

11-042

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 11-042

AN ORDER to repeal ETF 10.08 (2) (b) 3. Note; to amend ETF 10.08 (1) (a), (2) (a), (b) 2. and 5. Example, and (d) Note, and 20.02 (1); and to create ETF 10.08 (2) (b) (title), (c) (title) and (d) (title), and 20.02 (2) (title), (3) (title), and (4), relating to rehired annuitants and separation from employment.

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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 create a stronger and clearer relationship between ETF 20.02 and 10.08, to clarify rule language for general readability, and to make amendments needed to ensure compliance with the Internal Revenue Code (IRC).

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:

40.23 (1) (a), 40.22, Stats.; IRC 401 (a).

2. Statutory Authority:

Sections 40.03 (2) (i), (ig), (ir), (t), 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.

This rule is not subject to s. 227.135 (2), as affected by 2011 Wis. Act 21. The statement of scope for this rule, submitted to the LRB on 01/20/2011 and published in the Administrative Register on 02/15/2011, was received by the LRB prior to the effective date of 2011 Wis. Act 21.

4. Related Statute or Rule:

- 1) 40.23 (1) (a), Stats., governs minimum break in service requirements as referenced in both ETF 20.02 and 10.08 for proper termination from employment.
- 2) 40.22, Stats., sets forth the eligibility criteria for inclusion under the Wisconsin retirement system. Plan eligibility is relevant to both proper termination as well as becoming a rehired annuitant, and is referenced in both regulations.

5. Plain Language Analysis:

The rule changes result from a need for general language clarification, stronger linkage between regulations, and better compliance with the IRC. These changes include the following:

- ETF 20.02 and 10.08 are related regulations: 20.02 governs the requirements for rehired annuitants while 10.08 provides the terms for an initial separation from employment. By definition, rehired annuitants must first have a valid separation from employment as set forth under 10.08. Language has been added to both sections to clarify the interconnected nature of the sections through direct cross-reference. In addition, the change includes an amendment to the definition of rehired annuitant to specifically require a valid termination of employment as defined in ETF 10.08. The language has been added to improve understanding of the sections, as well as to ensure compliance with the

IRC which requires a valid separation of service before an annuitant returns to employment.

- An additional section, 20.02 (4), was added to require employers to report to the Department all rehired employees, regardless of whether they meet the requirements in 40.22, Stats., as a WRS participating employee. Employer reporting of all rehired employees will allow ETF to more accurately monitor whether rehires have had a proper separation from employment under ETF 10.08 so they qualify as a rehired annuitant under ETF 20.02. This will allow ETF to maintain compliance with the IRS break-in-service requirements under IRC s. 401 (a).
- A note following ETF 10.08 (2) (b) 3 was removed for risk of IRC noncompliance. Prior to retirement, discussion with one's employer regarding re-employment of any kind is impermissible for IRS purposes. Doing so provides evidence against the intent to completely sever the employee-employer relationship. The note in this section could be construed to suggest that such agreements or discussions are acceptable.
- Language was added to an example provided under ETF 10.08 (2) (b) 5 to clarify that emeritus professors, as provided in the example, can only return to service if there is no compensation of any kind, including employer contributions to 403 (b) accounts. Contributions to 403 (b) accounts have been an issue in the past for emeritus-type programs.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:

IRC 401 (a), governing the qualified status of the pension plan, requires that there be a valid severance from employment before one can become a rehired annuitant. The changes and clarifications made to ETF 10.08 and 20.02 are intended in part to clarify language to strengthen understanding and to maintain compliance with this federal regulation. Under IRS guidelines, the IRS has made it clear that there must be a complete separation of the employee-employer relationship for a "bona fide" separation of service. The IRS has focused greatly on the intent of the employee to completely retire, with no prior arrangements to return to work for the employer. It was necessary to remove sections in the current regulation to clarify that such agreements are not permissible.

7. Comparison with Rules in Adjacent States

- Illinois – The relevant code for the State Retirement System of Illinois (SRS) is 40 ILCS 5/14-111, *Re-entry After Retirement*. The Illinois statute indicates that, with some exceptions, an annuitant who reenters service after retirement shall receive no payments from the retirement annuity during the time of employment. Only if the annuitant accepts temporary employment for a period not exceeding 75 working days in any calendar year can the employee continue to receive annuity payments.

Unlike WRS, SRS statutes do not set forth conditions for a valid separation of service as a requirement for an annuitant's reemployment under the system. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards. As such the SRS administrative code also does not include language for full reporting of all rehired annuitants to the agency, as created under the proposed changes to ETF 20.02 (4).

