



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 23-052

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. The statutes cited in the rule analysis as authority for the rulemaking—ss. 227.04 (2) (b) and 895.59, Stats.—are from earlier versions of the statutes. These statutes were modified and reorganized by 2013 Wisconsin Act 296. Additionally, proposed s. DMA 3.01 correctly cites to s. 227.04 (2m), Stats., but retains the incorrect citation to s. 895.59, Stats. The department should amend the proposed rule and rule analysis to reflect the current provisions authorizing this rulemaking.

b. Related to the above comment, the department should ensure that the proposed rule aligns with current statutory language. For example, proposed s. DMA 3.05 (3) and (4) list certain circumstances under which the department may not exercise discretion that were required under the previous statutory language but removed by 2013 Act 296. And proposed s. DMA 3.05 (5) lists a circumstance under which the department may not exercise its discretion as specified under prior law, but that was modified by the act. That part of the rule replicates earlier statutory language that referred to a small business “repeatedly violat[ing] the same statute, rule, or guideline”. Current law, however, provides that an agency may not exercise discretion if “[t]he small business has violated the same rule or guideline more than 3 times in the past 5 years”. [s. 227.04 (2m) (c) 2., Stats.]

c. Section 227.04, Stats., requires each agency to promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in the enforcement of rules against a small business that has committed a minor violation. Although the agency’s explanation of authority uses the phrase “minor violation”, and the plain language analysis states that the rule creates a definition of “minor violation”, the text of the proposed rule does not create a definition for this term or otherwise refer to minor violations.

d. The rule refers in a few instances to violations of rules and guidelines. Section 227.04, Stats., pertains only to rule violations. Does the department intend the proposed rule to apply to violations other than rule violations?

e. The rules appears to allow the department to exercise its discretion only if the small business discloses an actual or potential violation of a department rule or guideline before the department discovers the violation. Section 227.04, Stats., does not require an agency to limit its exercise of discretion to violations disclosed before discovery by the agency. Rather, s. 227.04 (2m) (b), Stats., requires a department's rule to consider six enumerated criteria for allowing discretion in the enforcement of a rule. Similarly, the definition of "minor violation" in s. 227.04 (1) (a), Stats., includes voluntary disclosure as a factor in identifying a minor violation, but voluntary disclosure is not by itself a determining factor. The department should address whether its limitation of the instances in which it may exercise enforcement discretion to cases in which a violation is disclosed before the department discovers it is consistent with s. 227.04, Stats. The department should also address whether the proposed rule adequately incorporates the criteria s. 227.04 (2m), Stats., requires that the rule consider.

2. Form, Style and Placement in Administrative Code

a. In the department's analysis for the proposed rule, the deadline for submitting comments should include a specific date or instructions on how a reader may determine the date.

b. In the text of the proposed rule, the proposed table of contents for ch. DMA 3 could be removed. It is not necessary to include a table of contents, as that is generated in the publication of the code provisions. [s. 1.04 (1), Manual.]

c. In the text of the proposed rule, the format for each statutory citation should be revised to use the abbreviation "s." or "ss.", as applicable, rather than the section symbol. [s. 1.15 (2) (d), Manual.]

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

a. The cross-reference to a definition for "small business" in proposed s. DMA 3.03 (2) is incorrect.

b. Proposed s. DMA 3.04 provides that "In exercising its discretion under sub. (1), the department will follow the applicable department rule or guideline when taking an enforcement action against a small business". It is not clear what rules or guidelines this might refer to. Since the purpose of this rulemaking is to implement the requirement that each agency promulgate a rule that requires the agency to disclose in advance the discretion the agency will follow in the enforcement of rules against a small business that has committed a minor, the department might consider whether these "applicable department rule[s] or guideline[s]" should be contained within the text of this rule. If the word "applicable" is intended to refer to the rule that has been violated, that should be specified.

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

In s. DMA 3.04 (2), the word "will" should be revised to "shall". [s. 1.08 (1) (b), Manual.]