

WISCONSIN DEPARTMENT OF CORRECTIONS

PROPOSED RULE MAKING ORDER
CR 09-120

INTRODUCTORY CLAUSE

The Wisconsin Department of Corrections proposes an order to create DOC 302.03 (1d), (1h), (1p), (1t), (7m), (9g), (9r), (11m), (12m), (15g), (15r), (17m), and (18m); DOC 302.33, DOC 302.34, DOC 302.35, DOC 302.36, DOC 302.37, DOC 302.38, DOC 302.39, DOC 302.40, and DOC 302.41 and to repeal and recreate DOC 302.18, relating to sentence computation and modification.

TEXT OF RULE:

SECTION 1. DOC 302.03 (1d), (1h), (1p), (1t), (7m), (9g), (9r), (11m), (12m), (15g), (15r), (17m), and (18m) are created to read:

DOC 302.03 (1d) "Administrator" means the administrator of the division of adult institutions.

DOC 302.03 (1h) "Agent" has the meaning given in s. DOC 328.03 (4).

DOC 302.03 (1p) "Assaultive activity" means an action that results in or is intended to result in physical harm to another.

DOC 302.03 (1t) "Certain earned release" means the process by which an inmate may be considered for release under s. 302.113 (9h), Stats., to extended supervision or another sentence.

DOC 302.03 (7m) "Detainer" means a writ or other legal instrument issued by a competent officer, directing the warden or superintendent of a correctional facility to notify the issuing authority when the named person is about to be released so that the issuing authority may obtain custody of the named person if appropriate.

DOC 302.03 (9g) "Enrolled victim" means a victim who has submitted a request to the office of victim services and programs for notification of inmate or offender status changes.

DOC 302.03 (9r) "Extended supervision" means the portion of a bifurcated sentence imposed under s. 973.01, Stats., to be served in the community under the supervision of the department.

DOC 302.03 (11m) "Office of victim services and programs" means the office in the department, which is responsible for victim information and advocacy.

DOC 302.03 (12m) "Positive adjustment time" means a period of time measured in days that can be earned to reduce an inmate's period of confinement.

DOC 302.03 (15g) "Projected extended supervision date" or "PESD" means the date that an inmate who is serving a bifurcated sentence is eligible for early release under s. 302.113 (2) (b) or 304.06 (1) (bg) 1. and 2., Stats.

DOC 302.03 (15r) "Release eligibility date" means the date that an inmate who is serving a risk reduction sentence under s. 973.031, Stats., has served 75% of the confinement portion of his or her sentence or the date that an inmate who is serving a bifurcated sentence under s. 973.01, Stats., has served 75% or 85% of the confinement portion of his or her sentence.

DOC 302.03 (17m) "Social worker" means the institution social worker to whom an inmate is assigned.

DOC 302.03 (18m) "Victim" has the meaning given in s. 950.02(4), Stats.

SECTION 2. DOC 302.18 is repealed and recreated to read:

DOC 302.18 Administrative review of a classification decision. (1) Within 10 calendar days of an inmate's receipt of a written decision concerning custody classification, institution placement, program need, or treatment need, the inmate may request a review of the decision made under s. DOC 302.13 (2) or 302.17 (8) if the inmate believes that the decision was based on erroneous information.

(2) Denial of a request for a classification review under s. DOC 302.17 (11) (d) is not subject to review under this section.

(3) The inmate shall submit a request for review under this section on a form approved by the department.

(4) The review shall be completed by one of the following:

(a) The director if the director is not the decision maker under s. DOC 302.13 (2) or 302.17 (8).

(b) The administrator if the director was the decision maker under s. DOC 302.13 (2) or 302.17 (8).

(5) The director or administrator shall respond within a reasonable period of time, following receipt of the administrative review request.

(6) The decision under sub. (5) is final.

SECTION 3. DOC 302.33, 302.34, 302.35, 302.36, 302.37, 302.38, 302.39, 302.40, and 302.41 are created to read:

DOC 302.33 Positive adjustment time--one for two. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one day of positive adjustment time for every two days served if all of the following apply:

(a) The department has determined the inmate is not at a high risk of reoffending. If an inmate is determined to be at a high risk to reoffend, the inmate may be reviewed for eligibility under 302.34.

(b) The inmate has not received a major penalty under s. DOC 303.68 (1) (a) on any day counted toward positive adjustment time.

(c) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) EXCLUSIONS. Notwithstanding sub. (1), this section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) A violent offender, as defined in s. 16.964 (12) (a), Stats.

(g) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.

(h) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(i) An inmate who is ineligible for positive adjustment time under this paragraph pursuant to s. 973.01 (3d) (b), Stats.

(j) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(k) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(l) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(m) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(n) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(o) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(p) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(q) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(r) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(s) An inmate who is serving, begins to serve, or has served, during his or her current period of confinement, a sentence for a Class A or B felony.

(t) An inmate who is serving, begins to serve, or has served during his or her current period of confinement a sentence for a felony defined in ch. 940, Stats.

(3) CRITERIA CONSIDERED FOR RELEASE. The department shall consider all of the following when making a decision to release an inmate under this section:

(a) The inmate meets the eligibility criteria under sub. (1) and is not excluded from consideration under sub. (2).

(b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense.

(c) The inmate has demonstrated satisfactory adjustment in the institution.

(d) The inmate has not refused or neglected to perform required or assigned duties, including programming and treatment identified by the department.

(e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate has gained maximum benefit from programs.

2. The inmate can complete programming and treatment in the community without presenting an undue risk.

3. The inmate has not been able to gain entry into programming and treatment and release would not present an undue risk.

(f) The inmate has developed an adequate release plan.

(g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate has reached a point at which the department concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice.

(4) VICTIM NOTIFICATION. (a) Prior to its decision to recommend release of an inmate under this section, the department shall notify an enrolled victim for the purpose of giving the victim the opportunity of providing input.

