

**Public Comment for Nevada Public Employees Deferred Compensation Program
Workshop on Proposed Regulations, LCB No. R066-13, September 24, 2013**

Submitted by: Brian L. Davie, Member, Nevada Deferred Compensation Committee

As an employee of the Legislative Counsel Bureau, I am prohibited from speaking in favor of, or opposition to, legislative issues. Since these regulations may come before the Legislative Commission, or its Subcommittee to Review Regulations, I would like to clarify that my testimony and statement before this workshop, and any other public meetings relating to these proposed regulations, are provided solely in my role as an appointed member of the Deferred Compensation Committee.

I am a long-time active contributor and participant in Nevada's Public Employees Deferred Compensation Program (NDC), and currently the longest serving member on the State's Deferred Compensation Committee, with over 10 years' experience, including four consecutive years as Chairman. I was appointed to this service by three successive governors. I have concerns and objections about the proposed regulation changes in R066-13 relating to their possible effect on legislative intent and the fairness of the recordkeeper selection process. The proposal also contains certain overly restrictive provisions.

Agreement by Reference

To avoid duplication and repetitive testimony, I would like to express my complete agreement with the "Public comment for NAC 287 regulation workshop, 9/24/2013, Submitted by Kent Ervin." Dr. Ervin has been a regular attendee at the Committee's public meetings throughout the previous 2012 RFP process and through current meetings in 2013. He has consistently provided thoughtful and incisive public testimony concerning the Committee's activities and actions. I see no point in repeating his well written submittal except to indicate that I have total agreement and respect for his arguments, analysis and recommendations concerning the Committee's proposed regulations.

In addition, I fully support and endorse the recommended changes and revisions by Dr. Ervin to the Committee's proposed regulations.

Abrogation of Legislative Intent

While I am not an attorney and it is not my intent to present any legal arguments, it is difficult to understand how the Committee's proposed regulations would not change the legislative intent in the plain language of its enabling statutes. NRS 287.330(1)(b) mandates that the Committee "Act in such a manner as to promote the collective best interests of the participants in the Program." NRS 287.330(3)(c) further protects the Committee and its individual members from liability for any investment decisions, if the Committee has, among other things, "Discharged its duties regarding the decision: (1) Solely in the interest of the participants in the Program."

The most controversial provision in the Committee's proposed regulations is found in the new language of NAC 287.715 which provides for the bases of selection of Recordkeeper(s).

Subparagraph 5 establishes as a basis for selection “The projected costs submitted by each applicant.” It goes on to specify that “The Committee will not select an applicant who submits the least expensive proposal if another applicant **will better meet the overall needs of the program as determined by a majority of the Committee.**” In my view and based on the experience of this Committee’s failed 2012 RFP process, this new provision would substitute a regulatory “determination by a majority (three members) of the Committee” for the statutory “collective best interests of the participants” in which the “overall needs of the program” are nowhere defined or even necessarily associated with the best interests of the participants.

This interpretation was verified by the current Committee Chairman when he indicated that the intent of the proposed regulations is to provide the Committee with “maximum flexibility” in its choice of a recordkeeper, regardless of the requirements of the State’s purchasing laws or the basic standards of fairness and impartiality. (See Minutes and Audio record of the Committee’s August 15, 2013, quarterly meeting under the final public comment period.)

Overly Restrictive and Incomplete Provisions

The Committee’s proposed regulations contain a few overly restrictive provisions, some of which are carried over from the existing language of the older regulations.

The old language in NAC 287.710 (2) specifies that the selection of a recordkeeper “. . . will be made as often as the Committee deems necessary, but not less frequently than in September of every fifth year. The statute in NRS 297.330(3)(e) specifies the Committee and its individual members are not liable for any decision relating to investments if the Committee has, among other things, “solicited proposals from qualified providers of plans at least once every 5 years.”

The RFP process is dynamic and the regulations should not be tied to a specific month in the fifth year. Such an overly restrictive provision could be used to challenge and mitigate an otherwise fair and impartial RFP process.

Similarly, the proposed changes in NAC 287.725 (1) and (4) to increase the notification periods for an RFP process from 30 to 60 days are unexplained and not understandable in today’s electronic world.

Additional Provision

A provision should be added to prohibit a Committee member from voting on a final RFP decision if he or she does not attend the finalists’ presentations.

The meeting for the finalists’ presentations is one of the most critical hearings for Committee members to attend, usually once every five years, because the finalists for the recordkeeper(s) contract present their “best and final” offers for the Program, and Committee members are allowed to adjust their scores of the finalists based on the bidders’ presentations and final offers. If a Committee member does not attend the finalists’ presentations, he or she would have no basis for casting an informed vote concerning the future of the Program.

When a recordkeeper is designated as a finalist in an RFP process, they believe they have a good chance of winning the bid and take significant time and expense to develop their presentations, and best and final offers. I believe that a Committee member cannot make an informed and intelligent decision on a five-year contract unless he or she attends the finalists' presentations at the end of the RFP process.

Concluding Remarks

The members of the State's Deferred Compensation Committee are fiduciaries responsible for the prudent management and oversight of more than \$600 million of other State and local government employees' money, on which those employees are relying to supplement their retirements. The Committee and NDC Program should be professionally managed by Committee members who are fair, impartial and balanced in their approach. I believe the Committee's proposed regulations do not encourage that approach and would shift the emphasis to recordkeepers who could get members appointed who are beholden to a particular company.

I would recommend that the Committee follow the existing laws in its procurement processes, and adopt the changes proposed by Dr. Ervin to provide for a truly fair, impartial and competitive bidding process for the sole benefit of the participants.

Thank you for your attention and consideration.