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CORRESPONDENCE MEMORANDUM

DATE: November 11, 2011

TO: Employee Trust Funds Board
Teachers Retirement Board
Wisconsin Retirement Board

FROM: Lucas Strelow, Policy Analyst
Office of Policy, Privacy and Compliance

SUBJECT: Clearinghouse Rule #11-041: Implementing Changes Required by 2009 Wisconsin Act 28, To Maintain Tax Compliance Under Internal Revenue Code 415 (b), and Clarify Procedure Relating to Qualified Domestic Relations Orders

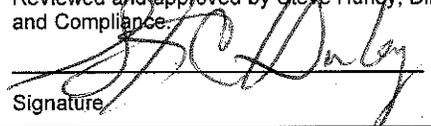
Staff recommends the Boards approve the final version of this proposed rule.

The Department of Employee Trust Funds (ETF) proposes to revise the existing ETF administrative rules relating to Qualified Domestic Relations Orders (QDROs) under ETF 20.35 to bring ETF's treatment of QDROs into agreement with state and federal statutes and clarify procedure.

The rule changes related to compliance include additional language for domestic partner QDROs in compliance with 2009 Wisconsin Act 28, and the addition of language addressing tax compliance requirements under IRC 415 (b) that provide for distribution limits on the participant and alternate payee's aggregate benefits.

Procedural clarifications in the rule specify that ETF will divide Wisconsin Retirement System (WRS) accounts in the chronological order in which the Department receives each QDRO, that interest is not payable on retroactive annuity payments to alternate payees for any months prior to receipt of a QDRO, QDROs received after the alternate payee's date of death are invalidated, and that retroactive corrections resulting in a benefit below statutory thresholds are not payable.

Reviewed and approved by Steve Hurley, Director, Office of Policy, Privacy and Compliance

 11-16-11

Signature Date

| Board | Mtg Date | Item # |
|-------|----------|--------|
| JL | 12.1.11 | 4C |
| TR | 12.1.11 | 3B |
| WR | 12.1.11 | 3B |
| ETF | 12.1.11 | 4C |

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

- Scope Statement approved by ETF Secretary on January 19, 2011
- Scope Statement published in Wisconsin Administrative Register No. 662 on February 15, 2011
- Proposed rule submitted to Legislative Council Administrative Rules Clearinghouse on July 15, 2011
- Published notice of hearing in Wisconsin Administrative Register No. 668 on August 31, 2011
- Received Legislative Council Rules Clearinghouse Report on August 10, 2011
- Held a public hearing on October 13, 2011

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 on October 13, 2011, and no written comments were received.

Board approval of the final version of the proposed rule is the next step in the administrative rule promulgation process. Once approved, ETF will first submit the proposed rule to the Governor's Office for approval and then to the State Legislature for consideration.

Department staff will be available at the Board meeting to answer any questions you may have regarding the proposed rule.

Attachment: Final Draft Report on Clearinghouse Rule #11-041

State of Wisconsin
Department of Employee Trust Funds,
Employee Trust Funds Board, Teachers Retirement Board
and Wisconsin Retirement Board

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #11-041

AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8) (b) and (c); and to create ETF 20.35 (8) (d), (9), and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order.

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Agency Person to be Contacted for Questions

Please direct any questions about this rule-making to Lucas Strelow, Policy Analyst, Office of Policy, Privacy and Compliance, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 267-0722. E-mail address: lucas.strelow@etf.state.wi.us.

Statement Explaining Need for Rule

This rule-making is needed to amend the existing qualified domestic relations order (QDRO) rule to incorporate language for QDROs from domestic partnerships, to address tax concerns under IRC S. 415(b), and to clarify and provide ETF with more flexibility in handling QDROs.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:
40.03 (2) (t), 40.02 (2m), (20), (21c), (21d), and (48m), Stats.
2. Statutory Authority:
Sections 40.03 (2) (i), (ig), (ir), and 227.11 (2) (a)(intro), 1. to 3., 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 the circumstances under which ETF will handle the division of WRS accounts and annuities.