(b) Prior to release of an inmate under this section, the department shall notify an enrolled victim that the inmate is to be released.

(5) COURT NOTIFICATION. When an inmate is within 90 days of release to extended supervision under sub. (7), the department shall notify the sentencing court that it intends to modify the inmate's sentence and release the inmate to extended supervision or to another sentence. The department shall provide the sentencing court with rationale for its recommendation.

(6) COURT ACTION. If the court does not schedule a review hearing within 30 days after notification, or the court accepts the department's recommendation, the department may proceed under sub. (7). If the court issues an order rejecting the department's recommendation, the inmate may not be released under this section. If the court orders the inmate to remain in prison for a period not to exceed the time remaining on the inmate's term of confinement, the department will proceed in accordance with the court order.

(7) RELEASE. An inmate under sub. (1) shall be released to extended supervision or to another sentence when he or she has served the term of confinement in the prison portion of his or her bifurcated sentence, less positive adjustment time earned unless denied by the court.

(8) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under sub. (7), the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.34 Positive adjustment time--one for three. (1) ELIGIBILITY.

Inmates who are sentenced under s. 973.01, Stats., for a Class F to Class I felony or a misdemeanor that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., and who are ineligible for positive adjustment time under s. 302.113 (2) (b), Stats., pursuant to s. 973.01(3d) (b), Stats., or for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one (1) day of positive adjustment time for every three (3) days served if all of the following apply:

(a) The inmate has not received a major penalty under s. DOC 303.68 (1) on any day counted toward positive adjustment time.

(b) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) SPECIAL CONSIDERATION. Inmates ineligible for positive adjustment time under s. DOC 302.33 (1) (a) may be considered for eligibility under this section.

(3) EXCLUSIONS. This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(g) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22(20d), Stats.

(h) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(i) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(j) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(l) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(m) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(n) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(o) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(4) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision or another sentence under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(5) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC.302.35 Positive adjustment time--one for 5.7. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a Class C to Class E felony may earn one (1) day of positive adjustment time for every 5.7 days served if all of the following apply:

(a) The inmate has not received a major penalty under s. DOC 303.68 (1) on any day counted toward positive adjustment time.

(b) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) EXCLUSIONS. This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(g) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(h) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(i) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(j) An inmate who is serving a sentence for a violation of s. 940.06, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.302, Stats.

(l) An inmate who is serving a sentence for a violation of s. 940.31 (1), Stats.

(m) An inmate who is serving a sentence for a violation of s. 948.03 (2) (a), Stats.

(n) An inmate who is serving a sentence for a violation of s. 948.40 (4) (a), Stats.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision or another sentence under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(4) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.36 Modification of bifurcated sentence after serving 75 percent of confinement time. **(1) ELIGIBILITY.** An inmate sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 75% of the term of confinement portion of his or her bifurcated sentence as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., Stats., less any positive adjustment time he or she has earned.

(2) EXCLUSION. This section does not apply to an inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(4) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.37 Modification of bifurcated sentence after serving 85 percent of confinement time. (1) ELIGIBILITY. An inmate sentenced under s. 973.01, Stats., for a Class C to Class E felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 85% of the term of confinement portion of his or her bifurcated sentence as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., Stats., less any positive adjustment time he or she has earned.

(2) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(3) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.38 Challenge incarceration program. (1) The department shall provide a challenge incarceration program which incorporates manual labor, education, military drill and ceremony, age appropriate strenuous physical activity and rehabilitative programming that is directly related to the inmate's criminal behavior in preparation for release on parole or extended supervision.

(2) Inmates convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed on or before December 30, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(4) The department may place an inmate into the challenge incarceration program if the inmate meets all of the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3).

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program.

(c) The inmate has not attained the age of 40 as of the date the inmate will begin the program.

(d) The inmate meets physical, medical and psychological criteria required for program participation.

(e) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment.

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmate's substance use is not a key factor in his or her criminal behavior.

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior.

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department shall determine if placement is appropriate and when placement will occur.

(7) For inmates sentenced for crimes committed on or after December 31, 1999, the department shall determine successful completion of the challenge incarceration program and notify the sentencing court of the successful completion to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department shall determine successful completion of the rehabilitation program and notify the earned release review commission.

(10) The department shall provide notice to an enrolled victim prior to an inmate's release under this section.

DOC 302.39 Wisconsin earned release program. (1) The department shall provide a rehabilitation program for the purposes of release.

(2) Inmates convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed before December 31, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(c) For inmates who are serving a bifurcated sentence and whose sentence was imposed on or after December 31, 1999 but before July 26, 2003, the inmate may petition the sentencing court with the department's approval to determine eligibility. The inmate shall serve a copy of the petition on the district attorney who prosecuted him or her.

(4) The department may place an inmate into the Wisconsin earned release program if the inmate meets all the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3).

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program.

(c) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment.

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmate's substance use is not a key factor in his or her criminal behavior.

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior.

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department shall determine if placement is appropriate and when placement will occur

(7) For inmates sentenced under s. 973.01, Stats., the department shall determine successful program completion and notify the sentencing court to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department shall determine successful completion of the rehabilitation program and notify the earned release review commission.

(10) The department shall provide notice to an enrolled victim prior to an inmate's release under this section.

DOC 302.40 Risk reduction program. (1) For inmates ordered to serve a risk reduction sentence, the department shall do all of the following:

(a) Complete a validated and objective assessment to identify the inmate's criminogenic factors and risk to reoffend.

(b) Create a risk reduction plan that is designed to address the identified criminogenic factors and reduce the inmate's risk of reoffending.

(c) Monitor and review the progress made towards completion of the risk reduction plan. The plan may be modified if programming is unavailable or a new program need is identified.

(2) The department shall determine if an inmate has completed the risk reduction program by review of the following:

(a) The inmate has demonstrated satisfactory institution adjustment.

(b) The inmate has participated and demonstrated sufficient efforts in meeting all the requirements of the risk reduction plan.

(c) The inmate has developed an adequate release plan.

