

**STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS**

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #04-104

FINAL RULE to amend ETF 10.30 (8) (title) and (a), 10.75 (2) (a) and 10.82 (1), repeal and recreate ETF 10.82 (2) and create ETF 10.82 (1) (am) regarding the receipt of facsimile and electronic mail communications by the department.

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Agency Person to be Contacted for Questions

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Statement Explaining Need for Rule

The rule is necessary to codify a general policy that, for purposes of administering benefits under ch. 40, Stats., receipt of a document via fax is functionally identical to receipt of that document by other available means, such as mail delivery or delivery by hand. The existing administrative rule, s ETF 10.82 (2), is silent on e-mail and its fax provisions are limited to specified documents. Also, the original must be received within 14 days after receipt of the fax. Since that rule was promulgated in 1995, occasional questions have arisen about whether other documents may be accepted by fax, or whether the Department had “received” a document at all if it arrived by fax but some criteria of s. ETF 10.82 (2) had not been fully satisfied.

Analysis Prepared by the Department of Employee Trust Funds

1. Statute interpreted:

None.

2. Statutory authority:

This rule will be promulgated under the authority granted to the Secretary of the Department of Employee Trust Funds under Wis. Stat. s. 40.03 (2) (i).

3. Explanation of agency authority:

The Secretary of the Department of Employee Trust Funds is expressly authorized to promulgate rules required for the efficient administration of the Public Employee Trust Fund or the benefit plans administered by the Department. Rules required for the administration of group health, long-term care, income continuation or life insurance plans under subchs. IV to VI of ch. 40, Stats., must also be approved by the Group Insurance Board. Approval by the Deferred Compensation Board is necessary for all rules required for the administration of deferred compensation plans established under subch. VII of ch. 40. Those programs aside, rule-making under Wis. Stat. s. 40.03 (2) (i) requires the approval of the Employee Trust Funds Board and rules relating to teachers must be approved by the Teachers Retirement Board while rules relating to participants other than teachers must be approved by the Wisconsin Retirement Board.

4. Related statute or rule:

Sections 137.11, 137.16, 137.17, and 137.23, Stats., all being part of subchapter II ("Electronic Transactions and Records; Electronic Notarization and Acknowledgement") of ch. 137, Stats., as affected by 2003 Wis. Act 294, effective May 5, 2004. Act 294 is intended to enact the Uniform Electronic Transactions Act in Wisconsin. As described by the National Conference of Commissioners on Uniform State Laws, the UETA is designed to support the use of electronic commerce. The primary objective of the UETA is to establish the legal equivalence of electronic records and signatures with paper writings and manually signed signatures, removing barriers to electronic commerce.

5. Plain language analysis:

The rule is loosely modeled on provisions of ss. 137.11, 137.16, 137.17, and 137.23, Stats. The rule codifies a general Department policy that receipt of a document via facsimile or electronic mail is functionally identical to receipt of that document by other available means, such as mail delivery or delivery by hand, for purposes of administering benefits under ch. 40 of the Wisconsin Statutes. An electronic copy may be treated as the original.

The rule does provide a new and different treatment of electronic documents concerning time of receipt. Facsimiles and e-mails may be received even when the Department's offices are closed, unlike other forms of communication.

Beginning in 1997, the DETF has optically imaged participant files to computer instead of retaining paper copies of documents. Since then, for DETF record keeping purposes at least, a facsimile is functionally identical to the original document.

The rule repeals and recreates Wis. Admin. Code s. ETF 10.82 (2). That provision was originally promulgated in 1995 for the purpose of allowing for documents to be filed via facsimile transmission, in order to preserve the earliest possible date of receipt. The 1995 rule included several additional requirements, including that the original of the document be provided to the DETF within 14 days, so that it could be added to the participant's file for future reference. The rule expressly applied only to forms listed in the rule. The purpose of that 1995 rule-making was to allow a person to "lock in" an earlier date of receipt by DETF than might be possible if the applicant relied only on mail, or other delivery methods that are less immediate than electronic transmission.

