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July 3, 2007

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**VIA FACSIMILE (775-684-5623) AND FEDEX**

College Savings Plan Board  
c/o Janice Wright, Secretary  
Office of the State Treasurer  
101 N. Carson Street, Suite 4  
Carson City, NV 89701-4786

Re: Response to Audit: Nevada College Savings Program

Dear Board Members:

Orrick, Herrington & Sutcliffe LLP ("Orrick") is pleased to accept your invitation to respond to the Audit Report of the Nevada College Savings Program (the "Program"). We believe that the Legislative Counsel Bureau ("LCB") reached erroneous conclusions that could have been corrected by seeking clarification from Orrick before LCB published its Audit Report. While we respond candidly to the Audit Report's errors, Orrick counts the State of Nevada as a valuable client and, as discussed in the conclusion to this response, our intent is not to risk that relationship or to foster an unnecessary and potentially damaging disagreement.

We do not respond in this letter to the Audit Report's allegations except to the extent that any of them imply that Orrick improperly benefited from any act or omission by the Board, or that Orrick was not entitled to the fees that it earned in helping you to establish one of the most successful Section 529 Programs in the United States.<sup>1</sup> We do not believe that it is appropriate or necessary for Orrick to comment on internal procedures of state agencies except when those allegations potentially reflect negatively on Orrick's work or reputation.

The LCB reached the following conclusions to which Orrick will respond:

1. "Although the contract that ended June 30, 2002, included a provision for legal services to be provided to other state agencies, the subsequent contracts did not."<sup>2</sup>

<sup>1</sup> See Audit Report at 1 ("Nevada's Program is the seventh largest in the country, based on total assets at the end of 2006, with total assets of \$3.3 billion.").

<sup>2</sup> Audit Report at 38.



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2. "The composite hourly rate paid for services during the term of the contract ended June 30, 2002, was \$428.64. This is significantly higher than the \$225 specified in the contract. Consequently, the law firm was paid nearly \$96,000 in excess of the contract rate."<sup>3</sup>

LCB's first conclusion is incorrect. A thorough reading of the contracts and all documents incorporated by reference discloses that the contracts invariably provided for services to other state agencies. As to the second conclusion, depending on interpretation of potentially ambiguous contract terms, Orrick billed and received a total amount that either was less than permitted by the relevant contracts or, if Orrick received fees in excess of the contract rates, that excess was far less than the amount alleged by LCB. Nonetheless, as noted in the conclusion to this response, Orrick does not intend to risk its relationship with the State of Nevada by prolonging any dispute, regardless of the defects in LCB's analysis.

\* \* \* \*

The following background information is essential to an understanding of the Audit Report's allegations and Orrick's response. Orrick responded to a 1999 Request for Proposals ("RFP") from the Nevada State Treasurer to provide bond counsel services to the State through the Treasurer's Office. As discussed more fully below, this and all later RFPs from the Treasurer also sought Orrick's bid for services to be provided to other state agencies at the Treasurer's discretion. As the law firm consistently ranked first in public finance throughout the United States, Orrick's selection as one of the winning bidders is hardly controversial.

Orrick and "the State of Nevada Acting By and Through Its Office of the Treasurer" entered into a series of "Contract[s] for Services of Independent Contractor":

1. the "1999 Contract" (August 11, 1999 to June 30, 2000);
2. the "2000 Contract" (July 1, 2000 to June 30, 2002);
3. the "2002 Contract" (July 1, 2002 to June 30, 2004), extended to September 30, 2005 by "Amendment #1 to Contract"; and
4. the "2006 Contract" (May 9, 2006 to December 31, 2006).

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<sup>3</sup> Audit Report at 39.



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The Contracts and the extension were entered into in full compliance with the State Purchasing Act, and the Audit Report does not claim otherwise. The Nevada Attorney General approved the Contracts as to form. After approval by the Board of Examiners, the Treasurer, the Governor (as Governor and Chairman to the Boards of Finance and Examiners), the Secretary to the Board of Finance, and the Secretary to the Board of Examiners signed the Contracts.

