

CR 11-041

**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 11-041

AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8) (b) and (c); and to create ETF 20.35 (8) (d), (9), and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order.

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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 qualified domestic relations order (QDRO) rule to incorporate language for QDROs from domestic partnerships, to address tax concerns under IRC S. 415(b), and to clarify and provide ETF with more flexibility in handling QDROs.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:
40.03 (2) (t), 40.02 (2m), (20), (21c), (21d), and (48m), Stats.
2. Statutory Authority:
Sections 40.03 (2) (i), (ig), (ir), and 227.11 (2) (a)(intro), 1. to 3., 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 the circumstances under which ETF will handle the division of WRS accounts and annuities.

5. Plain Language Analysis:

These rule changes add language for domestic partner QDROs, address tax concerns under IRC S. 415(b), clarify procedure, and provide ETF with more flexibility in handling QDROs received out of sequence. These changes include the following:

- In order to remain in compliance with 2009 Wisconsin Act 28, language must be added throughout ETF 20.35 to make QDROs applicable to domestic partnerships.
- Currently, ETF 20.35 has no procedure to follow when multiple QDROs are received out of sequence in relation to their decree date. In other words, if the department receives more than one QDRO awarding a portion of the participant's WRS account or annuity to different "alternate" payees, but the award received by ETF first was issued by the court on a later date than the other(s), ETF has no rule for choosing which payee should receive the award. The newly proposed rule, under ETF 20.35 (9), divides the account chronologically in the order in which the department receives the QDRO. This policy is meant to encourage the timely submittal of QDROs to ETF and to manage the inherent difficulty of payment of a QDRO received out of sequence.
- An amendment, under ETF 20.35 (3) (c) (5), is added to address add-on service for part-time non-teaching staff. Language governing creditable service for these individuals was not included in the previous rule.
- An amendment to the rule, under ETF 20.35 (8) (d), fills a gap in procedure regarding retroactive annuity payments. The rule clarifies that no interest is payable from ETF on retroactive annuity payments made to alternate payees for any months prior to ETF's receipt of a QDRO. No interest is due because the WRS account is divided only when the QDRO is received by ETF, rather than at the time of its decree date.
- An amendment, under ETF 20.35 (6) (c), changes the language to invalidate QDROs received after the alternate payee's date of death. Previously, language only invalidated a QDRO upon the participant's death.

- An amendment, under ETF 20.35 (8) (c), addresses retroactive corrections that result in a benefit below statutory thresholds. The amendment clarifies that retroactive corrections below the threshold are not payable.
 - Finally, in order to ensure compliance with the Internal Revenue Code, an amendment to the code, ETF 20.35 (10), addresses how to apply IRC 415 (b) limits to the participant's and alternate payee's aggregate benefits. The department is given flexibility under the amendment to make necessary adjustments to the participant's and alternate payee's benefits on an equitable pro rata basis to assure tax compliance.
6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:
There are no existing federal regulations that specifically address how public retirement plans are to administer domestic partner QDRO's. IRC 415 (b) limits are, however, one federal statutory limitation that the proposed rule change stands to address. The amendment is written to ensure continued compliance with these federal tax laws, which provide for a general dollar limit that the plan can pay an annuitant annually.
7. Comparison with Rules in Adjacent States
- Illinois – The State of Illinois does not have domestic partnerships, and the state's civil unions are not given pension rights. The State Retirement System of Illinois (SRS) does not include domestic partnership or civil union language in its QDRO rule. SRS also does not have a rule in place for multiple QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
 - Iowa – Iowa allows same-sex marriage, but uses the term “*administrable domestic relations order*” or “*ADRO*” to govern a domestic relations order that divides the marital property of same gender spouses. The Iowa Public Employee Retirement System (IPERS) has incorporated the ADRO into its domestic relations order rule, primarily as an addition to existing language. IPERS does not have a rule in place for multiple QDROs (or ADROs) received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
 - Michigan – Michigan's Constitution bans same-sex marriage and other kinds of same-sex unions. Domestic partnership language is not within the State Employees Retirement System of Michigan regulations on QDROs. The State Employees Retirement System of Michigan also does not have a rule in place for multiple QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.