(d) Release would not pose an unreasonable risk to the public.

(3) The department may rescind or withhold a determination regarding the completion of the risk reduction plan based misconduct or failure to complete any component of the risk reduction plan.

(4) If the department determines that the risk reduction plan has been completed and institution adjustment is satisfactory, the department will notify the sentencing court at least 30 days prior to release. The department will notify an enrolled victim that the inmate will be released under this section.

(5) The department shall release an inmate to extended supervision on or after the inmate's release eligibility date when inmate has completed the risk reduction program pursuant to sub. (2).

(6) If an inmate is released after successfully completing the risk reduction program and demonstrating satisfactory institution adjustment but prior to his or her release eligibility date, the inmate's overall sentence shall be reduced by the confinement time not served. The term of extended supervision shall not be increased.

DOC 302.41 Certain earned releases under s. 302.113 (9h), Stats. (1) ELIGIBILITY. Under s. 302.113 (9h), Stats., the department may release to extended supervision or to another sentence certain persons who are serving the confinement portion of a bifurcated sentence and who meet all of the following conditions:

(a) The inmate is serving a confinement portion of a bifurcated sentence for misdemeanor or a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.

(b) The social worker or agent has reason to believe that the inmate will be able to maintain himself or herself while on extended supervision without engaging in assaultive activity.

(c) The release to extended supervision date is not more than 12 months before the inmate's extended supervision eligibility date.

(2) EXCLUSIONS. An inmate is not eligible for certain earned release if any of the following apply:

(a) The inmate is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) The inmate has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) The inmate has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) The inmate is required to register under s. 301.45, Stats.

(e) The inmate has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving, begins to serve, or has served, during his or her current period of confinement, a sentence for a Class A or B felony.

(g) An inmate who is serving, begins to serve, or has served during his or her current period of confinement a sentence for a felony defined in ch. 940, Stats.

(3) CRITERIA CONSIDERED FOR RELEASE. The department shall consider all of the following when making a decision to release an inmate under this section:

(a) The inmate meets the eligibility criteria under par. (1) and is not excluded from consideration under par. (2).

(b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense.

(c) The inmate has demonstrated satisfactory adjustment in the institution.

(d) The inmate has not refused or neglected to perform required or assigned duties, including programming and treatment identified by the department.

(e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate has gained maximum benefit from programs.

2. The inmate can complete programming and treatment in the community without presenting an undue risk.

3. The inmate has not been able to gain entry into programming and treatment and release would not present an undue risk.

(f) The inmate has developed an adequate release plan.

(g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate has reached a point at which the department concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice.

(4) RELEASE TO DETAINER. An inmate who has an active detainer is eligible for certain earned release consideration without meeting the criteria under par. (1) (a) if the detainer concerns a sentence imposed in another jurisdiction and the remainder of the confinement portion of that sentence is equal to or longer than the remainder of the confinement portion of the Wisconsin sentence. In this paragraph, "active" means that the jurisdiction issuing the detainer intends to obtain custody of the inmate immediately upon release.

(5) VICTIM NOTIFICATION. (a) Prior to its decision to recommend release of an inmate under this section, the department shall notify an enrolled victim for the purpose of giving the victim the opportunity of providing input.

(b) Prior to release of an inmate under this section, the department shall notify an enrolled victim that the inmate is to be released.

(6) COURT AND DISTRICT ATTORNEY NOTIFICATION. The department shall notify the court and district attorney upon the inmate's release.

(6) RELEASE AUTHORITY. The secretary may release eligible inmates under this section consistent with public safety and reentry goals.

(7) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

SECTION 4. EFFECTIVE DATE. This rule will take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.

RULE SUMMARY

A. Statutes Interpreted: ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, and s. 301.03 (2), Stats., and 973.01 (3d) (b), as created by 2009 Wis. Act 28, s. 3377.

B. Statutory Authority to Promulgate the Rule: ss. 227.11 (2), 301.02, 301.03 (2), and 302.07, Stats.

C. Explanation of agency authority:

The Department of Corrections is responsible for supervision of inmates sentenced to Wisconsin prisons, including sentence calculations. Under 2009 Wisconsin Act 28, specifically, ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, the legislature created several statutory provisions which affect the calculation of sentences. The Department is promulgating rules to address these changes. In addition, under s. 301.03, Stats., the Department is responsible for the supervision of inmates. As part of that supervision, the Department reviews inmates for appropriate custody level, facility placement, program needs, and education needs.

D. Related Statute or Rule:

Sections 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, § 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751

Chapter PAC 1, Wisconsin Administrative Code, which addresses release procedures for inmates, including those under 2009 Wisconsin Act 28.

E. Plain Language Analysis:

The rule amends ch. DOC 302 to bring it into compliance with significant changes made in sentence calculations and releases from prison under 2009 Wis. Act 28, including:

1. Creating definitions for the following terms: administrator, agent, assaultive activity, certain earned release, detainer, enrolled victim, extended supervision, office of victim services and programs, positive adjustment time, projected extended supervision date, risk eligibility date, social worker, and victim.
2. Creating s. DOC 302.33, relating to positive adjustment time (PAT) under s. 302.113 (2) (b), Stats., as created by 2009 Wis. Act 28, s. 2722. Under this section, an inmate may become eligible for PAT at the rate of one for every two days served if the inmate is eligible, is not excluded, and meets certain criteria for release. Eligibility criteria and exclusions are statutorily established. With regard to eligibility criteria, the department has clarified through rule two of the criteria. First, with respect to violations of prison regulation, the department determined that it will only consider violations of institution regulations which result in a major penalty as being an impediment to earning PAT at the one day for every two days served rate. Since a liberty interest is involved, the department determined that the due process afforded

when a major penalty was imposed was necessary before eligibility under this criterion was denied. Second, with regard to an inmate refusing to perform required or assigned duties, the department clarified the criterion to include participation in programming and treatment identified by the department as appropriate for the inmate.