This rule is permissive. It does not require the Department to accept documents transmitted electronically as originals when there may be doubts about the completeness or authenticity of the document. The Department may make inquiries and require additional authentication. The Department also retains its strong preference for receipt of certain documents in the original (or by certified copy), such as court orders. However, when authenticity is satisfactorily established, the rule provides the Department may even accept court orders by fax or e-mail.

Since the Department promulgated its first fax rule in 1995, an occasional question has arisen about whether the rule prohibited receiving documents by facsimile if the document was not specifically listed in the rule, or whether DETF had technically "received" a document at all if it arrived by fax but the sender then deliberately failed to send the original within 14 days. This rule resolves those questions, in large part, by removing the list of permitted documents and minimizing the criteria for deeming a fax or e-mail document as "received" by the Department.

Some administrative rules written since 1995 have included specific authorization to receive a particular document by "fax." This rule codifies a general policy, rather than a piecemeal approach, by amending those provisions to fit under the rule.

6. Summary of, and comparison with, existing or proposed federal regulations:

Public Law 106-229 (June 30, 2000), the federal Electronic Signatures in Global and National Commerce Act, codified at 15 U.S. Code ss. 7001 to 7006, 7021 and 7031, provides that in all transactions in or affecting interstate or foreign commerce, a contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form. The federal law

generally preempts state laws that require contracts or other records be written, signed, or in non-electronic form and, to at least some extent, requires governmental agencies to use and accept electronic records and electronic signatures with respect to records other than contracts to which the agency is a party. However, the federal law also allows states to instead adopt the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws.

7. Comparison with rules in adjacent states:

There are numerous administrative code provisions in adjacent states that use the terms "facsimile," "fax," "e-mail" or "electronic mail." A search on one legal database located 880 documents containing such references. For example, the Illinois Secretary of State accepts filings by electronic or facsimile transmission and the date the transmission is received is the receipt date, if the document is acknowledged and accepted. See 2 Illinois Administrative Code s. 570.40. Similar provisions for honoring the time of receipt of a fax can be found in 44 Ill. Adm. Code ss. 1.2005, 500.300, 526.2005, 1100.2005, 1120.2005, 1300.2005, 1400.2505, 1500.2005, 1600.2005 and 2000.2005. Some other Illinois code provisions require a separate acknowledgement of receipt in order to establish the fax was received.

8. Summary of factual data and analytical methodologies:

The rule is based on DETF experiences with documents received by fax, particularly under the 1995 fax rule codified as s. ETF 10.82 (2).

9. Analysis and documents used to determine effect on small business:

The Department relies on the text of rule itself, which affects only the Department and persons who elect to communicate with the Department by fax or e-mail. The rule applies only to such communications. The vast majority of the communications to and from the Department pertain to the pension and employee fringe benefit plans administered by the Department, and to benefit determinations concerning particular individuals. The only employers participating in these benefit plans are the state and some local units of government in the state. The rule therefore has no effect on small businesses.

10. Anticipated costs incurred by private sector:

None.

11. Statement of effect on small business:

The rule has no effect on small businesses.

Regulatory Flexibility Analysis:

The rule has no significant effect on small businesses because only governmental employers and their employees may participate in the benefit programs under ch. 40 of the statutes administered by the Department of Employee Trust Funds.

Fiscal Estimate:

The rule has a direct fiscal impact on the Department of Employee Trust Funds, which will need to expand the number of ports available for its fax server in order to handle DETF fax machines not currently connected to the server. DETF is able to verify time of receipt outside of normal working hours only if the fax machine is connected to the fax server. The cost to upgrade to eight (8) fax lines is \$2,495. The cost of extended support, to assure one day turnaround in the event of a failure, is an additional \$1,495 per year. It is possible that additional telephone lines may also be necessary. Those costs are not included in this estimate. These costs would be administrative expenses borne by the Public Employee Trust Fund, not state funds.

The rule generates no revenues for any unit of government. It has no effect on the fiscal liabilities of the state or of any county, city, village, town, school district, technical college district or sewerage district.