- Minnesota – Minnesota does not provide for domestic partnerships, and the Minnesota State Retirement System (MSRS) does not include language for them in its QDRO rule. MSRS also does not have a rule in place for multiple QDROs received out of sequence, nor does it have a rule addressing compliance with S. 415 (b) of the Internal Revenue Code regarding the aggregate benefits paid to participant and alternate payee.
8. Summary of Factual Data and Analytical Methodologies:
The proposed rule amendment is intended to make ETF's QDRO rule clearer and more flexible, as well as to bring it into closer harmony with state and federal 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 Wisconsin Retirement System.
 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 not have any fiscal effect on the administration of the Wisconsin Retirement System, nor will it have any fiscal effect on the private sector, the state or on any county, city, village, town, school district, technical college district, or sewerage districts.
 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

1 **Section 1. ETF 20.35 (1) (b) and 20.35 (1) (c) are amended to read:**

2
3 **ETF 20.35 (1) (b)** The purpose of this section is to specify how the
4 department shall apply a valid QDRO to the participant's account or annuity
5 or respond to an order which is not a valid QDRO.
6

7 **ETF 20.35 (1) (c)** For purposes of ss. 40.02 (48m) and 40.08 (1m), Stats.,
8 and this section, a marriage is terminated upon entry of a judgment, decree
9 or order of divorce, annulment or legal separation. A domestic partnership
10 as defined in s. 40.02 (21d), Stats., is terminated as provided in sub. ETF
11 20.10 (3). A domestic partnership, as defined in s. 770.01 (2) Stats., is
12 terminated as provided in s. 770.12, Stats.
13

14 **Section 2. ETF 20.35 (2), 20.35 (3) (a), (b), (c) 1., (c) 2., (c) 3., and (c) 5. are amended**
15 **to read:**

16
17 **ETF 20.35 (2) DIVISION BY VALID QDRO.** Except as otherwise provided in
18 sub. (6) or (7), upon receipt of a valid QDRO the department shall divide
19 WRS accounts and annuities in accordance with the percentage awarded to
20 the alternate payee in the valid QDRO, based on the date on which the
21 marriage was terminated by a court judgment, decree or order or the
22 domestic relationship was terminated as provided in sub. ETF 20.10 (3) or s.
23 770.12, Stats. which includes the order to divide Wisconsin retirement
24 system benefits and the date the valid QDRO was received by the
25 department, as follows:
26

27 (a) With respect to marriages terminated on or after January 1, 1982, and
28 before April 28, 1990, the division shall be as provided in subs. (3) and
29 (4), when a valid QDRO is received by the department after May 2, 1998.
30

31 (b) With respect to marriages or domestic partnerships terminated ~~before~~ on
32 or after April 28, 1990, the division shall be as provided in subs. (3) and (5).
33

34 **Note:** ~~It was the department's intent for par. (b) to read as follows: "With~~
35 ~~respect to marriages terminated on or after April 28, 1990, the division shall~~
36 ~~be as provided in subs. (3) and (5)."~~ This language is consistent with the
37 heading of s. ETF 20.35 (5), which reads: Marriages terminated on or after
38 April 28, 1990."
39

40 **ETF 20.35 (3) ALL QDRO DIVISIONS.** (a) *Percentages.* The percentage of
41 the participant's account or annuity that is awarded to the alternate payee by
42 a valid QDRO is limited to a percentage between zero percent (0%) and fifty
43 percent (50%) expressed to no more than 2 decimal places. An otherwise
44 valid QDRO with a percentage awarded to the alternate payee expressed to
45 more than 2 decimal places may not be rejected for that reason alone, but
46 the department shall round the percentage to 2 decimal places.
47

48 (b) *Debts of the participant.* Any debt, memorandum account or account
49 receivable balance reflecting amounts owed by the participant to the
50 department, the fund or any benefit plan, accrued as of the decree date and
51 still outstanding at the time the account or annuity is divided, shall be divided
52 between the participant and alternate payee in the same proportion as the
53 participant's account or annuity.
54

