

**State of Wisconsin  
Department of Employee Trust Funds  
Employee Trust Funds Board  
Wisconsin Retirement Board  
Teachers Retirement Board  
Group Insurance Board  
Deferred Compensation Board**

**The Wisconsin department of employee trust funds proposes an order to amend ETF 11.11, relating to legal counsel advising the boards that are attached to the department while a board considers a final decision pertaining to an appeal.**

**Notice of Public Hearing**

A public hearing on this proposed rule will be held on August 13, 2009 at 1:00 p.m. in Conference Room GB at the offices of the Department of Employee Trust Funds, 801 West Badger Road, Madison, Wisconsin. Persons wishing to attend should come to the reception desk up the stairs (or by elevator) from the main entrance to the building.

**Analysis Prepared by the Department of Employee Trust Funds**

1. Statute interpreted:  
Section 40.03, Wis. Stats.
2. Statutory authority:  
Sections 40.03 (2) (i), (ig), (ir) and 227.11 (2) (a), Wis. Stats.
3. Explanation of agency authority:  
By statute, the DETF 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:  
Ch. ETF 11, Wis. Admin. Code, establishes a procedure for the review of appealable department determinations by the board responsible for the subject matter. Section 40.03 (3) provides that the department of justice shall provide legal counsel and prosecute and defend all actions brought by or against the boards or the department. There are no other related administrative rules or statutes.

5. Plain language analysis:  
The purpose of this rule is to allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with Wis. Stat. s. 40.03, to provide that the legal counsel shall provide legal representation to the board, and to provide the boards with additional flexibility in the use of legal counsel.
6. Summary of, and comparison with, existing or proposed federal regulations:  
There are no existing or proposed federal regulations that directly pertain to this proposed rule.
7. Comparison with rules in adjacent states:  
  
The department did not locate any comparable rule or statute in any adjacent states.
8. Summary of factual data and analytical methodologies:  
Currently s. ETF 11.11 provides that board staff arrange for legal counsel to advise the boards attached to the department from one of three sources: 1) the Department of Justice, if the department is a party to the appeal; 2) the department's chief counsel, if the department is not a party to the appeal; and 3) outside counsel, if neither the department's chief counsel nor the Department of Justice is able to provide legal counsel. The current rule also prescribes a number of specific duties of the legal counsel.  
  
The proposed revision would allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with Wis. Stat. s. 40.03 (3). In addition, the proposed rule would simply provide that the legal counsel shall provide legal representation to the board, rather than specifying specific duties. These changes will provide the boards with additional flexibility in using legal counsel services.
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 (including email and telephone):  
Please direct any questions about the proposed rule to David Nispel,

General Counsel, department of employee trust funds, P. O. Box 7931, Madison, WI 53707. The email address: david.nispel@etf.state.wi.us. The telephone number is: (608) 264-6936.

12. Place where comments are to be submitted and deadline for submissions: Written comments on the proposed rule may be submitted to David Nispel, General Counsel, department of employee trust funds, 801 W. Badger Road, P. O. Box 7931, Madison, WI 53707. Written comments must be received at the department of employee trust funds no later than 4:30 p.m. on August 13, 2009.

### Text of Proposed Rule

ETF 11.11 (1) and (2) are amended to read:

**ETF 11.11 Counsel for the board. (1)** In accordance with Wis. Stat. s. 40.03 (3), Board staff shall arrange for legal counsel to advise the board during its consideration of a final decision, ~~as follows:~~

- ~~(a) In any appeal to which the department is a party, legal counsel shall be requested from the department of justice.~~
- ~~(b) In any appeal to which the department is not a party, legal counsel shall be requested from the department's chief counsel.~~
- ~~(c) If neither the department of justice or the department's chief counsel are able to provide legal counsel, board staff shall follow the appropriate procedures for hiring outside counsel familiar with administrative law and ch. 40, Stats.~~

**(2)** Any legal counsel asked to represent the board under sub. (1) shall fully disclose any real or apparent conflict of interest to the board chair and state whether counsel is able to render objective advice to the board. The board chair may waive the conflict on behalf of the board.

ETF 11.11 (3) is repealed and recreated to read:

**(3)** Counsel appointed under sub. (1) shall provide legal representation to the board including:

- (a) Advising the board during its deliberations and making specific recommendations for action by the board and
- (b) Drafting findings of fact and conclusions of law.

#### Proposed Effective Date:

This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin administrative register as provided by s. 227.22 (2) (intro.), Stats.

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Fiscal Estimates:

The rule will have no effect on county, city, village, town, school district, technical college district or sewerage district fiscal liabilities or revenues. The rule will have no effect on state funds.

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.

Approved for publication:

This proposed rule is approved for publication in the Wisconsin Administrative Register.

Date this \_\_\_\_\_ day of July, 2009.

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David Stella, Secretary  
Department of Employee Trust Funds