5. Plain Language Analysis:

These rule changes add language for domestic partner QDROs, address tax concerns under IRC S. 415(b), clarify procedure, and provide ETF with more flexibility in handling QDROs received out of sequence. These changes include the following:

- In order to remain in compliance with 2009 Wisconsin Act 28, language must be added throughout ETF 20.35 to make QDROs applicable to domestic partnerships.
- Currently, ETF 20.35 has no procedure to follow when multiple QDROs are received out of sequence in relation to their decree date. In other words, if the department receives more than one QDRO awarding a portion of the participant's WRS account or annuity to different "alternate" payees, but the award received by ETF first was issued by the court on a later date than the other(s), ETF has no rule for choosing which payee should receive the award. The newly proposed rule, under ETF 20.35 (9), divides the account chronologically in the order in which the department receives the QDRO. This policy is meant to encourage the timely submittal of QDROs to ETF and to manage the inherent difficulty of payment of a QDRO received out of sequence.
- An amendment, under ETF 20.35 (3) (c) (5), is added to address add-on service for part-time non-teaching staff. Language governing creditable service for these individuals was not included in the previous rule.
- An amendment to the rule, under ETF 20.35 (8) (d), fills a gap in procedure regarding retroactive annuity payments. The rule clarifies that no interest is payable from ETF on retroactive annuity payments made to alternate payees for any months prior to ETF's receipt of a QDRO. No interest is due because the WRS account is divided only when the QDRO is received by ETF, rather than at the time of its decree date.
- An amendment, under ETF 20.35 (6) (c), changes the language to invalidate QDROs received after the alternate payee's date of death. Previously, language only invalidated a QDRO upon the participant's death.
- An amendment, under ETF 20.35 (8) (c), addresses retroactive corrections that result in a benefit below statutory thresholds. The amendment clarifies that retroactive corrections below the threshold are not payable.

- Finally, in order to ensure compliance with the Internal Revenue Code, an amendment to the code, ETF 20.35 (10), addresses how to apply IRC 415 (b) limits to the participant's and alternate payee's aggregate benefits. The department is given flexibility under the amendment to make necessary adjustments to the participant's and alternate payee's benefits on an equitable pro rata basis to assure tax compliance.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:

There are no existing federal regulations that specifically address how public retirement plans are to administer domestic partner QDRO's. IRC 415 (b) limits are, however, one federal statutory limitation that the proposed rule change stands to address. The amendment is written to ensure continued compliance with these federal tax laws, which provide for a general dollar limit that the plan can pay an annuitant annually.

7. Comparison with Rules in Adjacent States

- Illinois – The State of Illinois does not have domestic partnerships, and the state's civil unions are not given pension rights. The State Retirement System of Illinois (SRS) does not include domestic partnership or civil union language in its QDRO rule. SRS also does not have a rule in place for multiple QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
- Iowa – Iowa allows same-sex marriage, but uses the term “*administrable domestic relations order*” or “ADRO” to govern a domestic relations order that divides the marital property of same gender spouses. The Iowa Public Employee Retirement System (IPERS) has incorporated the ADRO into its domestic relations order rule, primarily as an addition to existing language. IPERS does not have a rule in place for multiple QDROs (or ADROs) received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
- Michigan – Michigan's Constitution bans same-sex marriage and other kinds of same-sex unions. Domestic partnership language is not within the State Employees Retirement System of Michigan regulations on QDROs. The State Employees Retirement System of Michigan also does not have a rule in place for multiple QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
- Minnesota – Minnesota does not provide for domestic partnerships, and the Minnesota State Retirement System (MSRS) does not include language for them in its QDRO rule. MSRS also does not have a rule in place for multiple

QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.

8. Summary of Factual Data and Analytical Methodologies:
The proposed rule amendment is intended to make ETF's QDRO rule clearer and more flexible, as well as to bring it into closer harmony with state and federal 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 Wisconsin Retirement System.
10. Effect on Small Business:
There is no effect on small business.
11. Agency Contact Person:
Lucas Strelow, 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: 608-267-0722; E-mail: lucas.strelow@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 not have any fiscal effect on the administration of the Wisconsin Retirement System, nor will it have any fiscal effect on the private sector, the state or on any county, city, village, town, school district, technical college district, or sewerage districts.
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.

