

**STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS, EMPLOYEE TRUST FUNDS BOARD
TEACHERS RETIREMENT BOARD, AND WISCONSIN RETIREMENT BOARD**

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #02-126

A RULE repealing and recreating § ETF 10.30, repealing §§ ETF 10.31, 10.32, 10.33 and 10.34, and amending § ETF 10.82 (2) (b) 5., Wisconsin Administrative Code, relating to participation in the variable division of the trust fund.

Agency Person to be Contacted for Questions	2
Statement Explaining Need for Rule	2
Analysis Prepared by Department of Employee Trust Funds	2
Authority for Rule.....	2
Statutes Interpreted.....	2
Fiscal Estimate.....	2
Final Regulatory Flexibility Analysis	3
Rule Text	3
Effective Date	13
Explanation of Modifications as Result of Testimony at Public Hearing.....	13
List of Persons Appearing or Registering For or Against the Rule.....	14
Legislative Council Staff Clearinghouse Report	15
Response to Legislative Council Staff Recommendation	19

Agency Person to be Contacted for Questions

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Statement Explaining Need for Rule

The Department of Employee Trust Funds is required by Wis. Stats. § 227.10 (1) to promulgate as a rule each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. This rule will govern the Department’s administration of participation in the Variable Division of the Trust Fund, which was re-opened by 1999 Wisconsin Act 11.

Analysis Prepared by the Wisconsin Department of Employee Trust Funds

Authority for Rule: Sections 40.03 (1)(m), (2)(i), (7)(d), and (8)(d), 227.10 and 227.11 (2)(a), Wis. Stats.

Statutes Interpreted: Section 40.04 (7)(a), Wis. Stats.

1999 Wisconsin Act 11 amended Wis. Stats. § 40.04 (7) (a) to permit all participating employees on or after January 1, 2001 to elect to have 50% of their future required and additional contributions deposited in the Variable Division of the Trust Fund. 1999 Wisconsin Act 11 also permits former Variable Division Trust Fund participants who completely cancelled their original variable participation before December 31, 1999 to re-elect to participate in the Variable Division of the Trust Fund.

The proposed rule repeals and recreates Wisconsin Administrative Code § ETF 10.30, repeals Wisconsin Administrative Code §§ 10.31, 10.32, 10.33, and 10.34, and amends § ETF 10.82 (2) (b) 5., Wisconsin Administrative Code. This will consolidate all administrative rules regarding participation in the Variable Division of the Trust Fund in one administrative code, streamlining the administrative code and providing for efficient administration of the Variable Division of the Trust Fund. It will further clarify the effective dates of a participant’s election to participate in and to cancel participation in the Variable Division of the Trust Fund, how interest will be credited on late reported variable contributions to participants’ accounts, and the effect of variable cancellations on individuals with multiple Wisconsin Retirement System accounts. Finally, the amended rule corrects a cross-reference to the rule governing elections to cancel variable participation.

Fiscal Estimate

The proposed rule has no fiscal impact on county, city, village, town, school district, technical college district or sewerage district fiscal liabilities and revenues. This rule has no anticipated state fiscal effect during the current biennium and no future effect on state funds, which do not include the Public Employee Trust Funds.

The Department of Employee Trust Funds anticipates some cost to the Public Employee Trust Funds in administering this rule. These costs include one-time costs for programming computer systems to handle the new variable program and on-going costs to process variable election forms and provide participants with information.

Final Regulatory Flexibility Analysis

The Department anticipates that the provisions of this proposed rule will have no direct adverse effect on small businesses.

(BEGINNING OF RULE TEXT)

SECTION 1. ETF 10.30 is repealed and recreated to read:

ETF 10.30 (title) Variable division participation. (1) PURPOSE. The purpose of this section is to interpret s. 40.04 (7), Stats. This section establishes the procedures for electing to participate, participating and electing to terminate participation in the variable division of the trust fund.

(1m) DEFINITIONS: In this section, “new participant” means any of the following

- (a) A person initially qualifying as a participant as defined by s. 40.02 (45), Stats., who has never previously been a participant in the Wisconsin retirement system or Wisconsin retirement fund or a member of the state teachers retirement system or Milwaukee teacher retirement fund.
- (b) A person who was previously a participant but whose Wisconsin retirement system account was closed because of payment of a lump sum benefit under s. 40.25, Stats., and who returns to covered employment for the first time since the account closure. The term “new participant” does not include a person whose closed account is reestablished under s. 40.25 (5), Stats.

(2) ELIGIBILITY FOR AND EFFECTIVE DATES OF PARTICIPATION IN THE VARIABLE

DIVISION. (a) An election to participate, or terminate participation, in the variable division shall be made on a form provided by the department. Except as provided in sub. (3), an election to participate in the variable division shall become effective for future contributions on the January 1 following receipt of the form by the department.

