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CORRESPONDENCE MEMORANDUM

DATE: February 8, 2011

TO: Deferred Compensation Board

FROM: Linda Owen, Policy Analyst
Office of Policy, Privacy and Compliance

SUBJECT: Clearinghouse Rule #10-138: Relating to Changes Made to Ch. 244, Stats. by 2009 Wisconsin Act 319 Regarding Power of Attorney

Staff recommends the Board approve the final version of this proposed rule.

The Department of Employee Trust Funds (ETF) proposes to revise the existing ETF administrative rules to reflect enactment of 2009 Wisconsin Act 319. This legislation made a number of changes to the statutes governing uniform power of attorney for property and finances. Rule changes are necessary to align ETF's treatment of power of attorney documents with the new statutes, including clarifying how ETF will process conflicting transaction requests from co-agents when the principal has granted authority to execute such transactions to multiple agents; specifying how the department will implement the 10-day deadline for rejecting power of attorney documents and requests provided in 2009 Wisconsin Act 319; and specifying how ETF will treat an agent's request to execute a transaction when the power of attorney document is incomplete or certification is required.

ETF has already taken the following actions as part of the rule promulgation process:

- Scope Statement approved by ETF Secretary on June 11, 2010.
- Scope Statement published in Wisconsin Administrative Register No. 654 on July 1, 2010.
- Proposed rule submitted to Legislative Council Administrative Rules Clearinghouse on November 16, 2010.
- Published notice of hearing in Wisconsin Administrative Register No. 660 on December 15, 2010.
- Received Legislative Council Rules Clearinghouse Report on December 17, 2010.
- Held a public hearing on February 3, 2011.

Reviewed and approved by Robert J. Conlin, Deputy Secretary

Signature: RJC Date: 2/17/11

Board	Mtg Date	Item #
DC	03.01.11	5

The final draft report on the proposed administrative rule is attached to this memorandum. Department staff made minor changes to the rule in response to comments received in the Legislative Council Staff Clearinghouse Report. The rule now conforms to recommended form and style. There were no appearances at the public hearing held at ETF February 3, 2011, and no written comments were received. Department staff will be available at the meeting to discuss this memorandum and answer any questions you may have regarding the proposed rule.

Board approval of the final version of the proposed rule is the next step in the administrative rule promulgation process. The Deferred Compensation Board is the first board to consider the proposed rule. ETF will also submit the proposed rule to the Teachers Retirement Board, Wisconsin Retirement Board and the Employee Trust Funds Board at their meetings on March 10, 2011. Once approved by all of the requisite boards, ETF will submit the proposed rule to the State Legislature for consideration.

Staff will be available to discuss this proposed rule with you at the Board meeting on March 1, 2011.

Attachment – Final Draft Report on CR #10-138

Clearinghouse Rule 10-138
State of Wisconsin
Department of Employee Trust Funds, Employee Trust Funds Board, Teachers Retirement Board and Wisconsin Retirement Board

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FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #10-138

FINAL RULE to amend administrative rule ETF 10.75 relating to the power of attorney.

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Agency Person to be Contacted for Questions

Please direct any questions about this rule-making to Linda Owen, Policy Analyst, Office of Policy, Privacy and Compliance, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 261-8164. E-mail address: linda.owen@etf.state.wi.us.

Statement Explaining Need for Rule

This rule-making is needed to amend the existing rule to bring the rule into harmony with the changes to Wisconsin power of attorney statutes enacted in 2009 Wisconsin Act 319.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:
   Various statute sections in ch. 244, Stats., relating to uniform power of attorney.

2. Statutory Authority:
   Sections 40.03 (2) (i), (ig), (ir), and 227.11 (2) (a), Stats.

3. Explanation of Agency Authority:
   By statute, the ETF Secretary is expressly authorized, with appropriate board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin statutes. Also, each state agency may

promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

4. Related Statute or Rule:
There are no other rules that clarify how ETF will administer Chapter 40 benefits with respect to power of attorney. 2009 Wisconsin Act 319 contains changes to the statutes relating to power of attorney for property and finances.

5. Plain Language Analysis:
2009 Wisconsin Act 319 updates provisions related to the uniform power of attorney for property and finances. Rule changes are necessary to bring ETF's treatment of power of attorney documents into harmony with the new statutes, including:

- A rule clarifying how the department will process conflicting transaction requests from co-agents when the principal has granted authority to execute such transactions to multiple agents.

- A rule specifying how the department will implement the 10-day deadline for rejecting power of attorney documents and requests provided in 2009 Wisconsin Act 319.

- A rule specifying the department's treatment of an agent's request to execute a transaction when the power of attorney document is incomplete or certification is required.

- A rule clarifying that a power of attorney does not automatically terminate when a domestic partnership established under Chapter 40 is terminated.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:
There are no existing federal regulations that specifically address how states process and administer power of attorney.