The Treasurer's Office realized at the outset that the Program needed specialized outside legal services (in addition to the Attorney General's services as Program counsel) to help prepare contracts with the program manager, and disclosure materials required by the federal securities laws for potential investors. The Treasurer's Office asked about Orrick's experience and qualifications, and learned that we had provided support services to 529 College Savings Programs in thirteen other states, and had experienced practitioners in this specialized field. This made Orrick the logical choice to provide certain services to the Program. However, the Program had no money to pay for initial legal services.

At your public meeting on July 18, 2001, Orrick agreed to provide legal services to the Program with the contingency that Orrick would be paid only when and if funds were available to do so. This concession by Orrick was intended to, and did, make it possible for the State to launch the Program with limited funds. You then authorized the Treasurer and Orrick to proceed.<sup>4</sup> For more than five years, staff from the Treasurer's Office, the Attorney General's Office, and Orrick worked together to establish the Program. For almost two years, Orrick worked without any payment for its services, and with payment contingent on the success of the Program.

**A. Contrary To The Auditors' Belief, Orrick's Contract With The Nevada Treasurer Provided At All Relevant Times For Services To Other State Agencies.**

The LCB apparently failed to read contract provisions that were incorporated by reference into Orrick's contracts with the State. As a result, LCB reached an erroneous conclusion. The Audit Report alleges:

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<sup>4</sup> See Nev. Rev. Stat. § 353B.320 ("The board may delegate to the state treasurer any of its administrative powers and duties specified in NRS 353B.300 to 353B.370, inclusive, if the board determines that such delegation is necessary for the efficient and effective administration of the Nevada college savings program and the trust fund.").



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The State Treasurer's Office contracted with a law firm for several years for legal services related to the issuance of bonds. The first contract was effective from September 7, 2000, to June 30, 2002. This contract related to the State Treasurer's responsibility to issue obligations of the State. However, the contract also had a provision which stipulated that any state agency could utilize the law firm for other legal services needed, at \$225 per hour. The contract states in part:

CONSIDERATION. . . .

Should the services of Orrick, Herrington & Sutcliffe personnel be utilized for issues not related to a securities issue, or utilized by a separate State of Nevada agency other than the Office of the Treasurer, the hourly rate will be \$225 as referenced in Attachment C.

The State Treasurer's Office had similar contracts with the law firm for bond disclosure services that covered services from July 1, 2002, to December 31, 2006. *Although the contract that ended June 30, 2002, included a provision for legal services to be provided to other state agencies, the subsequent contracts did not.*<sup>5</sup>

As LCB disclosed, the 2000 Contract provided for an "hourly rate" of \$225 for any services "utilized by a separate State of Nevada agency other than the Office of the Treasurer . . . ."<sup>6</sup> The 2002 and 2006 Contracts replaced that provision with a more ambiguous term: "An hourly range for special services is \$500."<sup>7</sup> LCB apparently surmised that this replacement meant that the 2002 and 2006 Contracts did not include a provision "for legal services to be provided to other state agencies."

Though neither of the later Contracts defines "special services," each Contract explicitly references and incorporates its corresponding RFP and the RFP Response:

**INCORPORATED DOCUMENTS.** The parties agree that the scope of work shall be specifically described; this Contract incorporates the following attachments in descending order of constructive precedence; a Contractor's Attachment shall not contradict or supersede any State specifications, terms or conditions without written evidence of mutual assent to such change appearing in this Contract.

<sup>5</sup> Audit Report at 38 (emphasis added).

<sup>6</sup> 2000 Contract, § 6; *see also* 1999 Contract, § 6.

<sup>7</sup> 2002 Contract, § 6; 2006 Contract, § 6.



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(Reference RFP 02-005.3. Scope of Services Pg. 3 for description of services)  
ATTACHMENT A: Section 0325. State Administrative Manual (SAM) 22nd edition  
ATTACHMENT B: RFP 002-005  
ATTACHMENT C: RFP RESPONSE<sup>8</sup>

Both the 2002 and 2006 RFPs – incorporated by reference in the Contracts – explicitly allow the Treasurer to authorize work for other state agencies:

The Treasurer may authorize state agencies to directly utilize the services of the bond counsel. Payment to the bond counsel for work performed under this provision shall be the sole responsibility of the agency requesting such work. However, it will be performed within the pricing scope of any contract that results from this RFP. . . .<sup>9</sup>