Text of Proposed Rule

Section 1. ETF 20.35 (1) (b) and 20.35 (1) (c) are amended to read:

ETF 20.35 (1) (b) The purpose of this section is to specify how the department shall apply a valid QDRO to the participant's account or annuity or respond to an order which is not a valid QDRO.

ETF 20.35 (1) (c) For purposes of ss. 40.02 (48m) and 40.08 (1m), Stats., and this section, a marriage is terminated upon entry of a judgment, decree or order of divorce, annulment or legal separation. A domestic partnership as defined in s. 40.02 (21d), Stats., is terminated as provided in sub. ETF 20.10 (3). A domestic partnership, as defined in s. 770.01 (2) Stats., is terminated as provided in s. 770.12, Stats.

Section 2. ETF 20.35 (2), 20.35 (3) (a), (b), (c) 1., (c) 2., (c) 3., and (c) 5. are amended to read:

ETF 20.35 (2) DIVISION BY VALID QDRO. Except as otherwise provided in sub. (6) or (7), upon receipt of a valid QDRO the department shall divide WRS accounts and annuities in accordance with the percentage awarded to the alternate payee in the valid QDRO, based on the date on which the marriage was terminated by a court judgment, decree or order or the domestic relationship was terminated as provided in sub. ETF 20.10 (3) or s. 770.12, Stats. ~~which includes the order to divide Wisconsin retirement system benefits and the date the valid QDRO was received by the department,~~ as follows:

- (a) With respect to marriages terminated on or after January 1, 1982, and before April 28, 1990, the division shall be as provided in subs. (3) and (4), when a valid QDRO is received by the department after May 2, 1998.
- (b) With respect to marriages or domestic partnerships terminated ~~before~~ on or after April 28, 1990, the division shall be as provided in subs. (3) and (5).

Note: ~~It was the department's intent for par. (b) to read as follows: "With respect to marriages terminated on or after April 28, 1990, the division shall be as provided in subs. (3) and (5)." This language is consistent with the heading of s. ETF 20.35 (5), which reads: Marriages terminated on or after April 28, 1990."~~

ETF 20.35 (3) ALL QDRO DIVISIONS. (a) *Percentages.* The percentage of the participant's account or annuity that is awarded to the alternate payee by a valid QDRO is limited to a percentage between zero percent (0%) and fifty percent (50%) expressed to no more than 2 decimal places. An otherwise valid QDRO with a percentage awarded to the alternate payee expressed to more than 2 decimal places may not be rejected for that reason alone, but the department shall round the percentage to 2 decimal places.

(b) *Debts of the participant.* Any debt, memorandum account or account receivable balance reflecting amounts owed by the participant to the department, the fund or any benefit plan, accrued as of the decree date and still outstanding at the time the account or annuity is divided, shall be divided between the participant and alternate payee in the same proportion as the participant's account or annuity.

(c) *Dividing Wisconsin retirement system annuities.*

1. 'Present actuarial values before and after division shall be equal.'

An annuity shall be divided so that the actuarial present value of the undivided annuity is equal to the aggregate actuarial present values of the 2 separate annuities resulting from the division, all calculated as of the effective date of the division.

2. 'Division of accelerated annuity option.' If the participant selected an accelerated payment option as provided in s. 40.24 (1) (e), Stats., or s. ETF 20.04 (3), and the participant's temporary annuity is still in force as of the effective date of the annuity division, then the department shall calculate the present value of both the temporary and life annuities using the actuarial tables in effect on the effective date of the annuity division. The department shall then divide the total present value based on the percentages specified in the QDRO and calculate separate annuities for the participant and alternate payee as specified in s. 40.08 (1m) (f) 2., Stats. If the participant or alternate payee provides a projection of his or her social security benefits at age 62 from the social security administration, the department shall use ~~the~~ that projected social security amount to calculate the amount of the temporary annuity for that person. If no projection is supplied, then notwithstanding s. ETF 20.03 (2), the department shall assume that person's projected social security benefits at age 62 equals ~~the~~ that person's prorated portion of the participant's temporary annuity amount as of the effective date of the annuity division, calculated based on the respective percentages of the annuity being awarded to the participant and alternate payee. If the reduced annuity payable for life to the alternate payee or participant is below the threshold specified by s. ETF 20.05 (1), then that person shall receive an annuity in the same optional form originally selected by the participant, except that the temporary annuity option provided in s. 40.24 (1) (e), Stats., or s. ETF 20.04 (3) is not available.