The department has added to the list of exclusions two additional groups of inmates who will not be considered for PAT at the rate of one day for every two days served. First, the department will not consider inmates who are serving, will begin to serve, or has served during the current period of confinement a sentence for a Class A or B felony. Second, the department will not consider inmates who are serving, will begin to serve or who have served during the current period of confinement a sentence for a felony defined in ch. 940, Stats. Given the serious nature of the offenses under either category, the department concluded that the inmates should be excluded from the one for two track.

The inmates who are not eligible for release under this provision may be considered for release under other Act 28 release mechanisms.

The department added the criteria it has been using for evaluating suitability for release under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision addressing enrolled victim notification to clarify the notification that will be given when the department is considering making a recommendation to the court to release an inmate under this provision. In addition, the department will give notification to an enrolled victim prior to the inmate being released.

The department changed the wording of the rule as it relates to the information provided to the court when it makes its recommendation for release. The department will provide the court with justification for its recommendation, rather than specifying and limiting the information or documents that are given.

The department clarified in the section titled "court action" that if the court orders a date other than the date recommended by the department, the department will comply with the court's order.

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under this provision results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

3. Creating ss. DOC 302.34 and DOC 302.35, relating to positive adjustment time (PAT) under 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28,

s. 2751. Under these sections, an inmate may earn PAT at two rates (1 for 3, or 1 for 5.7) depending on the offense of which the inmate was convicted. The inmate may be eligible for PAT, which may result in modification of the term of confinement of the inmate's bifurcated sentence if the department determines that the inmate has not received a major penalty under s. DOC 303.68 (1), and the inmate has not neglected or refused to perform required or assigned duties.

The department has clarified through rule the two eligibility criteria. First, with respect to violations of prison regulation, the department determined that only violations of institution regulations which result in a major penalty will be considered as being an impediment to earning PAT at the one for three or one for 5.7 rate. Since a liberty interest is involved, the department also determined that the due process afforded when a major penalty was imposed was necessary before eligibility under this criterion was denied. Second, with regard to an inmate refusing to perform required or assigned duties, the department clarified the criterion to include participation in programming and treatment identified by the department as appropriate for the inmate.

The department clarified that an inmate who is ineligible for PAT at the one for two rate may be considered for eligibility under the provision for PAT at the one for three rate.

The department rule provides that the earned release review commission considers inmates for release under these provisions. The procedures for release consideration under these provisions, including victim notification, are found in the commission's rules (ch. PAC 1).

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under these provisions results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

4. Creating ss. DOC 302.36 and DOC 302.37, relating to sentence calculations under s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, for an inmate who has been convicted under s. 973.01, Stats., following the inmate's having served at least 75% or 85% of the confinement time of a bifurcated sentence, depending on the classification of the crime.

The department rule provides that the earned release review commission considers inmates for release under these provisions. The procedures for release consideration under these provisions, including victim notification, are found in the commission's rules (ch. PAC 1).

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under these provisions results in a

lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

5. Creating ss. DOC 302.38 and DOC 302.39, relating to the challenge incarceration program and the earned release program under ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712. The department had not previously had a rule provision addressing either of these two programs. The rule creates provisions which codify the department's implementation of the programs and also updates the provisions to reflect the legislative change which permits inmates who do not have AODA needs to participate.
6. Creating s. DOC 302.40, relating to the risk assessment program under s. 302.042, as created by 2009 Wis. Act 28, s. 2699m. A court may order an offender to serve a risk reduction sentence if the offender agrees to participate in the risk reduction plan established by the department. The department is required to complete a validated and objective assessment of an offender's criminogenic factors and risk to reoffend. Based on that assessment, the department is required to establish the plan, monitor the inmate's progress and participation in the plan, and evaluate the inmate's institutional conduct. The plan may be modified if programming and treatment is unavailable or a new program need is identified.

The department will look at four factors in determining whether the plan has been successfully completed. The factors are: the inmate's demonstrated satisfactory institution adjustment, his or her participation and demonstrated sufficient efforts in meeting the requirements of the plan, the inmate's development of an adequate release plan, and evaluation of the risk to the public if release is granted.

If the department determines that the plan has been completed, the department will notify the sentencing court and an enrolled victim. The department will release the inmate to extended supervision on or after the inmate's risk eligibility date when the inmate has completed the plan.

The department inserted a provision which clarifies that if an inmate is released prior to his or her release eligibility date, the inmate's overall sentence is reduced by the period of confinement time not served. The period of extended supervision is not increased.

7. Creating s. DOC 302.41, relating to the earned release of certain inmates (CER) within 12 months of their release under s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739. The rule lists the statutory conditions which establish eligibility and exclusions.

The department has added to the list of exclusions two additional groups of inmates who will not be considered for release under CER. First, the

department will not consider inmates who are serving, will begin to serve, or has served during the current period of confinement a sentence for a Class A or B felony. Second, the department will not consider inmates who are serving, will begin to serve or who have served during the current period of confinement a sentence for a felony defined in ch. 940, Stats. Given the serious nature of the offenses under either category, the department concluded that the inmates should be excluded from this provision.

The department added the criteria it has been using for evaluating suitability for release under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision on enrolled victim notification to clarify the notification that will be given when the department is considering making a recommendation for release of an inmate under this provision for the purposes of giving an enrolled victim an opportunity to have input. In addition, the department will give notification to an enrolled victim prior to the inmate being released.

The department added a separate subsection to clarify that it will provide notice to the court and the district attorney of the release of an inmate under this section.

The department clarified in the rule that release under this section would be consistent with public safety and reentry goals.

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under this provision results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

8. Repealing and recreating s. DOC 302.18, relating the inmate requests for review of department decisions concerning custody classification, institution placement, program needs, or treatment needs. The revised section shortens the time in which an inmate can appeal a decision regarding custody, institution placement, program need, or treatment need from 30 days to 10 days. The revision clarifies that a classification review under s. DOC 302.17 (11) is not subject to review under this process. The clarifies that the person conducting the administrative review will be either the director of the bureau of offender classification and movement or the administrator of the division of adult institutions, depending on who made the initial decision. Finally, the rule clarifies that the review decision is final.

