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## *Correspondence Memorandum*

**Date:** September 9, 2016

**To:** Employee Trust Funds Board  
 Teachers Retirement Board  
 Wisconsin Retirement Board

**From:** Dan Hayes, Attorney

**Subject:** Administrative Rulemaking

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

This memo provides a brief summary of the process that state agencies must follow in order to promulgate administrative rules.

### **Authority to Promulgate**

State agencies promulgate administrative rules pursuant to rulemaking authority granted by the Legislature through state statutes. The statutes define an administrative rule as a regulation, standard, policy statement, or order of general application promulgated by a state agency to make specific, 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 its programs.<sup>1</sup> Administrative rules have the force and effect of law.

Chapter 40 of the Wisconsin Statutes confers authority to the Department of Employee Trust Funds (ETF) Secretary to promulgate rules that are required for the efficient administration of the fund or of any of the benefit plans established by Chapter 40. Such rules are subject to the approval from the various boards attached to ETF.<sup>2</sup>

### **Scope Statement**

The first step in the rule promulgation process is preparation of a scope statement that sets forth information about the agency's intended rulemaking, including the objective of

<sup>1</sup> Wis. Stat. §227.01(13).

<sup>2</sup> Wis. Stat. §§ 40.03(2)(i), (ig) and (ir) grants rulemaking power to the Secretary; 40.03(1)(m) requires approval or rejection of rules by the ETF Board; 40.03(7)(d) requires approval or rejection of rules by the Teachers Retirement Board; and 40.03(8)(d) requires approval or rejection of rules by the Wisconsin Retirement Board.

Reviewed and approved by David H. Nispel, General Counsel

Electronically Signed 9/16/16

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the proposed rule, the statutory authority for the rule, and a description of all entities that may be affected by the rule. Before work may begin on actual rule drafting, the agency must submit the scope statement to the Governor for approval. If the scope statement is approved by the Governor, then it is submitted to the Legislative Reference Bureau (LRB) for publication in the Wisconsin Administrative Register. Following publication, the scope statement must be approved by the individual or body with policymaking powers for the agency, which, in the case of ETF, is the Secretary.

**Note: Wisconsin Administrative Register**

The LRB publishes the *Wisconsin Administrative Register*. For many years the *Register* was published bimonthly; however, as of January 2015, the *Register* is published every Monday and is only available online at: <http://docs.legis.wisconsin.gov/code/register>. Each issue of the *Register* contains a section with notices and other items that are required to be published during the rulemaking process.

**Rule Drafting**

After the scope statement is approved, agency staff may begin drafting the rule. Agencies are directed, to the extent possible, to adhere to the format and drafting style of bills prepared for the Legislature and to draft rules in concise, simple sentences, using plain language that can be easily understood.

**Preparation of Economic Impact Analysis**

An agency must prepare an economic impact analysis (EIA) for every rule before the rule is submitted to the Legislative Council staff for review. The EIA must include information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. It must also explain the policy problem the rule is intended to address, the approach to the problem the rule takes, a comparison to approaches taken by the federal government and by Iowa, Minnesota, Illinois, and Michigan.

**Review by Legislative Council Rules Clearinghouse**

When the agency has completed its work on an initial draft rule, the rule is submitted to the Legislative Council staff for review. The Legislative Council staff reviews the rule for form, style, and technical adequacy. Staff also reviews the rule to determine whether there is statutory authority for the agency to adopt the rule. The Legislative Council has 20 working days to review the proposed rule. A Clearinghouse Report containing the staff comments is sent to the agency.

Beginning in 2015, the LRB began offering voluntary and informal editing of a proposed rule prior to submission to the Legislative Council. Editing is for structure of the proposed rulemaking order and the form and style of the rule text. ETF has used this process twice and found it very helpful.

### **Public Hearing**

With some exceptions, an agency must provide notice and hold a public hearing on a proposed rule after the Clearinghouse Review. The agency's notice of public hearing must include, among other things, the text of the proposed rule, a plain language analysis of the rule, and the EIA and fiscal estimate. In addition to testimony at the public hearing, agencies also accept written comments regarding the proposed rule. ETF typically accepts comments for a period of time concluding with the date of the public hearing. Comments may be submitted directly to ETF online through the following email address: [ETFAdminRuleComments@etf.wi.gov](mailto:ETFAdminRuleComments@etf.wi.gov).

### **Approval or Rejection by Boards Attached to ETF**

After the public hearing on a proposed rule, it is presented to the board or boards that have jurisdiction over the rule. The proposed rule is in the form of the Final Draft Report that will be presented to the Governor and Legislature. The rule is approved if it receives a favorable vote by a majority of board members.

### **Submission of Final Draft Rule to Governor**

If the proposed rule receives board approval, it must be submitted in final draft form to the Governor for written approval before the rule may be submitted to the Legislature.

### **Submittal of Rule to Legislature**

After the Governor has approved a final draft rule, the agency must submit the Final Draft Report to the Chief Clerk of each house of the Legislature for referral by the presiding officer to a standing committee in each house. Generally, the standing committee review period extends for 30 days after referral but may be extended for an additional 30 days if the committee chair, within the initial 30-day period, publishes or posts a notice that the committee will hold a meeting with the agency or a hearing to review the proposed rule. If no action is taken within the 30-day period, the rule is considered approved. But a committee may vote to object to all or part of a rule. It may do so for one or more of the following reasons:

- Absence of statutory authority.
- Emergency relating to public health, safety, or welfare.
- Failure to comply with legislative intent.
- Conflict with state law.
- Change in circumstances since enactment of the earliest law on which the proposed rule is based.
- Arbitrariness or capriciousness, or imposition of an undue hardship.

### **Review by the Joint Committee for the Review of Administrative Rules (JCRAR)**

When a standing committee's jurisdiction over a proposed rule ends, the rule is referred to JCRAR. The review period for JCRAR is also 30 days, with the possibility of an extension for an additional 30 days. If a proposed rule received an objection in a standing committee, JCRAR is required to meet and take executive action and may either concur in the objection, object to the proposed rule, or seek modifications to

the rule. JCRAR may, but is not required to, take executive action with respect to any proposed rule that did not receive a standing committee objection.

If JCRAR objects to a rule or part of a rule, it must meet and take executive action within 30 days regarding introduction in each house of a bill to support the objection. If either bill becomes law, the agency may not promulgate the rule, or part of the rule, that was objected to, unless a later law specifically authorizes promulgation of the rule.

**Note: Submission to Legislature After Session Ends**

If the Legislature receives a proposed rule for committee review after the last day of the Legislature's final general business floorperiod in the biennial session, the rule will be considered received on the first day of the next regular session of the Legislature. However, the presiding officers of both houses may direct referral of the rule before that day. That happens rarely. This means that rules submitted after the final general business floor period, which is usually in mid-March or early April of an even-numbered year, will not be referred to the standing committees until shortly after the first of the following year.

**Publication**

Administrative rules are published in the Wisconsin Administrative Code. After the legislative review process is complete, the rule is sent to the LRB for publication. In most cases the rule is effective on the first of the month after publication.

**Note: Administrative Rules Online**

The Wisconsin Administrative Code, Administrative Register, active administrative rules and other related documents may be found at: <http://docs.legis.wisconsin.gov/code>. As of September 1, 2016 members of the public are able to comment on all rules, both permanent and emergency, through this webpage.