3. 'Disability annuities.' Upon division of a disability annuity calculated under the provisions of s. 40.63 (1) or (4), Stats., the alternate payee's annuity shall consist of a portion based on the participant's actual service and a portion based on the assumed service used to calculate the participant's disability annuity. The portion of the alternate payee's annuity based on the participant's assumed service and age shall cease upon the death of the alternate payee. Benefits payable upon the death of the alternate payee's shall be based on the guaranteed

portion of the alternate payee's annuity only. Once the participant's disability annuity has been divided, the termination or suspension of the participant's disability annuity or the death of the participant has no effect on the alternate payee's annuity. If the participant's disability annuity is subsequently terminated and the participant's account restored under the provisions of s. 40.63 (9) and (10), Stats., the contributions and service credited to the restored account shall be reduced by the same percentage awarded to the alternate payee by the valid QDRO.

5. For the purposes of determining the amount of service used to calculate the alternate payee's actuarial reduction for early retirement under the provisions of s. 40.23 (2m) (fm), Stats., if the participant has part-time service in at least five of the ten annual earnings periods immediately preceding the annual earnings period in which the alternate payee's retirement benefit becomes effective or the date on which the participant terminated covered employment, whichever is earlier, the provisions of s. 40.23 (2m) (fm), Stats., shall apply. If the decree date is prior to July 1, 2009, the provisions of s. 40.23 (2m) (fm), Stats., in effect prior to that date shall apply.

Section 3. ETF 20.35 (4) (c) 3. is amended to read:

ETF 20.35 (4) (c) 3. If the participant's retirement annuity is a money purchase annuity calculated under the provisions of s. 40.23 (2) (c), (2m) (c) or (d), or (3), Stats., the portion of the participant's annuity awarded to the alternate payee shall be based on the ratio of the portion of the account balance awarded to the alternate payee as of the decree date including interest creditable through the day before the participant's annuity effective date, based on the percentage specified in the valid QDRO, divided by the total account balance used to calculate the participant's retirement annuity, with the quotient rounded to 2 decimal places.

Section 4. ETF 20.35 (5) and 20.35 (6) are amended to read:

ETF 20.35 (5) MARRIAGES AND DOMESTIC PARTNERSHIPS

TERMINATED ON OR AFTER APRIL 28, 1990. (a) If the participant was not an annuitant on the decree date, the department shall divide the participant's account as provided in s. 40.08 (1m) (b) 1., (c), (d) and (f) 1., Stats., and sub. (3) (d), and as follows:

1. The creditable service and amounts awarded to the alternate payee shall be in a separate account in the fund for the benefit of the alternate payee. After the division under this section, the alternate payee may apply for a separation benefit under s. 40.25 (2), Stats., provided the application is received by the department prior to the date on which the participant would have met the minimum age requirement for a retirement annuity under s. 40.23, Stats., and payment of a separation benefit would comply with all provisions of

the internal revenue code. After the date the participant reaches or would have reached the minimum retirement age, the alternate payee may only apply for retirement benefits under s. 40.23, 40.24, or 40.25 (1), Stats.

2. The participant shall have retain the remainder in his or her separate account under s. 40.04 (4) (a), Stats., unless the participant is an annuitant at the time of the division. If the participant is an annuitant when the division occurs, the participant's creditable service and account as of the decree date shall be reduced by the percentage awarded to the alternate payee. The balances shall then be brought forward to the effective date of the current annuity, including any contributions and service for periods after the decree date, and the annuity option chosen by the participant shall be recalculated. The amount by which the monthly annuity payments previously made to the participant exceed the participant's recalculated monthly entitlement for the same period shall be a balance due from the participant. This balance due shall be due from the participant and may be collected as provided in s. 40.08 (4), Stats., including by a reduction of the present value of the participant's annuity as reduced by the division, resulting in a recalculation and reduction of the participant's monthly annuity.

