



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 11-045

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.]

As a preliminary comment, this rule is in need of significant revision. It contains numerous drafting errors that could have been avoided by adherence to the rule drafting instructions set forth in the Administrative Rules Procedures Manual. The rule pertains to compliance on the part of the Wisconsin Retirement System (WRS) with Internal Revenue Code (IRC) limitations on benefits and contributions in order to maintain the tax-qualified status of the WRS. As such, the rule is technical and complicated in nature. Therefore, it is important that the rule be drafted in proper format and use clear and concise language. It is also important that the rule analysis include an adequate explanation of the IRC provisions necessitating the changes contained in the rule, as well as a description of the rule provisions themselves. In addition to providing a more thorough rule analysis, the department should also insert an explanatory note immediately following each rule provision that references an IRC provision or other federal ruling or requirement for the first time in the rule.

2. Form, Style and Placement in Administrative Code

a. As a general note, many of the specific rule provisions commented on under this heading also have comments under heading 5 (clarity, grammar, etc.), which should be reviewed in tandem with the comments below. Also, where a particular problem is noted here or under heading 5, the entire rule should be reviewed for other occurrences of the same problem.

b. Section 1.02 (1), Manual, describes the proper format for the introductory clause which comes at the beginning of a rule-making order. The introductory clause is to consist of an enumeration of the sections treated, the nature of the treatment (amend, repeal, etc.), and a

relating clause concisely stating the subject matter. The introductory clause to this rule is not in proper format and lacks a relating clause. An introductory clause in the format described below should replace the title “DRAFT REPORT ON CLEARINGHOUSE RULE” and the sentence beginning with “RULE” immediately following that title:

The Wisconsin Department of Employee Trust Funds proposes an order to amend ETF 10.01 (3i); and to create ETF 10.01 (9), 10.85, 10.87, 20.0257, 20.38 and 20.39, relating to compliance with Internal Revenue Code limitations on benefits and contributions.

Note that once the department determines how it will renumber s. ETF 20.39 in accordance with comment 2. n., below, the renumbered provision should replace “20.39” in the above clause. Further, if the department revises the definition of “415 limit” in s. ETF 10.01 (9), in accordance with comment 2. h., below, the new definition may have a different subsection number, as a result of alphabetization, which should also be referenced in the clause above.

c. The rule summary, with all of the headings set forth in s. 1.02 (2) (a), Manual (and *only* those headings), should immediately follow the introductory clause. Therefore, the table of contents on page 1 should be deleted. The following comments pertain to the rule summary:

- (1) On page 2, the agency contact information should be deleted, as it is properly included on page 4 under heading 11, “Agency Contact Person”.
- (2) Also on page 2, the “Statement Explaining Need for Rule” should be deleted, as that explanation should be provided under heading 5, “Plain Language Analysis”, the purpose of which is, in part, to explain why the rule is needed.
- (3) On page 3, in heading 9, the word “Report” should be replaced by “Analysis” [to reflect the new name of the economic impact document required under 2011 Wisconsin Act 21].
- (4) On page 4, the information in heading 12, “Proposed Effective Date”, should be moved to a numbered provision at the end of the rule text. [s. 1.02 (4) Manual.] In its place, heading 12 should read: “Place Where Comments are to be Submitted and Deadline for Submission.”
- (5) Also on page 4, the current headings 13, “Fiscal Estimate”, and 14, “Free Copies of Proposed Rule”, should not be included in this list. The fiscal estimate is contained in a separate document, along with the economic impact analysis, which the department properly submitted to the Clearinghouse along with the rule.

d. Regarding the format and placement of these rule provisions within ETF’s current rule structure, the department should consider whether the provisions relating to compliance with the IRC could be consolidated in one location in a single ETF rule chapter for ease of reference. For example, could they all be located in ch. ETF 20, which relates to the WRS, with any necessary cross-references to those provisions inserted in other ETF rule chapters?

e. Definitions should be placed at the beginning of the rule section or other subunit to which they apply. See comment 2. m., below, for a specific example of this problem.

f. Use of parentheses should be avoided throughout the rule. The material contained in parentheses should be set apart by commas or placed in a separate sentence. In some instances, the material may be placed in an explanatory note immediately following the rule provision. [s. 1.01 (6), Manual.]

g. In s. ETF 10.01 (3i), the word “Department” on the last line should not be capitalized or underscored. Throughout the rule, “department” should appear without capitalization.

h. In s. ETF 10.01 (9), a definition is created of the term “415 limit”. However, definitions are to be placed in alphabetical order so they are readily located. [s. 1.01 (7) (a), Manual.] A definition that begins with a numeral cannot meet that requirement. Also, the definition of “415 limit” refers to “the limit set forth in section 415 (b) or (c) of the Internal Revenue Code”. These IRC provisions create two different limits, one for defined benefit plans and one for defined contribution plans. If the generic term “415 limit” is used, it will be unclear which of the two limits is being referred to. Further, while the term “415 limit” is defined, it is rarely used in the rule text. Instead, “the 415 (b) limit” and “the 415 (c) limit” are used more frequently. Separate definitions should be created for “limit under 415 (b)” and “limit under 415 (c)” and it should be clear in which circumstances a limitation applies to a defined benefit plan and when it pertains to a defined contribution plan.

