

Public Employees, Retirement and Social Security Committee
1020 N Street, Room 153
Sacramento, CA 95814

June 19, 2006

Dear Mr. Torrico:

Re: SB 1729

I urge members of the Public Employees, Retirement and Social Security Committee to consider amendments to ensure the scope of SB 1729 (June 14, 2006) is broad enough to cover any reasonably anticipated post-employment benefit and to ensure the Board of Administration of the California Public Employees' Retirement System (CalPERS) is bound by the Administrative Procedure Act (APA) in promulgating implementing regulations.

Changes to accounting standards under statements 43 and 45 of the Government Accounting Standards Board (GASB) will require state governments, such as California, to disclose "other post-employment benefit" (OPEB) liabilities in fiscal years starting after December 15, 2006. The Legislative Analyst has estimated those liabilities for retirees from state employment at \$40-70 billion and indicates that prefunding, through a trust fund, will substantially lower the ultimate cost of providing benefits. Other benefits include the following:

- Investment return assumption (discount rate assumption) will be higher, making annual expense and the unfunded liability lower.
- Prevents net OPEB obligation from becoming a significant liability on balance sheet.
- Enhanced security for members.
- Enhance inter-generational equity.
- By not pre-funding, the employer's credit rating might be affected, making it difficult or more expensive to issue bonds.

Just as 80-85% of CalPERS pensions are currently paid by investment earnings, rather than by direct employer or employee contributions, a healthcare trust fund could eventually do the same.

SB 1729 would create a statutory framework allowing the CalPERS Board exclusive power over the administration and investment of a health care trust fund to provide such benefits.

Scope

Existing provisions of law establish the "Annuitants' Health Care Coverage Fund" and provide the CalPERS Board authority over that fund, which is intended for

“prefunding of health care coverage.” While the scope of this is likely to cover the vast majority of OPEB offerings, GASB’s language is broader than existing or proposed provisions of Government Code section 22940, including medical benefits, dental, vision, hearing, and *life insurance*. The Committee should consider amending SB 1729 to ensure the scope of authority provided to CalPERS is broad enough to cover any reasonably anticipated OPEB offering.

Applicability of the APA

The proposed amendments to Government Code section 22946 now include a broad exemption of implementing regulations from the Administrative Procedure Act (APA), including exemption from review and approval by OAL. The Committee should reject this language.

For many years, CalPERS claimed the provisions of the California Constitution, article XVI, section 17, exempted it from the APA. That claim was thoroughly rejected by OAL and by the courts (see attached [1999 OAL Determination No. 18](#)). The Board now seeks, through SB 1729, what it failed to obtain in the courts. Granting such a broad exemption would be a mistake.

OAL’s authority to review proposed regulations does not allow it to interfere with the substance of proposed regulations, but, along with the APA, does afford CalPERS members and taxpayers several benefits, including:

- Public notice, disclosure of studies relied upon, opportunity for comment and a public response to comments for initially proposed regulations and subsequent amendments.
- Consideration and disclosure of fiscal and economic impacts.
- Review for necessity, authority, clarity, consistency, reference and nonduplication.

The Board has a long history of abusing its rulemaking authority. As a candidate for the Board I am most familiar with abuse in the area of its own election procedures. For example, the Board once voted in favor of regulations prohibiting inclusion of "candidates' opinion or positions on issues of general concern to the system's membership." Fortunately, the Board chose to use the APA process for that rulemaking and the public outcry put a stop to it. (see [Calpers Muzzles Critics Ballot Rules Protect Board, Keep Others In The Dark](#), Sacramento Bee, May 25, 1999)

However, abuses in this area continue. Current underground regulations expose CalPERS members who sign nomination petitions to increased risk of identity theft because of required use of Social Security Numbers. Additionally, they facilitate potential abuse by incumbents who can change the number of signatures required, the election schedule, or other procedures to their own

advantage without the benefit of public input, the protections of the APA, or review by OAL. (see attached: [May 26 letter to Fred Buenrostro](#), [Petition for Reconsideration](#) and [Draft Petition for Underground Regulations Determination](#))

As indicated above, I am fully in favor of legislation setting up a legal framework for an OPEB trust fund and of placing authority for the administration of that fund with the CalPERS Board. Like the pension fund, this fund will also eventually contain hundreds of billions of dollars. It will be vitally important to public employees, taxpayers and the general public. Please don't exempt the Board's regulations for administration of such funds from the important protections afforded by the APA.

Sincerely,

James McRitchie
Candidate for the CalPERS Board of Administration
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Suggested amendments to SB 1729

Amend Government Code proposed section 22946 as follows:

The board may adopt emergency regulations that implement this article. Those regulations shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. ~~not be subject to review and approval of the Office of Administrative Law pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3. However, the board shall transmit those regulations to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations. Those regulations shall become effective immediately upon filing with the Secretary of State.~~