Text of Rule

SECTION 1. ETF 10.30 (8) (title) and (a) is amended to read:

ETF 10.30 (8) Electronic receipt dates. (a) ~~Notwithstanding~~ Subject to s. ETF 10.82 (2), the department may accept correctly completed elections to participate in the variable division, elections to terminate participation in the variable division and notifications to rescind elections to terminate participation in the variable division that are received by the department's facsimile machine or by electronic mail in a complete and legible form. The facsimile or electronic mail may be accepted as the original.

SECTION 2. ETF 10.75 (2) (a) is amended to read:

ETF 10.75 (2) (a) The department received the original of the power of attorney which is signed by the person granting the power of attorney, dated, and notarized, or a legible photocopy or facsimile copy or e-mail attachment thereof, subject to s. ETF 10.82 (2). The department may require submittal of the original power of attorney and any such additional information as the department deems necessary to verify that the power of attorney remains in effect.

SECTION 3. Section ETF 10.82 (1) (a) is amended to read:

ETF 10.82 Receipt by the department. (1) DATE OF RECEIPT OR FILING; NONBUSINESS HOURS AND HOLIDAYS EXCLUDED. (a) Except as otherwise specifically provided in ~~sub. (2) par. (am)~~ for a facsimile or electronic mail, the date a document is received by, or filed with, the department is the date the original document is physically received at the department at its offices during regular business hours as provided under s. 230.35 (4) (f), Stats., regardless of the date the document was mailed or otherwise intended to be transmitted to the department and regardless of any mishandling or misdirection by the U.S. postal service or any other agency or person. A document which arrives at the department's offices after 4:30 p.m. Monday through Friday or on a Saturday, Sunday or holiday as defined by s. 230.35 (4) (a), Stats., is deemed received by the department at 7:45 a.m. on the next day on which the department's offices are regularly open for business as provided under s. 230.35 (4) (f), Stats.

SECTION 4. Section ETF 10.82 (1) (am) is created to read:

ETF 10.81 (1) (am) Unless otherwise provided in sub. (2), a fax or e-mail to which sub. (2) applies is received by the department, regardless of whether any individual is aware of its receipt, when it enters the information processing system designated or used by the department for the purpose of receiving facsimiles or electronic mail, respectively, provided the following are true:

1. The fax or e-mail transmission is in a form capable of being processed by department's information processing system.
2. The department is able to retrieve the fax or e-mail from the information processing system.

SECTION 5. Section ETF 10.82 (2) is repealed and recreated to read:

ETF 10.82 (2) RECEIPT OF ELECTRONIC CORRESPONDENCE; FACSIMILES AND ELECTRONIC MAIL. (a) *Electronic correspondence may be accepted.* The department may accept correspondence transmitted to the department by fax or by e-mail, including letters, messages, and documents associated with payment or administration of, or eligibility for, benefits under ch. 40, Stats., and including authorizations to disclose confidential personal information, applications for benefits, beneficiary designations and elections to participate or terminate participation in the variable retirement investment trust.

Note 1: The purpose of this subsection is to allow persons corresponding with the department to utilize the speed, convenience and other legitimate advantages of electronic communications in transactions with the department. It is the purpose of this

subsection to permit persons with access to fax or e-mail to carry out transactions only to the same extent and with the same results as for transactions by non-electronic means, except for the expanded time of receipt provided by sub. (1) (am).

Note 2: It is recognized that under this subsection and because of the inherent nature of electronic communications that the department may at times accept and act upon fax or e-mail correspondence without ever receiving a holographic document or signature. The department may reasonably rely on representations made in correspondence to the department in any form. The department is not required to use different or extraordinary care before accepting or acting upon correspondence received by fax or e-mail.

Note 3: Under s. 943.395 (1) (c), it is prohibited to present or cause to be presented a false or fraudulent claim or benefit application, or any false or fraudulent proof in support of such a claim or benefit application, or false or fraudulent information which would affect a future claim or benefit application, to be paid under any employee benefit program created by ch. 40. Criminal penalties are provided for violation of this prohibition.

