



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**January 2011 Special Session  
Senate Bill 8**

**Senate Substitute Amendment 1  
and Senate Amendment 1 to the  
Substitute Amendment**

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January 2011 Special Session Senate Bill 8 makes a number of changes to the current administrative rule promulgation process. This memo describes the provisions of Senate Substitute Amendment 1 and Senate Amendment 1 to the substitute amendment.

### **SENATE SUBSTITUTE AMENDMENT 1**

#### **Agency Authority to Promulgate Rules and Implement Standards**

Senate Substitute Amendment 1 (hereafter, “the substitute amendment”) provides that all of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

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

The substitute amendment further provides that an agency cannot implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless the implementation or enforcement is expressly required or permitted by statute or by a rule that has been promulgated in accordance with statutory rule-making procedures. The Governor may, by executive order, prescribe standards to ensure that rules are promulgated in compliance with subch. II of ch. 227, Stats.

### **Gubernatorial Approval of Statements of Scope**

The substitute amendment requires a state agency to submit a statement of scope (“scope statement”) of a proposed rule to the Governor and to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. The agency may not send the scope statement to the Legislative Reference Bureau (LRB) for publication until the Governor approves the scope statement in writing. A state employee or official may not perform any activity in connection with drafting a rule, except as necessary to prepare the scope statement, until the Governor and the individual or policy-making body approve the scope statement.

If the agency modifies the scope of the proposed rule in any meaningful or measurable way, it must prepare and obtain approval of a revised scope statement in the same manner as the original statement was prepared and approved. No state employee or official may perform any activity in connection with drafting the rule, except as necessary to prepare the revised scope statement, until that statement is approved.

### **Gubernatorial Approval of Final Draft Rules**

The substitute amendment requires a state agency to submit a final draft rule to the Governor for approval. The Governor may approve or reject the proposed rule, and, if the Governor approves a proposed rule, he or she must provide the agency with a written notice of that approval. A proposed rule may not be submitted to the Legislature for review unless the Governor has approved the proposed rule in writing.

### **Economic Impact Analyses**

The substitute amendment requires a state agency to prepare an economic impact analysis for a proposed rule before submitting the rule to the Legislative Council staff for review. The analysis must contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state’s economy as a whole. When preparing the analysis, the agency must solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule.

The agency must prepare the analysis in coordination with local governmental units that may be affected by the proposed rule. The agency may request information that is reasonably necessary for the preparation of an economic impact analysis from other businesses, associations, local governmental units, and individuals and from other agencies. The economic impact analysis must include all of the following:

- An analysis and quantification of the policy problem that the proposed rule is intending to address, including comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and, if the approach chosen by the agency to address that policy problem is different from those approaches, a statement as to why the agency chose a different approach.
- An analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the proposed rule.
- An analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address.
- An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.
- A determination made in consultation with the businesses, local governmental units, and individuals that may be affected by the proposed rule as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state.

The substitute amendment requires that an agency submit the economic impact analysis to the Legislative Council staff, the Department of Administration (DOA), the Governor, and the Chief Clerk of each house of the Legislature for distribution to the presiding officers of each house, the chairs of the appropriate standing committees in each house, and the co-chairs of the Joint Committee for Review of Administrative Rules (JCRAR).

Further, the substitute amendment requires that if a proposed rule is modified after the economic impact analysis is submitted so that the economic impact of the proposed rule is significantly changed, the agency must prepare a revised economic impact analysis for the modified proposed rule. A revised economic impact analysis must be prepared and submitted in the same manner as the original economic impact analysis is prepared and submitted.

If an economic impact analysis regarding a proposed rule indicates that a total of \$20 million or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals as a result of the proposed rule, DOA must review the proposed rule and issue a report. The agency may not submit a proposed rule to the Legislature for review until the agency receives a copy of DOA's report and the approval of the DOA Secretary. The report must include all of the following findings:

- That the economic impact analysis is supported by related documentation contained or referenced in the economic impact analysis.
- That the agency has statutory authority to promulgate the proposed rule.

- That the proposed rule, including any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations.
- That the agency has adequately documented the factual data and analytical methodologies that the agency used in support of the proposed rule and the related findings that support the regulatory approach that the agency chose for the proposed rule.

