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Department of Employee Trust Funds  
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SECRETARY

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**CORRESPONDENCE MEMORANDUM**

**DATE:** August 23, 2010  
**TO:** Employee Trust Funds Board  
Teachers Retirement Board  
Wisconsin Retirement Board  
**FROM:** Steve Hurley, Director  
Office of Policy, Privacy and Compliance  
**SUBJECT:** Governance Manual Policy for the Promulgation of Administrative Rules


**Staff recommends the Boards adopt the attached draft policy, which incorporates existing delegations of authority and requests new delegations of authority, and approve the draft policy's inclusion in the Board Governance Manual.**

Please find attached a draft *Board Policy for Promulgation of Administrative Rules*. In December 2004, the Employee Trust Funds Board, Teachers Retirement Board, and the Wisconsin Retirement Board approved a rule-making process in which a proposed rule did not need to come formally before the Boards for action until the Department was ready to submit the final draft report of the rule to the Legislature, subject to regular rule status reports. The streamlined process approved by the Boards has worked well.

The attached draft policy is intended to re-affirm these existing delegations of authority and consolidate the information into the Governance Manual policy section for easy reference. In addition, the draft policy expands the existing delegations of authority to give the Department the authority to make non-substantive corrections to the board-approved final draft of the rule, and for the Department to promulgate emergency rules when necessary.

Authority to Make Technical Corrections after the Rule is Approved by the Board

The delegation of authority to the Secretary to make non-material corrections after the Board has approved the final draft is needed when non-material errors are discovered in the rule text after the Board has met and approved the final draft. Without an explicit delegation of authority to the Secretary to make these technical changes, any variation

Reviewed and approved by Robert J. Conlin, Deputy Secretary.  
  
Signature \_\_\_\_\_ Date 8/27/10

Board	Mtg Date	Item #
EXC	9.15.10	4A
JL	9.16.10	4Bi
ETF	9.16.10	4Bi
TR	9.16.10	3Ai
WR	9.16.10	3Ai

in the final draft that is submitted to the Legislature from the version approved by the Boards could provide a potential basis for outside legal challenge to the validity of the rule. In addition, the lack of an explicit delegation of authority to the Secretary could cause undue delay in promulgation of the rule while a special Board meeting is arranged or because of the several-months wait in between Board meetings.

Authority to Promulgate Emergency Rules

Wisconsin law permits an agency to issue an emergency rule under expedited procedures for exigent situations. Emergency rules are not common, and are effective for only 150 days, but time is of the essence when an emergency rule is needed. When approvals are required from multiple boards to advance an emergency rule, the multiple board meeting dates can increase the time needed to promulgate an emergency rule. Staff recommends that the Boards delegate to the Secretary the authority to promulgate emergency rules and ask for extensions as necessary, so that the Department can be more responsive to changing situations.

The attached draft policy delegates authority to the Secretary to promulgate emergency administrative rules and apply for emergency rule extensions without prior Board approval, but also requires a report on such activity to the Boards at the earliest opportunity. Under the attached policy, the permanent version of the emergency rule would come before the Board in the same manner as ordinary administrative rules.

Summary of Delegations under the Draft Policy

EXISTING DELEGATIONS	NEW DELEGATIONS
File Scope Statements without prior Board review; Department to provide quarterly reports of status of rules.	Make necessary technical changes or other non-substantive changes to the Board-approved Final Draft prior to submission to the Legislature.
Submit draft of proposed rules to the Legislative Council Rules Clearinghouse	Promulgate emergency rules, with duty to report all such rules to the Board as soon as practicable.
--	Request extensions to emergency rules as applicable.

Staff will be available at the meeting to answer questions.