7. Comparison with Rules in Adjacent States
All states except Louisiana have adopted the Uniform Power of Attorney Act, although each state may incorporate additional minor provisions into their own power of attorney laws. If a power of attorney was executed in a state other than Wisconsin, the department would abide by that state's laws with respect to the powers granted in the power of attorney document.

8. Summary of Factual Data and Analytical Methodologies:
2009 Wisconsin Act 319 amended Wisconsin's statutes governing uniform power of attorney for finances and property. The proposed rule change is intended to bring ETF's power of attorney rule into harmony with the amended statutes

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report:

The rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the benefit programs administered by the department.

10. Effect on small business:
There is no effect on small business.

11. Agency contact person:
Linda Owen, Policy Analyst, Department of Employee Trust Funds, 801 W Badger Rd, Madison, WI 53713-7931, P.O. Box 7931 (use ZIP Code 53707 for PO Box); Phone: 608-261-8164; E-mail: linda.owen@etf.state.wi.us

12. Proposed Effective Date:
This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided by s. 227.22 (2) (intro.), Stats.

13. Fiscal Estimate:
The rule will have a minimal fiscal effect, in that it will require minor changes to ETF's procedures with respect to reviewing power of attorney documents. Any costs are anticipated to be insignificant, and the Department can absorb these costs within the existing base budget. The rule will not create any additional fiscal impact on any county, city, village, town, school district, technical college district, or sewerage districts. The rule will not create any additional fiscal impact on the state for the current biennium. The rule will not have any fiscal impact on the private sector.

14. Free Copies of Proposed Rule:
Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931. The telephone number is: (608) 266-1071.

ETF 10.75 is repealed and recreated to read:

ETF 10.75 Power of attorney. (1) As used in this section, "power of attorney" includes all of the following: (a) A uniform statutory power of attorney as set forth in s. 244.61, Stats.;

(b) A uniform statutory power of attorney as defined under and containing the language required in a uniform statutory power of attorney act enacted by a jurisdiction other than the state of Wisconsin, provided the power of attorney meets the requirements of and does not conflict with s. 244.61, Stats.

(c) A durable power of attorney as defined in s. 244.02 (3), Stats.

(d) A durable power of attorney as defined under and containing the language required in a uniform durable power of attorney act enacted by a jurisdiction other than the state of Wisconsin, provided the power of attorney meets the requirements of and does not conflict with s. 244.02 (3) Stats.

(e) A person's common law authorization, whether durable or non–durable, to act as the person's agent under a power of attorney.

(1m) (a) A power of attorney document signed before September 1, 2010, is presumed to be non-durable unless the power of attorney document specifies that it is durable.

(b) A power of attorney document signed on or after September 1, 2010, is presumed to be durable unless the power of attorney document specifies that it is non-durable.

(2) The department or the Wisconsin deferred compensation program administrator, as applicable, shall accept the agent's signature in lieu of the principal's signature for all transactions for which the department or the Wisconsin deferred compensation program administrator requires the principal's signature, provided that all of the following conditions are met:

(a) The department or the Wisconsin deferred compensation program administrator, as applicable, received either the original of the power of attorney which is dated and signed by the person granting the power of attorney, or a legible facsimile copy or e-mail attachment, subject to s. ETF 10.82. The department or the Wisconsin deferred compensation program administrator, as applicable, may require additional documentation deemed necessary to verify that the power of attorney remains in effect.

(b) The appointment under power of attorney has not terminated or expired.

(c) The powers delegated under the power of attorney include authority to make the transaction authorized by the agent.

(d) If requested by the department or the Wisconsin deferred compensation program administrator, the agent certifies that he or she does not have knowledge of the termination of the appointment, the principal's death, or if applicable, the principal's incapacitation. If the department or the Wisconsin deferred compensation program