F. Summary of and Comparison with Existing or Proposed Federal Regulations that are intended to address the activities to be regulated by the proposed rule:

There are no federal regulations that regulate the activities addressed by the proposed rule.

G. Comparison of similar rules in adjacent states (Illinois, Iowa, Michigan, and Minnesota):

1. Illinois: Under 730 ILCS 5/3-6-3, the state of Illinois has provided for the early release of inmates on account of good conduct. Inmates are able to earn good conduct credit at the rate of 4.5 days of credit or 7.5 days of credit for each month of a sentence of imprisonment for certain very serious crimes. (For example, 1 for 4.5 crimes include: home invasion, armed robbery, and aggravated vehicular hijacking. 1 for 7.5 crimes include: gunrunning, narcotics racketeering, and drug-induced homicide.) For all other offenses, inmates are able to earn one day of good conduct credit for each day of the inmate's sentence of imprisonment. Good conduct credit may be revoked or lost following a due process determination by the Prisoner Review Board which is a citizen member board and which is independent of the IL DOC. Under 730 ILCS 5/5-8-1.1, Illinois has an Impact Incarceration Program which is similar to the Challenge Incarceration Program. It is not limited to individuals who have AODA needs but involves rigorous physical elements.
2. Iowa: Under ICA s. 903A.2, each inmate is eligible to earn a reduction of sentence by the accumulation of "earned time." Inmates who receive category A sentences are able to earn credit at the rate of 1.2 days of credit for each day the inmate demonstrates good conduct and satisfactory participation in programs or placement. An inmate may be eligible for an additional reduction of sentence of up to 365 days of the full term of the sentence for exemplary acts. Inmates who receive category B sentences may receive 15/85 of a day for each day of good conduct. Under IA ADC s. 201.-20.18(904), Iowa has established a rigorous program called "violation/shock probation programs" which are aimed at individuals who are on community supervision and who have violated the conditions of supervision. The goal is avoid lengthy periods of incarceration.
3. Michigan: Under MCLA 800.33, each inmate shall receive a reduction from his or her sentence. The rate of reduction depends on when the crime was committed (there is a statutory change in the rate for crimes which occurred prior 4/1/87) and what the crime was. An inmate may be eligible for good time credit, disciplinary credit, or special disciplinary credit. Special disciplinary credit is additional credit which an inmate may earn if the inmate has not had a major conduct violation and upon the recommendation of the institution disciplinary credit committee. If the credit is lost, it cannot be restored. An inmate cannot earn any of the three types of credit during a month during which the inmate incurred a major conduct report.
4. Minnesota: Under Minnesota law, inmates convicted on or after August 1, 1993 are not eligible to earn good time sentence reduction credit. Under s. 244.171, MN Stats., the commissioner of corrections shall establish a challenge incarceration program.

H. Summary of the factual data and analytical methodologies that DOC used in support of its determination of the rule's fiscal effect on small businesses under s. 227.114, Stats.:

The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in § 227.114, Stats.

I. Any analysis and supporting documents that DOC used in support of DOC's determination of the proposed rule's effect on small businesses or that was used when the DOC prepared an economic impact report:

Not applicable.

J. Effect on small businesses:

Not applicable.

K. Agency contact person (including email and telephone):

Kathryn R. Anderson, Chief Legal Counsel, Department of Corrections
3099 East Washington Avenue, P.O. Box 7925, Madison, WI 53707-7925
(608) 240-5049; FAX (608) 240-3306
Kathryn.Anderson@wisconsin.gov

L. Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rule will be accepted and receive consideration if they are received by Friday, March 5, 2010. Written comments should be addressed to: Kathryn R. Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email: Kathryn.Anderson@wisconsin.gov.

EFFECTIVE DATE:

This rule will take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.

FISCAL ESTIMATE: See attached.

FINAL REGULATORY FLEXIBILITY ANALYSIS: The Earned Release Review Commission has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

STATEMENT EXPLAINING THE NEED FOR THE PROPOSED RULE:

The legislature passed 2009 Wisconsin Act 28, which established several mechanisms for release to extended supervision for persons sentenced for crimes under s. 973.01, Stats., including positive adjustment time (one for two, one for three, and one for 5.7), modification of a bifurcated sentence after having served either 75% or 85% of the term of confinement, expansion of the challenge in incarceration program and Wisconsin earned release program, risk reduction sentences, and certain earned releases. As a result, the department has developed rules to address these release mechanisms.

In addition, the department revised the provision which addresses the administrative review of a classification decision to update the provision to reflect current practice and policy.

STATEMENT OF THE BASIS AND PURPOSE OF THE RULE, INCLUDING HOW THE RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

The Department of Corrections proposes to make modifications and additions to DOC 302 for the following purposes:

Under 2009 Wisconsin Act 28, the legislature provided for the modification of bifurcated sentences under limited circumstances, resulting in the release from prison to extended supervision of inmates who have been sentenced under s. 973.01, Stats., if certain criteria are met. The department has responsibility for several of the sentence modification provisions, including: (1) positive adjustment time (one for two rate), (2) earned release program and challenge incarceration program, (3) certain earned release, and (4) risk reduction sentences. For clarification purposes, the department has also developed rule provisions which address the sentence modification provisions which are under the responsibility of the earned release review commission, including positive adjustment time (one for three and one for 5.7 rates) and sentence modification after an inmate has served 75% or 85% of his or her sentence. In addition, the department has revised section DOC 302.18 to facilitate the review of inmates for purposes of early release.

The purpose of the rule is to implement newly created statutory provisions providing for release of inmates who have been sentenced under s. 973.01, Stats., under specified circumstances.