55 (c) *Dividing Wisconsin retirement system annuities.*
56

57 1. 'Present actuarial values before and after division shall be equal.'
58 An annuity shall be divided so that the actuarial present value of the
59 undivided annuity is equal to the aggregate actuarial present values of
60 the 2 separate annuities resulting from the division, ~~all calculated~~ as of
61 the effective date of the division.
62

63 2. 'Division of accelerated annuity option.' If the participant selected an
64 accelerated payment option as provided in s. 40.24 (1) (e), Stats., or
65 s. ETF 20.04 (3), and the participant's temporary annuity is still in
66 force as of the effective date of the annuity division, then the
67 department shall calculate the present value of both the temporary
68 and life annuities using the actuarial tables in effect on the effective
69 date of the annuity division. The department shall then divide the total
70 present value based on the percentages specified in the QDRO and
71 calculate separate annuities for the participant and alternate payee as
72 specified in s. 40.08 (1m) (f) 2., Stats. If the participant or alternate
73 payee provides a projection of his or her social security benefits at age
74 62 from the social security administration, the department shall use
75 ~~the~~ that projected social security amount to calculate the amount of
76 the temporary annuity for that person. If no projection is supplied, then
77 notwithstanding s. ETF 20.03 (2), the department shall assume that
78 person's projected social security benefits at age 62 equals ~~the~~ that
79 person's prorated portion of the participant's temporary annuity
80 amount as of the effective date of the annuity division, calculated
81 based on the respective percentages of the annuity being awarded to
82 the participant and alternate payee. If the reduced annuity payable for
83 life to the alternate payee or participant is below the threshold
84 specified by s. ETF 20.05 (1), then that person shall receive an
85 annuity in the same optional form originally selected by the participant,
86 except that the temporary annuity option provided in s. 40.24 (1) (e),
87 Stats., or s. ETF 20.04 (3) is not available.
88

89 3. 'Disability annuities.' Upon division of a disability annuity calculated
90 under the provisions of s. 40.63 (1) or (4), Stats., the alternate payee's
91 annuity shall consist of a portion based on the participant's actual
92 service and a portion based on the assumed service used to calculate
93 the participant's disability annuity. The portion of the alternate payee's
94 annuity based on the participant's assumed service and age shall
95 cease upon the death of the alternate payee. Benefits payable upon
96 the death of the alternate payee's shall be based on the guaranteed
97 portion of the alternate payee's annuity only. Once the participant's

98 disability annuity has been divided, the termination or suspension of
99 the participant's disability annuity or the death of the participant has no
100 effect on the alternate payee's annuity. If the participant's disability
101 annuity is subsequently terminated and the participant's account
102 restored under the provisions of s. 40.63 (9) and (10), Stats., the
103 contributions and service credited to the restored account shall be
104 reduced by the same percentage awarded to the alternate payee by
105 the valid QDRO.

107 5. For the purposes of determining the amount of service used to
108 calculate the alternate payee's actuarial reduction for early retirement
109 under the provisions of s. 40.23 (2m) (fm), Stats., if the participant has
110 part-time service in at least five of the ten annual earnings periods
111 immediately preceding the annual earnings period in which the
112 alternate payee's retirement benefit becomes effective or the date on
113 which the participant terminated covered employment, whichever is
114 earlier, the provisions of s. 40.23 (2m) (fm), Stats., shall apply. If the
115 decree date is prior to July 1, 2009, the provisions of s. 40.23 (2m)
116 (fm), Stats., in effect prior to that date shall apply.

117
118 **Section 3. ETF 20.35 (4) (c) 3. is amended to read:**

119
120 **ETF 20.35 (4) (c) 3.** If the participant's retirement annuity is a money
121 purchase annuity calculated under the provisions of s. 40.23 (2) (c), (2m) (c)
122 or (d), or (3), Stats., the portion of the participant's annuity awarded to the
123 alternate payee shall be based on the ratio of the portion of the account
124 balance awarded to the alternate payee as of the decree date including
125 interest creditable through the day before the participant's annuity effective
126 date, based on the percentage specified in the valid QDRO, divided by the
127 total account balance used to calculate the participant's retirement annuity,
128 with the quotient rounded to 2 decimal places.

