

CR 10-138

**State of Wisconsin
Department of Employee Trust Funds,
Employee Trust Funds Board, Teachers Retirement Board, Deferred Compensation Board,
and Wisconsin Retirement Board**

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #10-138

FINAL RULE to repeal and recreate administrative rule ETF 10.75 relating to the implementation of statutory changes related to power of attorney pursuant to 2009 Wisconsin Act 319.

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Agency Person to be Contacted for Questions

Please direct any questions about this rule-making to Lucas Strelow, Policy Analyst, Office of Policy, Privacy and Compliance, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 267-0722. E-mail address: lucas.strelow@etf.state.wi.us.

Statement Explaining Need for Rule

This rule-making is needed to amend the existing rule to bring the rule into harmony with the changes to Wisconsin power of attorney statutes enacted in 2009 Wisconsin Act 319.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:
Various statute sections in ch. 244, Stats., relating to uniform power of attorney.
2. Statutory Authority:
Sections 40.03 (2) (i), (ig), (ir), and 227.11 (2) (a), Stats.

3. Explanation of Agency Authority:
By statute, the ETF 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:
There are no other rules that clarify how ETF will administer Chapter 40 benefits with respect to power of attorney. 2009 Wisconsin Act 319 contains changes to the statutes relating to power of attorney for property and finances.
5. Plain Language Analysis:
2009 Wisconsin Act 319 updates provisions related to the uniform power of attorney for property and finances. Rule changes are necessary to bring ETF's treatment of power of attorney documents into harmony with the new statutes, including:
 - A rule clarifying how the department will process conflicting transaction requests from co-agents when the principal has granted authority to execute such transactions to multiple agents.
 - A rule specifying how the department will implement the 10-day deadline for rejecting power of attorney documents and requests provided in 2009 Wisconsin Act 319.
 - A rule specifying the department's treatment of an agent's request to execute a transaction when the power of attorney document is incomplete or certification is required.
 - A rule clarifying that a power of attorney does not automatically terminate when a domestic partnership established under Chapter 40 is terminated.
6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:
There are no existing federal regulations that specifically address how states process and administer power of attorney.
7. Comparison with Rules in Adjacent States
All states except Louisiana have adopted the Uniform Power of Attorney Act, although each state may incorporate additional minor provisions into their own power of attorney laws. If a power of attorney was executed in a state other than Wisconsin, the department would abide by that state's laws with respect to the powers granted in the power of attorney document.
8. Summary of Factual Data and Analytical Methodologies:

2009 Wisconsin Act 319 amended Wisconsin's statutes governing uniform power of attorney for finances and property. The proposed rule change is intended to bring ETF's power of attorney rule into harmony with the amended statutes

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 benefit programs administered by the department.

10. Effect on small business:

There is no effect on small business.

11. Agency contact person:

Lucas Strelow, Policy Analyst, Department of Employee Trust Funds, 801 W Badger Rd, Madison, WI 53713-7931, P.O. Box 7931 (use ZIP Code 53707 for PO Box); Phone: 608-267-0722; E-mail: lucas.strelow@etf.state.wi.us

12. Proposed Effective Date:

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

13. Fiscal Estimate:

The rule will have a minimal fiscal effect, in that it will require minor changes to ETF's procedures with respect to reviewing power of attorney documents. Any costs are anticipated to be insignificant, and the Department can absorb these costs within the existing base budget. The rule will not create any additional fiscal impact on any county, city, village, town, school district, technical college district, or sewerage districts. The rule will not create any additional fiscal impact on the state for the current biennium. The rule will not have any fiscal impact on the private sector.

14. 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.

Text of Proposed Rule

SECTION 1. ETF 10.75 is repealed and recreated to read:

ETF 10.75 Power of attorney. (1) As used in this section, “power of attorney” includes all of the following: (a) A uniform statutory power of attorney as set forth in s. 244.61, Stats.

(b) A uniform statutory power of attorney as defined under and containing the language required in a uniform statutory power of attorney act enacted by a jurisdiction other than the state of Wisconsin, provided the power of attorney meets the requirements of and does not conflict with s. 244.61, Stats.

(c) A durable power of attorney as defined in s. 244.02 (3), Stats.

