposed rules. If, however, the resource person hears misstatements of facts from persons giving testimony, the resource person should correct those misstatements regarding the rules to prevent subsequent misunderstandings.

3.3.6 After the hearing

Following the holding of all hearings related to a particular rule and the period during which the hearing record was left open for written comments, you need to carefully appraise what was heard and learned from the hearing(s). During this time, you will probably be working closely with your supervisor and those policymakers who were instrumental in specifying the original language of the rule to determine if you want to change the language based on the testimony received.

You do not need to respond orally or in writing to those offering comments on the rules regarding those comments.

This will likely, although not necessarily, lead to an amended draft of the proposed rules in preparation for the next stage of rules review.

If you revise the rules so significantly that your original hearing notice no longer fairly apprises the public of the issues involved in the rulemaking or of the substance of the proposed rule, you should consider holding another hearing. In other words, you need to ask if you have you so dramatically departed on one or more substantively important issues that affected persons should be given another opportunity for comment.

Assuming your rule draft has not changed to such an extent that additional hearings are required, your next task is to prepare a report to the Legislature that, among other things, summarizes the public hearings and how the hearings influenced the composition of the proposed rules.

3.4 Legislative Committee Review

3.4.1 Preparing a Report to the Legislature

After public hearing or, when there is no hearing, after the 30-day period following publication of the notice of rulemaking, you need to get your proposed rules into "final draft form" and prepare a report, incorporating the rules, for consideration by the two pertinent standing committees of the Legislature.

Legislative committee review of proposed rules is the fourth and last stage of rules review. Your report to the Legislature should consist of the following:

- The proposed rules (as amended after the hearings) and rulemaking order.
- An analysis for legislative committees, including:
  - A plain language explanation of the need for the rules and their reasonableness (you can use the analysis part of the order for this).
  - Responses to Clearinghouse recommendations. (Either state that you accept all of their recommendations or, if you don't accept all of them, give your reason for not accepting each recommendation that you don't accept. The Rules Unit will provide guidance on these recommendations.)
  - A list of persons who appeared or registered for or against the proposed rules at the public hearing or hearings (name, affiliation, city).
  - A summary of public hearing comments on the proposed rules.
  - A summary of modifications you've made in the proposed rules in response to testimony received at the public hearing or hearings.
  - Copies of or references to related forms described in the rules.
  - A fiscal estimate of the cost of the rule
  - A final regulatory flexibility analysis related to small businesses.

With respect to that last item, the *Final Regulatory Flexibility Analysis Related to Small Businesses*, you should include one or more paragraphs at the end of the report, unless you determine after consulting with the Rules Unit that the proposed rules will not have a significant economic impact on a substantial number of small businesses (s. 227.19(3m), Stats.). If a final regulatory flexibility analysis is required, it should contain as much information about the following as can feasibly be obtained and analyzed with existing staff and resources (s. 227.19(3)(e), Stats.):

- Reasons for including or failing to include in the rules any of the 5 methods for reducing the impact of the rules on small businesses.
- A summary of issues raised by small businesses during the public hearings on the proposed rules, any changes made in the rules as a result of alternatives suggested by small businesses, and reasons for rejecting any suggested alternative.
- The nature of any reports required by the rules and the cost to small businesses of their preparation.
- The nature and estimated costs of other measures and investments the rules will require small businesses to make.
- Any additional cost to the agency of administering or enforcing the rules which include any of the 5 methods for reducing the impact of the rules on small businesses.

- Any impact on public health, safety or welfare caused by including in the rules any of the 5 methods for giving regulatory relief to small businesses.

An example of the report is included as Appendix 9.

3.4.2 Transmittal of Report to the Legislature

The report the Department sends to the Legislature is important because it summarizes constituents' feelings about your proposed rules and identifies the extent that the Department has modified the rules based on those comments. By doing so, it provides the legislature an indication of how responsive the Department has been to constituents' concerns. Given the significance of this report, before sending it on to the Rules Unit, you should review its contents with your Division Administrator or the Administrator's designee. Following approval by your Division Administrator, you should submit a copy of the report, including two versions of the rules in final draft form, to the Rules Unit. The rationale for preparing two versions is to facilitate and expedite the Secretary Office's review.

Version #1: A "clean copy" similar to what is contained in Appendix 9.

Version #2: Based on the "clean" version #1 copy, indicate via ~~strikeouts~~ and underlines what provisions have been struck or added to the rule based on the comments received from the Legislative Clearinghouse or the public hearings. Explain in footnotes those substantive policy changes that have been made and identify if such changes are controversial.

The Rules Unit will perform a pre-standing committee check of the report for the accuracy of the rules and will note changes in the rules from the earlier draft in response to Clearinghouse recommendations, public hearings, and for other reasons. The Rules Unit may subsequently ask you to make corrections and improvements in the documents. The Rules Unit will report to the Secretary on the readiness of the rules for transmittal to the standing committees. Once the Secretary has decided that the rules can be sent to the standing committees, the Rules Unit prepares a cover letter addressed to the President of the Senate and the Speaker of the Assembly, officially notifying them that the Department's rules are in final draft form. Rules Unit staff insert the notice and copies of the report, including the rules, into Clearinghouse file folders (jackets) and deliver one folder (jacket) to the President of the Senate and the other to the Speaker of the Assembly by way of the chief clerk's office in each house.