- Iowa –The relevant codes governing the Iowa Public Employees' Retirement System (IPERS) includes: Iowa Admin. Code 495-12.8, *Reemployment of retired members*; and Iowa Admin. Code 495-11.5, *Bona fide retirement and bona fide refund*. The relationship between these administrative codes does in fact bear a similar resemblance to the relationship being emphasized between ETF 10.08 and 20.02 in the current rule change.

One code is devoted to proper termination from employment (bona fide retirement in Iowa's case) and the other to rehired annuitants (reemployment of retired members). However, there is less direct reference in the Iowa language between the regulations, in part because Iowa's rehired annuitant code is devoted instead to a type of benefit payments that does not apply to WRS.

Some of the amendments currently proposed in the ETF rule changes are, however, reflected in the Iowa code. There is a section under Iowa Admin. Code 495-11.5, for example, indicating that a school employee will not be considered to have a bona fide termination in service unless all of the employee's compensated duties for their current employer cease. Similarly, in the ETF rule change, language was added to ETF 10.08 (2) (b) 5 regarding "emeritus" professors to clarify that contributions to 403 (b) accounts are included in impermissible compensation. The Iowa code also indicates that a member will fail to have a bona fide separation of service if a contract for reemployment (of any nature) is made prior to the expiration of that state's minimum separation of service. A note following ETF 10.08 (2) (b) 3 was removed to make certain the no-contract requirement is properly reflected in the ETF code.

The Iowa administrative code does not, however, include language for full reporting of all rehired annuitants to the agency, as created under the proposed changes to ETF 20.02 (4).

- Michigan – Mich. Admin. Code R. 38.38 states that a "retirement allowance" shall be suspended during any time period that the "retirant" returns to work in a covered position, unless there was a bona fide termination of employment. The statutes and regulations, however, do not set forth a definition of a bona fide termination of employment, nor do they lay out conditions for proper termination. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards.

- Minnesota – The relevant code for the Minnesota State Retirement System (MSRS) is M.S.A. § 352.115 Subd. 10, *Reemployment of annuitant*. The statute only indicates the maximum earnings allowable. Unlike WRS, MSRS does not have a regulation that sets forth conditions for a valid separation of service as requirement for rehired annuitants. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards.

8. Summary of Factual Data and Analytical Methodologies:

The proposed rule amendment is intended to make ETF's regulations governing rehired annuitants and proper separation from employment clearer and more flexible, as well as to bring it into closer harmony with federal statutes. Factual data was collected from ETF departments as to the current procedures and requirements for reporting of rehired annuitants from the employer. Data was also collected from the procedures and regulations of nearby states and comparable government pension systems. Analytical methodologies included discussion with legal counsel as to using the amendments to achieve the goal of the strengthening compliance with IRS requirements for a bona fide separation of service and proper re-employment of annuitants. ETF also utilized comparative analysis to draw from other pensions' methods and regulations, as well as position ETF's proposed amendments within the statutes and regulations that present the greatest compliance with the IRC.

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. Place Where Comments are to be Submitted and Deadline for Submissions:

Comments may be submitted to the contact person no later than 4:30 p.m., Central Standard Time, on 10/28/2011. The public hearing will be held at 1:00pm on 10/21/2011 in conference room GB of the Wisconsin Employee Trust Fund building at 801 W Badger Rd, Madison WI 53713.

13. 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.

14. 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.

15. 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 10.08 (1) (a) is amended to read:

ETF 10.08 (1) (a) This section defines separation of employment under s. 40.23 (1) (a) 1., Stats., for purposes of establishing eligibility to receive benefits from the Wisconsin retirement system, including separation benefits, lump sum benefits and retirement annuity benefits as provided by ss. 40.23, 40.24 and 40.25, Stats. For purposes of the Wisconsin retirement system, the terms “separation from employment” and “termination” are used interchangeably. An otherwise valid termination may become void and without effect as the result of reinstatement of the employee under s. 40.25 (5), Stats., and s. ETF 10.01 (3t), or because the employee received remedial payments deemed to be earnings under s. ETF 20.12 for a period in question, or if the employee failed to meet the minimum break in service requirements as a rehired annuitant under s. ETF 20.02 and s. 40.26 (5) Stats., and shall thereby be treated as employed during that period.

SECTION 2. ETF 10.08 (2) (a) is amended to read:

ETF 10.08 (2) (a) Intent to terminate. No person may receive any retirement annuity, separation benefit or lump-sum payment from the Wisconsin retirement system without first terminating from his or her current ~~participating~~ employment with all participating employers. Whether the termination is a voluntary termination by the employee or an involuntary termination by the employer, the employer and employee shall act with the good-faith intent of ending the employee-employer relationship.

