WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Powers of the Joint Committee for Review of Administrative Rules

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State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature, following the process prescribed in ch. 227, Stats. In *Evers v. Marklein*, 2025 WI 36 ("*Marklein II*"), the Wisconsin Supreme Court significantly limited the scope of legislative oversight of administrative rulemaking by changing the approach to evaluating the Legislature's power to review administrative rules, and holding that five specific powers of the Joint Committee for Review of Administrative Rules (JCRAR) violate the bicameralism and presentment requirements of the Wisconsin Constitution. Accordingly, the extent of formal JCRAR oversight of agency rulemaking following *Marklein II* is limited to its remaining roles in the rule promulgation process, discussed below, to the extent such activities do not violate the Wisconsin Constitution.[1]

This issue brief identifies the five JCRAR powers expressly invalidated in *Marklein II* and describes the remaining statutory roles of JCRAR and its cochairs in the oversight of the administrative rulemaking process and in oversight of the existing administrative code under current law.

MARKLEIN II

Citing the bicameralism and presentment requirements of the Wisconsin Constitution, the Wisconsin Supreme Court in *Marklein II* held each of the following statutes, relating to JCRAR powers during and after rule promulgation, to be facially unconstitutional:

- Section 227.19 (5) (c), Stats., which specifies that an agency may not promulgate a proposed rule until JCRAR completes a review of the proposed rule. A review is completed either through expiration of a 30- to 60-day passive review period, waiver of its jurisdiction, or until any objection of the committee and subsequent legislative activity is concluded. The Court referred to this provision as a "pre-promulgation pause."
- Section 227.19 (5) (d), Stats., which permits JCRAR to temporarily object to a proposed rule, and prevents an agency from promulgating the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the objection.
- Section 227.19 (5) (dm), Stats., which permits JCRAR to indefinitely object to a proposed rule, and prevents an agency from promulgating the rule unless a bill is enacted to authorize the promulgation.
- Section 227.26 (2) (d), Stats., which permits JCRAR to temporarily suspend an existing rule, and prohibits an agency from enforcing the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the suspension.
- Section 227.26 (2) (im), Stats., which permits JCRAR to suspend a rule multiple times.

OVERSIGHT OF THE RULEMAKING PROCESS

Scope Statement Hearing

The first opportunity for legislative oversight of the rulemaking process begins just after the agency publishes a scope statement in the administrative register. Within 10 days after publication, the cochairpersons of JCRAR may direct an agency to hold a preliminary hearing on the proposed rule. Upon such a request, the agency may not perform any activity in connection with drafting of the proposed rule until the hearing is held and the agency head approves the scope statement.[2]

Independent EIA

Prior to an agency's submission of a final proposed rule to the Governor and the Legislature, an individual cochair of JCRAR may request an independent Economic Impact Analysis (EIA) on the proposed rule.[3] The request must be approved by the organization committee for the cochair's house of the Legislature. If approved, a contract may be entered into for an entity other than the agency to prepare an EIA.[4]

Extension of Emergency Rules

When an agency promulgates an emergency rule, the rule is temporary in nature and is initially effective for a period of 150 days. JCRAR may grant an extension for up to an additional 60 days. The total period for all extensions granted may not exceed 120 days.[5]

Repeal of Unauthorized Rules

As an alternative to the general rulemaking process, an agency may use a petition process to repeal unauthorized rules. Under this process, which applies to rules that an agency may not enforce due to repeal or amendment of law, an agency must submit a petition for repeal to JCRAR and the Clearinghouse. Following Clearinghouse review and issuance of a report to JCRAR, the committee may vote to approve the petition, allowing the agency to publish the repeal in the administrative register.[6]

Administrative Code Oversight

Retrospective EIA

For any existing rule, JCRAR may vote to direct an agency to prepare a retrospective EIA. The request may be made for one or more chapters, or any sections or other subunits of a rule. A retrospective EIA must address the same categories of analysis and determinations as an initial EIA, and must include a specific comparison between the expected economic effect when the rule was proposed and the actual economic effect.[7]

Requirement to Promulgate Policy as a Rule

If JCRAR determines that an agency's statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days of JCRAR's action. Further, JCRAR may require any agency that is promulgating a policy as a rule to hold a public hearing and to report its actions to JCRAR.[8]

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[1] Within the rulemaking process, legislative review under ch. 227, Stats., consists of standing committee and JCRAR review periods. In *Marklein II*, the Court invalidated the JCRAR review period as a "pre-promulgation pause." While not specifically invalidated, the standing committee review period could be similarly construed by a future court. More broadly, the Legislature also retains oversight of administrative rules through actions not addressed in the issue brief, such as enacting legislation to revise agency rulemaking authority and challenging promulgated rules through litigation. For additional information on *Marklein II* and its potential effects on elements of the rulemaking process other than those expressly invalidated by the decision, see Legislative Council, *Evers v. Marklein II: Administrative Rulemaking*, Issue Brief (July 2025).

[2] s. 227.135 (2), Stats. As noted in endnote 1, authority of a JCRAR cochairperson to delay the rulemaking process via a request for a preliminary hearing may be scrutinized as a "pre-promulgation pause" under the holding of *Marklein II*.

[3] For a description of "EIA" and other rulemaking terms, see Legislative Council, *Glossary of Rule Promulgation Documents*, Issue Brief (July 2024).

[4] s. 227.137 (4m), Stats. As noted in endnote 2, the legislative authority to delay the rulemaking process pending completion of an independent EIA may be scrutinized as a "pre-promulgation pause" under the holding of *Marklein II*. Additionally, ch. 227, Stats., prescribes a similar authority for JCRAR to request an independent EIA, under s. 227.19 (5) (b) 3., Stats. However, it is unclear how JCRAR may exercise this power in a meaningful way following *Marklein II*.

[5] s. 227.24 (2), Stats.

[6] s. 227.26 (4), Stats.

[7] s. 227.138, Stats.

[8] s. 227.26 (2) (b) and (3), Stats.