ETF 20.35 (6) INVALID QDRO. (a) *Rejection and notice.* The department may not honor any order to divide Wisconsin retirement system benefits which it determines is not a valid QDRO as defined in s. 40.02 (48m), Stats. The department shall send written notice of its rejection of an order to the person offering submitting the order and to the participant and alternate payee if that those person's name persons' current names and address-is addresses are stated in the order or is are readily determinable from department records.

(b) *Account already closed.* An otherwise valid QDRO received after the participant's account was closed by payment of a lump sum benefit on or after the decree date has no effect, regardless of whether the participant returned to participating employment after the decree date. If the participant's account to which the valid QDRO applies is subsequently restored under the provisions of s. 40.25 (5), Stats., ~~or~~ because the benefit was paid in error, or under an agreement approved by the department where the full amount of the benefit paid plus monthly interest at the assumed rate has been paid to the department, the restored account shall be divided according to the valid QDRO.

(c) *Participant or alternate payee deceased.* An otherwise valid QDRO received after the participant's or alternate payee's date of death has no effect on the participant's account or annuity.

Section 5. ETF 20.35 (7) (a) is amended to read:

ETF 20.35 (7) (a) If the department rejects an order for the division of a participant's account and subsequently receives a an otherwise acceptable application from the participant for a benefit which would close the participant's account due to payment of a lump sum benefit, the department shall delay payment of the lump sum benefit until 30 days after the date the order for division was rejected. This paragraph applies only if the basis for the rejection was one or more of the following: 1. The order did not meet all of the requirements in s. 40.02 (48m), Stats. 2. The order received by the department was not a certified copy or an original, signed by the judge or a duly authorized family court commissioner.

Section 6. ETF 20.35 (8) (b) and (c) are amended to read:

ETF 20.35 (8) (b) *Active military service.* If the department divided a participant's account per a valid QDRO without first receiving proof and certification of active military service, as provided in sub. (3) (d) 3., and the participant subsequently provides documentation of active military service and the certification on the form prescribed by the department, the department shall divide the creditable-military service creditable for based on services rendered prior to the decree date between the participant and alternate payee's accounts pursuant to the valid QDRO. Any resulting adjustments to the alternate payee's and participant's benefits shall be made retroactive to the respective benefit effective dates. The participant may not receive creditable military service for any active military service that would have been granted to the alternate payee had the participant submitted timely to the department the certification of active military service as provided in s. 40.02 (48m) (f), Stats.

ETF 20.35 (8) (b) (c) *Other corrections and adjustments directly affecting benefits.* The effect of any other corrections and adjustments to service, contributions, or interest earnings affecting the benefits the participant accrued as of the decree date, including corrections of administrative errors and corrections or adjustments of any factor affecting the calculation of an annuity to be divided, shall be divided between the participant and the alternate pursuant to the valid QDRO. The participant and alternate payee accounts or annuities shall be adjusted accordingly. However, the department shall not adjust benefit amounts if the amount of the adjustment would be less than the thresholds specified in s. 40.08 (7) (a), Stats.

Section 7. ETF 20.35 (8) (d) is created to read:

ETF 20.35 (8) (d) When a participant's annuity is divided as provided in sub. (5) (b) and retroactive payments are due to an alternate payee, or when an alternate payee's annuity must be increased retroactively for any reason, no interest as specified in s. 40.08 (7) (c) is payable to the alternate payee for any monthly payments payable prior to the month in which the department received the valid QDRO.

Section 8. ETF 20.35 (9) and (10) are created to read:

ETF 20.35 (9) MULTIPLE QDROS RECEIVED OUT OF SEQUENCE. If the department receives more than one QDRO for a participant that each awards a portion of that participant's WRS account or annuity to a different alternate payee, the account or annuity shall be divided based on the chronological order in which the department receives the QDROs without regard to the chronological order of the decree dates. The alternate payee shall be awarded a percentage of the account value as of the decree date for the QDRO received first. If the department subsequently receives a QDRO with an earlier decree date, that QDRO shall have no effect on the portion of the participant's account or annuity awarded to the alternate payee in the QDRO received on an earlier date.

