

# Report on N.C.G.S. § 114-8.3(b1) Review of Proposed Contract

North Carolina Department of State Treasurer, General Counsel's Office



## I. Description of Contract

Fund name:

Contractual documents:

Type of contract:

## II. Confirmation

I have reviewed the above-listed contract to confirm that the contract (i) is in proper legal form; (ii) contains all clauses required by North Carolina law; (iii) is legally enforceable to the extent governed by North Carolina law; and (iv) appears to accomplish the intended purposes of the proposed contract.

This confirmation is limited to the scope of review required under N.C.G.S. § 114-8.3(b1).

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Date

## III. Description of Process

Because this transaction involves highly technical and specialized matters, the Treasurer retained outside legal counsel with expertise in negotiating complex investment transactions. Outside counsel, with the assistance of Department of State Treasurer staff and attorneys, developed a set of preferred terms for transactions of this type. In this transaction, outside counsel negotiated with the opposing party, seeking to produce a contract as close to the State's preferred terms as possible. However, in the market the State is one of many buyers, competing with other funds for the best investment opportunities. Because in this context the State's negotiating power is limited, inevitably any contract will deviate from the Treasurer's preferred terms. The Treasurer's fundamental goal is to obtain the best investment performance possible; counsel seek to secure a contract that will cause the State to meet that fundamental goal.

## IV. Scope of Review

The above-signed counsel completed this report after (1) reviewing the contractual documents listed above; (2) reviewing a memorandum from outside counsel comparing the contract's key terms to the State's preferred terms for similar transactions; and (3) completing the checklist below. The above-signed counsel has not performed the due diligence or review of law or fact that would be customary in rendering a formal third party legal opinion in connection with the closing of a business transaction. This report and the signature above do not constitute such an opinion.

The above-signed attorney has been designated by the General Counsel to perform the review and confirmation required by G.S. § 114-8.3(b1). This report solely describes review under G.S. § 114-8.3(b1), and it does not summarize other issues analyzed by the State’s counsel in connection with this transaction.

**V. Checklist**

**A. Type of Contract**

<p>1. Is the Contract for one of the following?</p> <p>a. “Investments to be acquired, held, or sold, directly or indirectly, by or for the State Treasurer, the Department of State Treasurer, or an investment entity created by the Department of State Treasurer, either on its own behalf or on behalf of another beneficial owner,” G.S. § 114-8.3(b1)(4)(a.); or</p> <p>b. “Investment-related services entered pursuant to the State Treasurer’s authority under G.S. 147-69.3 not constituting consulting contracts,” G.S. § 114-8.3(b1); or</p> <p>c. “Investments administered by the North Carolina Supplemental Retirement Board of Trustees,” G.S. § 114-8.3(b1)(4)(b.).</p> <p><i>Note: If the answer is “Yes” to at least one of these three questions, proceed with this checklist. If the answer is “No” to all three questions, any necessary attorney review will be governed by G.S. §§ 114-8.3(a) &amp; 143-50.1, pursuant to the procedures of the Attorney General and Department of Administration.</i></p>	
<p>2. Is the Contract for the acquisition of an equity interest in an investment vehicle?</p> <p><i>Note: If the answer is “Yes,” it is not a contract for services.</i></p>	
<p>3. Is it a contract for services?</p> <p><i>Note: If the answer is “Yes,” the contract must include the signature of the General Counsel or the General Counsel’s designee confirming that the Department of State Treasurer has adhered to the procedures established by the General Counsel regarding the review of the contract.</i></p>	

**B. Intended Purpose and Use of Preferred Terms**

<p>1. Was the Contract negotiated by counsel based on the Preferred Terms, form side letter, or form investment management agreement (hereinafter, the “Preferred Terms”) developed jointly by the General Counsel outside counsel?</p>	
<p>2. Does the Contract contain all clauses that are mandatory under the Preferred Terms?</p>	
<p>3. Did the counsel negotiating the transaction seek to have as many of the Preferred Terms incorporated into the Contract as possible, either in the precise form listed in the Preferred Terms or in substance?</p>	
<p>4. Through the due diligence process, has the agency developed a complete and understandable statement of its intended purpose in making the Investment Contract?</p>	
<p>5. Has the agency developed a detailed description of the investment sought and the desired results to be obtained through the contract?</p>	

6.	Is the purpose of the Contract identified?	
7.	Does the Contract appear to accomplish the intended purposes of the proposed contract?	