i. The first time a reference is made to the “Internal Revenue Code”, follow it with the acronym “(IRC)” and then use the acronym in the remainder of the rule. This should be done for the first reference to the IRC in each rule chapter affected by this rule. The same comment applies to “Wisconsin Retirement System”, which can be shortened to “WRS.”

j. The title to newly created s. ETF 10.85, “Compliance with code section 503 (b) for prohibited transactions”, should not include an IRC code citation. It could simply read “Prohibited transactions”. Also, the rule text provides that the “department shall not engage in a transaction prohibited by section 503 (b) of the internal revenue code”. However, IRC 503 (b) merely creates a definition of “prohibited transaction”. It appears that the provision should read: “The department shall not engage in a prohibited transaction, as defined in sec. 503 (b) of the internal revenue code”. This is an example of a provision that needs an explanatory note, indicating the types of transactions prohibited.

k. This rule creates s. ETF 10.86, General Code Compliance. From the language in sub. (1), the provision appears to relate to the WRS as a whole. Should it be placed in ch. ETF 20, relating to the WRS?

l. The following comments pertain to s. ETF 20.0257 (in addition to comments under heading 5, below):

- (1) As currently numbered, this newly created provision is inserted between s. ETF 20.025, relating to the minimum retirement age, and s. ETF 20.03, relating to annuity computations. Is this the appropriate location for a provision relating to compliance with IRC limitations on contributions and benefits?
- (2) In sub. (1), and elsewhere in the rule, the phrase “Notwithstanding any other provisions of the laws governing the Wisconsin retirement system to the contrary,” is used. The department should specify the provisions being

“notwithstanding” (or at least give the general subject of those provisions), by stating: “Notwithstanding s. _____, Stats.,” or “Notwithstanding provisions of laws governing...”. The phrase “to the contrary” should be deleted.

- (3) In sub. (4), and in numerous other places throughout the rule, incorrect numbering and lettering of provisions is used. [Refer to s. 1.03, Manual, for guidance on properly subdividing and numbering rule text.] The entire rule should be reviewed to correct other occurrences of this error. In sub. (4), the numbering and lettering, and the language itself, become very convoluted beginning in what is currently lettered par. (a) on page 7. The multi-layered introductory clauses ending in colons make the provision very difficult to follow and should be avoided [See s. 1.03 (2) (h), Manual, for proper format of introductory material and provisions that follow.] In addition, the numbering is internally inconsistent. For example, sub. (4) (b) uses subdivision paragraphs denoted by lowercase Roman numerals (i, ii), while sub. (4) (c) uses lowercase letters (a., b.), which are correct.
- (4) The remainder of s. ETF 20.0257 should be reviewed and rewritten, keeping the above comments and those under heading 5 in mind, to improve the organization of the material and clarify the meaning of the various provisions.

m. In s. ETF 20.38, the definitions of a number of terms are buried within the text of the provision, yet appear to apply to the entire rule section. The definitions should be moved to the beginning of the rule section, in s. ETF 20.38 (1), with an introductory clause that reads: “In this section:”. The definitions should then appear in alphabetical order, each in a separate lettered paragraph (“(a)”, etc.) in the following format: “‘Eligible rollover distribution’ means...”, and so forth.

n. The rule creates s. ETF 20.39, titled “Limits on Compensation”. However, s. ETF 20.39, titled “Delinquent State Tax Obligations”, already exists. Therefore, the provision created in this rule relating to limits on compensation must be given a different number. The department should review whether a provision on limits on compensation, which discusses rules for determining final average earnings, is properly placed in this location within the ETF rules.

o. Throughout the rule, references to “Effective on or after” or “beginning on or after” a specified date should be changed to read “Effective on” or “Beginning on” or, alternatively, “On or after”.

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

- a. In the “Statutes Interpreted” provision:
 - (1) The word “Sections” should be inserted at the beginning of the sentence and “, Stats.” should be inserted after the final statutory citation.
 - (2) More specific citations should be provided to the statutory powers being interpreted in this rule, rather than referring to all enumerated board powers and duties. It appears that the citations should specify ss. 40.03 (1) (am), 40.31 (1), and 40.32 (1).

(3) The “relating to” language should be deleted.

b. In the “Statutory Authority” section, the ch. 227 provision should be cited as “227.11 (2) (a)”, because par. (a) *includes* par. (a) (intro.) and subds. 1 to 3.