129
130 **Section 4. ETF 20.35 (5) and 20.35 (6) are amended to read:**

131
132 **ETF 20.35 (5) MARRIAGES AND DOMESTIC PARTNERSHIPS**

133 **TERMINATED ON OR AFTER APRIL 28, 1990.** (a) If the participant was not
134 an annuitant on the decree date, the department shall divide the participant's
135 account as provided in s. 40.08 (1m) (b) 1., (c), (d) and (f) 1., Stats., and sub.
136 (3) (d), and as follows:

137
138 1. The creditable service and amounts awarded to the alternate payee
139 shall be in a separate account in the fund for the benefit of the
140 alternate payee. After the division under this section, the alternate
141 payee may apply for a separation benefit under s. 40.25 (2), Stats.,
142 provided the application is received by the department prior to the
143 date on which the participant would have met the minimum age
144 requirement for a retirement annuity under s. 40.23, Stats., and
145 payment of a separation benefit would comply with all provisions of
146 the internal revenue code. After the date the participant reaches or
147 would have reached the minimum retirement age, the alternate payee

148 may only apply for retirement benefits under s. 40.23, 40.24, or 40.25
149 (1), Stats.

150
151 2. The participant shall ~~have~~ retain the remainder in his or her
152 separate account under s. 40.04 (4) (a), Stats., unless the participant
153 is an annuitant at the time of the division. If the participant is an
154 annuitant when the division occurs, the participant's creditable service
155 and account as of the decree date shall be reduced by the percentage
156 awarded to the alternate payee. The balances shall then be brought
157 forward to the effective date of the current annuity, including any
158 contributions and service for periods after the decree date, and the
159 annuity option chosen by the participant shall be recalculated. The
160 amount by which the monthly annuity payments previously made to
161 the participant exceed the participant's recalculated monthly
162 entitlement for the same period shall be a balance due from the
163 participant. This balance due shall be due from the participant and
164 may be collected as provided in s. 40.08 (4), Stats., including by a
165 reduction of the present value of the participant's annuity as reduced
166 by the division, resulting in a recalculation and reduction of the
167 participant's monthly annuity.

168
169 **ETF 20.35 (6) INVALID QDRO.** (a) *Rejection and notice.* The department
170 may not honor any order to divide Wisconsin retirement system benefits
171 which it determines is not a valid QDRO as defined in s. 40.02 (48m), Stats.
172 The department shall send written notice of its rejection of an order to the
173 person ~~offering~~ submitting the order and to the participant and alternate
174 payee if ~~that those person's name~~ persons' current names and address is
175 addresses are stated in the order or is are readily determinable from
176 department records.

177
178 (b) *Account already closed.* An otherwise valid QDRO received after the
179 participant's account was closed by payment of a lump sum benefit on or
180 after the decree date has no effect, regardless of whether the participant
181 returned to participating employment after the decree date. If the participant's
182 account to which the valid QDRO applies is subsequently restored under the
183 provisions of s. 40.25 (5), Stats., ~~or~~ because the benefit was paid in error, or
184 under an agreement approved by the department where the full amount of
185 the benefit paid plus monthly interest at the assumed rate has been paid to
186 the department, the restored account shall be divided according to the valid
187 QDRO.

188
189 (c) *Participant or alternate payee deceased.* An otherwise valid QDRO
190 received after the participant's or alternate payee's date of death has no
191 effect on the participant's account or annuity.

192
193 **Section 5. ETF 20.35 (7) (a) is amended to read:**

194
195 **ETF 20.35 (7) (a)** If the department rejects an order for the division of a
196 participant's account and subsequently receives a an otherwise acceptable
197 application from the participant for a benefit which would close the

198 participant's account due to payment of a lump sum benefit, the department
199 shall delay payment of the lump sum benefit until 30 days after the date the
200 order for division was rejected. This paragraph applies only if the basis for
201 the rejection was one or more of the following: 1. The order did not meet all
202 of the requirements in s. 40.02 (48m), Stats. 2. The order received by the
203 department was not a certified copy or an original, signed by the judge or a
204 duly authorized family court commissioner.

