

Report From Agency

STATE OF WISCONSIN  
DEPARTMENT OF EMPLOYEE TRUST FUNDS  
EMPLOYEE TRUST FUND BOARD  
WISCONSIN RETIREMENT BOARD  
TEACHERS RETIREMENT BOARD  
GROUP INSURANCE BOARD  
DEFERRED COMPENSATION BOARD

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FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #09-047

**FINAL RULE** 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.

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Agency Person to be Contacted for Questions.....	2
Statement Explaining Need for Rule.....	2
Analysis Prepared by Department of Employee Trust Funds.....	2
Statutes interpreted.....	2
Statutory authority.....	2
Explanation of agency authority.....	3
Related statutes or rules.....	3
Plain language analysis.....	3
Summary of, and comparison with, existing or proposed federal regulations.....	3
Comparison with rules in adjacent states.....	3
Summary of factual data and analytical methodologies.....	3
Analysis and documentation concerning effect on small businesses.....	4
Anticipated costs incurred by private sector.....	4
Statement of effect on small business.....	4
Regulatory Flexibility Analysis.....	4
Fiscal Estimate.....	4
Text of Rule.....	4
Economic Impact Report.....	None

Department of Administration s. 227.138 Report.....None

Energy Impact Report.....None

Legislative Council Staff Clearinghouse Report.....6

Response to Legislative Council Staff Recommendation.....9

List of Persons Who Appeared or Registered at the Public Hearing.....9

Summary of Public Comments .....9

Modifications to the Rule as Originally Proposed.....9

Modifications to the Analysis Accompanying the Proposed Rule.....9

Modifications to the Fiscal Estimate .....9

Board Authorization for Promulgation.....9

Effective Date.....9

**Agency Person to be Contacted for Questions**

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. Telephone: (608) 264-6936. E-mail address: [david.nispel@etf.state.wi.us](mailto:david.nispel@etf.state.wi.us).

**Statement Explaining Need for Rule**

This rule-making is needed to allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with s. 40.63, Stats., 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.

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

1. Statute interpreted:

Section 40.03, Stats.

2. Statutory authority:

Sections 40.03 (2) (i), (ig), (ir) and 227.11 (2) (a), 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), Stats., 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 s. 40.03, Stats., 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:**

This 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. Anticipated costs incurred by private sector**

None.

**11. Statement of effect on small business:**

The rule has no effect on small businesses.

**Regulatory Flexibility Analysis:**

The proposed rule has no significant effect on small businesses because only governmental employers and their employees may participate in the benefit programs under ch. 40 of the statutes administered by the Department of Employee Trust Funds.

**Fiscal Estimate:**

The proposed rule has no direct fiscal impact. The proposed rule generates no revenues for any employer. The proposed rule itself has no effect on the fiscal liabilities of any county, city, village, town, school district, technical college district or sewerage. The rule has no state fiscal effect during the current biennium and no fiscal impact on state funds.

**Text of Rule**

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

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

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~~(b) — In any appeal to which the department is a party, legal counsel shall be requested from the department of justice.~~

~~(c) — In any appeal to which the department is not a party, legal counsel shall be requested from the department's chief counsel.~~

~~(d) — 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.

Section 2. ETF 11.11 (3) is repealed and recreated to read

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

(a) Advising the board during its deliberations and making specific recommendations for action by the board.

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~~(a)(b)~~ Drafting findings of fact and conclusions of law.

(end of rule text)



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FORM 2

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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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Ronald Sklansky  
*Clearinghouse Director*

Richard Sweet  
*Clearinghouse Assistant Director*

Terry C. Anderson  
*Legislative Council Director*

Laura D. Rose  
*Legislative Council Deputy Director*

### CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

#### CLEARINGHOUSE RULE **09-047**

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.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

07-01-2009 RECEIVED BY LEGISLATIVE COUNCIL.

07-21-2009 REPORT SENT TO AGENCY.

RS:LR

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

- 1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]  
Comment Attached      YES       NO
  
- 2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]  
Comment Attached      YES       NO
  
- 3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]  
Comment Attached      YES       NO
  
- 4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]  
Comment Attached      YES       NO
  
- 5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]  
Comment Attached      YES       NO
  
- 6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]  
Comment Attached      YES       NO
  
- 7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]  
Comment Attached      YES       NO



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### CLEARINGHOUSE RULE 09-047

#### Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

#### 2. Form, Style and Placement in Administrative Code

a. In item 4 of the rule preface, the notation “Stats.,” should be inserted after the number “40.03 (3).” Also, in s. ETF 11.11 (1), the correct cross-reference is “s. 40.03 (3), Stats.,”.

b. In s. ETF 11.11 (3), the introduction should conclude with the phrase “all of the following” and par. (a) should conclude with a period rather than the word “and.”

ould replace “must” and “The” should replace “Such.” Also, “subs.” should be replaced with “subsection.” [See s. 1.07, Manual.]



**Response to Legislative Council Staff Recommendations**

The DETF implemented all of the Legislative Council Staff recommendations contained in the Clearinghouse Report. This involved making changes in form, style and placement in the administrative code.

**List of Persons Appearing or Registering For or Against the Rules.**

No persons registered either for or against the rule at the public hearing on August 13, 2009.

**Summary of Comments Received at Public Hearing.**

No person wished to testify concerning the rule. The record was held open for written comments until 4:30 p.m. on August 13, 2009, but no comments were received.

**Modifications to Rule as Originally Proposed as a Result of Public Comments**

None.

**Modifications to the Analysis Accompanying the Proposed Rule.**

None.

**Modifications to the Initial Fiscal Estimate**

None.

**Board Authorization for Promulgation**

This final draft report on Clearinghouse Rule #09-047 has been duly approved for submission to the Legislature, and for promulgation, by the Department of Employee Trust Funds, and by the Employee Trust Funds Board, Wisconsin Retirement Board and Teachers Retirement Board at their meetings on September 17, 2009, and by the Group Insurance Board at its meeting on November 10, 2009.

**Effective Date**

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), Stats.

Respectfully submitted,

**DEPARTMENT OF EMPLOYEE TRUST FUNDS**

\_\_\_\_\_  
David A. Stella  
Secretary

Date: \_\_\_\_\_

