



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 08-107

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

2. Form, Style and Placement in Administrative Code

a. In the comparison of similar rules in adjacent states, the rule preface should note whether the adjacent states have adopted a substantially similar rule. If not, the rule preface should note the substantive differences between Clearinghouse Rule 08-107 and the rules in the adjacent states.

b. The titles to all of the subsections in s. Ins 2.07 are shown incorrectly, namely, subsections (1) to (9) are shown in bold text and subsection (10) is shown in lowercase letters. Subsection titles should instead be written in solid capital letters. [See s. 1.05 (2) (c), Manual.]

c. Section Ins 2.07 (1) (intro.) and many other provisions in s. Ins 2.07 refer to “this regulation.” Such a reference is vague. All such references should be changed to refer to the specific applicable provision. For example, s. Ins 2.07 (1) (intro.) should be changed to refer to “this section.” [See s. 1.07 (1) (a), Manual.]

A similar comment applies to s. Ins 2.07 (1) (b), (2) (intro.) and (i), (5) (a), (f), and (g), (6) (a) 1., and (9) (a), (b), and (c). The entire rule should be reviewed for this problem.

Section Ins 2.07 (10) refers to “this rule.” Again, such a reference is vague and should be replaced by a reference to the applicable provision, that is, “this section.” (But see the comment below regarding whether s. Ins 2.07 (10) should be retained.)

Similarly, should the phrase “This section” be replaced by the phrase “This paragraph”?

d. Several provisions in s. Ins 2.07 include an introductory phrase that does not adequately explain the relationship of the following subunits. For example, s. Ins 2.07 (5) (intro.) specifies that “Each insurer shall.” It is not clearly stated whether all of the following paragraphs (each of which ends in a period) apply, although that appears to be the intent. In contrast, s. Ins 2.07 (8) (b) 1. and 2. uses a conjunction (“and”) between the provisions to make the relationship clear. Neither of these drafting approaches is recommended.

In general, introductory material usually should contain words like “all of the following” or “any of the following” to make the relationship of the subunits clear. [See s. 1.03 (2) (h), Manual.] Each of the subunits can then be followed by a period. This comment also applies to s. Ins 2.07 (1) (intro.), (2) (intro.), (5) (intro.), (6) (a) (intro.) and (c) (intro.), and (8) (b) (intro.). The entire rule should be reviewed for this problem.

e. The format for cross-references to other rule provisions is sometimes incorrect. For example: in s. Ins 2.07 (2) (b), the reference to “subsection (8)” should be changed to “sub. (8)”; in s. Ins 2.07 (2) (k), the reference to “subsections (6) (a) 2. and (7) (b)” should be changed to “subs. (6) (a) 2. and (7) (b)”; the references in s. Ins 2.07 (5) (e) and (f) to “subsection (4) (e)” should be changed to “sub. (4) (e)”; and the references in s. Ins 2.07 (4) (b) to “paragraph (a)” should be changed to “par. (a).” A similar problem exists in s. Ins 2.07 (6) (a) 3. and (c) 1. and 2., and (8) (b) 2. [See s. 1.07 (2), Manual.] The entire rule should be reviewed for this problem. Also, in s. Ins 2.07 (8) (b) 2., the reference to “subsections (6) (a) 3., (6) (a) 4., and (6) (b)” should be changed to “sub. (6) (a) 3. and 4. and (b).”

f. Except for citations to the Internal Revenue Code, citations to federal law should be to the U.S. Code reference. The popular name of an act may be included in a note. [See s. 1.07 (3) (a), Manual.] Thus, in s. Ins 2.07 (2) (f), the references to the “Employee Retirement and Income Security Act” and its acronym ERISA should be replaced by the U.S. Code citation, with reference to ERISA in a note. (Also, the common name for ERISA does not include “and.”) A similar comment applies to s. Ins 2.07 (3) (i), which refers to the “Securities Act of 1933.”

g. In s. Ins 2.07 (3), an introductory clause should be added specifying that “In this section.” [See s. 1.01 (7) (a), Manual.] Otherwise, it is unclear to which provisions the definitions in s. Ins 2.07 (3) apply. This is especially the case since the definitions in s. Ins 2.07 (3) (f) and (g), respectively, specify that the definition is “for the purposes of this section” and “for the purpose of this section.” Presumably, all of the definitions apply throughout s. Ins 2.07. Thus, it creates confusion if only two of the definitions specify that they apply throughout the section. (If introductory language is included by creating s. Ins 2.07 (3) (intro.), then the phrases “for the purposes of this section” and “for the purpose of this section” should be deleted from s. Ins 2.07 (3) (f) and (g), respectively.)