SECTION 3. ETF 10.08 (2) (b) (title) is created to read:

ETF 10.08 (2) (b) *Required conditions.*

SECTION 4. ETF 10.08 (2) (b) 2. is amended to read:

ETF 10.08 (2) (b) 2. If the employee’s termination is voluntary, the employee and employer comply with the employer’s policies for voluntary termination, including the filing of a letter of resignation ~~if applicable.~~

SECTION 5. ETF 10.08 (2) (b) 3. Note is repealed.

SECTION 6. ETF 10.08 (2) (b) 5. Example is amended to read:

ETF 10.08 (2) (b) 5. Example: Emeritus professors could render services for the university after termination ~~for which~~ on the condition that they would do not receive any form of compensation, including employer contributions to IRC s. 403 (b) accounts.

SECTION 7. ETF 10.08 (2) (c) (title) and 10.08 (2) (d) (title) are created to read:

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ETF 10.08 (2) (c) Rehired annuitants.

ETF 10.08 (2) (d) Terminated annuities.

SECTION 8. ETF 10.08 (2) (d) Note is amended to read:

ETF 10.08 (2) (d) Note: Refer to s. ETF 20.02 (2) on rehired annuitants.

(END OF RULE TEXT)

SECTION 9. 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.

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Text of Proposed Rule

SECTION 1. ETF 20.02 (1) is amended to read:

ETF 20.02 (1) SCOPE. In this section, "rehired annuitant" means a participant on or after July 1, 1996, who has applied for and is eligible to receive a monthly annuity under s. ~~40.24~~ 40.23, Stats., including satisfying the requirement to remain separated from participating employment for the period specified under s. 40.23 (1) (a) 1., Stats., and who subsequently is employed by a participating employer in employment which would meet the eligibility criteria for inclusion under the provisions of the Wisconsin retirement system specified in s. 40.22, Stats., but for the exclusion of s. 40.22 (2) (L), Stats., and whose termination of previous employment by a participating employer meets all criteria under s. ETF 10.08 (2) (b).

SECTION 2. ETF 20.02 (2) (title) and 20.02 (3) (title) are created to read:

ETF 20.02 (2) BREAK IN SERVICE.

ETF 20.02 (3) REQUIRED CONTRIBUTIONS.

SECTION 3. ETF 20.02 (4) is created to read:

ETF 20.02 (4) EMPLOYER REPORTING. Employers shall report to the department all rehired employees receiving an annuity from the Wisconsin retirement system, regardless of whether the employee qualifies as a rehired annuitant under this section and whether the employee's position meets the qualifications for inclusion under s. 40.22, Stats. Employers shall report rehired annuitants in the manner, form, and at the time requested by the department.

(END OF RULE TEXT)

SECTION 4. 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.



**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 11-042

AN ORDER to repeal ETF 10.08 (2) (b) 3. Note; to renumber ETF 20.02 (3) (a) 3. and (c); to amend ETF 10.08 (1) (a), (2) (b) 2. and 5. and Note, and (d) and 20.02 (1); and to create ETF 10.08 (2) (a) (title), (b) (title), (c) (title), and (d) (title) and 20.02 (2) (title), 20.03 (3) (title) and 20.04 (4), relating to rehired annuitants and separation from employment.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

08-18-2011 RECEIVED BY LEGISLATIVE COUNCIL.

09-15-2011 REPORT SENT TO AGENCY.

SG/JKR: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



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 11-042

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 introductory clause should be rewritten as follows:

An order to repeal ETF 10.08 (2) (b) 3. Note; to amend ETF 10.08 (1) (a), (2) (a), (b) 2. and 5. Example, and (d) Note, and 20.02 (1); and to create ETF 10.08 (2) (b) (title), (c) (title) and (d) (title), and 20.02 (2) (title), (3) (title), and (4), relating to rehired annuitants and separation from employment.

b. The treatment clauses for the various SECTIONS of the rule should be modified to conform to the treatments in the introductory clause, as shown above. Where a title is created for a provision, but the remaining text of the provision is not affected, the title should be created, rather than amending the provision, and the language of the provision should not be included in the rule. For example, in SECTION 3, the treatment clause should read: “ETF 10.08 (2) (b) (title) is created to read:” and the text should simply read: “ETF 10.08 (2) (b) *Required conditions.*” Note that paragraph titles are written with an initial capital letter and italicized, as shown here. [s. 1.05 (2) (d), Manual.] Because this is newly created material, it is not underscored.

Where a title is being created for a provision that is also being amended, the insertion of the title may be done in conjunction with amending the provision. For example, in SECTION 2, the treatment clause would read: “ETF 10.08 (2) (a) is amended to read:”. The title would be

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shown, with underscoring, as follows: "ETF 10.08 (2) (a) Intent to terminate." This would be followed by the rule text of sub. (2) (a), as currently shown in the first portion of SECTION 2.