PUBLIC HEARINGS:

- A. Two public hearings were held February 25, 2010 on the rule, one in Milwaukee and one in Madison. Written public comments were also received.
- B. List of persons who appeared or registered for or against the proposed rule at the public hearings.

Milwaukee hearing:

Ron Koepke, Colgate, WI	Registered for and testified
Kathleen Hart, Glendale, WI	Registered uncertain and testified
Penny Adrian, Milwaukee, WI	Registered uncertain and testified
Le Vern Boyd, Milwaukee, WI	Signed in but did not register or testify
Oliver Johnson, Milwaukee, WI	Registered for and testified

Rose Scott, Milwaukee, WI Testified
Greg Williams, Milwaukee, WI Registered uncertain and testified

Madison hearing:

No one appeared at the hearing.

C. Summary of public comments on the rule and DOC responses to those comments.

The comments were generally favorable to the new legislation. Most of the comments addressed general observations and concerns which were not directly related to the rule as proposed. In addition, some of the comments addressed issues which related only to the earned release review commission, over which the department has no authority.

In addition, over 34 inquiries were received from inmates regarding the impact of the 2009 Wisconsin Act 28 sentence reform measures on them personally, as opposed to comments about the proposed rule. The department requested that the inmates direct their inquiries to the records offices of the institution in which the inmates were currently incarcerated. Those offices have the information concerning an individual inmate, including the judgment of conviction, institution history, and programming and treatment in order to respond to the inquiry.

A summary of the comments and the DOC response are as follows:

1. *Programming—before and after release*

- Comments: More programming is needed in the prisons and the programming should begin early in the period of incarceration.

DOC Response: Given limited resources, programming is made available to inmates based on the inmate's needs, department operations, and the meeting of conflicting priorities.

- Comments: More programming should be made available to inmates at the time of release.

DOC Response: Limited resources in the community dictate what programming is available.

- Comments: Even low risk inmates should receive programming after release.

DOC Response: Limited resources in the community dictate what programming is available.

- Comments: The proposed rule does not address the adequacy of supervision in the areas of treatment and mentorship following release.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28.

- Comments: There is a need to start reentry programs while in prison and provide continued follow up for three years after release.

DOC Response: Given limited resources, programming is made available to inmates based on the inmate's needs, department operations, and the meeting of conflicting priorities. Limited resources in the community dictate what programming is available.

- Comments: Early release will motivate inmates to take programming to correct behavior.

DOC Response: It is hoped that the release mechanisms established by the legislature in 2009 Wis. Act 28 will provide incentive for inmates to participate in programming.

- Comments: The ERRC should consider the fact that the spouse of an inmate has insurance coverage for treatment in its consideration of the inmate for release.

DOC Response: The DOC does not have authority over the earned release review commission. However, the ERRC does consider an inmate's release plan when reviewing the individual for release.

- Comments: There should be consideration of programming in the release consideration.

DOC Response: The DOC does not have authority over the earned release review commission. However, the ERRC does consider programming when reviewing the individual for release.

- Comments: There is a concern that those persons who sponsor or mentor inmates before release are not able to continue the relationship after release because of department policies.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. The DOC is reviewing the concern identified in the comment.

- Comments: The Department of Corrections should permit department employees to submit letters in support under s. PAC 1.06 (18).

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. The department does not permit employees to support the release of individual inmates, except as required as part of their duties and responsibilities. The department has concerns regarding possible fraternization and the safety and security of the institution.

2. *ERRC hearings, agents, and presumption of release*

- Comments: It was suggested that the PRC and ERRC use discretion.

DOC Response: The department exercises the discretion granted to it by the legislature. The department does not have any authority over the commission.

- Comments: Inmates should be informed of what they need to do to get paroled and that the ERRC should have less discretion.

DOC Response: Inmates have access to the statutes and rules which address eligibility for parole, as well as information from the records office of the institution at which they are incarcerated as to the specifics of their individual situation. The department exercises the discretion granted to it by the legislature.

- Comments: Concern was expressed regarding the speed of consideration by the PRC and ERRC.

DOC Response: The department does not have authority over the commission. With respect to its own processing of release actions, it acts expeditiously given its limited resources.

- Comments: A suggestion was made that there be a presumption of release after the serving of 25% of a sentence.

DOC Response: The department does not have authority over the commission. However, the ERRC complies with the statutory provision under s. 304.06 (1) (b), which permits consideration for release after an inmate serves 25% of his or her sentence.

- Comments: Hearings should be held before the entire commission.

DOC Response: The department does not have authority over the commission.

- Comments: Rehearings should be held immediately when incorrect or missing information is involved rather than a deferral.

DOC Response: The department does not have authority over the commission.

- Comments: A suggestion was made that deferrals should not be longer than one year.

DOC Response: The department does not have authority over the commission.

- Comments: Hearings should be recorded and a tape provided to an inmate.

DOC Response: The department does not have authority over the commission.

- Comments: Attorneys, advocates, or family members should be allowed at all hearings.

DOC Response: The department does not have authority over the commission.

- Comments: A suggestion was made that there should be a presumption of parole.

DOC Response: The department does not have authority over the commission.

- Comments: Concerns questioning the number of deferrals were received. Inmates need to know the criteria for avoiding deferrals.

DOC Response: The department does not have authority over the commission.

- Comments: There was a need to work with inmates while in prison but also after their release. Agents should be trained to help inmates to succeed.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. As part of the department's work on reentry, the concerns raised by these comments are being addressed.

- Comments were received, concerning the fact that an inmate pays for an agent who does not help.

DOC Response: Presumably, these comments question the supervision fees imposed on offenders. The fees are statutorily mandated. The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28.

- Comments: The ERRC should parole inmates after 3 to 4 years.

DOC Response: The department does not have authority over the ERRC.

- Comments: The PRC, ERRC, and BOCM should be regulated and consistent with guidelines.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. The department acts within the statutes which apply to it and within the rules which it has promulgated. With regard the ERRC, the department has no authority over the commission.

- Comments: The ERRC should release all eligible inmates who do not pose a significant risk to others.