h. In s. Ins 2.07 (3) (c), the phrase “individual life insurance policy (policy) or annuity contract (contract)” should be changed. First, parentheses should be avoided. [See s. 1.01 (6), Manual.] Second, use of a parenthetical term is not the correct drafting procedure in administrative rules to denote how a term will be used. Rather, a definition should be supplied if a term is to be used repeatedly. [See s. 1.01 (7), Manual.]

i. In s. Ins 2.07 (3) (f), “e.g.” should be replaced by “for example.” [See s. 1.01 (8), Manual.]

j. In general, substantive requirements should not be included in definitions. [See s. 1.01 (7) (b), Manual.] This comment applies especially to s. Ins 2.07 (3) (f).

k. Definitions must be arranged alphabetically. [See s. 1.01 (7) (a), Manual.] The definition of “replacing insurer” in s. Ins 2.07 (3) (h) is out of order.

l. In general, the word “such” should not be used in place of an article. Thus, in s. Ins 2.07 (6) (a) 4., the reference to “such notice” should be changed to “this notice.” [See s. 1.01 (9) (c), Manual.] Also, the provision would be more readable if the semicolon preceding “such notice” were changed to a period and the provision about the notice were changed to a separate sentence.

m. In s. Ins 2.07 (5) (e), the phrase “each insurer shall be able to” should be deleted in order to make this paragraph structurally consistent with the remaining paragraphs in the subsection.

n. In s. Ins 2.07 (7) (a), “Insurance Department” should not be capitalized. [See s. 1.01 (4), Manual.] (Also, compare the reference to insurance department in s. Ins 2.07 (6) (a) 3.)

o. Section Ins 2.07 (10) includes an “effective date” provision stating that “this rule” (presumably intending to refer to “this section”) applies to all solicitations that commence on or after March 1, 2009. First, this is an initial applicability provision, not an effective date provision. Second, it should be drafted as first applying to solicitations that commence on March 1, 2009, not as applying to solicitations that commence “on or after” March 1, 2009. [See s. 1.02 (3m), Manual.] Third, an initial applicability provision is typically drafted after the text of a rule, not as part of the rule [see s. 1.02 (3m), Manual], and such a provision is included in SECTION 2 of the rule. It should not be included in both places. Fourth, given that the public hearing on the rule is not scheduled until January 29, 2009, the rule will not be submitted to the 2009-10 Legislature until after that date, and the rule cannot be promulgated until after jurisdiction for legislative committees expire. Thus, it will be almost impossible to have a permanent rule go into effect before March 1, 2009. Moreover, materials will have to be produced that comply with the new rule after it becomes effective, and producers will have to be trained about the new rule. Given these factors, a March 1, 2009 initial applicability date does not appear to be feasible and likely will predate the effective date of the rule. Has consideration been given to having an initial applicability date linked to the effective date of the rule or to the first day of the ___th month that begins after the effective date of the rule?

p. In SECTIONS 2 and 4, the initial applicability provision and effective date provisions refer to “These changes.” They should instead refer to “This rule.” [See s. 1.02 (3m) and (4), Manual.]

3. Conflict With or Duplication of Existing Rules

a. Section Ins 6.80 (2) (b) 2. currently refers to s. Ins 2.07 (5) (a) 2. d. and (b) 2. b. Since s. Ins 2.07 is repealed and recreated, these citations are not correct (for that matter, they are not correct under current law either). Section Ins 6.80 (2) (b) 2. should be amended or repealed to be consistent with the repealed and recreated s. Ins 2.07. [See s. 1.07 (1) (c), Manual.]

b. Section Ins 6.61 (10) requires each intermediary to maintain records for a three-year period indicating that the necessary suitability inquiry and replacement procedures required by s. Ins 2.07 (and other provisions in the administrative code) were followed for, in pertinent part, each individually issued life policy written or replaced, or both.

