

STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED RULES

Rule No.: Wis. Admin. Code ch. Jus 10.

Relating to: Handgun transfers.

1. Description of the objectives of the rules:

The State of Wisconsin Department of Justice (DOJ) proposes to make amendments to Wis. Admin. Code ch. Jus 10 (“Jus 10”), which governs the procedures for searching the records of people to whom a handgun dealer proposes to transfer a handgun. The objective of the proposed rules is to repeal Jus 10.06(2)(d) and amend the language of Jus 10.06(2)(c) to make the chapter consistent with Wis. Stat. § 175.35(2g)(c)4.c., as amended by 2015 Wis. Act 22, § 4.

2. Description of existing policies relevant to the rules and of new policies proposed to be included in the rules and an analysis of policy alternatives; the history, background, and justification for the rules:

Wisconsin Stat. § 175.35 governs the purchase of handguns and requires DOJ to promulgate rules to interpret the statutes. Wisconsin Stat. § 175.35(2) provides that “[w]hen a firearms dealer sells a handgun, he or she may not transfer possession of that handgun to any other person until all of the following have occurred.” The following must have occurred: “(a) The transferee has provided identification as required by rule under sub. (2g)(a);” “(b) The transferee has completed the notification form described in sub. (2g)(b);” “(c) The firearms dealer has conveyed the information from the completed notification form to the department of justice as required by rule under sub. (2g)(b) and requested a firearms restrictions record search;” and “(d) The firearms dealer has received an approval number regarding the firearms restrictions record search under sub. (2g)(c) from the department of justice.” Wis. Stat. § 175.35(2)(a)–(d).

Wisconsin Stat. § 175.35(2g)(c) requires DOJ to “promulgate rules for firearms restrictions record searches regarding transferees under sub. (2), including procedures for all of the following.” Subsection (2g)(c) then lists the following procedures for which DOJ must promulgate rules:

1. A firearms dealer to convey the information from a completed notification form to the department using either a toll-free telephone number provided by the department or an alternative means the department provides.

2. The department to provide the firearms dealer with a confirmation number confirming the receipt of the information under subd. 1.

3. The department to conduct the firearms restrictions record search regarding the transferee. The rules shall include, but not be limited to, a requirement that the department use the transaction information for management of enforcement system and the national crime information center system.

4. The department to notify the dealer as soon after receiving the information under subd. 1. as practicable, of the results of the firearms restrictions record search as follows:

a. If the search indicates that the transferee is prohibited from possessing a firearm under s. 941.29, the department shall provide the firearms dealer with a unique nonapproval number. The department may not disclose to the firearms dealer the reason the transferee is prohibited from possessing a firearm under s. 941.29.

b. If the search indicates that the transferee is not prohibited from possessing a firearm under s. 941.29, the department shall provide the firearms dealer with a unique approval number.

c. If the search indicates that it is unclear whether the person is prohibited under state or federal law from possessing a firearm and the department needs more time to make the determination, the department shall make every reasonable effort to determine whether the person is prohibited under state or federal law from possessing a firearm and notify the firearms dealer of the results as soon as practicable but no later than 5 working days after the search was requested.

Wis. Stat. § 175.35(2g)(c)1.–4.a.–c. DOJ previously promulgated the required rules, in Jus 10.

Because of a subsequent amendment to Wis. Stat. § 175.35(2g)(c)4.c., however, DOJ seeks to amend Jus 10 so that it is consistent with the statutory amendment. Specifically, the statute was amended to state that DOJ must “make every reasonable effort to determine whether the person is prohibited under state or federal law from possessing a firearm and notify the firearms dealer of the results *as soon as practicable but no later than 5 working days after the search was requested.*” Wis. Stat. § 175.35(2g)(c)4.c. (emphasis added). DOJ seeks to amend Jus § 10.06(2)(c) and (d) to be consistent with this amended language.

Jus § 10.06(2)(c) currently states:

(c) *Notify dealer of search results.* If infeasible during the telephone call required under sub. (1)(d), then as soon after the call as reasonably possible and in no event more than 48 hours after the dealer receives a confirmation number under par. (a)2.b., the department shall notify the dealer by telephone of the results of its record search performed under par. (b). In notifying the dealer, the department shall proceed as follows:

1. If the search shows that transferring a handgun to the transferee is allowed under s. 941.29, Stats., the department shall approve the transfer and provide the dealer an approval number;

2. If the search shows that transferring a handgun to the transferee is prohibited by s. 941.29, Stats., the department shall not approve the transfer and shall provide the dealer a nonapproval number; or

3. If the search shows a felony arrest of the transferee but shows no recorded disposition of that arrest or if the search shows an out-of-state criminal conviction but fails to show whether that conviction would be a felony in Wisconsin, the department shall, as soon as reasonably practicable within the 48 hours described in par. (c)(intro.), notify the dealer by telephone that a three working-day extension of time, as allowed under par. (d)1., is required for the department to complete its record search.

Jus § 10.06(2)(c)1.-3.

And Jus § 10.06(2)(d) currently states:

(d) *Extension of time for search.*

1. The extension of time allowed under par. (c)3. shall extend until midnight of the third complete working day following the day on which the department makes a finding under that subdivision.

2. During the extension under subd. 1., the department shall take all reasonable steps required to determine the disposition of any identified felony arrest of the transferee and to determine whether an out-of-state criminal conviction would be a felony in Wisconsin.

