

Burgos, Alexander N

Subject: FW: [External] RE: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Monday, September 18, 2023 1:10 PM

To: Rowe, Laura <laura.rowe@nctreasurer.com>; Melton, Timothy M <Timothy.Melton@nctreasurer.com>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] RE: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC

Hi Laura and Tim,

I've reviewed your responses and have a follow up from .0211 that relates back to .0210.

Rule .0211

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". We disagree that 0.211(a) defines the term "surety." Rule .0210 defines surety as "a written agreement given for fulfillment and guarantee of the withdrawal payment to cease participation in the Retirement System under G.S. 128-30(i)." In Rule .0211, both (a) and (b) together constitute a written agreement meeting the definition of "surety" in Rule .0210.

If (a) and (b) is the surety, full stop, then I think .0210 needs to say that. Right now .0210 just says "written agreement". You seem to have something very specific (a resolution and a letter) in mind as what may fulfill that agreement. Unless I'm mistaken and there is another form of "surety" that you would accept that doesn't fall within the guidelines of .0211. Hence my point about how this rule defines "surety". This may sound like I'm splitting hairs, but you have statutory authority to define what a surety is, and "address how an eligible employer that is not a taxing authority will cover a withdrawal liability...." N.C. Gen. Stat. 128-23(i). The letter itself doesn't cover the withdrawal liability, so if it isn't part of the definition of "surety" then I don't see that you can require it.

I'd appreciate you getting back to me ASAP, but no later than 10 AM tomorrow.

Thanks,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Request to Remove SRP Rules from Periodic Review

From: Laura Rowe <Laura.Rowe@nctreasurer.com>

Sent: Thursday, September 14, 2023 10:05 AM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Chisholm, Reid <reid.chisholm@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] Request to Remove SRP Rules from Periodic Review

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Hi Brian,

Thank you for your assistance with this request and for your review. I will be out of the office next week but Reid Chisholm would be able to attend the meeting virtually in the event the RRC members have any questions. **Alex**, would you be able to share the meeting participation link with Reid next week?

Thank you,

Laura Rowe

Director, Contracts and Compliance

State Health Plan

Office: (919) 814-3851

3200 Atlantic Avenue, Raleigh, NC 27604

www.SHPNC.org



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Dale R. Folwell, CPA
STATE TREASURER OF NORTH CAROLINA
DALE R. FOLWELL, CPA

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Burgos, Alexander N

Subject: FW: [External] RE: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC
Attachments: Response to Request for Changes LGERS Rules 02C .0210 and .0211 LGERS (9.14.2023).docx; 20 NCAC 02C .0210 Defintions (Post-Comment Period).docx; 20 NCAC 02C .0211 Surety for Non-Taxing Authority Participation (Post Comment Period).docx

From: Laura Rowe <Laura.Rowe@nctreasurer.com>
Sent: Thursday, September 14, 2023 9:53 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Melton, Timothy M <Timothy.Melton@nctreasurer.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Good Morning Brian,
Thank you for your review and input on our rules. Attached please find responses to the Request for Changes along with revisions to the LGERS rules 20 NCAC 02 .0210; .0211.

Please note that I will be out of the office the week of September 18th and any additional communication about these rules ahead of the September 21, 2023 RRC meeting should continue to include to Tim Melton, Assistant General Counsel for the Retirement Systems Division.

Please contact us if you have any additional questions –

Thanks,
Laura

Laura Rowe

Director, Contracts and Compliance
State Health Plan
Office: (919) 814-3851

3200 Atlantic Avenue, Raleigh, NC 27604
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Dale R. Folwell, CPA
STATE TREASURER OF NORTH CAROLINA
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1 20 NCAC 02C .0210 is adopted as published in the NC Register at page 1154, with changes, as follows:

2

3 **20 NCAC 02C .0210 DEFINITIONS**

4

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).

12

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

14 *Eff. October 1, 2023.*

15

1 20 NCAC 02C .0211 is adopted as published in the NC Register, page 1154, with changes, as follows:

2
3 **20 NCAC 02C .0211 SURETY FOR NON-TAXING AUTHORITY PARTICIPATION**

4
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 adopted by the NTA's governing body stating ~~that~~ the NTA is
7 maintaining an amount equal to or greater than the Estimated Withdrawal Liability in a secure financial instrument
8 and will maintain the funds in such an instrument, including any other secure financial instrument, ~~instrument~~
9 throughout its participation in the Retirement System. A secure financial instrument may include: an escrow account,
10 a letter of credit, a bond, a deed of trust, or a deposit in the Ancillary Governmental Participant Investment Program
11 (AGPIP) under G.S. 147-69.3 to the extent such an investment by the NTA is permitted by the Internal Revenue Code
12 and State law.