The substitute amendment requires that the Legislative Council staff include, or provide a link to, the economic impact analysis on its administrative rules Internet site. A notice of a hearing on a proposed rule must include the economic impact analysis and any report prepared by DOA, or a summary of that analysis and report and a description of how a copy of the full analysis and report may be obtained from the agency at no charge.

Lastly, the substitute amendment repeals a provision of current law that exempts agencies from the requirement to prepare economic impact reports on emergency rules. By this repeal, the substitute amendment could be interpreted to require that agencies prepare economic impact analyses for emergency rules.

### **Emergency Rules**

The substitute amendment requires a state agency to prepare a scope statement of a proposed emergency rule and obtain approval of the statement by the Governor as well as the individual or body with policy-making powers over the subject matter of the emergency rule. If the agency changes the scope of a proposed emergency rule, the agency must prepare and obtain approval of a revised scope statement.

The substitute amendment further requires an agency to submit a proposed emergency rule in final draft form to the Governor for approval. The Governor may approve or reject the proposed emergency rule. If the Governor approves a proposed emergency rule, the Governor must provide the agency with a written notice of that approval. An agency may not file an emergency rule for publication until the Governor approves the emergency rule in writing.

### **Treatment of Proposed Rules Submitted to the Legislature Late in Biennial Session**

Under the substitute amendment, if an agency submits a rule to the Legislature on or after the last day of the Legislature's final general-business floorperiod in the biennial session, the Legislature has two options: (a) it can do nothing, in which case the rule is treated as if it were submitted on the first day of the next regular session of the Legislature; or (b) the presiding officers of each house may refer the rule to a standing committee for review at any time before the end of the biennial session. If the presiding officers refer the rule to standing committees for review before the end of the biennial session, the standing committees may retain jurisdiction over the rule until the end of the biennial session.

### **Referral of All Proposed Rules to JCRAR**

The substitute amendment requires that all proposed rules be referred to JCRAR. If a standing committee objects to a rule or part of a rule, JCRAR must meet to take executive action with respect to the standing committee's objection. An agency may not proceed with promulgation of any rule until

JCRAR has concluded its review. It is unclear whether the substitute amendment grants JCRAR the authority to take no action (that is, exercise “passive review”) with respect to rules to which no standing committee has objected.

Under the substitute amendment, as under current law, JCRAR generally retains jurisdiction over a rule for 30 days, but may extend that jurisdiction in several ways.

In the case of a rule that was submitted to the Legislature on or after the last day of the Legislature’s final general-business floorperiod in the biennial session, JCRAR may retain jurisdiction until the end of the biennial session and may take executive action on the rule during that time. However, JCRAR is not required to meet to take action on the rule during that time, even if a standing committee has objected to the rule or part of the rule.

Lastly, the substitute amendment prohibits an agency from promulgating a proposed rule or a part of a proposed rule until JCRAR nonconcur in the objection of a committee, concurs in the approval of the committee, otherwise approves the proposed rule or part of the proposed rule, or waives its jurisdiction over the proposed rule or part of the proposed rule, or until a bill introduced to prevent promulgation of the proposed rule fails to be enacted.

#### **Venue for Challenging Validity of Administrative Rules**

Under the substitute amendment, all actions challenging the validity of an administrative rule (called a declaratory judgment proceeding) must be brought in the circuit court in the county where the party asserting the invalidity of a rule resides or has its principal place of business in the state [rather than in Dane County Circuit Court, as provided under current law]. However, under the substitute amendment, if the party is a nonresident or does not have its principal place of business in this state, venue is in Dane County Circuit Court.

#### **Venue for Other Civil Actions Against the State**

The substitute amendment provides that for all other civil actions in which the sole defendant is the state, a state board or commission, or a state officer, employee, or agent in an official capacity, venue is in the county where the plaintiff resides unless another venue is specifically authorized by law. If the plaintiff is a nonresident or is not a natural person, venue is in the county where the dispute arose.

#### **SENATE AMENDMENT 1 TO SENATE SUBSTITUTE AMENDMENT 1**

*Senate Amendment 1 to Senate Substitute Amendment 1* makes the following changes to the substitute amendment:

1. Modifies provisions relating to agency authority to promulgate rules.

SECTION 1 of the *substitute amendment* provides that:

No agency may implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless such implementation and enforcement is expressly required or permitted by statute or by a rule that has been promulgated in accordance with this

subchapter. The governor, by executive order, may prescribe standards to ensure that rules are promulgated in compliance with this subchapter.