(d) A durable power of attorney as defined under and containing the language required in a uniform durable power of attorney act enacted by a jurisdiction other than the state of Wisconsin, provided the power of attorney meets the requirements of and does not conflict with s. 244.02 (3) Stats.

(e) A person’s common law authorization, whether durable or non-durable, to act as the person’s agent under a power of attorney.

(1m) (a) A power of attorney document signed before September 1, 2010, is presumed to be non-durable unless the power of attorney document specifies that it is durable.

(b) A power of attorney document signed on or after September 1, 2010, is presumed to be durable unless the power of attorney document specifies that it is non-durable.

(2) The department or the Wisconsin deferred compensation program administrator, as applicable, shall accept the agent’s signature in lieu of the principal’s signature for all transactions for which the department or the Wisconsin deferred compensation program administrator requires the principal’s signature, provided that all of the following conditions are met:

(a) The department or the Wisconsin deferred compensation program administrator, as applicable, received either the original of the power of attorney which is dated and signed by the person granting the power of attorney, or a legible facsimile copy or e-mail attachment, subject to s. ETF 10.82. The department or the Wisconsin deferred compensation program administrator, as applicable, may require additional documentation deemed necessary to verify that the power of attorney remains in effect.

(b) The appointment under power of attorney has not terminated or expired.

(c) The powers delegated under the power of attorney include authority to make the transaction authorized by the agent.

(d) If requested by the department or the Wisconsin deferred compensation program administrator, the agent certifies that he or she does not have knowledge of the termination of the appointment, the principal’s death, or if applicable, the principal’s incapacitation. If the department or the Wisconsin deferred compensation program

49 administrator requests such certification, and the agent does not provide the certification
50 as requested, the department or the Wisconsin deferred compensation program
51 administrator may decline to act upon the request.
52

53 (e) If the power of attorney is conditioned on the incapacitation of the principal, upon
54 request of the department or the Wisconsin deferred compensation program administrator
55 the agent provides evidence satisfactory to the department or the Wisconsin deferred
56 compensation program administrator that the principal has become incapacitated.
57

58 (f) Subject to par. (c), the department and the Wisconsin deferred compensation
59 program administrator, as applicable, shall treat as valid any beneficiary designation
60 received prior to the principal's death that is signed by the agent, without regard to the date
61 on which the power of attorney was executed by the principal or the date on which the
62 department or the Wisconsin deferred compensation program administrator receives the
63 beneficiary designation form, provided that the agent signed the beneficiary designation on
64 or after the date on which the principal executed the power of attorney granting that
65 authority to the agent.
66

67 **(3)** (a) The department or the Wisconsin deferred compensation program administrator,
68 as applicable, shall review acknowledged power of attorney documents for technical
69 completeness, and will reject any that are technically deficient within 10 days after receipt
70 by the department.
71

72 (b) The department and the Wisconsin deferred compensation program administrator,
73 as applicable, shall not honor transaction requests by the agent for which the power of
74 attorney document does not grant authority to the agent, regardless of whether the agent's
75 request is rejected within 10 days after the department received the agent's request.
76

77 (c) The effective dates of certain transactions are based on the receipt date of either the
78 transaction request or certain documents, such as a benefit application. If the department
79 receives such a transaction request from the agent, but either has not received the power
80 of attorney or the department requests certification under sub. (2) (d), the department must
81 receive the requested certification or the power of attorney within 30 days after the
82 department's notification to the agent that the power of attorney or certification is required.
83 If the department receives the certification or power of attorney within 30 days, the
84 effective date of the transaction requested will be based on the original date on which the
85 department received the transaction request.
86

87 (d) Par. (c) shall not apply if the principal executed the power of attorney after the date
88 on which the department received the transaction request.
89

90 (e) A document signed by the agent prior to the date on which the power of attorney
91 becomes effective shall have no force or effect.
92

93 **(4)** (a) If the principal has granted joint power of attorney to co-agents, the department
94 or the Wisconsin deferred compensation program administrator, as applicable, shall
95 require the signature of each agent on any transaction that requires the principal's
96 signature.
97