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

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

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

AGENCY: Local Governmental 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). The agreement is between the NTA, who offers terms for fulfilling a potential withdrawal liability obligation, and the Local Governmental Employees' Retirement System (LGERS) Board of Trustees, who accepts the terms of the agreement as part of approving the NTA's participation in LGERS. As to the definition of "surety": The authorizing statutory provision, G.S. 128-23(i), requires that no NTA can commence participation in the Local Governmental Employees' Retirement System without "obtaining a surety." Therefore, the statutory context of "surety" seems to refer to an agreement or arrangement of some sort (which could be "obtained"), rather than a person or institution (which could not be "obtained"). It also seems to refer to an agreement or arrangement as opposed to the primary common usage of "surety," meaning "the state of being sure." The Regulatory and Fiscal Impact Analysis adopted by the LGERS Board of Trustees contains the following discussion:*

"The term 'surety,' used in G.S. 128-23(i), means 'a formal engagement (such as a pledge) given for the fulfillment of an undertaking; guarantee.' This is the second listed definition in the Merriam-Webster dictionary, which seems clearly more applicable to the context of G.S. 128-23(i) than the first definition, 'the state of being sure.' ('Surety.' Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/surety>. Accessed 18 Nov. 2022.)"

See: <https://www.myncretirement.com/documents/files/governance/boarddocs/13-proposed-administrative-rules-text-and-impact-analysis/download?attachment>.

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

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

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". **Agreed and corrected.**

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? We disagree that 0.211(a) defines the term "surety." Rule .0210 defines surety as "a written agreement given for fulfillment and guarantee of the withdrawal payment to cease participation in the Retirement System under G.S. 128-30(i)." In Rule .0211, both (a) and (b) together constitute a written agreement meeting the definition of "surety" in Rule .0210. Even if an NTA satisfied the requirement by obtaining an insurance policy as you suggest, they would be required under this Rule to provide surety (the written agreement) to the Board in the form stated by the Rule.

In (a), line 6, please define "duly adopted". **Agreed and corrected to "adopted by the NTA's governing body."**

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? We believe the words "is maintaining" in lines 6-7 mean that some action by the NTA has already occurred when the resolution is submitted.

Moreover, the application of an NTA to join LGERS is a voluntary process. There is no requirement for local governments or NTAs in North Carolina to join LGERS, and many have not. But if they do, it is an irrevocable decision, subject only to the "Procedure and Payment to Cease Participation" under G.S. 128-30(i). Complying with the surety requirement is only one part of the application process for NTAs who undertake this voluntary process.

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2023

Finally, it seems you may be describing a situation where the NTA makes a material misrepresentation on its application to join the Retirement System. Depending on the hypothetical situation you have in mind, G.S. 128-32, which makes it a misdemeanor for any person to “knowingly make any false statement or permit to be falsified any record or records of this Retirement System in any attempt to defraud such System as a result of such act,” may be relevant to your question.

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. Agreed and corrected to “maintain the funds in such an instrument, including any other secure financial instrument.”

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”. We disagree that 0.211(a) defines the term “surety.” Rule .0210 defines surety as “a written agreement given for fulfillment and guarantee of the withdrawal payment to cease participation in the Retirement System under G.S. 128-30(i).” In Rule .0211, both (a) and (b) together constitute a written agreement meeting the definition of “surety” in Rule .0210.

In (b), line 12, by “entity” did you mean an NTA? Yes; agreed and corrected.

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). Although we believe the Board could require all members of the governing board to sign, we understand the concerns raised by this question (and others below) and have amended to “a person or persons authorized to act on behalf of the NTA.”

*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. We believe the change described above in (b), line 13, addresses this hypothetical.*

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2023

What if a member of the Board who signs the letter leaves? Does a new member have an obligation to sign the letter? **No. Also, we believe the change described above in (b), line 13, addresses this hypothetical.**

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? **Yes. We believe the term “withdrawal liability” was sufficiently clear in meaning the actual withdrawal liability but have added the word “actual.”**

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

Burgos, Alexander N

From: Laura Rowe <Laura.Rowe@nctreasurer.com>
Sent: Friday, September 1, 2023 4:25 PM
To: Liebman, Brian R; Melton, Timothy M
Cc: Burgos, Alexander N
Subject: [External] RE: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC

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Good Afternoon Brian,
Our office is receipt of your email and are in the process of reviewing.

Thanks, Laura

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Friday, September 1, 2023 1:12 PM
To: Laura Rowe <Laura.Rowe@nctreasurer.com>; Timothy Melton <Timothy.Melton@nctreasurer.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 20 NCAC 02C LGERS Requests for Changes - September 2023 RRC

Good afternoon,

I'm the attorney who reviewed the Rules submitted by LGERS for the September 2023 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, September 21, 2023, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised Rules and forms to me via email, no later than 5 p.m. on Friday, September 15, 2023.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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