205
206 **Section 6. ETF 20.35 (8) (b) and (c) are amended to read:**

207
208 **ETF 20.35 (8) (b) *Active military service.*** If the department divided a
209 participant's account per a valid QDRO without first receiving proof and
210 certification of active military service, as provided in sub. (3) (d) 3., and the
211 participant subsequently provides documentation of active military service
212 and the certification on the form prescribed by the department, the
213 department shall divide the ~~creditable~~-military service creditable for based on
214 services rendered prior to the decree date between the participant and
215 alternate payee's accounts pursuant to the valid QDRO. Any resulting
216 adjustments to the alternate payee's and participant's benefits shall be made
217 retroactive to the respective benefit effective dates. The participant may not
218 receive creditable military service for any active military service that would
219 have been granted to the alternate payee had the participant submitted
220 timely to the department the certification of active military service as provided
221 in s. 40.02 (48m) (f), Stats.

222
223 **ETF 20.35 (8) (b) (c) *Other corrections and adjustments directly affecting***
224 ***benefits.*** The effect of any other corrections and adjustments to service,
225 contributions, or interest earnings affecting the benefits the participant
226 accrued as of the decree date, including corrections of administrative errors
227 and corrections or adjustments of any factor affecting the calculation of an
228 annuity to be divided, shall be divided between the participant and the
229 alternate pursuant to the valid QDRO. The participant and alternate payee
230 accounts or annuities shall be adjusted accordingly. However, the
231 department shall not adjust benefit amounts if the amount of the adjustment
232 would be less than the thresholds specified in s. 40.08 (7) (a), Stats.

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234
235
236 **Section 7. ETF 20.35 (8) (d) is created to read:**

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238 **ETF 20.35 (8) (d)** When a participant's annuity is divided as provided in sub.
239 (5) (b) and retroactive payments are due to an alternate payee, or when an
240 alternate payee's annuity must be increased retroactively for any reason, no
241 interest as specified in s. 40.08 (7) (c) is payable to the alternate payee for
242 any monthly payments payable prior to the month in which the department
243 received the valid QDRO.

244
245
246 **Section 8. ETF 20.35 (9) and (10) are created to read:**

248 **ETF 20.35 (9) MULTIPLE QDROS RECEIVED OUT OF SEQUENCE.** If the
249 department receives more than one QDRO for a participant that each awards
250 a portion of that participant's WRS account or annuity to a different alternate
251 payee, the account or annuity shall be divided based on the chronological
252 order in which the department receives the QDROs without regard to the
253 chronological order of the decree dates. The alternate payee shall be
254 awarded a percentage of the account value as of the decree date for the
255 QDRO received first. If the department subsequently receives a QDRO with
256 an earlier decree date, that QDRO shall have no effect on the portion of the
257 participant's account or annuity awarded to the alternate payee in the QDRO
258 received on an earlier date.
259

260
261 **ETF 20.35 (10) COMPLIANCE WITH SECTION 415(b) OF THE INTERNAL**
262 **REVENUE CODE.** (a) The aggregate benefits paid to the participant and
263 alternate payee shall not exceed the benefit limits under Section 415(b) of
264 the Internal Revenue Code. The department shall make any necessary
265 adjustments to the participant's and alternate payee's benefits on an
266 equitable pro rata basis to assure compliance with Section 415(b) of the
267 Internal Revenue Code. Benefits derived from employee contributions that
268 are actually paid by the employee shall not be subject to the benefit
269 limitations under this subsection.
270

271 (b) If the participant's retirement annuity has been divided per a QDRO under
272 s. 40.08 (1m) (b) 2., Stats., any subsequent adjustments necessary for
273 compliance with Section 415(b) of the Internal Revenue Code that result from
274 either post-retirement annuity adjustments under s. 40.27 (2) or s. 40.28 (2),
275 Stats., or from increases in the compensation limits specified in Section
276 415(b) of the Internal Revenue Code, shall be prorated based on the
277 percentage of the participant's account that was awarded to the alternate
278 payee in the QDRO.
279