Section Ins 2.07 (6) (a) 3. and (c) 2., respectively, require the replacing insurer that uses a producer to retain certain records about notices for at least five years or until the next regular examination, if later, and to retain sales material under certain circumstances for at least five years after the termination or expiration of a policy or contract. Also, s. Ins 2.07 (5) (e) requires that the producer's and applicant's signed statements about financing and replacement be retained for at least five years after the termination or expiration of the proposed policy or annuity contract.

While these provisions are not inconsistent inasmuch as they apply to different entities, is the intent that both the intermediary and insurer are retaining these records for a different length of time?

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. Ins 2.07 (2) (f), the reference to "Section 414" should be changed to "Section 414 of the Internal Revenue Code."

b. Section Ins 2.07 (4) (b) and (5) (d) requires the use of the notice in Appendix I. Section Ins 2.07 (6) (a) 4. refers to the notice in Appendix I or III. Section Ins 2.07 (8) (b) 1., which relates to direct-response solicitations, refers to the notice in Appendix III.

Producers are involved in s. Ins 2.07 (4), (5), and (6). Is s. Ins 2.07 (6) (a) 4. correct in referring to both Appendix I and Appendix III?

If so, is s. Ins 2.07 (4) (b) and (5) (d) correct in referring only to Appendix I?

If not, and if Appendix III is to be used with direct-response solicitations where there is no producer, it is unclear why Appendix III refers in at least three places to the person's agent. (While some of these could be interpreted as the person's agent on the existing policy, some appear to be referring to an agent who is soliciting the sale, for example, suggesting that a list of items (including about the proposed new policy) be discussed with "your agent.")

In summary, s. Ins 2.07 should be clearer about when Appendix I is used versus Appendix III.

c. In the third sentence of s. Ins 2.07 (8) (b) 1., it appears that the reference to the notice referred to in “this paragraph” should be changed to “this subdivision.” [See s. 1.07 (2), Manual.] Also, in the last sentence of s. Ins 2.07 (8) (b) 1., it appears that the reference to the notice referred to in “this section” should be changed to “this subdivision” (otherwise, it is unclear which notice is being referred to as there is more than one notice mentioned in s. Ins 2.07).

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section Ins 2.07 (2) is unclear as to what s. Ins 2.07 applies to. The first sentence of s. Ins 2.07 (2) (intro.) indicates that the section applies to the solicitation of life insurance and annuities authorized by s. Ins 6.75 (1) (a) and (b). Those provisions are broadly worded. The second sentence of s. Ins 2.07 (2) (intro.) indicates that “this regulation” (presumably, it was intended to refer to “this section”) does not apply to transactions involving certain types of insurance listed in the subsequent paragraphs, “unless otherwise specifically included.” One possible reading is that certain types of insurance were “included” in the first sentence of s. Ins 2.07 (2) (intro.). (For example, credit life insurance is included in the first sentence by reference to s. Ins 6.75 (1) (a); which specifically refers to credit life insurance; however, credit life insurance is excluded in s. Ins 2.07 (2) (a).) This leads to confusion.

It appears that this ambiguity could be resolved by combining the first two sentences of s. Ins 2.07 (2) (intro.) or by qualifying the first sentence to also refer to the exceptions.

b. Section Ins 2.07 (2) is particularly unclear as to which provisions in s. Ins 2.07 apply to group life insurance and group annuities that are marketed through direct-response solicitation of individuals. It appears that such solicitations are subject to s. Ins 2.07 according to the first sentence of s. Ins 2.07 (2) (intro.), plus the fact that no exception for direct-response solicitation of such products is included in s. Ins 2.07 (2) (a) to (k). However, the statement in the last sentence of s. Ins 2.07 (2) (b) indicates that direct-response solicitation of such products is subject to s. Ins 2.07 (8). This implies, but does not state, that direct-response solicitation of such products is not subject to other provisions in s. Ins 2.07. If that is the intent, the exception should be specifically stated. If that is not the intent, it is confusing to single out sub. (8) if other provisions of s. Ins 2.07 also apply.

c. Section Ins 2.07 (3) (a) defines “direct-response solicitation.” However, when that term is used in s. Ins 2.07 (2) (b) and (8), the phrase “direct response solicitation” is not hyphenated. A consistent approach should be used.

d. In s. Ins 2.07 (3) (a), it appears that “mails” should be changed to “mail.”