The entire rule should be reviewed for consistency with this approach. This, along with other suggested changes, may result in a renumbering of SECTIONS.

c. In the rule summary, the agency should include the "place where comments are to be submitted and deadline for submission" heading, as described in s. 1.02 (2) (a) 12., Manual.

d. In the sequentially numbered provisions of the rule, the word "Section" should be written as "SECTION" throughout. [See s. 1.04 (1), Manual.]

e. Underscored material should follow stricken material when material is deleted and inserted in the same location. For example, in s. ETF 10.08 (1) (a), the underscored material should follow the stricken "and". The entire rule should be reviewed for occurrences of this problem. [s. 1.06 (1), Manual.]

f. Periods should be preserved in the amended material. For example, in s. ETF 10.08 (2) (b) 2., "if applicable." should replace "~~if applicable.~~" [s. 1.06 (4), Manual.]

g. The text of s. ETF 10.08 (2) (b) 3. is not amended and therefore should not be included in the rule. Only the Note following the provision is being repealed. The repeal should be in a separate SECTION, with the following treatment clause: "ETF 10.08 (2) (b) 3. Note is repealed." Because it is repealed, the text of the Note is not shown.

h. The second set of rule SECTIONS that are currently denoted as SECTIONS 1 and 2 (on pages 9 and 10) should be renumbered as appropriate.

i. A title should be inserted for s. ETF 20.02 (1). The other subsections in s. ETF 20.02 contain titles. If titles are used for any subsection in a section, they must be used for all subsections in the section. [s. 1.05 (1), Manual.] The proper format for a subsection title is solid capital letters. [s. 1.05 (2) (c), Manual.]

j. Section ETF 20.02 (3) (a) 1. should end with a period instead of a semicolon.

k. Section ETF 20.02 (3) (a) 3. and (c) should not be renumbered. The renumbering of a provision requires the renumbering of any cross-references to that provision throughout the Wisconsin Administrative Code and therefore is discouraged.

l. The agency should include an effective date clause at the end of the proposed rule. [s. 1.02 (4), Manual.]

m. Throughout the rule and rule summary, "s." or "ss.", whichever is applicable, should precede references to a section of the administrative code or state statutes. [s. 1.07, Manual.]

n. Rule subdivisions should be designated by a number followed by a period. [s. 1.03 (2) (e), Manual.] For example, in s. ETF 10.08 (2) (b) 2., "ETF 10.08 (2) (b) 2." should replace "ETF 10.08 (2) (b) (2)".

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

In s. ETF 20.02 (1), “s. 40.23, Stats.” should replace “s. 40.21, Stats.” The existing text refers to s. 40.23, Stats., and not s. 40.21, Stats.

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

a. In s. ETF 10.08 (1) (a), the last sentence is long and ungrammatical, which makes its meaning unclear. It appears that the word “who” should be stricken on line 11 and the word “and” on line 12 should not be stricken. The agency should revise the sentence to clarify its meaning.

b. In s. ETF 10.08 (2) (b) 5., the word “provides” should remain “provide” because it refers to the employees and not the WRS participating employer. Consequently, s. ETF 10.08 (2) (b) 5. does not need to be amended. Note that if the word were to be amended, the proper format for doing so would be as follows: ~~provide~~ provides.

c. In s. ETF 10.08 (2) (b) 5. Example, the phrase “on condition that” should read “*on the condition that*”.

d. In s. ETF 20.02 (1), the new material added at the end of the subsection should be replaced with the following language to make it clear that the material is referring to previous employment and not the employment for which the annuitant was rehired: “and whose termination of previous employment by a participating employer meets all criteria under s. ETF 10.08 (2) (b)”.

e. Section ETF 20.02 (4), as created in the rule, requires that employers report rehired annuitants in the “manner, form, and at the time requested by the department”. The agency should promulgate the requirements relating to the manner, form, and time for reporting rehired annuitants as an administrative rule.

ETF implemented nearly all the Legislative Council staff recommendations. The Department could not yet implement specific language as to the method of employer reporting of all rehired annuitants due to a need for additional operational decision-making on the required method.

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 21, 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 28, 2011 but ETF did not receive any written comments.

Modifications to Rule as Originally Proposed

The statutory reference to break in service requirements in the amendment to ETF 10.08 (1) (a) was changed from s. 40.23 (1) (a), Stats., to s. 40.26 (5), Stats. The reference to s. 40.23 (1) (a), Stats., was not correct. S. 40.26 (5), Stats., specifically governs rehire break in service requirements. To ensure proper statutory authority, the reference needed to be changed.

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 11-042 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.