(b) *Rejection and non-receipt.* 1. The department may, at its sole discretion and in whole or in part, treat as never received or formally reject any fax or e-mail unless the department is satisfied that the transmission is complete, duly authorized by the proper person, authentic and is not likely to result in any payment of benefits through fraud, misrepresentation or error. To the extent that the correspondence consists of a purported copy of a document, the department may reject a fax or e-mail or treat it as never received unless satisfied that the transmission is an accurate copy.

2. Examples of circumstances under which a transmission may be rejected or treated as if never received include the following:

- a. The transmission as received is illegible, in whole or part.
- b. The transmission is, or appears to be, incomplete or interrupted.
- c. The transmission was not received on a fax machine or e-mail server, for fax and e-mail correspondence respectively, used by the department.
- d. There is no separate fax cover sheet or similar information accompanying the transmission which provides the sender's name, mailing address, and telephone number, as well as the fax number or e-mail address from which the transmission was sent.
- e. The department is unable to determine to its satisfaction the identity of the sender from the information transmitted.
- f. The department is unable to determine from the transmitted information to whom or to what transaction the transmission pertains.

Note: Records in the department pertaining to participants, alternate payees and insured persons are filed by Social Security Number and name. Records pertaining to beneficiaries of deceased participants are filed with the deceased participant's records, identified by the decedent's name and Social Security Number, as well as the name and Social Security Number of the beneficiary. To help assure prompt and accurate processing, this identifying information should be included with any fax or e-mail or, indeed, any other form of correspondence.

g. A reasonable doubt exists that a fax or e-mail or e-mail attachment is a true copy of the document of which it purports to represent, as determined by the department.

h. The authenticity of an underlying document is not established to the satisfaction of the department.

i. With respect to a benefit application form, waiver of benefits, beneficiary designation, election concerning the variable retirement investment trust or other document affecting entitlement to or payment of benefits, it is not established to the satisfaction of the department that the sender of the transmission was the living person whose benefits are affected, a person duly authorized to act on that person's behalf, such as a guardian of the estate or attorney-in-fact, or the trustee of a trust or personal representative of an estate entitled to receive death benefits.

j. The document is received after the deadline for receipt by, or filing with, the department.

Example: Annuity applications or beneficiary designations received after the death of the participant are never accepted.

(c) Department may request additional information. Before agreeing to acknowledge, accept, file, formally receive or act upon correspondence transmitted by fax or e-mail, the department may request additional information, including but not limited to the original document or other supporting representations and documentation, as necessary to establish to the department's satisfaction that the transmitted correspondence is authentic, offered by the proper person and, if the correspondence includes or consists of a copy of a document, that the transmission is a true and authentic copy.

(d) No presumptions as to receipt. Any attempt to file documents with the department by facsimile or electronic mail is entirely at the risk of the person transmitting

the facsimile or electronic mail to the department. Transmission does not create a presumption of actual receipt by the department. Dates and times inserted into a fax or e-mail by a sending machine do not establish when, or if, correspondence was received by the department. Mere acknowledgement that a transmission was received does not establish that the transmission was complete, was accepted or that the content sent corresponds to the content received.

Note: Silence by the department does not indicate receipt or acceptance. If verification of receipt is important to the sender, the sender should seek and obtain verification from the department division, bureau or staff actually responsible for processing the transaction in question.

(e) *Agents and third-party administrators not affected.* This subsection does not require a third party administrator or agent under contract to any board to administer a benefit program supervised by that board to accept correspondence or documents by fax or e-mail. Neither does this rule prohibit such an agent or third party administrator from doing so, provided security, privacy, authenticity and accuracy concerns are adequately addressed.

(f) *Specific documents excluded.* 1. The department may not accept or rely on electronic copies of certain documents, as follows:

a. The text includes words to the effect that a copy may not be relied upon to the same extent as the original.

b. The document is a record, or is offered to the department as necessary evidence, of adoption, divorce, other matters of family law, the execution of a will or the creation of a testamentary trust.

c. The document is, or is offered to the department as necessary evidence of, a notice provided by a court, a court order or an official court document including a brief, pleading or other writing required to be executed in connection with court proceedings.