(b) Participants who elected to terminate participation in the variable division effective before December 31, 1999 may elect to participate in the variable division as provided in this section.

(c) Except as provided in par. (d), pursuant to s. 40.04 (7) (b), Stats., participants who elected to terminate participation in the variable division effective on or after December 31, 1999 may not re-elect to participate in the variable division.

(d) A participant who elects to terminate participation in the variable division effective on or after December 31, 1999 may re-elect to participate in the variable division only if the participant ceases to be a participant by closing the participant's account through taking a benefit under s. 40.25, Stats., and subsequently becoming a new participating employee.

(e) An election to participate in the variable division received by the department from a participant who is not a participating employee, and who ceased to be a participating employee before January 1, 2001, shall become effective on the January 1 on or after the date on which the participant again becomes a participating employee.

(f) An election to participate in the variable division received by the department after the participant's date of death is invalid.

Note: Forms for electing to participate in the variable division, "Election to Participate in the Variable Trust Fund," ET-2356, can be obtained from the following address: Department of Employee Trust

Funds, P.O. Box 7931, Madison, WI 53707-7931 or from the department's internet site: etf.wi.gov.

(3) VARIABLE DIVISION PARTICIPATION FOR NEW PARTICIPANTS. (a) An election to participate in the variable division filed by a person who becomes a new participant on or after January 1, 2001 shall become effective as follows:

1. Retroactive to the date on which the person becomes a participant, providing that the department receives the form no later than 30 calendar days after the date on which the person became a participant.
2. Elections to participate in the variable division that are received by the department more than 30 calendar days after the date on which the person becomes a participant shall become effective on the January 1 following receipt of the form by the department.

(b) The department shall accept elections to participate in the variable division up to 90 calendar days before the date on which a participant becomes a participating employee. Elections received by the department within this 90-day period or within the next 30 days after the person becomes a participating employee shall become effective on the date on which the person becomes a participating employee. Elections to participate in the variable division received by the department more than 90 calendar days before the date on which a person becomes a participant are invalid.

(4) RETROACTIVE CONTRIBUTIONS. (a) Retroactive interest credited to contributions for late-paid earnings shall be credited at the fixed effective rates as provided in s. 40.06 (5), Stats.

(b) Late-paid and other retroactive contributions shall be deposited in the fixed and variable trust

accounts according to the participant's variable participation status at the time the contributions are deposited, regardless of the participant's variable participation status in the annual earnings period to which the contributions may be attributed for other purposes.

(5) TERMINATING PARTICIPATION IN THE VARIABLE DIVISION. (a) A participant may elect to terminate participation in the variable division and transfer the participant's variable division contributions to the fixed division on one of the following bases:

1. For future contributions only: Effective as of the December 31 after the date on which the department receives an election to terminate participation in the variable division, all future contributions shall be deposited in the fixed division.
2. An unconditional basis: Effective as of the December 31 after the date on which the department receives an election to terminate participation in the variable division, all future contributions shall be deposited in the fixed division and all variable contributions and accrued gain or loss shall be transferred to the fixed division.
3. A conditional basis:
 - a. For annuities, effective on the first January 1 after the department receives the election when the condition under s. 40.04 (7) (a) 1., Stats. is satisfied.
 - b. For all accounts from which an annuity is not being paid, effective on the first January 1 after the department receives the election when the condition under s. 40.04 (7) (a) 2., Stats. is satisfied. As of the first January 1 after the Department receives the election, all future contributions shall be deposited in the fixed division. As of the first January 1

when the condition under s. 40.04 (7) (a) 2., Stats., is satisfied, all variable contributions and accrued gain or loss shall be transferred to the fixed division.

Example 1: A participant, alternate payee, named survivor or beneficiary who is receiving an annuity from the Wisconsin retirement system, and who also has an account from voluntary additional contributions from which no annuity is being paid, is not an annuitant under s. 40.04 (7) (a) with respect to the additional contributions.

Example 2: An alternate payee who was also a participating employee in the Wisconsin retirement system and who is receiving an annuity only from the alternate payee account is not an annuitant with respect to the separate account established as a participating employee.

Note: Forms for electing to terminate participation in the variable division, "Election to Cancel Variable Participation," ET-2313, can be obtained from the following address: Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931 or from the department's internet site: etf.wi.gov.

(b) Except as provided in par. (c), an election to terminate participation in the variable division may be rescinded if the department receives a written request to rescind the election from an alternate payee, beneficiary, named survivor, or participant as defined in s. 40.02 (2m), (8), (41r) and (45), Stats., before the December 31 following the date on which the election to terminate participation in the variable division was received.