ETF 20.35 (10) COMPLIANCE WITH SECTION 415(b) OF THE INTERNAL REVENUE CODE. (a) The aggregate benefits paid to the participant and alternate payee shall not exceed the benefit limits under Section 415(b) of the Internal Revenue Code. The department shall make any necessary adjustments to the participant's and alternate payee's benefits on an equitable pro rata basis to assure compliance with Section 415(b) of the Internal Revenue Code. Benefits derived from employee contributions that are actually paid by the employee shall not be subject to the benefit limitations under this subsection.

(b) If the participant's retirement annuity has been divided per a QDRO under s. 40.08 (1m) (b) 2., Stats., any subsequent adjustments necessary for compliance with Section 415(b) of the Internal Revenue Code that result from either post-retirement annuity adjustments under s. 40.27 (2) or s. 40.28 (2), Stats., or from increases in the compensation limits specified in Section 415(b) of the Internal Revenue Code, shall be prorated based on the percentage of the participant's account that was awarded to the alternate payee in the QDRO.

(c) If the participant's account is divided as provided in pars. (3) (d) or (5) (a), any benefit adjustments required under Section 415(b) of the Internal Revenue Code shall be applied as follows:

1. If the alternate payee's benefit becomes effective prior to the participant's benefit effective date:

a. If the aggregate benefits that would be payable to both the alternate payee and the participant on the alternate payee's benefit effective date do not exceed the maximum benefits that would be payable to the participant under Section 415(b) of the Internal Revenue Code if the account had not been divided, the alternate payee's benefit will not be reduced.

b. Any subsequent benefit adjustments necessary for compliance with Section 415(b) of the Internal Revenue Code will be applied solely to the participant's benefits, and shall not affect the benefit amount payable to the alternate payee.

2. If the participant's benefit becomes effective prior to the alternate payee's benefit effective date, or the participant's and alternate payee's benefits become effective on the same date:

a. If the aggregate benefits that would be payable to both the participant and alternate payee on the participant's benefit effective date exceed the maximum benefits that would be payable to the participant under Section 415(b) of the Internal Revenue Code if the account had not been divided, the adjustment to participant's annuity shall be prorated based on the percentage of the participant's account that was not awarded to the alternate payee in the QDRO.

b. When a benefit is subsequently paid to the alternate payee, the portion of the total adjustment necessary for compliance with Section 415(b) of the Internal Revenue Code that is applied to the alternate payee's benefits shall be prorated based on the percentage of the participant's account awarded to the alternate payee in the QDRO.

3. If the participant's benefit effective date is on or after the alternate payee's benefit effective date as specified in subd. 2., and as a result of either post-retirement annuity adjustments under s. 40.27 (2) or s. 40.28 (2), Stats., or of increases in the compensation limits specified in Section 415(b) of the Internal Revenue Code, subsequent benefit adjustments are necessary for compliance with Section 415(b) of the Internal Revenue Code, such adjustments shall be prorated based on the percentage of the participant's account that was awarded to the alternate payee in the QDRO.

(d) For the purposes of determining the aggregate benefits payable to the participant and alternate payee under par. (b), the department shall:

1. First calculate the present value of what the participant's benefit would be as of the benefit effective date of the participant's or alternate payee's benefit effective date, whichever is earlier, as though the participant's account had never been divided by a QDRO.

2. If that total aggregate benefit amount is higher than the maximum benefits permitted under Section 415(b) of the Internal Revenue Code, the department shall reduce the aggregate benefits to the maximum amount payable under Section 415(b) of the Internal Revenue Code. The present value of that maximum benefit payable shall be divided

between the participant and alternate payee in proportion to the percentage of the participant's account that was awarded to the alternate payee. The benefits payable to the participant and alternate payee shall then be adjusted as follows:

a. If the alternate payee has received a lump sum benefit under s. 40.25 (1) or (2), Stats., the gross amount of the alternate payee's lump sum payment shall be subtracted from the present value of the participant's maximum benefit payable under Section 415(b) of the Internal Revenue Code calculated under par. (d). The present value of the benefit paid to the participant shall not exceed the remainder of the present value of that maximum benefit payable under Section 415(b) of the Internal Revenue Code.

b. If the alternate payee has previously taken a monthly retirement annuity, the present value of the alternate payee's annuity as of the alternate payee's annuity effective date shall be subtracted from the present value of the participant's maximum benefit payable under Section 415(b) of the Internal Revenue Code. The present value of the benefit paid to the participant shall not exceed the remainder of the present value of that maximum benefit payable under Section 415(b) of the Internal Revenue Code.

c. If the participant's benefit becomes effective prior to the alternate payee's benefit effective date, the present value of the benefit paid to the participant shall not exceed the maximum aggregate benefit calculated under par. (d) minus the present value of the benefit payable to the alternate payee as of the participant's annuity effective date.