e. Section Ins 2.07 (3) (g) defines “producer.” However, several provisions, including s. Ins 2.07 (2) (b) and (f), do not use the defined term but, rather, use the term “insurance producer.” The defined term should be used consistently unless a different meaning is intended.

f. Section Ins 2.07 (2) (intro.) indicates that s. Ins 2.07 applies to the solicitation of certain life insurance and annuities “issued by insurance corporations, fraternal benefit societies, or the State Life Insurance Fund.” Section Ins 2.07 does not define a term that generically refers to all of these entities. Rather, s. Ins 2.07 uses an inconsistent approach, sometimes referring to “company” (for example, s. Ins 2.07 (2) (e), (3) (d) and (k), (4) (e), (5) (a), (6) (a) 3. and (c) (intro.), 1., and 2., and (9) (a) and Appendices I and III); “insurance company” (for example, in s. Ins 2.07 (3) (b) and (h)); or “insurer” (for example, in s. Ins 2.07 (1) (a), (3) (b) and (j), (5) (intro.) and (e), (6) , (7) (intro.), (8) (b), and (9) (c)).

This inconsistent terminology creates ambiguity, especially since it is not clear that either the State Life Insurance Fund or a fraternal benefit society would be considered either a “company” or “insurance company.” Consistent terminology should be used to avoid ambiguity.

g. In s. Ins 2.07 (2) (h), the reference to a “policy that will expire in 5 years or less” is unclear. It is not clear if the 5 years is measured from when the policy was issued or measured from the date of the solicitation.

h. The first part of the first sentence in s. Ins 2.07 (4) (c) requires that the notice list all life insurance policies and annuities “proposed to be replaced.” The last part of the first sentence refers not only to policies and contracts that will be replaced, but also to “a policy that will be used as a source of financing for the new policy or contract.” “Replacement,” as defined in s. Ins 2.07 (2) (j), includes a financed purchase.

To be consistent, it appears that the reference to a policy’s being used as a source of funding should also be included in the first part of the first sentence in s. Ins 2.07 (4) (c) or else deleted in the second part of the first sentence (on the basis that replacement includes a financed purchase).

On the other hand, given that the definition of “replacement” includes reference to a policy or contract being used in a financed purchase, it may be more appropriate to delete the reference to using the policy as a source of funding in the last part of the first sentence. In any event, a consistent approach with respect to exclusion or inclusion should be used.

Also, if the reference to use as a source of funding is retained, should these provisions also include reference to an annuity contract that will be used as a source of funding, as well as to a policy that is used for that purpose?

i. In the first sentence of s. Ins 2.07 (4) (c), the semicolon should be deleted.

j. In s. Ins 2.07 (4) (e), the clause “Except as provided in sub. (6) (c)” should be followed by a comma.

k. The last sentence of s. Ins 2.07 (5) (a) indicates that compliance with that paragraph “may include, but shall not be limited to, systematic customer surveys, interviews, confirmation letters, or programs of internal monitoring.” Including but not limited to language should be avoided since it has the same meaning as including. [See s. 1.01 (7) (c), Manual.] (Further, with respect to insurance statutes, s. 600.02 (1), Stats., makes clear that “includes” means “including but not limited to,” and it is unnecessary to include “but not limited to” language.)

l. The second sentence of s. Ins 2.07 (5) (b) refers to each producer’s “life replacements.” Is this intended to be a reference only to life insurance replacements or to both life insurance replacements and annuity contract replacements?

m. In s. Ins 2.07 (6) (a) (intro.) and (9) (c), “Where” should be changed to “When.” Also, in s. Ins 2.07 (6) (a) (intro.), “the transaction” should be changed to “a transaction.”

n. In s. Ins 2.07 (7) (c), “sent separate” should be changed to “sent separately.”

o. In s. Ins 2.07 (9) (c), a comma should follow “met.”

p. Section Ins 2.07 (9) (c), refers to both replacement policies and replacement annuity contracts. It refers to providing certain materials to the “policy owner.” However, some materials are required to be provided to the owner of an annuity contract; thus, “contract owner” should also be referred to, as well as a policy owner.

q. In Appendices I and III, for the signature lines, “Name Date” should be changed to “Name and Date.”

r. Appendices I and III contain references to “old” policy and “existing” policy. Since these appear to be the same concept, one term should be selected and used consistently to avoid ambiguity.