Note: No specific form exists for rescinding an election to terminate participation in the variable division. The letter should make clear your intent and include words to the effect of "I want to rescind my election to terminate participation in the variable division." Participants may send a letter

or fax with this request to the following address: Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931 or fax (608) 267-4549.

(c) An election to terminate participation in the variable division received within 30 days after the date on which the person became a participant may be rescinded if the department receives the participant's written request to rescind the election no later than 30 days after the date on which the person became a new variable division participant as provided in sub. (3).

(d) A rescinded election to terminate participation in the variable division shall be treated as if the election never existed.

(e) When the department receives an election to terminate participation in the variable division more than 30 calendar days after the date on which a person became a new variable division participant as defined in sub. (3), the participant shall not be eligible to re-elect to participate in the variable division without meeting the requirements of sub. (2) (d).

(f) For an account or annuity that includes additional contributions, when an election to terminate participation in the variable division pursuant to s. 40.04 (7) (a) 1. or 2., Stats., is made by an alternate payee, beneficiary, named survivor, or participant as defined in s. 40.02 (2m), (8), (41r) and (45), Stats., the determination of whether the variable contributions and accrued gain or loss shall be transferred to the fixed division shall be based on an evaluation of the combined total of the required and additional contributions and shall be effective as prescribed in this section.

(g) An election to terminate participation in the variable division filed pursuant to s. 40.04 (7), Stats., shall be effective for all retirement contributions and benefits accrued as a participant except that for an annuitant who has variable accumulations from which no annuity is being paid, the effective date of

an election shall be separately determined for the current annuity or annuities and for the variable division accumulations from which no annuity is being paid.

(h) When multiple elections to terminate participation in the variable division for an account are received by the department, the last election received by the department shall supercede previous elections and shall be applied to the account if it is received before the December 31 on which the previous election to terminate variable division participation would become effective.

(i) Any gains or losses at the effective date of a transfer pursuant to s. 40.04 (7), Stats., including subsequent interest credits, shall be reflected as an adjustment to the benefit at the time it is payable.

(j) Participants may rescind elections to participate in the variable division under the following conditions:

1. If an election to participate in the variable division would become effective on a January 1 after it is received, as provided in sub. (2), the election shall be rescinded if the department receives an election to terminate participation in the variable division before the date on which the election would otherwise become effective.
2. If an election to participate in the variable division would become effective on the date on which the participant became a participating employee as provided in sub. (3), the election to participate shall be rescinded if the department receives an election to terminate participation in the variable division within 30 calendar days after the date on which the participant becomes a participating employee.

(k) An election to terminate participation in the variable division received by the department after the date of death of the person making the election is invalid.

(L) A person may be a participant, alternate payee, named survivor, beneficiary or combination thereof under the Wisconsin retirement system, and may have different accounts or annuities in each capacity. Except as otherwise provided in this paragraph, an election to terminate participation in the variable division applies to all of a person's accounts and annuities. A person may specify that an election to terminate participation in the variable division applies only to one or more of the following:

1. All accounts and annuities held in the capacity of a participant.
2. All accounts and annuities held in the capacity of an alternate payee of a specified participant.
3. All accounts and annuities held in the capacity of a named survivor of a specified participant.
4. All accounts and annuities held in the capacity of a beneficiary of a specified participant.

(m) The December 31 effective date for an election to terminate participation in the variable division means on December 31 after interest crediting under s. 40.04 (4) (a), Stats. has occurred.

(6) RIGHTS OF BENEFICIARIES, ALTERNATE PAYEES, AND NAMED SURVIVORS. (a)

An election to participate in the variable division received by the department from an alternate payee, beneficiary, or named survivor as defined in s. 40.02 (2m), (8), and (41r), Stats., is invalid.

(b) A person receiving or eligible to receive benefits as the alternate payee, sole beneficiary, or named survivor of a participant as defined in s. 40.02 (2m), (8), and (41r) Stats., may elect to terminate participation in the variable division pursuant to s. 40.04 (7), Stats.

(c) Except as provided in pars. (d) and (e), terminating participation or rescinding an election to participate in the variable division shall be determined pursuant to sub. (5).

(d) If there is more than one beneficiary of an account from which no annuity is being paid, the multiple beneficiaries may jointly elect to terminate participation in the variable division pursuant to s. 40.04 (7), Stats. Participation in the variable division will be terminated effective on the December 31 following receipt of an election to terminate participation in the variable division from each of the multiple beneficiaries. Any one of the multiple beneficiaries may rescind his or her election to terminate participation in the variable division prior to the date it would otherwise have gone into effect, in which case the rescinded election to terminate participation in the variable division shall be treated as if the election never existed.