2. Notwithstanding subd. 1., if time is of the essence, the department may nevertheless accept and rely upon a fax or e-mail of a court order to the department, or a fax or e-mail of a certified copy of such order, when the transmission originates directly from the court or the department is otherwise satisfied that the faxed or e-mailed court order is authentic, provided the order is one of the following:

a. A court order for the department to disclose confidential personal information under s. 40.07 (1) (c) or (2).

b. A qualified domestic relations order under s. 40.02 (48m).

c. An order to the department as a party to the underlying action or an order to the department to take other action which the department is permitted to do.

Note. The department generally requires a copy of the court order directed at the department bearing an original certification of authenticity from the court, or an original court order.

3. This subsection does not apply to documents transmitted in connection with any program under the administrative oversight of the private employer health care coverage board.

(g) *Requirement to be in writing.* If a provision of ch. 40, Stats. or a rule adopted under ch. 40, Stats., requires a document offered to the department to be in writing, then the department may deem an e-mail or fax to satisfy that requirement.

(h) *Signature requirement.* If a provision of ch. 40, Stats. or a rule adopted under ch. 40, Stats., requires a signature, then the department may deem a signature transmitted by fax or incorporated in an e-mail, including any electronic sound, symbol or process attached to or logically associated with the e-mail and executed, adopted, or affixed by a person with the intent to sign the e-mail, to satisfy that requirement.

(end of rule text)

Effective Date

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in Wis. Stat. s. 227.22 (2).

Legislative Council Staff Clearinghouse Report on CR #

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Legislative Council Staff Clearinghouse Report on CR #

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Legislative Council Staff Clearinghouse Report on CR #

Insert Page 3 of Legislative Council Clearinghouse Report here. The report is not available in Word format.

Response to Legislative Council Staff Recommendations

The DETF implemented all the Legislative Council Staff recommendations in paragraphs 2. a., c., d. and e. of the Council's report. The text of the rule was modified accordingly.

The DETF also implemented the comments in paragraph 2.b. of the Report. As requested, the DETF has removed the parentheses and enclosed words used in s. ETF 10.82 (1) (a), " ... a facsimile ("fax") or electronic mail ("e-mail")." As suggested, the Department considered defining the terms "fax" and "e-mail" in s. ETF 10.01. However, the Department decided that the commonly understood meaning of these terms is entirely sufficient for the purposes of this rule. Usage within the administrative rule and the history of this rule-making clearly shows that the terms facsimile and fax are used interchangeably, as are the terms electronic mail and e-mail.

List of Persons Appearing or Registering For or Against the Rules.

No persons registered either for or against the rule at the public hearing on October 28, 2004. No one attended.

Summary of Comments Received at Public Hearing.

No person wished to testify concerning the rule. The record was held open for written comments until 4:30 p.m. on November 12, 2004, but no comments were received.

Modifications to Rule as Originally Proposed as a Result of Public Comments

No modifications were made to the rule as originally proposed based on public comments. However, the Deferred Compensation Board approved the scope statement for this rule on November 9, 2004. The text of s. ETF 10.82 (2) (f) 3. was therefore revised to delete reference to the Deferred Compensation Board programs being excluded from the effects of this rule.

Modifications to the Analysis Accompanying the Proposed Rule.

Minor editorial revisions have been made to the original analysis. There are no substantive changes in the analysis.

Modifications to the Initial Fiscal Estimate

None.

Board Authorization for Promulgation

This final draft report on Clearinghouse Rule #04-104 has been duly approved for submission to the Legislature, and for promulgation, by the Department of Employee Trust Funds and by:

The Employee Trust Funds Board at its meeting on _____.

The Teachers Retirement Board at its meeting on _____.

The Wisconsin Retirement Board at its meeting on _____.

The Group Insurance Board at its meeting on _____.

The Deferred Compensation Board at its meeting on _____.

Respectfully submitted,

DEPARTMENT OF EMPLOYEE TRUST FUNDS

Eric O. Stanchfield
Secretary

Date: _____