(END OF RULE TEXT)



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

Pam Shannon
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Scott Grosz and Jessica Karls-Rupflinger
Clearinghouse Co-Assistant Directors

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 11-041

AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8); and to create ETF 20.35 (9) and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

07-12-2011 RECEIVED BY LEGISLATIVE COUNCIL.

08-09-2011 REPORT SENT TO AGENCY.

PS:SG

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 11-041

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. The first entry after the heading “DRAFT REPORT ON CLEARINGHOUSE RULE” should be an enumeration of the sections treated by the proposed order and the nature of the treatment, as well as an introductory clause consisting of a relating clause concisely stating the subject of the proposed order. [s. 1.02 (1), Manual.] If the changes suggested in comment e., below, are made, the treatment clause and relating clause would then read: “AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8) (b) and (c); and to create ETF 20.35 (8) (d), (9), and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order”.

b. In the analysis of the proposed rule, the department should cite statutes, not rules, in the section of the analysis titled, “Statutes Interpreted”.

c. Section ETF 20.35 (3) (c) 4. should be omitted, and the treatment clause of SECTION 2 amended, since subd. 4. does not appear to be modified by the proposed rule.

d. In s. ETF 20.35 (6) (a), the “are” on line 7 should be underscored.

e. The amendments to language in s. ETF 20.35 (8) (b) and (c) are appropriately placed in SECTION 6 of the rule. However, sub. (8) (a) is not being amended and should be omitted from the rule. Further, because sub. (8) (d) contains newly-created language, it should be moved to SECTION 7, with the following treatment clause: “ETF 20.35 (8) (d) is created to read:”. Also,

the underscoring should be deleted because it is not used when creating an entire rule unit. [s. 1.06 (1), Manual.] On the first line of par. (d), "par." should be changed to "sub." Current SECTION 7 should be renumbered as SECTION 8.

f. In the treatment clause to what will now be SECTION 8, the second "20.35" should be deleted. Again, none of the language in SECTION 8 should be underscored, as it is all newly-created language. In s. ETF 20.35 (10) (title), a period should replace the comma at the end of the subsection title.

g. In s. ETF 20.35 (10) (a), at the end of the subsection, "subsection" should be spelled out rather than abbreviated.

h. The proposed rule should conclude with a provision setting forth the effective date of the rule. [s. 1.02 (4) (a), Manual.]

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

For consistency with s. 227.11 (2) (a) 2., Stats., the department should refer to s. 40.03 (2) (t), Stats., in the "Statutes Interpreted" section of the rule analysis, rather than in the section titled, "Statutory Authority". Section 40.03 (2) (t), Stats., relates to the subject matter of the proposed rule-making but does not appear to comply with s. 227.11 (2) (a) 2., Stats., as a source of statutory authority for a proposed rule. Additionally, the department should identify other provisions of ch. 40, Stats., relating to domestic partnership or domestic partners, or both, which provide statutory authority. (See, e.g., s. 40.02 (2m), (20), (21c), and (21d), Stats.)

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

a. In s. ETF 20.35 (1) (c), the department should insert "Stats.," after the reference to s. 770.01 (2), and a comma after "domestic partnership".

b. In s. ETF 20.35 (2) (a), the word "a" should be replaced by "as" before "provided".

c. In s. ETF 20.35 (8), the hyphen in the phrase "based on-services" should be deleted.

d. A colon should replace the period at the end of s. ETF 20.35 (10) (c) (intro.). [s. 1.03 (1) (b), Manual.]

Response to Legislative Council Staff Recommendations

ETF implemented all 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 October 13, 2011.

Summary of Comments Received at the Public Hearing

No person testified concerning the rule. The record was held open for written comments until October 21, 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.

Effective Date

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