DOC Response: The department has no authority over the commission in this matter.

- Comments: Inmates should be deferred because they have not served enough time.

DOC Response: The department has no authority over the commission.

- Comments: The ERRC focuses only on the crime and not changes that the inmate has undergone.

DOC Response: The department has no authority over the commission.

- Comments: Concerns questioning how long the crime remains the focus of the ERRC review were received.

DOC Response: The department has no authority over the commission.

- Comments: Depreciation of the seriousness of the crime should not be included under s. PAC 1.04.

DOC Response: The department does not have authority over the commission.

- Comments: Inmates should have access to confidential information.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. Inmate access to confidential information may be limited for a number of reasons, including safety and security of the institution, staff, and the public, victim's rights, and privacy.

- Comments: A suggestion was made to keep the process simple.

DOC Response: The department has no authority over the commission in development of the process by which it makes decisions, relating to release.

- Comments: Section PAC 1.06 (12) should leave discretion to the ERRC if an inmate requests that the interview be in person.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. The department has no authority over the commission.

- Comments: An inmate should have the right to an attorney.

DOC Response: The department has no authority over the commission in the development of the process by which it makes decisions, relating to release.

- Comments: The term "maximum benefit" in s. PAC 1.06 (16) (e) 1., is immeasurable.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: If a victim is permitted to attend a release consideration hearing, then the inmate should be able to have a representative.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: Under s. PAC 1.07 one commissioner, instead of a majority of the commission, can make a decision were received.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: The ERRC should release an inmate unless there is clear and convincing evidence that the inmate is a danger to himself or others.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: The term "sentence structure" is vague were received.

DOC Response: The term "sentence structure" refers to the sentence or sentences under which the inmate is currently incarcerated. For example, if the inmate is currently incarcerated for several offenses, the calculation of his or her sentence could be dependent on a number of factors, including the class of the felonies of which the inmate was convicted and whether the sentences are concurrent or consecutive.

- Comments: There was not always enough time during a release consideration interview to review all of the pertinent documents for purposes of pointing out perceived errors of material fact under s. PAC 1.06 (7).

DOC Response: The department has no authority over the commission with regard to the conduct of an interview for release consideration.

- Comments: Deferrals of longer than 12 months need no justification. The concern is that deferrals of longer than 12 months will be become more frequent.

DOC Response: The department has no authority over the commission.

- Comments: The term "protection of the public" under s. PAC 1.09 (5) (a) was vague.

DOC Response: The department has no authority over the commission in the development of its rules.

3. *Extraordinary health and aged*

- Comments: The new procedure for release under extraordinary health condition or age does not give an inmate a fair review, representation, or an opportunity to be heard.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: There was a need for terminology to be defined and for a list of circumstances.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: The process was too complicated and that a physician should be able to decide if the inmate meets the criteria.

DOC Response: The department has no authority over the commission in the development of its rules.

- Comments: There should be aftercare plans for an inmate released under the extraordinary health condition provision.

DOC Response: The department has no authority over the commission in the development of its rules. However, as part of the review of a petition for release due to extraordinary health or age, the commission may consider the inmate's release plan.

4. *In the interest of justice*

- Comments: The term "in the interest of justice" is vague and should be removed or defined.

DOC Response: This term is used in the commission's rule, ch. PAC 1. The department has no authority over the commission in the development of its rules.

5. *Risk assessment*

- Comments: A suggestion urging the use of a risk assessment prior to release eligibility was made.

DOC Response: The proposed rule addresses the process and procedures for consideration of release to extended supervision as provided in 2009 Wisconsin Act 28. The department is developing a program for assessing the risk of all inmates.

6. *Sentencing and parole*

- Comments: All inmates should be eligible for the same release consideration.

DOC Response: The time of the offense or the time of conviction determines what sentencing provisions apply. As a result there are different provisions addressing the issue of release whether to parole or extended supervision. The department has not authority over the statutory provisions.

7. *Violent classification*

- Comments: There were no non-violent C or D felonies.

DOC Response: The designation of violent or nonviolent for Class F through I felonies is a function of the legislature. If there should be a comparable designation for class C or D felonies, the legislature will need to act.

- Comments: Concerns that the Department of Corrections is responsible for determining if an inmate is a violent offender under s. 302.113 (1) (b) 6., Stats., were received.

DOC Response: By statute, inmates that meet the definition of a violent offender under s. 16.964 (12) (a), Stats. are ineligible for positive adjustment time at the rate of one day for every two days served. However, inmates who are ineligible for PAT one for two may be considered for release under other release mechanisms if they meet the eligibility requirements and not otherwise excluded.

8. *Statutory matters*

- Comments: Concerns that the 10 day minimum notice under s. PAC 1.08 (4) (b) is not adequate were received.

DOC Response: The department does not have authority over the commission in the development of its rules.

- Comments: The definition of "victim" in the rule does not include an adult child.

DOC Response: The department does not have authority over the commission in the development of its rules.

9. *Victim contact*

- Comments: Inmates should be able to contact victims directly.

DOC Response: The department does not have the authority to permit this nor does the department believe that this would be in the best interests of justice.

- D. Modifications made in the proposed rule as a result of the testimony received at public hearings or public comments made.

The department clarified the criteria it uses in making release decisions and recommendations under PAT one for two and certain earned release. The department decided that the criteria should be the same as that used by the earned release review commission.

In addition, the department clarified the effect of the sentence modification actions under these provisions. For all but the risk reduction sentence, the overall length of a sentence remains unchanged.

LEGISLATIVE COUNCIL STAFF CLEARINGHOUSE REPORT:

See attached.

RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS IN THE CLEARINGHOUSE REPORT:

The department has quoted verbatim only those Legislative Council Staff Recommendations which the department has accepted with comment or has rejected.

