

STATE OF WISCONSIN  
CONTROLLED SUBSTANCES BOARD

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IN THE MATTER OF RULE-MAKING	:	ORDER OF THE
PROCEEDINGS BEFORE THE	:	CONTROLLED SUBSTANCES
CONTROLLED SUBSTANCES BOARD	:	BOARD
	:	ADOPTING RULES
	:	(CLEARINGHOUSE RULE 22-036)

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ORDER

An order of the Controlled Substances Board to create CSB 2.86 relating to scheduling Fospropofol.

Analysis prepared by the Department of Safety and Professional Services.

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ANALYSIS

**Statutes interpreted:** s. 961.16, Stats.

**Statutory authority:** s. 961.11 (1) and (4), Stats.

**Explanation of agency authority:**

Section 961.11 (1), Stats. provides that “[t]he controlled substances board shall administer this subchapter and may add substances to or delete or reschedule all substances listed in the schedules in ss. 961.14, 961.16, 961.18, 961.20 and 961.22 pursuant to the rule-making procedures of ch. 227.”

Section 961.11(4), Stats. provides that “[i]f a substance is designated, rescheduled or deleted as a controlled substance under federal law and notice thereof is given to the controlled substances board, the board by affirmative action shall similarly treat the substance under this chapter after the expiration of 30 days from the date of publication in the federal register of a final order designating the substance as a controlled substance or rescheduling or deleting the substance or from the date of issuance of an order of temporary scheduling under 21 USC 811 (h), unless within that 30-day period, the board or an interested party objects to the treatment of the substance. If no objection is made, the board shall promulgate, without making the determinations or findings required by subs. (1), (1m), (1r) and (2) or s. 961.13, 961.15, 961.17, 961.19 or 961.21, a final rule, for which notice of proposed rulemaking is omitted, designating, rescheduling, temporarily scheduling or deleting the substance. If an objection is made the board shall publish notice of receipt of the objection and the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the board shall make a determination with respect to the treatment of the substance as provided in subs. (1), (1m), (1r) and (2) and shall publish its decision, which shall be final unless altered by statute. Upon publication of an objection to the treatment by the board, action

by the board under this chapter is stayed until the board promulgates a rule under sub. (2).”

**Related statute or rule:** s. 961.16, Stats.

**Plain language analysis:**

This rule schedules Fospropofol as a Schedule IV controlled substance.

The Controlled Substances Board did not receive an objection to similarly listing Fospropofol as a schedule IV under ch. 961, Stats. within 30 days of the date of publication in the federal register of the final order listing Fospropofol as a schedule IV controlled substance.

Pursuant to s. 961.11 (4), Stats., the Controlled Substances Board took affirmative action to similarly treat Fospropofol under ch. 961, Stats. by creating the following:

***CSB 2.86 Addition of Fospropofol to schedule IV. Section 961.20 (2) (en), Stats., is created to read:***

*961.20 (2) (en) Fospropofol.*

The Affirmative Action order, dated July 9, 2021, took effect on July 19, 2021 to allow for publication in the Administrative Register and expires upon promulgation of a final rule.

**Summary of, and comparison with, existing or proposed federal regulation:**

On October 6, 2009, the Department of Justice, Drug Enforcement Administration published its final rule in the Federal Register listing Fospropofol into schedule IV of the federal Controlled Substances Act. The scheduling action is effective November 5, 2009.

**Summary of public comments received on statement of scope and a description of how and to what extent those comments and feedback were taken into account in drafting the proposed rule:** N/A

**Comparison with rules in adjacent states:**

**Illinois:** Illinois has listed Fospropofol a schedule IV controlled substance [720 Illinois Compiled Statutes 570/210 (c) (11.1)].

**Iowa:** Iowa has listed Fospropofol a schedule IV controlled substance [Iowa Administrative Code 124.210 (3) (ba)].

**Michigan:** Michigan has not scheduled Fospropofol as a controlled substance.

**Minnesota:** Minnesota has listed Fospropofol a schedule IV controlled substance [Minnesota Statutes 152.02 (5) (c) (24)].

**Summary of factual data and analytical methodologies:**

The methodology was to schedule Fospropofol to conform with the federal Controlled Substances Act.

**Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:**

The proposed rules were posted for a period of 14 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals. No comments were received.

**Fiscal Estimate and Economic Impact Analysis:**

The Fiscal Estimate and Economic Impact Analysis is attached.

**Effect on small business:**

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department’s Regulatory Review Coordinator may be contacted by email at Jennifer.Garrett@wisconsin.gov, or by calling (608) 266-6795.

**Agency contact person:**

Nilajah Hardin, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, 4822 Madison Yards Way, P.O. Box 8366, Madison, Wisconsin 53708; telephone 608-267-7139; email at DSPSAdminRules@wisconsin.gov.

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TEXT OF RULE

SECTION 1. CSB 2.86 is created to read:

**CSB 2.86 Addition of Fospropofol to schedule IV.** Section 961.20 (2) (en), Stats., is created to read:

961.20 (2) (en) Fospropofol.

SECTION 2. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.), Stats.

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(END OF TEXT OF RULE)  
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Dated 05/12/23

Agency *Douglas Englebort*  
Chairperson  
Controlled Substances Board