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

a. The rule analysis should be rewritten to provide greater detail about the changes made in this rule and the reason for each change. Presumably, all of the changes relate to bringing ETF rules into conformity with provisions of the IRC. Because those IRC provisions are complicated and unfamiliar to the lay reader, each one should be explained briefly in the analysis. It should be clear how each rule change brings that particular provision into compliance with the IRC.

b. In s. ETF 10.01 (9), a period should be inserted at the end of the sentence.

c. In s. ETF 10.86, how does the title of the provision relate to the text? What “funds” are referred to in sub. (2)? How is the reader supposed to know what “Revenue Ruling 91-4” is, what it permits, and how to find it? A brief explanation of the ruling should be inserted in a note following this provision and the ruling should be explained in the rule analysis.

d. The following comments pertain to s. ETF 20.0257 (in addition to those under heading 2, above):

- (1) In sub. (1) on line 4, reference is made to “the plan”, without any antecedent. What plan is being referred to? Also, sub. (1) states that the contributions paid to and benefits paid from the plan “shall be limited to the extent necessary to conform to the requirements of section 415 of the internal revenue code for a qualified pension plan.” The rule should provide enough information about the IRC requirements so that it can be determined to what extent the contributions and benefits must be limited to meet the federal requirements.
- (2) In sub. (2), the colon in the title should be replaced by a semi-colon. In sub. (2) (a), “any participating employee” should be changed to “a participating employee”. It may be helpful to define “participating employee”. Commas should be inserted before and after the clause “as defined in section 414 (j), IRC”.
- (3) In sub. (3) (a), what additional limits are “specified in the laws governing the Wisconsin retirement system”? Applicable statutory or rule provisions should be cited. Also, what is meant by “limitation year”? Should the term be defined? In sub. (3) (b) 1., the “and” at the end of the provision should be changed to “or”.
- (4) Subsection (4), entitled “Adjustments to Basic 415 (b) Limitation for Form of Benefit”, refers to a benefit that is “other than the form specified in par. (3) (b)...”. However, sub. (3) (b) defines “annual benefit”. The section should read: “If the benefit under the Wisconsin retirement system is a benefit other than an annual benefit, as defined in (3) (b), then the benefit...”. Also, what is meant by “form of benefit”? Is it the same as the “type” of benefit? Also, in sub. (4), the

lettering and numbering of provisions make it very difficult to understand what the subsection means. The entire subsection should be reviewed and revised so that its meaning is clear. [See also comment l. (3) under heading 2 above.] Current par. (a) states “if the form of benefit without regard to an automatic benefit increase feature is not a straight life annuity or a qualified joint and survivor annuity, the preceding sentence is applied...”. The language should specify what is being applied, rather than referring to “the preceding sentence”.

- (5) Subsection (9) (c) should clarify what is meant by “thereafter, in any subsequent limitation year”. Does this refer to any year subsequent to the January 1, 2009 date referenced in sub. (9) (intro.)? Also, what is meant by “limitation year”? The term should be defined or otherwise explained.
 - (6) Subsection (11) (b) 2. c. is unclear. Should this section read: “The payments made pursuant to a nonqualified unfunded deferred compensation plan..”?
 - (7) Subsection (11) (b) 3. and 4. refer to “qualified military service within the meaning of section 414 (u) (1) of the internal revenue code”. However, this section of the IRC does not provide a definition of qualified military service. Do these sections refer to a participating employee to whom section 414 (u) (1) of the IRC applies?
 - (8) Subsection (12) (b) should refer to the “Wisconsin retirement system” or “WRS” rather than simply stating “the system”.
 - (9) In sub. (12) (c), a comma should be inserted following: “For purposes of this section”.
 - (10) In addition to the comment in 2. e., above, regarding placement of definitions, note that sub. (12) (c) 3. includes a second sentence that does not constitute a characteristic of “service credit” which should follow from sub. (12) (c) (intro.). It appears that this sentence should be placed in a subd. 4.
 - (11) Subsection (12) (e) defines the term “nonqualified service credit” used in the preceding par. (d). Paragraph (e) should be moved to par. (d).
 - (12) Subsection (12) (g) 1. should clarify what is being referred to by “the limitations of paragraph (4) of this subsection”. Paragraphs are denoted with letters, not numbers.
 - (13) In the last sentence of sub. (12) (g) 3., a comma should be inserted following “For purposes of this paragraph.”.
 - (14) The sentence comprising sub. (14) is 13 lines long. The sentence should be split into multiple sentences or paragraphs to improve readability. The same comment pertains to s. ETF 20.39 (2).
- e. In s. ETF 20.38 (3) (d), the second sentence begins with “(3)”, but the purpose of this citation is unclear. Should it be sub. (4)? In that case, subsequent subsections must be renumbered.

f. In s. ETF 20.38 (3) (d) 3., why is the second sentence included as part of the subdivision? The preceding sentence and the preceding subdivisions describe the accounts or plans to which a portion may be transferred. It appears the language should be in a subd. 4., with the phrase “the definition of eligible rollover distribution also includes a distribution” deleted.

g. In s. ETF 20.38 (4) (e), “Affective” should read “Effective”.

h. In s. 20.38 (5), the second and third sentences in the subsection should appear as paragraphs or as separate subsections incorporated into a revised definition of “distributing” consistent with comment 2. e. above.

i. In s. ETF 20.39 (3), the “3” should be enclosed with parentheses.