1. Statutory Authority.

Recommendation: In s. DOC 302.33 (1) (a), the department must determine that an inmate is not at a high risk of reoffending in order to be eligible to receive positive adjustment time. This is not a criterion for positive adjustment time under s. 304.06 (1) (bg), Stats. Therefore, it appears that the department does not have the statutory authority to impose this requirement. This comment also applies to s. DOC 302.34 (1) (a).

DOC Response: With respect to DOC 302.33 (1) (a), the DOC has the authority under s. 973.01 (3d) (b), to evaluate whether an inmate is at a high risk of reoffending. Under that provision, the DOC must apply an objective risk assessment instrument to determine how likely it is that the person will commit another offense.

With respect to DOC 302.34 (1) (a), the department accepts the recommendation and has deleted the proposed rule provision. The department also reviewed DOC 302.35 (1) (a) and concluded that the same comment is applicable. The department deleted the proposed rule provision.

2. Form, Style and Placement in Administrative Code.

Recommendations (a) through (d): DOC Response: Accepted.

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

Recommendations (a) through (j): DOC Response: Accepted.

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

Recommendations (a) through (c): DOC Response: Accepted.

Recommendation (d): In s. DOC 302.03 (15r), “under” should be replaced with “on which” and “his or her” should replace “their.”

DOC Response: Accepted in part and rejected in part. In s. Doc 302.03 (15r), the department does not agree that the word "under" should be replaced with the words "on which" in the text of rule. The text is to clarify that the sentence is imposed under s. 973.031, Stats. The department agrees with the recommendation to replace the word "their" with the words "his or her."

Recommendation (e) through (n): DOC Response: Accepted.

Recommendation (o): In s. DOC 302.39 (7), should "on or" be inserted before" after?"

DOC Response: Accepted. The department revised the text of the rule to be consistent with the provisions of the rule. When the department is referring to sentences imposed on or after December 31, 1999, the department has designated those sentences as sentences imposed under s. 973.01.

Recommendations (p) through (r): DOC Response: Accepted.

Recommendation (s): In s. Doc 302.41, it is not clear what the purpose of sub. (5) is.

DOC Response: The purpose of s. DOC 302.41 (5) is to clarify that releases under this section will be granted if the releases are consistent with public safety and reentry goals.

EXPLANATION OF ANY CHANGES THAT HAVE BEEN MADE TO THE PLAIN LANGUAGE ANALYSIS OR THE FISCAL ESTIMATE:

Changes to the Plain Language Analysis:

1. Changed the term "certain early release" to "certain earned release" to clarify that release under this provision is an earned privilege. Changed the word "early" to "earned" throughout the rule for the same reason.
2. Created two new definitions, "enrolled victim" and "office of victim services and programs." Enrolled victims are those individuals who have requested that the department notify them about the change in status of an inmate. The department through the office of victim services and programs notifies those victims who have enrolled when an inmate's status changes. The text of the rule was changed to clarify when notification is given to enrolled victims.
3. Separated the description of the provision for positive adjustment time (PAT) under s. 302.113 (2) (b), "one for two" rate, from the other two PAT provisions.

The department expanded the description of the department's interpretation of its responsibilities under the law, including that violations of prison regulations resulting in a major penalty will be considered and that refusal to participate in programming and treatment will also be considered. The department added two categories to the list of exclusions, offenders convicted of a Class A or B felony and offenders convicted of a crime defined in ch. 940.

The department listed in the rule the criteria it will use in making a recommendation under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision regarding enrolled victim notification. The department also clarified the provision regarding the provision of information to the court regarding its recommendation to modify the inmate's sentence under this section. Finally, the department added a provision clarifying that modification of a sentence under this provision does not change the overall length of the sentence.

4. The department expanded the description of the department's interpretation of its responsibilities under the law regarding PAT one for three and one for 5.7, including that violations of prison regulations resulting in a major penalty will be considered and that refusal to participate in programming and treatment will also be considered.

The department clarified the responsibility of the earned release review commission to review inmates for eligibility under these provisions. The department also provided that procedures for consideration are found in the commission's rule, PAC 1. Finally, the department added a provision clarifying that modification of a sentence under this provision does not change the overall length of the sentence.

5. The department expanded the description of the department's interpretation of its responsibilities under the law regarding release of an inmate who has served 75% or 85% of the confinement portion of his or her bifurcated sentence. The department clarified the responsibility of the earned release review commission to review inmates for eligibility under these provisions. The department also provided that procedures for consideration are found in the commission's rule, PAC 1. Finally, the department added a provision clarifying that modification of a sentence under this provision does not change the overall length of the sentence.
6. The department expanded the description of the rule provisions, relating to the challenge incarceration program and the Wisconsin earned release program. The department did not have rules governing these two programs previously. The rules provisions were developed to reflect the department's statutory authority and the changes to the programs made by 2009 Wisconsin Act 28.
7. The department expanded the description of the department's interpretation of its responsibilities under the law regarding risk reduction sentences. The department set the four factors which it will consider when determining whether a plan developed under this provision has been successfully completed by an inmate. The department inserted a provision which clarifies that any portion of the period of confinement which is reduced by early release of an inmate is not added to the period of extended supervision.

8. The department expanded the description of the department's interpretation of its responsibilities under the law relating to the release of an inmate within 12 months of his or her release eligibility date under s. 302 113 (9h). The department added two categories to the list of exclusions, offenders convicted of a Class A or B felony and offenders convicted of a crime defined in ch. 940.

The department listed in the rule the criteria it will use in making a recommendation under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision regarding enrolled victim notification before a decision is made and at the time of release. The department also added a provision regarding notice to the court and the district attorney at the time of release. The department added a provision clarifying that modification of a sentence under this provision does not change the overall length of the sentence. The department clarified that releases under this section would be consistent with public safety and reentry goals. Finally, the department inserted a provision which clarifies that any portion of the period of confinement which is reduced by early release of an inmate is not added to the period of extended supervision.

9. The department expanded the description of the revised provision regarding the review of department decisions relating to custody classification, institution placement, program needs, or treatment needs.

Changes to the Fiscal Estimate: None