280 (c) If the participant's account is divided as provided in pars. (3) (d) or (5) (a),
281 any benefit adjustments required under Section 415(b) of the Internal
282 Revenue Code shall be applied as follows:
283

284 1. If the alternate payee's benefit becomes effective prior to the
285 participant's benefit effective date:
286

287 a. If the aggregate benefits that would be payable to both the
288 alternate payee and the participant on the alternate payee's
289 benefit effective date do not exceed the maximum benefits that
290 would be payable to the participant under Section 415(b) of the
291 Internal Revenue Code if the account had not been divided, the
292 alternate payee's benefit will not be reduced.
293

294 b. Any subsequent benefit adjustments necessary for
295 compliance with Section 415(b) of the Internal Revenue Code
296 will be applied solely to the participant's benefits, and shall not
297 affect the benefit amount payable to the alternate payee.

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2. If the participant's benefit becomes effective prior to the alternate payee's benefit effective date, or the participant's and alternate payee's benefits become effective on the same date:

a. If the aggregate benefits that would be payable to both the participant and alternate payee on the participant's benefit effective date exceed the maximum benefits that would be payable to the participant under Section 415(b) of the Internal Revenue Code if the account had not been divided, the adjustment to participant's annuity shall be prorated based on the percentage of the participant's account that was not awarded to the alternate payee in the QDRO.

b. When a benefit is subsequently paid to the alternate payee, the portion of the total adjustment necessary for compliance with Section 415(b) of the Internal Revenue Code that is applied to the alternate payee's benefits shall be prorated based on the percentage of the participant's account awarded to the alternate payee in the QDRO.

3. If the participant's benefit effective date is on or after the alternate payee's benefit effective date as specified in subd. 2., and as a result of either post-retirement annuity adjustments under s. 40.27 (2) or s. 40.28 (2), Stats., or of increases in the compensation limits specified in Section 415(b) of the Internal Revenue Code, subsequent benefit adjustments are necessary for compliance with Section 415(b) of the Internal Revenue Code, such adjustments shall be prorated based on the percentage of the participant's account that was awarded to the alternate payee in the QDRO.

(d) For the purposes of determining the aggregate benefits payable to the participant and alternate payee under par. (b), the department shall:

1. First calculate the present value of what the participant's benefit would be as of the benefit effective date of the participant's or alternate payee's benefit effective date, whichever is earlier, as though the participant's account had never been divided by a QDRO.

2. If that total aggregate benefit amount is higher than the maximum benefits permitted under Section 415(b) of the Internal Revenue Code, the department shall reduce the aggregate benefits to the maximum amount payable under Section 415(b) of the Internal Revenue Code. The present value of that maximum benefit payable shall be divided between the participant and alternate payee in proportion to the percentage of the participant's account that was awarded to the alternate payee. The benefits payable to the participant and alternate payee shall then be adjusted as follows:

347 a. If the alternate payee has received a lump sum benefit under
348 s. 40.25 (1) or (2), Stats., the gross amount of the alternate
349 payee's lump sum payment shall be subtracted from the
350 present value of the participant's maximum benefit payable
351 under Section 415(b) of the Internal Revenue Code calculated
352 under par. (d). The present value of the benefit paid to the
353 participant shall not exceed the remainder of the present value
354 of that maximum benefit payable under Section 415(b) of the
355 Internal Revenue Code.
356
357 b. If the alternate payee has previously taken a monthly
358 retirement annuity, the present value of the alternate payee's
359 annuity as of the alternate payee's annuity effective date shall
360 be subtracted from the present value of the participant's
361 maximum benefit payable under Section 415(b) of the Internal
362 Revenue Code. The present value of the benefit paid to the
363 participant shall not exceed the remainder of the present value
364 of that maximum benefit payable under Section 415(b) of the
365 Internal Revenue Code.
366
367 c. If the participant's benefit becomes effective prior to the
368 alternate payee's benefit effective date, the present value of the
369 benefit paid to the participant shall not exceed the maximum
370 aggregate benefit calculated under par. (d) minus the present
371 value of the benefit payable to the alternate payee as of the
372 participant's annuity effective date.
373

(END OF RULE TEXT)



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

Pam Shannon
Clearinghouse Director

Terry C. Anderson
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Scott Grosz and Jessica Karls-Rupfnger
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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 11-041

AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8); and to create ETF 20.35 (9) and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

07-12-2011 RECEIVED BY LEGISLATIVE COUNCIL.