50 administrator requests such certification, and the agent does not provide the certification
51 as requested, the department or the Wisconsin deferred compensation program
52 administrator may decline to act upon the request.
53
54 (e) If the power of attorney is conditioned on the incapacitation of the principal, upon
55 request of the department or the Wisconsin deferred compensation program administrator
56 the agent provides evidence satisfactory to the department or the Wisconsin deferred
57 compensation program administrator that the principal has become incapacitated.
58
59 (f) Subject to par. (c), the department and the Wisconsin deferred compensation
60 program administrator, as applicable, shall treat as valid any beneficiary designation
61 received prior to the principal's death that is signed by the agent, without regard to the date
62 on which the power of attorney was executed by the principal or the date on which the
63 department or the Wisconsin deferred compensation program administrator receives the
64 beneficiary designation form, provided that the agent signed the beneficiary designation on
65 or after the date on which the principal executed the power of attorney granting that
66 authority to the agent.
67
68 **(3)** (a) The department or the Wisconsin deferred compensation program administrator,
69 as applicable, shall review acknowledged power of attorney documents for technical
70 completeness, and will reject any that are technically deficient within 10 days after receipt
71 by the department.
72
73 (b) The department and the Wisconsin deferred compensation program administrator,
74 as applicable, shall not honor transaction requests by the agent for which the power of
75 attorney document does not grant authority to the agent, regardless of whether the agent's
76 request is rejected within 10 days after the department received the agent's request.
77
78 (c) The effective dates of certain transactions are based on the receipt date of either the
79 transaction request or certain documents, such as a benefit application. If the department
80 receives such a transaction request from the agent, but either has not received the power
81 of attorney or the department requests certification under sub. (2) (d), the department must
82 receive the requested certification or the power of attorney within 30 days after the
83 department's notification to the agent that the power of attorney or certification is required.
84 If the department receives the certification or power of attorney within 30 days, the
85 effective date of the transaction requested will be based on the original date on which the
86 department received the transaction request.
87
88 (d) Par. (c) shall not apply if the principal executed the power of attorney after the date
89 on which the department received the transaction request.
90 (e) A document signed by the agent prior to the date on which the power of attorney
91 becomes effective shall have no force or effect.
92
93 **(4)** (a) If the principal has granted joint power of attorney to co-agents, the department
94 or the Wisconsin deferred compensation program administrator, as applicable, shall
95 require the signature of each agent on any transaction that requires the principal's
96 signature.
97
98 (b) If the principal has granted separate power of attorney to more than one agent, each
99 with independent authority, the department and the Wisconsin deferred compensation

program administrator, as applicable, shall honor transaction requests signed by any single agent, subject to sub. (2) (c).

(c) If agents under par. (b) request to execute conflicting transactions, the department or the Wisconsin deferred compensation program administrator, as applicable, may decline to act upon the requests of one or more of the agents if it is determined to be in the best interests of the principal.

(5) The department or the Wisconsin deferred compensation program administrator, as applicable, may decline to act upon the request of an agent acting under an alleged power of attorney if there is reason to believe that the purported agent is not the appointed person, the appointment is not in effect, the authority of the power of attorney does not extend to the particular transaction, or the power of attorney is otherwise defective.

(6) (a) Unless otherwise specified in the power of attorney, if the agent is the principal's spouse or domestic partner as defined in s. 770.01 (1), Stats., the power of attorney terminates if an action is filed for the dissolution of the agent's marriage to the principal or the domestic partnership of the principal and agent is terminated.

(b) Unless otherwise specified in the power of attorney, if the agent is the principal's domestic partner as defined in s. 40.02 (21c), Stats., the power of attorney does not automatically terminate if only the domestic partnership as defined in s. 40.02 (21d), Stats., terminates.

LCRC FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **10-138**

AN ORDER to repeal and recreate ETF 10.75, relating to the implementation of statutory changes related to power of attorney for finances and property pursuant to 2009 Wisconsin Act 319.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

11-18-2010 RECEIVED BY LEGISLATIVE COUNCIL.

12-16-2010 REPORT SENT TO AGENCY.

RNS:DWS

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LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☐ NO ☑

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☑ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

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CLEARINGHOUSE RULE 10-137

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

2. Form, Style and Placement in Administrative Code

a. In the rule preface plain language analysis, the second sentence should begin with the reference "Section 40.25 (3m), Stats." The first sentence of the second paragraph should begin with the phrase "Both ss. 40.24 (7) and 40.25 (3m), Stats."

b. References to the law in adjacent states are not informative without comparing and contrasting the Wisconsin provisions and those in the adjacent states.

c. In the treatment clause, the notation "SECTION 1." should be inserted before the phrase "ETF 20.055 is amended to read:".

d. The end of the introductory clause of s. ETF 20.055 should read "...shall be accepted for any of the following reasons:".

e. In s. ETF 20.055 (1) (b), the second occurrence of the notation "s." should be deleted since the statutory reference is in the disjunctive form.

f. In s. ETF 20.055 (1) (c), the paragraph letter "c" should be placed within parentheses.

g. In s. ETF 20.055 (3), the sentence, after it is amended, should read: "The requirements in s. 40.24 (7) (a) (intro.) and (b), Stats., and in s. 40.25 (3m), Stats., as it applies to s. 40.25 (1) (b), Stats., related to...."

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

In the rule preface statement of where comments on the rule are to be submitted, and the deadline for their submission, it appears that the date "2010" should be replaced by the date "2011."

Response to Legislative Council Staff Recommendations

ETF implemented all of the Legislative Council staff recommendations.

List of Persons Appearing or Registering For or Against the Rules

No persons appeared at the hearing or registered for or against the rule at the public hearing on February 3, 2011.

Summary of Comments Received at the Public Hearing

No person testified concerning the rule. The record was held open for written comments until 4:30 on Monday, February 14, 2011, but ETF did not receive any written comments.

Modifications to Rule as Originally Proposed

No changes were made from the original proposal as a result of public comments.

Modifications to Fiscal Estimate as Originally Proposed

No changes were made to the fiscal estimate in the original proposal.

Modifications to the Analysis Accompanying the Proposed Rule

No changes were made to the analysis accompanying the proposed rule.