Having incorporated these provisions by reference, the Audit Report's conclusion – that later Contracts did not include provisions for legal services to other state agencies – is simply incorrect. LCB overlooked the effect of that incorporated provision. Indeed, the current Treasurer's Office follows this same practice. The Treasurer's February 2007 RFP states:

The Treasurer may authorize state agencies or various municipalities to directly utilize the services of bond counsel. Payment to bond counsel for work performed under this provision shall be the sole responsibility of the agency/municipality requesting such work. However, it will be performed within the pricing scope of any contract that results from this RFP. . . .<sup>10</sup>

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<sup>8</sup> 2002 Contract, § 5, *see also* 1999 Contract, § 5; 1999 Contract, § 5. The 2006 Contract varies slightly in form, but is no less inclusive:

**INCORPORATED DOCUMENTS.** The parties agree that the scope of work shall be specifically described; this Contract incorporates the following attachments in descending order of constructive precedence; a Contractor's Attachment shall not contradict or supersede any State specifications, terms or conditions without written evidence of mutual assent to such change appearing in this Contract:

ATTACHMENT A: STATE SOLICITATION (RFP #02-005)

SCOPE OF WORK (Reference RFP 02-005.3. Scope of Services Pg. 3 for description of services)

ATTACHMENT B: RFP 002-005

2006 Contract, § 5.

<sup>9</sup> The 1999 and 2000 RFPs included a similar provision: "The Treasurer may authorize state agencies to directly utilize the services of the bond counsel. Payment to the bond counsel for work performed under this provision shall be the sole responsibility of the agency requesting such work.." 1999 RFP, § IV.A.3; 2000 RFP, § IV.A.3.

<sup>10</sup> Request for Proposal #RFP07-003, ¶ 3.21.



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**B. No Reasonable Contract Interpretation Supports The Statement That Orrick Was Paid "Nearly \$96,000 In Excess Of The Contract Rate."**

**1. The Contracts Provided A "Blended" Rate For Which Orrick Would Bill Legal Services Rendered To Other State Agencies.**

The 1999 and 2000 RFPs asked: "Should the Treasurer or a state agency require legal services on an hourly basis, what is the hourly rate per attorney your firm would charge?"<sup>11</sup> Orrick responded: "Answer: \$225 per hour."<sup>12</sup>

The 2002 and 2006 RFPs required that vendors "submit a blended hourly rate of the several lawyers to be involved for services."<sup>13</sup> The Treasurer answered questions from would-be respondents in 2002 to clarify the meaning of the requirement:

*Sec 8.3 requires submission of blended rates for lawyers involved. Section 8.2 of the RFP states that proposer must submit "fixed prices". Please clarify. A blended hourly rate must be submitted in order to facilitate quotes to various agencies that may need services through our bond counsel. These agencies would be able to utilize these services at an hourly rate through the contract with the Office of the Treasurer. This is a rate that must be submitted under Section 8.3 for this purpose only. Any Bond issuance cost would be based on the principal amount of bonds as repeated in the range specified in 8.1.*<sup>14</sup>

Orrick's 2002 and 2006 Responses to RFP provided the requested rate: "The following additional information is provided in response to Section 8.3 of the RFP. Our blended hourly rate is \$500." As noted above, the "Consideration" section in the 2002 and 2006 Contracts reiterated: "An hourly rate range for special services is \$500." The only reasonable conclusion is that Orrick and the Treasurer agreed to a blended rate of \$500 for services performed and billed to other state agencies under the 2002 and 2006 Contracts.

<sup>11</sup> 1999 RFP, § VIII; 2000 RFP, § VIII.

<sup>12</sup> Response To Request For Proposals For Bond Counsel And Other Legal Services, July 7, 1999, at 15.

<sup>13</sup> 2002 RFP, ¶ 8.3; 2006 RFP, ¶ 8.3.

<sup>14</sup> Questions and answers provided to potential respondents to the 2002 RFP, "Question 5," at 3.



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The legal services industry understands a “blended hourly rate” to be an hourly rate charged for all attorneys regardless of seniority, experience, or expertise.<sup>15</sup> Typically, the rate is higher than the rate for the most junior attorneys, and lower than the rate for the most senior and experienced attorneys.