08-09-2011 REPORT SENT TO AGENCY.

PS:SG

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 11-041

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 first entry after the heading “DRAFT REPORT ON CLEARINGHOUSE RULE” should be an enumeration of the sections treated by the proposed order and the nature of the treatment, as well as an introductory clause consisting of a relating clause concisely stating the subject of the proposed order. [s. 1.02 (1), Manual.] If the changes suggested in comment e., below, are made, the treatment clause and relating clause would then read: “AN ORDER to amend ETF 20.35 (1) (b) and (c), (2), (3), (4) (c) 3., (5), (6), (7) (a), and (8) (b) and (c); and to create ETF 20.35 (8) (d), (9), and (10), relating to the division of Wisconsin retirement system accounts under a qualified domestic relations order”.

b. In the analysis of the proposed rule, the department should cite statutes, not rules, in the section of the analysis titled, “Statutes Interpreted”.

c. Section ETF 20.35 (3) (c) 4. should be omitted, and the treatment clause of SECTION 2 amended, since subd. 4. does not appear to be modified by the proposed rule.

d. In s. ETF 20.35 (6) (a), the “are” on line 7 should be underscored.

e. The amendments to language in s. ETF 20.35 (8) (b) and (c) are appropriately placed in SECTION 6 of the rule. However, sub. (8) (a) is not being amended and should be omitted from the rule. Further, because sub. (8) (d) contains newly-created language, it should be moved to SECTION 7, with the following treatment clause: “ETF 20.35 (8) (d) is created to read:”. Also,

the underscoring should be deleted because it is not used when creating an entire rule unit. [s. 1.06 (1), Manual.] On the first line of par. (d), “par.” should be changed to “sub.” Current SECTION 7 should be renumbered as SECTION 8.

f. In the treatment clause to what will now be SECTION 8, the second “20.35” should be deleted. Again, none of the language in SECTION 8 should be underscored, as it is all newly-created language. In s. ETF 20.35 (10) (title), a period should replace the comma at the end of the subsection title.

g. In s. ETF 20.35 (10) (a), at the end of the subsection, “subsection” should be spelled out rather than abbreviated.

h. The proposed rule should conclude with a provision setting forth the effective date of the rule. [s. 1.02 (4) (a), Manual.]

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

For consistency with s. 227.11 (2) (a) 2., Stats., the department should refer to s. 40.03 (2) (t), Stats., in the “Statutes Interpreted” section of the rule analysis, rather than in the section titled, “Statutory Authority”. Section 40.03 (2) (t), Stats., relates to the subject matter of the proposed rule-making but does not appear to comply with s. 227.11 (2) (a) 2., Stats., as a source of statutory authority for a proposed rule. Additionally, the department should identify other provisions of ch. 40, Stats., relating to domestic partnership or domestic partners, or both, which provide statutory authority. (*See, e.g.*, s. 40.02 (2m), (20), (21c), and (21d), Stats.)

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

a. In s. ETF 20.35 (1) (c), the department should insert “Stats.,” after the reference to s. 770.01 (2), and a comma after “domestic partnership”.

b. In s. ETF 20.35 (2) (a), the word “a” should be replaced by “as” before “provided”.

c. In s. ETF 20.35 (8), the hyphen in the phrase “based on-services” should be deleted.

d. A colon should replace the period at the end of s. ETF 20.35 (10) (c) (intro.). [s. 1.03 (1) (b), Manual.]

ETF implemented all 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 October 13, 2011.

Summary of Comments Received at the Public Hearing

No person testified concerning the rule. The record was held open for written comments until October 21, 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 11-041 has been duly approved for submission to the Governor, the Legislature, and for promulgation by the Department of Employee Trust Funds and the following boards:

- Employee Trust Funds Board on December 1, 2011
- Teachers Retirement Board on December 1, 2011
- Wisconsin Retirement Board on December 1, 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.