**BOARD POLICY FOR PROMULGATION OF  
ADMINISTRATIVE RULES  
Updated 8/23/2010**

**DRAFT**

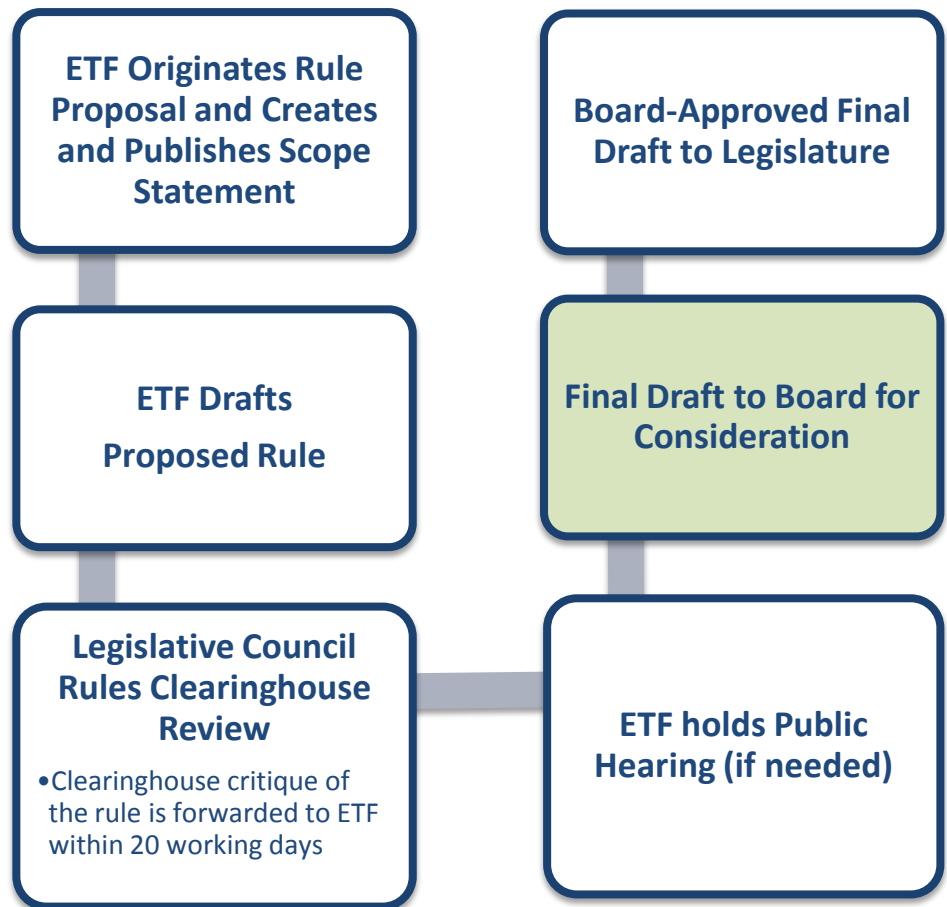
This policy is intended to serve as the reference document regarding any delegation of authority from the Board to the Secretary in relation to administrative rules. The latest version of this policy shall remain in effect until amended or terminated by the Boards.

**Administrative Rules - General**

An administrative rule is a regulation, standard, policy statement, or order of general application promulgated by a state agency. Administrative rules have the force and effect of law. Rules are issued by an agency to implement or interpret provisions of statutes that are enforced or administered by the agency, or to establish procedures for the agency to follow in administering programs.

**Delegation of Authority - General**

Wisconsin law provides that the Board shall approve rules promulgated by the Secretary for the efficient administration of the fund or the benefit plans. The law permits the board to delegate its powers as deemed necessary or desirable.<sup>1</sup>



*Diagram of Administrative Rule Process with Delegated Authority*

<sup>1</sup> 40.03 Powers and duties. (1) EMPLOYEE TRUST FUNDS BOARD. The board:

(L) May delegate powers and duties as deemed necessary or desirable.

(m) Shall approve or reject all administrative rules proposed by the secretary under sub. (2) (i).

(2) SECRETARY. The secretary:

(i) Shall promulgate, with the approval of the board, all rules, except rules promulgated under par. (ig) or (ir), that are required for the efficient administration of the fund or of any of the benefit plans established by this chapter. In addition to being approved by the board, rules promulgated under this paragraph relating to teachers must be approved by the teachers retirement board and rules promulgated under this paragraph relating to participants other than teachers must be approved by the Wisconsin retirement board, except rules promulgated under s. 40.30.

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**Emergency Rules**

Under Wis. Stat. § 227.24, in emergency situations state agencies may promulgate rules without complying with the usual procedures. However, unless the authority is delegated, Chapter 40 would require the Department to first obtain Board approval of the emergency rule. Using the expedited procedure in the statute to issue emergency rules, an agency must find the preservation of the public peace, health, safety or welfare necessitates the bypassing of normal rule-making procedures, unless the Legislature specifically exempts an agency from making these findings. Emergency rules are effective upon being published in the Wisconsin State Journal. The emergency rule has the force and effect of law and may be suspended under the same process that is applied to permanent rules. Emergency rules are in effect for 150 days and, upon petition to the Legislature’s Joint Committee for Review of Administrative Rules, can be extended up to an additional 120 days with no single extension to exceed 60 days. A permanent rule must be promulgated using normal procedures.

SPECIFIC DELEGATION	DATE OF DELEGATION		
Authority Delegated By Board to the ETF Secretary	Wisconsin Retirement Board	Teachers Retirement Board	Employee Trust Funds Board
File Scope Statements without prior Board review <sup>2</sup> ; Department to provide quarterly reports of status of rules.	12/09/2004	12/09/2004	12/10/2004
Submit draft of proposed rules to the Legislative Council Rules Clearinghouse	12/09/2004	12/09/2004	12/10/2004
Make necessary technical changes or other non-substantive changes to the Board-approved Final Draft prior to submission to the Legislature.	9/16/2010	9/16/2010	9/16/2010
Promulgate emergency rules, with duty to report all such rules to the Board as soon as practicable.	9/16/2010	9/16/2010	9/16/2010
Request extensions to emergency rules as applicable.	9/16/2010	9/16/2010	9/16/2010

<sup>2</sup> Filing a scope statement does not commit the Department or the Boards to any specific course of action with respect to revision of an administrative rule.