**2. Depending On Contract Interpretation, Orrick Either Received Less For Its Services Than The Contracts Allowed, Or Orrick Received Excess Payments Significantly Less Than Alleged By The Audit Report.**

No Contract makes clear whether the Contract rate that applies for other state agency work is the rate under the Contract in force at the time that Orrick performed the work (even if Orrick had no right to payment), or the rate set by the Contract in force at the time that Orrick earned the right to bill for the work. Under the well-accepted principle that an ambiguous contract “will be construed against the drafter,”<sup>16</sup> a court would need to construe any ambiguity in the Contracts to favor Orrick.

As shown by Orrick’s billing statements to the Treasurer’s Office, Orrick’s work on the Program commenced on July 12, 2001, but Orrick could not bill for any services until June 23, 2003, when funds were available to pay. Rather than charging a blended hourly rate, Orrick mistakenly charged its usual hourly rates, varying by timekeeper:

TIME PERIOD	DATE BILLED	HOURS BILLED	AVERAGE RATE	TOTAL BILL
7/12/01-5/14/02	6/23/03	419.50	\$429.23	\$180,063.00
5/9/02-8/26/06	11/20/03	79.10	\$416.57	32,950.66
10/21/03-3/31/04	4/26/04	352.75	\$479.74	169,228.00
7/30/02-9/2/03	11/8/04	235.95	\$423.82	100,000.00
11/8/02-8/18/04	12/13/05	624.65	\$478.00	298,580.00
4/1/04-1/10/06	5/16/06	404.75	\$503.49	203,786.75
	HOURS BILLED	2,116.70	TOTAL BILLED	\$984,608.41

<sup>15</sup> See, e.g., <http://www.abanet.org/yld/tyl/mar98bill.html> (“The blended hourly rate is a hybrid of the hourly rate. Instead of specific hourly rates for each attorney or paralegal working on a matter, one hourly rate applies to all time billed.”); <http://www.lawdepartmentconsortium.com/page.php?id=133> (“A blended hourly rate agreement is one in which the law firm charges an agreed hourly rate for services without regard to the experience level or hourly rates normally charged by the individuals performing work for the client.”).

<sup>16</sup> See, e.g., *Dickenson v. State*, 110 Nev. 934, 937 (1994).



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The Audit Report takes the position that Orrick was not entitled to bill in excess of \$225.00 per hour of work provided before June 30, 2002:

The composite hourly rate paid for services during the term of the contract ended June 30, 2002 was \$428.64. This is significantly higher than the \$225 specified in the contract. Consequently, the law firm was paid nearly \$96,000 in excess of the contract rate.<sup>17</sup>

However, the Audit Report ignores the fact that the Contracts, at a minimum, entitled Orrick to bill \$500 per hour for work performed or billed after June 30, 2002, and the Audit Report ignores that Orrick's actual billings were at prevailing rates rather than the approved "blended hourly rate." While this may have disadvantaged the State under LCB's theory before June 30, 2002, the billing error was an advantage to the State after June 30, 2002. Thus, even under LCB's apparent Contract interpretation, the Program underpaid Orrick for much of the work performed:

BILLING PERIOD	HOURS BILLED	ACTUAL BILLING	ALLOWED BLENDED RATE BILLING (HOURS x \$500)	ADDITIONAL AMOUNT OWED TO ORRICK
5/9/02-8/26/06	27.85 (post 6/30/02)	\$11,232.29 (post 6/30/02)	\$13,925.00 (post 6/30/02)	\$2,692.71
10/21/03-3/31/04	352.75	\$169,228.00	\$176,375.00	\$7,147.00
7/30/02-9/2/03	235.95	\$100,000.00	\$117,975.00	\$17,975.00
11/8/02-8/18/04	624.65	\$298,580.00	\$312,325.00	\$13,745.00
4/1/04-1/10/06	404.75	\$203,786.75	\$202,375.00	(\$1,411.75)
TOTAL ADJUSTMENT				\$40,147.96

Furthermore, the auditors asked for and received an accounting from Orrick of additional time that was not billed to the Program because the billing attorney did not believe that the Program had funds to pay for the work. Though the auditors knew of this unbilled time as an offset to any alleged excess payment, the Audit Report gives no credit for unbilled time worth \$10,000.00 (at the approved blended hourly rate). Even ignoring any argument that the \$225 cap did not apply to work performed but not billed before June 30, 2002, Orrick would be entitled to an offset of at least \$50,147.96 to the allegedly excess amount of \$95,862.62, for a total alleged excess of \$45,714.66, less than half the amount cited in the Audit Report.