The Rules Unit places a notice in the Wisconsin Administrative Register stating that a proposed rule has been submitted to the presiding officer of each house of the Legislature. The notice includes the clearinghouse number, introductory clause, date of submittal to presiding officers and, if known, the committees to which the rule is assigned.

The presiding officers of the Senate and the Assembly have seven working days from their receipt of the notice and report to forward these to an appropriate committee. Most of the time, the reports go to the *Health, Utilities, Veterans and Military Affairs Committee* in the Senate and the *Health Committee* or the *Children and Families Committee* in the Assembly. Since committees do not accept proposed rules for review from November 1 in even-numbered (election) years to the first day of the new session

the next January, in even-numbered years, the Rules Unit will hold proposed rules ready for this stage of review until expiration of this 10-11 week *no-review* period.

When the Rules Unit has delivered the report, including the rules in final draft form, to the Legislature, your Division should send a copy of the report to everyone who testified at a public hearing on the rules.

3.4.3 Review by Standing Committees of the Legislature

The two legislative standing committees have 30 days for review after the Rules Unit refers the rules to them. If both committees take no action by the end of that period, the Department can file the rules. This is the outcome of legislative review for about 60% of DHFS-proposed rules. Although it is more common that committees take no action on proposed rules within the 30-day review period, either committee may do so. Knowing this, affected interests dissatisfied with the rules that have emerged from the Department in final draft form can seize a second opportunity to state their case by approaching a committee member or contacting one of the chairpersons. An individual legislator with a particular interest in a program may do the same. Either one of the committee chairpersons might then ask the Department to send representatives to meet with the committee to answer questions about the proposed rules or post notice that the committee will hold a public hearing on the rules. A committee may object to a proposed rule, or part of a proposed rule, ***only*** for one or more of the following reasons:

- The rule does not have adequate statutory authority.
- The rule inadequately responds to an emergency related to public health or welfare.
- The rule fails to comply with legislative intent.
- The rule conflicts with existing state law.
- There has been a change in circumstances since passage of the law that authorized the rule.
- The rule is arbitrary or capricious or imposes an undue hardship on affected parties.

If a committee decides to meet with the Department or hold a hearing to consider and perhaps mediate the dispute between aggrieved interests and the Department, it will notify the DHFS Secretary of the meeting or hearing before expiration of the 30-day review period. Whenever this happens, the committee's review period is extended by 30 days from the date of notification. The DHFS Legislative Liaison will arrange for Department representation and substantively review the representative's testimony. If, following the meeting or hearing, the committee, by majority vote of a quorum of the committee, recommends modifications in a proposed rule (and DHFS, in writing, agrees to make modifications), the review period for both committees is extended to the later of:

a) The 10th working day following receipt by the committees of the modified proposed rule; or
b) The expiration of the initial or extended committee review period.

There is no limit on the number of times that modifications may be sought, prior to the conclusion of the committee review period. The committee also has the authority to terminate the balance of the review period.

Within that 10 working day or original review period, either standing committee may do any of the following:

- Ask the Department for further modifications in the rules, which extends the review period once again to 10 working days after receipt of the modifications or after the Department's response if the Department did not make the requested modifications.
- Do nothing, in which case, the Department is free to file the rules.
- Formally object to the proposed rules, in which case, the rules or the objectionable parts are referred to the Joint Committee for Review of Administrative Rules (JCRAR) for a review lasting 30 more days from the date of referral.

If only a portion of a proposed rule receives an objection, the Department may continue promulgating the portion of the rule that receives no objection.

3.4.4 Review by the Joint Committee for the Review of Administrative Rules

The Joint Committee for Review of Administrative Rules consists of 5 senators and 5 representatives, and the membership from each house must include representatives of both the majority and minority parties. The Joint Committee's involvement with rules is far-reaching and can occur in three situations:

JCRAR can:

1. Suspend or order the promulgation of emergency rules.
2. Review proposed rules when standing committees object to them.
3. Suspend rules that have already been promulgated by the Department.

Situation #1: If JCRAR determines that a Department agency's statement of policy or interpretation of a statute (e.g., an agency policy memorandum) is in fact a rule, it may direct the Department to promulgate the statement or interpretation as an emergency rule within 30 days of JCRAR's action. In addition, JCRAR can order the Department to suspend an emergency rule that's currently in effect. For more information on this, see chapter 4 on "*emergency rules*."

Situation #2: When either or both of the standing committees objects to a proposed rule or portion of a rule, the rules must be referred to JCRAR. JCRAR then has 30 days to review the rule, but that review period may be extended for an additional 30 days (or more, if modifications are agreed to.) JCRAR may either uphold (concur) with the standing committee's action, reverse the standing committee's objection or seek rule modifications from the Department. JCRAR's meeting ordinarily takes the form of a legislative public hearing after which it goes into executive (closed door) session. If JCRAR also objects to the rules or a part of them, JCRAR must within still another 30 days introduce bills supporting that objection before both houses of the Legislature for consideration at the next regular session, and the Department may not promulgate the rules until and unless that bill fails to be enacted in the next regular session. If either bill is enacted, DHFS may not adopt the rule unless specifically authorized to do so by subsequent legislative action.