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**CORRESPONDENCE / MEMORANDUM**

**DATE:** May 13, 2015  
**TO:** Deferred Compensation Board  
**FROM:** David Nispel, Chief Legal Counsel  
Angel Johnson, Legal Services Intern  
**SUBJECT:** Legal Response to Board Questions about Permitting Local Public Plans with Loans to Adopt the WDC

**This memo is for informational purposes only. No Board action is required.**

During the March 12, 2015, Deferred Compensation Board meeting, ETF staff and a representative from the Wisconsin Deferred Compensation (WDC) Program's administrator, Empower Retirement, discussed a possible revision to the WDC Plan and Trust that would allow local public employers to convert their existing 457 plans, including plans with loans, to the WDC. Before taking action on the proposed language, the Board requested that ETF's Legal Services provide answers to three questions:

1. Is approving the change within the Board's mission and scope?
2. If there is an appeal, what would be the appeal process be and what issues would be raised?
3. If the Board is sued, who would defend the Board? Does the Board's insurance cover this?

The remainder of this memo contains Legal Services' response to these questions.

**1. Is approving the change within the Board's mission and scope?** As stated in Wis. Stat. § 40.03(9), the Deferred Compensation Board has certain statutory responsibilities. These statutory responsibilities are outlined in Wis. Stat. §§ 40.80(2) and 40.80(2m):

- The Board shall determine the requirements for and the qualifications of plan providers.
- The Board shall approve the terms and conditions of contracts for administrative and investment services.

Reviewed and approved by Bob Conlin, Secretary

Electronically Signed 5/26/15

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- The Board shall determine the procedure for the selection of the deferred compensation plan providers.
- The Board shall approve model salary reduction agreements used by state agencies and the service provided to state agencies by plan providers.
- The Board shall require as a condition of the contractual agreements entered into under this section that approved deferred compensation plan providers shall provide service to state agencies only as approved by the deferred compensation board.
- The Board shall require that plan providers reimburse the Department for costs incurred in soliciting, evaluating, monitoring, and servicing deferred compensation plans.
- The Board shall serve as trustee of any deferred compensation plan established under Wis. Stat. § 40.80, hold the assets and income of the plan in trust, and maintain the plan as an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code
- The Board may accept timely appeals of Department determinations affecting any right or benefit under any deferred compensation plan provided under Wis. Stat. § 40.80.
- The Board shall promulgate rules establishing procedures, requirements and qualifications for offering deferred compensation plans to state employees in addition to the deferred compensation plans offered by deferred compensation providers selected and contracted with under Wis. Stat. § 40.80(2).

To summarize, the Board carries out the following primary duties: (1) select and contract with deferred compensation plan providers for investment and record keeping; (2) develop deferred compensation plan policies, procedures, and rules that govern provider participation in the program; and (3) hear participant appeals of program determinations.

The Deferred Compensation Board has the statutory authority for program administration and oversight. Therefore, the Board has the authority and scope to approve grandfathered loans into the WDC. In addition to this scope, the contract between the Board and Great-West (now Empower Retirement) leaves the option of loans within the WDC open; thus, if the Board allows grandfathered loans in the WDC the Board is not violating the contract. The mission of the Board does not clearly touch on this issue, but there are benefits to accepting the proposed changes for grandfathered loans. These benefits include offering a solution to a challenge facing local public employers, growth to the WDC, and potentially lower fees for participants.

2. **If there is an appeal, what would be the appeal process be and what issues would be raised?** If a WDC participant has an issue with the program, the participant is required by Wisconsin law to exhaust ETF's administrative appeal process before taking any further judicial action. ETF's administrative appeal process is outlined by Chapter ETF 11 of the Wisconsin Administrative Code. The Deferred Compensation Board shall hear the timely appeal of a determination made by the department with respect to a right or benefit under the deferred compensation plan provided by Wis. Stat. §§ 40.80 and 40.82. As common practice with appeals, nothing in Chapter ETF 11 prevents the board responsible for hearing the subject matter of an appeal from delegating that responsibility to a hearing examiner. Wis. Admin. Code § ETF 11.01(7).

While it is difficult to predict what issues would be raised on appeal, for the grandfathered loans specifically, there are two potential sources: 1) the coupon book administered by Empower Retirement and 2) when a participant defaults on a grandfathered loan.

Both of these potential issues are administered by Empower Retirement and, if an issue was raised by a participant, these would require going through ETF's administrative appeal process (since Empower Retirement is a third-party administrator). As discussed by Empower Retirement's representative on March 12, such issues have not occurred historically and are unlikely to occur. As mentioned above, the process and parameters of the grandfathered loans are provided by the Internal Revenue Service.

3. **If the Board is sued, who would defend the Board? Does the Board's insurance cover this?** Attorney General opinion OAG 2-06 directly discusses whether Wis. Stat. § 895.46 applies to ETF's various board members. The AG opinion states members of the Deferred Compensation Board are state officers and public employers for the purpose of Wis. Stat. §§ 895.46 and 893.82. Therefore, Board members are entitled to a time limit for asserting claims, legal representation, limitation on damage awards, and indemnification for damages.

To summarize the Attorney General opinion, the Attorney General would defend the Board and individual Board members for acts committed while carrying out Board duties. As discussed above, a participant of the WDC would have to exhaust ETF's administrative appeal process before filing for judicial relief in a state or federal court. If a participant exhausted ETF's administrative appeal process, then filed for judicial relief in state or federal court, the Attorney General would defend the Board and its members.

The Board's insurance would cover any damages awarded in proceedings against the Board or any Board member. Board members are clearly indemnified when acting in the scope of their duties under Wis. Stat. § 895.46. This means the state will pay an 'excess damages' award in proceedings against a Board member who is sued in his

or her official capacity or for acts committed while carrying out Board duties and the court or jury finds that the Board member was acting within the scope of employment. Excess damages are those that exceed any applicable insurance coverage of the Board member.

Conclusion:

If the Board allowed local public employers with “grandfathered loans” to adopt the WDC, the Board would be acting within its scope and authority. If a participant with a grandfathered loan decided to appeal an issue with the WDC, the participant would have to exhaust ETF’s administrative appeal process before filing in a state or federal court. After the completion of ETF’s administrative appeal process, the Attorney General would represent the Board and the Board’s insurance would cover any damage awards.

Staff will be at the June 16, 2015 meeting to answer questions on the contents of this memo.