98 (b) If the principal has granted separate power of attorney to more than one agent, each
99 with independent authority, the department and the Wisconsin deferred compensation
100 program administrator, as applicable, shall honor transaction requests signed by any
101 single agent, subject to sub. (2) (c).
102

103 (c) If agents under par. (b) request to execute conflicting transactions, the department or
104 the Wisconsin deferred compensation program administrator, as applicable, may decline to
105 act upon the requests of one or more of the agents if it is determined to be in the best
106 interests of the principal.
107

108 **(5)** The department or the Wisconsin deferred compensation program administrator, as
109 applicable, may decline to act upon the request of an agent acting under an alleged power
110 of attorney if there is reason to believe that the purported agent is not the appointed
111 person, the appointment is not in effect, the authority of the power of attorney
112 does not extend to the particular transaction, or the power of attorney is otherwise
113 defective.
114

115 **(6)** (a) Unless otherwise specified in the power of attorney, if the agent is the principal's
116 spouse or domestic partner as defined in s. 770.01 (1), Stats., the power of attorney
117 terminates if an action is filed for the dissolution of the agent's marriage to the principal or
118 the domestic partnership of the principal and agent is terminated.
119

120 (b) Unless otherwise specified in the power of attorney, if the agent is the principal's
121 domestic partner as defined in s. 40.02 (21c), Stats., the power of attorney does not
122 automatically terminate if only the domestic partnership as defined in s. 40.02 (21d), Stats.,
123 terminates.



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

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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 10-138

AN ORDER to repeal and recreate ETF 10.75, relating to the implementation of statutory changes related to power of attorney for finances and property pursuant to 2009 Wisconsin Act 319.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

11-18-2010 RECEIVED BY LEGISLATIVE COUNCIL.

12-16-2010 REPORT SENT TO AGENCY.

RNS:DWS

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 10-138

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.]

2. Form, Style and Placement in Administrative Code

a. The line preceding line 1 should read: “SECTION 1. EFT 10.75 is repealed and recreated to read:”.

b. All of the paragraphs in s. ETF 10.75 (1) should end with periods rather than semicolons.

c. In sub. (1) (a), the term “defined” should be deleted and replaced with “set forth” as the section to which the reader is referred is not a definition.

d. Subsection (1) (f) and (g) do not follow from the introductory material. It is suggested that they become sub. (1m) (a) and (b).

e. Throughout the rule, “Deferred Compensation Program” should be lowercase. In sub. (3) (a), “Department” should be lowercase.

f. Subsection (3) (c) occurs twice in the proposed rule at line 78 and line 87. Line 87 should be renumbered “(d)” and should refer back to “par. (c)” rather than “par. (b)” as currently drafted, and “(d)” at line 89 should be changed to “(e)”.

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

a. In sub. (1) (c) and (d), “s. 244.01 (3), Stats.” should read “s. 244.02 (3), Stats.” as this is where the definition of durable power of attorney is located.

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b. In the first sub. (3) (c), "sub. (2) (d)" should replace "par. (2) (d)". A similar change is needed in sub. (4) (b).

Response to Legislative Council Staff Recommendations

ETF implemented all of the Legislative Council staff recommendations.

List of Persons Appearing or Registering For or Against the Rules

No persons appeared at the hearing or registered for or against the rule at the public hearing on February 3, 2011.

Summary of Comments Received at the Public Hearing

No person testified concerning the rule. The record was held open for written comments until 4:30 on Monday, February 14, 2011, but ETF did not receive any written comments.

Modifications to Rule as Originally Proposed

No changes were made from the original proposal as a result of public comments.

Modifications to Fiscal Estimate as Originally Proposed

No changes were made to the fiscal estimate in the original proposal.

Modifications to the Analysis Accompanying the Proposed Rule

No changes were made to the analysis accompanying the proposed rule.

Board Authorization for Promulgation

This final draft report on clearinghouse Rule #10-138 has been duly approved for submission to the Legislature, and for promulgation, by the Department of Employee Trust Funds and the following boards:

- Deferred Compensation Board on March 1, 2011
- Employee Trust Funds Board on March 10, 2011
- Teachers Retirement Board on March 10, 2011
- Wisconsin Retirement Board on March 10, 2011

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.