(e) If there is more than one beneficiary of an account from which no annuity is being paid, and the beneficiaries do not all elect to terminate participation in the variable division pursuant to s. 40.04 (7), Stats. as provided in par. (d), an individual beneficiary's election to terminate participation in the variable division received by the department shall become effective on the December 31 on or after the effective date of the beneficiary's annuity from that beneficiary's portion of the participant's account, unless previously withdrawn.

(f) A participant's election to terminate participation in the variable division received by the department before the participant's date of death shall become effective as provided in sub. (2), and shall apply to any accounts or annuities that are payable to the participant's beneficiaries unless the election is rescinded as provided in sub. (5).

(7) INCOMPLETE ELECTIONS. (a) An election to participate in the variable division or an election to terminate participation in the variable division that does not contain the name, social security number and signature of the person making the election shall be deemed incomplete.

(b) An election to terminate participation in the variable division received by the department from a beneficiary or named survivor as defined in s. 40.02 (8) and (41r), Stats., that does not include the participant's name and social security number in addition to the name, social security number and signature of the person making the election shall be deemed incomplete. For terminations, the election must include a cancellation type as specified in sub. (5)(a).

(c) When the department receives an incomplete election, the election shall be returned by mail to the elector for completion. If a correctly completed election is received by the department within a grace period of 30 calendar days after the incomplete election was returned by mail to the elector, the original receipt date of the election shall be preserved for the purpose of determining the effective date of the election. The effective date for corrected elections that are not returned during the 30-day grace period shall be determined without regard to the original submission and based on the date a correctly completed election is received by the department.

(8) RECEIPT DATES. (a) Notwithstanding s. ETF 10.82 (2), the department may accept correctly completed elections to participate in the variable division, elections to terminate participation in the variable division and notifications to rescind elections to terminate participation in the variable division that are received by the department's facsimile machine in a complete and legible form. The facsimile may be accepted as the original.

(b) The deadline for submitting an election to terminate participation in the variable division that is effective December 31 is December 31 of that year.

(c) The deadline for submitting an election to participate in the variable division that is effective January 1 is December 31 of the prior year.

(d) For the purposes of determining deadlines under this section, see s. 990.001 (4), Wis. Stats.

Note: Under s. 230.35 (4) (a), Stats., December 31 and January 1 are always legal holidays on which state offices are closed, as is the day following January 1 when January 1 falls on a Sunday. The

department does not have duly established office hours on Saturday. Therefore, under s. 990.001 (4)

(b), Stats., a December 31 deadline would be extended until the next date which is not a holiday,

Saturday or Sunday. For example, the deadline of December 31, 2002, will be extended to Thursday,

January 2, 2003. The deadline of December 31, 2004, will be extended to Monday, January 3, 2005.

The deadline of December 31, 2005, will be extended to Tuesday, January 3, 2006.

SECTION 2. Sections ETF 10.31, 10.32, 10.33 and 10.34 are repealed.

SECTION 3. Section ETF 10.82 (2) (b) 5. is amended to read:

5. Form ET-2313, election to cancel variable participation under s. ETF ~~40.34~~ 10.30 (5).

(END OF RULE TEXT)

Effective Date

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

Explanation of Modifications as Result of Testimony at Public Hearing

No testimony was offered at the public hearing. The only modifications made to the text of the rule were in response to the recommendations of the Legislative Council Staff or minor editorial changes to clarify the analysis of the rule.

List of Persons Appearing or Registering For or Against the Rules

No persons appeared or registered either for or against the rule at the public hearing on November 19, 2002. The record was held open for written comments until November 21, 2002, but no comments were received.

Legislative Council Staff Clearinghouse Report on CR #02-126

The Legislative Council Clearinghouse Report is included on the following pages.

Response to Legislative Council Staff Recommendations

Each of the Legislative Council Staff recommendations concerning form, conflict with existing rules, references, clarity, grammar, punctuation and use of plain language was adopted and the text of the rule was modified accordingly. A new section amending ETF 10.82 (2) (b) 5. to correct a cross-reference was also included, based on a Legislative Council Staff recommendation.

Board Authorization for Promulgation

This final draft report on Clearinghouse Rule #02-126 has been duly approved for submission to the Legislature and for promulgation by the Employee Trust Funds Board at its meeting on December 13, 2002, and by both the Teachers Retirement and Wisconsin Retirement Boards at their respective meetings on December 12, 2002.

Respectfully submitted,

DEPARTMENT OF EMPLOYEE TRUST FUNDS

Eric O. Stanchfield, Secretary
Wisconsin Department of Employee Trust Funds