<sup>17</sup> Audit Report at 39.



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If Orrick was entitled to charge the blended hourly rate in effect when Orrick earned the right to bill for the work (that is, when the Program finally had funds to pay for the work), then Orrick was entitled to charge \$1,058,350.00, meaning that Orrick was entitled to \$73,741.60 more than it charged.<sup>18</sup>

**3. The Contracts Allowed Orrick To Recover Certain Disbursements, Which Were Not Billed To The State, Either Increasing The Amount To Which Orrick Was Entitled, Or Reducing Any Alleged Excess Billing.**

In its "Consideration" section, each Contract provided that Orrick would receive flat fees based on the principal amount of the state securities issued. Additionally, all Contracts provided for Orrick's right to recover certain expenses in connection with its work:

*This fee will include all related costs and expenses (except for direct out of pocket expenses for such things as phone, copying and delivery charges and travel approved by the State), including but not limited to overhead and support staff.*<sup>19</sup>

The Contracts provide no similar limitations on costs and expenses incurred in connection with work for other state agencies. However, Orrick did not bill the Program for any costs and expenses, regardless of whether "out-of-pocket" or relating to "overhead and support staff." Giving the Program the benefit of that limitation nonetheless, Orrick had unbilled "out-of-pocket" costs and expenses of at least \$4,634.34.<sup>20</sup> Therefore, depending on contract interpretation, Orrick either received an excess payment of \$41,080.32, 43% of the excess alleged by the Audit Report, or Orrick received \$78,375.94 less than Orrick was entitled to receive.

No reasonable and fair interpretation supports the conclusion that Orrick received "nearly \$96,000" in excess of agreed rates. In short, the Audit Report omits or fails to take information into account that would have been relevant to its conclusions.

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<sup>18</sup> 2,116.70 hours x \$500.00/hour = \$1,058,350.00; \$1,058,350.00 - 984,608.41 = \$73,741.60.

<sup>19</sup> 1999 Contract, § 6 (emphasis added); see also 2000 Contract, § 6; 2002 Contract (same), § 6 ("This fee will include all related costs and expenses (except direct out-of-pocket expenses for such things as phone, copying and delivery charges and travel as approved by the State), including but not limited to overhead and support staff."); 2006 Contract, § 6 (same).

<sup>20</sup> Orrick's total costs and expenses are \$7,136.36. Being liberal in reductions that might qualify as "overhead," "staff support," or not otherwise recoverable, Orrick believes that \$4,634.34 is a conservative calculation of permissible costs and expenses.



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While LCB's findings are fundamentally flawed, Orrick sees no value in creating or maintaining an adversarial relationship with a valued client. Orrick is particularly proud of the contribution we have made to help the State's 529 College Savings Program become one of the most successful in the United States, and we are proud and happy to serve the State of Nevada in other ways as well.

The Contracts are indisputably ambiguous and could be read by reasonable people to suggest that Orrick has not received fees and costs to which it is entitled or that, if Orrick received more than it was entitled to receive, any such excess is far less than the amount calculated by LCB. Nevertheless, Orrick would just as soon resolve any lingering issue without the need for further disagreement. In a show of good faith, we enclose a check in the amount of \$95,862.62. Any claim for reimbursement in this amount would not be enforceable in any judicial or administrative forum, and our voluntary reimbursement is not meant to be an admission of any kind. Instead, the payment is an acknowledgment of Orrick's desire to continue its relationship with the State of Nevada, and an affirmation that we are in the business of serving our clients, not having disagreements or misunderstandings with them.

Thank you for bringing your concerns to our attention, and giving Orrick the opportunity to respond. We trust that this response and our voluntary reimbursement now puts this issue behind all of us so that the State and Orrick can continue working cooperatively for the benefit of Nevada's citizens.

Yours truly,

James E. Houpt

JEH:jlj

Encl.

cc: Hon. Kate Marshall  
Lisa Brewer  
William Donovan