3. As soon as practicable and no later than the end of the extension under subd. 1., the department shall notify the dealer by telephone of the results of its extended search. In notifying the dealer, the department shall proceed as follows:

a. If the extended search shows that transferring a handgun to the transferee is allowed under s. 941.29, Stats., the department shall approve the transfer and provide the dealer an approval number;

b. If the extended search shows that transferring a handgun to the transferee is prohibited by s. 941.29, Stats., the department shall not approve the transfer and shall provide the dealer a nonapproval number;

c. If the extended search shows a felony arrest of the transferee but shows no recorded disposition of that arrest or if the department cannot reasonably determine whether an out-of-state conviction would be a felony in Wisconsin, the department shall provide the dealer a nonapproval number; or

d. If the extended search shows that a felony arrest is still awaiting disposition, the department shall not provide the dealer a nonapproval number under subpar. c but shall instead approve the transfer and provide the dealer an approval number.

Jus § 10.06(2)(d)1.–3.a.–d.

The proposed rules will make Jus 10 consistent with Wis. Stat. § 175.35(2g)(c)4.c. by repealing Jus § 10.06(2)(d) and amending Jus § 10.06(2)(c).

3. Statutory authority for the rules (including the statutory citation and language):

The proposed promulgation of these rules is supported by Wis. Stat. §§ 227.11(2)(a) and 175.35(2g)(c).

Wisconsin Stat. § 227.11(2)(a) provides:

(2) Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making

authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Wis. Stat. § 227.11(2)(a)1.–3.

Wisconsin Stat. § 175.35(2g)(c) provides:

(c) The department of justice shall promulgate rules for firearms restrictions record searches regarding transferees under sub. (2), including procedures for all of the following:

1. A firearms dealer to convey the information from a completed notification form to the department using either a toll-free telephone number provided by the department or an alternative means the department provides.

2. The department to provide the firearms dealer with a confirmation number confirming the receipt of the information under subd. 1.

3. The department to conduct the firearms restrictions record search regarding the transferee. The rules shall include, but not be limited to, a requirement that the department use the transaction information for management of enforcement system and the national crime information center system.

4. The department to notify the dealer as soon after receiving the information under subd. 1. as practicable, of the results of the firearms restrictions record search as follows:

a. If the search indicates that the transferee is prohibited from possessing a firearm under s. 941.29, the department shall provide the firearms dealer with a unique nonapproval number. The department may not disclose to the firearms dealer the reason the transferee is prohibited from possessing a firearm under s. 941.29.

b. If the search indicates that the transferee is not prohibited from possessing a firearm under s. 941.29, the department shall provide the firearms dealer with a unique approval number.

c. If the search indicates that it is unclear whether the person is prohibited under state or federal law from possessing a firearm and the department needs more time to make the determination, the department shall make every reasonable effort to determine whether the person is prohibited under state or federal law from possessing a firearm and notify the firearms dealer of the results as soon as practicable but no later than 5 working days after the search was requested.

Wis. Stat. § 175.35(2g)(c)1.-4.a.-c.

These statutes confer on DOJ the power to promulgate rules interpreting provisions in Wis. Stat. § 175.35 that are to be enforced or administered by DOJ to effectuate the purpose of those statutory provisions, as long as the rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the rules here proposed:

- do not exceed the bounds of correct interpretation of Wis. Stat. § 175.35(2g)(c);
- are authorized by Wis. Stat. §§ 227.11(2)(a) and 175.35(2g)(c) and are not based on authority derived from any other statutory or nonstatutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of the specific requirements of Wis. Stat. § 175.35(2g)(c) and 2015 Wis. Act 22 and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in Wis. Stat. § 175.35(2g)(c).

For these reasons, the proposed rules are authorized by Wis. Stat. §§ 227.11(2)(a) and 175.35(2g)(c).

4. Estimate of the amount of time that state employees will spend to develop the rules and of other resources necessary to develop the rules:

It is estimated that state employees will spend approximately 40 hours on the rulemaking process for the rules proposed here, primarily for compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rules:

Several entities may be impacted by the proposed rules. First, DOJ may be impacted, as it is the agency primarily tasked with administering the laws regarding handgun transfers. Second, handgun dealers who would like to transfer handguns may be impacted.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rules:

Federal firearm transfers are governed by the Gun Control Act of 1968, Title 18, United States Code, chapter 44. In 1993, the Gun Control Act of 1968 was amended by the enactment of the Brady Handgun Violence Prevention Act, which required the United States Attorney General to establish the National Instant Criminal Background Check System (NICS). NICS must be contacted by any licensed importer, licensed manufacturer, or licensed dealer of firearms to conduct a firearms restriction record search to determine whether the transfer of a firearm to any person is permitted under federal and state firearms eligibility laws.

Prior to the enactment of the Brady Handgun Violence Prevention Act, the State of Wisconsin required licensed firearms dealers to contact DOJ to conduct a firearms restriction record search on any person prior to the sale of a handgun to that person. As a result, upon passage of the Brady Handgun Violence Prevention Act, to conduct a firearms restriction record search, licensed firearms dealers in Wisconsin continued to contact DOJ for the sale of a handgun, but contact the NICS for the transfer of any other firearm.

28 C.F.R. § 25.6(c)(1)(iv)(B) governs when a licensed firearms dealer may transfer a firearm to a transferee after submitting a firearms restriction record search to the NICS. Under 28 C.F.R. § 25.6(c)(1)(iv)(B), a “Delayed” response indicates that the firearm transfer should not proceed pending receipt of a follow-up “Proceed” response from the NICS or the expiration of three business days, whichever occurs first. The proposed amendment to Jus 10 will bring the rule in line with Wis. Stat. §175.35(2g)(c)4.c., which requires that DOJ must notify a firearms dealer of the results of a firearms restrictions record search “as soon as practicable but no later than 5 working days after the search was requested.”

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