**Senate Amendment 1** replaces the above provision with the following:

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

SECTION 3 of the **substitute amendment** limits an agency's rulemaking authority to that which is expressly conferred on the agency by the Legislature. **Senate Amendment 1** changes "expressly" to "explicitly" in these provisions.

2. Clarifies that economic impact analyses are *not* required for emergency rules.

Under current law, five state agencies are required to submit economic impact reports on proposed administrative rules under certain circumstances. Current law specifies that emergency rules are *not* subject to this requirement.

As described above, the **substitute amendment** makes numerous changes to the economic impact report requirements and repeals the provision of current law that exempts emergency rules from these requirements.

**Senate Amendment 1** restores the exemption for emergency rules, so that under the amendment, agencies are *not* required to prepare economic impact analyses for emergency rules.

3. Requires Internet posting of revised economic impact analyses.

The **substitute amendment** requires the Legislative Council staff to post or provide a link to any economic impact analysis of a proposed rule submitted by a state agency.

**Senate Amendment 1** specifies that the Legislative Council staff must also post or provide a link to any *revised* economic impact analyses submitted by state agencies.

4. Requires revised economic impact analyses to be included as part of the report provided to the Chief Clerks of each house of the Legislature when a proposed rule is in final draft form.

The **substitute amendment** requires that when an agency submits a final draft rule to the Legislature, it must be accompanied by a report that includes, among other items, a copy of the economic impact analysis prepared by the agency.

**Senate Amendment 1** specifies that the agency must also include in the report a *revised* economic impact analysis, if one has been prepared.

5. Clarifies that JCRAR has passive review authority over rules that were not objected to by a standing committee.

Under the *substitute amendment*, all rules are referred to JCRAR, even those that were not objected to by a standing committee. It is unclear whether the substitute amendment grants JCRAR passive review authority with respect to rules to which no standing committee has objected.

*Senate Amendment 1* clarifies that JCRAR does have passive review authority with respect to those rules.

6. Modifies provisions regarding venue for administrative rule declaratory judgment proceedings.

Under the *substitute amendment*, if a party challenging the validity of an administrative rule is a nonresident or does not have its principal place of business in the state, the declaratory judgment proceeding must be brought in Dane County Circuit Court.

*Senate Amendment 1* instead provides that if the party is a nonresident or does not have its principal place of business in the state, the declaratory judgment proceeding must be brought in the county where the dispute arose.

7. Modifies provisions regarding venue in other civil actions against the state.

Under the *substitute amendment*, venue for all civil actions in which the sole defendant is the state, a state board or commission or a state officer, employee, or agent in an official capacity is in the county where the plaintiff resides unless another venue is specifically authorized by law. If the plaintiff is a nonresident or is not a natural person, the action must be venued in the county where the dispute arose.

*Senate Amendment 1* restores current law to provide that all these actions shall be venued in Dane County unless another venue is specifically authorized by law, except that venue for proceedings challenging the validity of administrative rules is as described under item 6., above.

8. Requires insertion of notations in the Wisconsin Administrative Code and the Wisconsin Administrative Register when a circuit court issues a declaratory judgment as to the validity of a rule.

Under the *substitute amendment*, venue for judicial review of the validity of a rule will no longer be solely in Dane County. As a result, there could be conflicting decisions in various circuit courts as to the validity or invalidity of a particular rule.

*Senate Amendment 1* requires that when a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. In turn, the LRB must publish a notice of that determination in the Wisconsin Administrative Register and insert an annotation of that determination in the Wisconsin Administrative Code.

**Legislative History**

Senate Substitute Amendment 1 was introduced by Senator Hopper on January 28, 2011. On February 8, 2011, the Senate Committee on Economic Development and Veterans and Military Affairs introduced and adopted Senate Amendment 1 to Senate Substitute Amendment 1 on a vote of Ayes, 5; Noes, 2. The committee then adopted Senate Substitute Amendment 1, as amended, on a vote of Ayes, 5; Noes, 2. The committee then recommended passage of the bill, as amended, on a vote of Ayes, 4; Noes, 3.

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