

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: Local Government Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02C .0210

DEADLINE FOR RECEIPT: Friday, September 15, 2023.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*In (a), line 5, who is the written agreement between? I'm a little confused because usually a "surety" is (roughly speaking) a guarantor, rather than an agreement (although one could have an agreement to **be** a surety).*

In your History Note, add a space between "G.S." and "128".

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 20 NCAC 02C .0210 is adopted as published in the NC Register at page 1154 as follows:
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3 **20 NCAC 02C .0210 DEFINITIONS**
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5 (a) “Surety” means a written agreement given for the fulfillment and guarantee of the withdrawal payment to cease
6 participation in the Retirement System under G.S. 128-30(i).

7 (b) “Estimated Withdrawal Liability” means the withdrawal liability under the terms of G.S. 128-30(i) estimated by
8 the Division’s consulting actuary. The estimate shall be prepared under the assumption that the participating employer
9 will cease participation ten years after initial participation.

10 (a) “Non-taxing authority” (“NTA”) means as an otherwise eligible employer that is not a taxing unit, as defined by
11 G.S. 105-273(16).

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13 *History Note: Authority G.S.128-23(i)*

14 *Eff. October 1, 2023.*

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REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: Local Government Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02C .0211

DEADLINE FOR RECEIPT: Friday, September 15, 2023.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In (a), lines 5-6, consider deleting all instances of "that".

In (a), line 5, it sounds like you're defining "surety" again, apart from the definition in .0210, and doing so in such a way that it means only that the NTA will provide its own surety by producing the withdrawal funds up front. For instance, is it possible for an NTA to satisfy the requirement by obtaining an insurance policy that will pay out the estimated withdrawal amount if the NTA withdraws?

In (a), line 6, please define "duly adopted".

*In (a), lines 6-7, does this language require the NTA to actually place the funds in a secure financial instrument, or does it simply require the NTA to **say** that they've done that? What stops an NTA from adopting but not acting upon the resolution?*

In (a), line 7, can the NTA move the funds from one type of secure financial instrument to another during the period of their participation in the Retirement System? The language "maintain the funds in such instrument" suggests they cannot, but it isn't clear.

What is your authority to require the acknowledgment and acceptance letter in (b)? G.S. 128-23(i) requires only that an NTA obtain a surety. The letter, as described here, sounds more like a promissory note (more on that below) than a surety. See the definition of "promissory note" in Black's Law Dictionary, 11th Ed. ("an unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person"). While you do seem to have statutory authority to define what a surety is in this context, the letter requirement, by its own terms stands apart from the surety, which is defined in (a) as "a duly adopted resolution".

In (b), line 12, by "entity" did you mean an NTA?

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2023

In (b), line 13, do you have authority to require that “every member” of the governing board sign? What if every member of the board did not agree in the vote to participate in the Retirement System, but only a majority? If the letter is binding the governing board as an entity, why shouldn’t it be signed by whomever is authorized to act on behalf of the entity (i.e. the chair of the governing board, a majority of its members, etc).

*Moreover, are the members of the board signing this letter in a personal capacity? Are they making themselves personally liable for the withdrawal amount? I’m particularly concerned by the requirement that they “accept the obligation to pay the withdrawal liability.” The obligation is imposed upon the **employer** by law (G.S. 128-30(i)). An employer need not accept the obligation for it to be bound. However, absent another provision of law protecting them, I think it could be argued that the individual members of the governing board are accepting personal liability by signing this letter. I do not see anything in your statutes requiring that or permitting the Board to require that.*

What if a member of the Board who signs the letter leaves? Does a new member have an obligation to sign the letter?

In (b), lines 15-16, did you mean to say that whoever is accepting the obligation to pay is accepting the obligation to pay the actual withdrawal liability, rather than the estimated withdrawal liability?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2023

1 20 NCAC 02C .0211 is adopted as published in the NC Register, page 1154, as follows:
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3 **20 NCAC 02C .0211 SURETY FOR NON-TAXING AUTHORITY PARTICIPATION**
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5 (a) An NTA shall provide surety to the Board establishing that any withdrawal liability that the NTA may incur will
6 be paid by submitting a duly adopted resolution stating that the NTA is maintaining an amount equal to or greater than
7 the Estimated Withdrawal Liability in a secure financial instrument and will maintain the funds in such instrument
8 throughout its participation in the Retirement System. A secure financial instrument may include: an escrow account,
9 a letter of credit, a bond, a deed of trust, or a deposit in the Ancillary Governmental Participant Investment Program
10 (AGPIP) under G.S. 147-69.3 to the extent such an investment by the NTA is permitted by the Internal Revenue Code
11 and State law.

12 (b) Any entity submitting a resolution required under Paragraph (a) of this Rule must also submit to the Division an
13 “acknowledgement and acceptance letter” signed by every member of the entity’s governing board. The letter must
14 acknowledge the specific amount of the Estimated Withdrawal Liability; acknowledge that the actual amount of the
15 withdrawal liability, if incurred, will differ from the Estimated Withdrawal Liability; accept the obligation to pay the
16 withdrawal liability, if incurred; and attest that the entity has reviewed the withdrawal-related requirements of G.S.
17 128-30(i).

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19 *History Note: Authority G.S. 128-23(i)*
20 *Eff. October 1, 2023.*
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