**C. Proper Legal Form, Enforceability, and Required Clauses**

1.	Does the Contract contain the essential data for the formation of an enforceable contract such as:	
a.	Identity of the parties	
b.	Description of the investment	
c.	Term of the contract	
d.	Price, fees, or other compensation to the counterparty	
2.	Has the state agency taken all action and/or obtained all approvals necessary to complete the transaction?	
3.	Do the signature pages include the proper parties, party names, and signature block?	
4.	Does the Contract include a provision concerning insurance coverage broadly consistent with (or more favorable than) the applicable provision in the Preferred Terms? List the provision(s) on this topic.	
5.	Does the Contract contain a clause noting that the State shall have access to records, so that the Treasurer (either by itself or in combination with other investors) may audit records and verify data affecting fees?	
6.	Does the Contract have a clause providing that the State's rights, duties and obligations under the Contract shall continue without interruption notwithstanding any reorganization of State government?	
7.	Prohibited Clauses or Clauses to Avoid	
a.	Does the investment manager attempt to obtain any ownership interest, title, copyright and/or patent in any intellectual property, deliverable, and/or property the investment manager is to deliver to the Department of State Treasurer?	
b.	Is there an arbitration clause and/or mandatory mediation clause in the Contract?	
c.	Limitations of Liability or Exculpations	
i.	Does the Contract limit the investment manager's liability for damages? If so, which provisions of the Contract state such a limitation?	
ii.	Did counsel negotiate, based on the Preferred Terms, to reduce the scope of this limitation of liability to the greatest extent possible?	

d.	Does the Contract give the investment manager the right to assign the Contract or parts of the investment manager’s scope of work?	
e.	Does proposed contract attempt to include any confidentiality provision that attempts to negate and/or circumvent N.C. Public Records Laws?	
f.	Indemnification	
i.	Is the Contract consistent with the Department of State Treasurer’s Policy Regarding Indemnification Obligations?	
ii.	If the LLC or limited partnership created under the Contract holds the right to claw back funds from investors under a provision styled as an indemnification, is that right limited to any distributions made to the Treasurer from the investment entity and the Treasurer’s capital commitment under the Contract?	
g.	Warranties	
i.	Does the Contract contain any disclaimers by the investment manager of any express or implied warranties?	
ii.	Did counsel negotiate, based on the Preferred Terms, to reduce the scope of these warranty disclaimers to the greatest extent possible?	
8.	Default, Termination, & Damages	
a.	What provisions of the Contract provide for remedies in the event of default by the investment manager?	
b.	What provisions of the Contract provide for termination of the Contract by the Treasurer?	
c.	What provisions of the Contract provide for termination of the Contract by the investment manager?	
9.	What choice of law is specified by the Contract?	
10.	What legal forum is specified by the Contract?	

**D. Integrity of Procurement Process**

1.	Does the Contract include representations, warrants, and/or covenants from the investment manager providing that the investment manager will comply with: <ul style="list-style-type: none"> <li>a. The Department of State Treasurer’s Placement Agent, Political Contribution, and Connection Disclosure Policy (the “<u>Placement Agent Policy</u>”);</li> <li>b. The Department of State Treasurer’s policy entitled “Prohibition of Gifts to State Employees” (the “<u>Gift Prohibition</u>”); and</li> <li>c. The Department of State Treasurer’s Charitable Donations Policy (the “<u>Donations Prohibition</u>”)?</li> </ul>	
2.	Do these ethics provisions in the Contract include any material deviation from the Preferred Terms?	

3.	Does the Contract contain a prohibition of gifts clause consistent with G.S. § 133-32 and the Department of State Treasurer's Gift Prohibition?	
4.	Did any outside or in-house legal counsel report an actual or potential conflict of interest with respect to the transaction? If so, provide details concerning any recusal of counsel or waiver of the conflict.	
5.	For this transaction, who served as the Compliance Counsel designated in the Placement Agent Policy?	
6.	Has the investment manager provided disclosure letters under the Placement Agent Policy?	
7.	Has the Compliance Counsel or in-house legal counsel provided a signed, separate Compliance Review Form under the Placement Agent Policy and Selection Policy and External Investment Manager and Vehicle Selection Policy?	
8.	Has the Compliance Counsel found that the disclosure letters provided under the Placement Agent Policy are responsive, complete, and sufficient in all material respects?	

**E. Compliance with Policies, Laws, and Regulations**

1.	Based on the information reviewed, specify any aspect of the transaction's recommendation, negotiation, or approval that could be viewed as not in compliance with any Department policy, law, or regulation.	
2.	Has external or internal legal counsel attested that the proposed transaction will fall within one of the asset classes authorized for investment under N.C.G.S. §§ 147-69.1 or 147-69.2?	