



Senate Appropriations Committee
State Capitol, Rm. 2206
Sacramento, CA 95814

July 30, 2008

Dear Senator Torlakson:

Re: AB 2940 (July 10, 2008), OPPOSE UNLESS AMENDED

I urge the Appropriations Committee to amend AB 2940 to ensure the Board of Administration of CalPERS is only temporarily exempted from competitive bidding and the Administrative Procedure Act (APA), with regard to the administration of the proposed savings program. Suggested amendments are attached.

PERSWatch.net, representing hundreds of activist CalPERS members, fully supports the intent of AB 2940, to facilitate the ability of millions of Californians to save for retirement. This is a unique opportunity, at no cost to CalPERS members, to offer private sector employees an inexpensive investment starter program. The Program could reduce future dependency on taxpayers, increase California's tax base, and broaden the base of CalPERS stakeholders, thus decreasing vulnerability of the System to attack by those who have sought to reduce or eliminate our defined benefit plans.

We understand the need to keep administrative costs down, especially during start-up. However, we strongly oppose permanent exemptions from good governance laws.

Applicability of Competitive Bidding

The bill would add Government Code, section 100004, subdivision (b), which would allow the CalPERS Board to contract for the Program "without regard to competitive bidding." One major "pay to play" scandal involving a large sole-source contract could put the whole System in jeopardy, making CalPERS politically vulnerable. Additionally, what moral authority would CalPERS have in advising corporations to be transparent, if its own contracting procedures were suspect?

The attached amendments would keep administrative costs low during startup by providing an exemption from competitive bidding only during the initial two years.

Applicability of the APA

Many CalPERS members are concerned the Program may be a "foot in the door" to privatization, ending our defined benefit plan, or using our pensions to subsidize the Program. While we believe the bill's provisions preclude these possibilities, exempting the Board from the APA, per the proposed addition of Government Code section 100018, will leave members relatively powerless if we do find mischief.

The language exempting the Board from the APA disenfranchises millions – ironically, the same Californians which the bill seeks to empower through an inexpensive and convenient savings program. Shouldn't Program participants, current CalPERS members, and taxpayers have a say over how the program is shaped over time? Why a permanent exemption from APA requirements?

Yes, the APA process adds some expense and startup costs should be minimized. Therefore, we propose that initial regulations be filed as legislatively authorized emergency regulations. After that initial rulemaking, the rights afforded by the APA should be applied to ensure the interests of the public are protected.

For many years, CalPERS claimed California Constitution, article XVI, section 17, exempted the agency from the APA and argued so in court. That claim was thoroughly rejected by *Connell v. CalPERS* in appellate court.

The Office of Administrative Law's authority to review proposed regulations does not allow it to interfere with the substance of proposed regulations, but, along with the APA's provisions, does afford CalPERS members, Program participants, and taxpayers several benefits, including:

- Public notice, disclosure of studies relied upon, opportunity for comment and 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 the APA. Please protect our rights.

Conclusion

As indicated above, we support setting up a legal framework for the California Employee Savings Program and do not oppose placing authority for the administration of that Program with CalPERS. Like our pension fund, this Program could eventually contain billions of dollars. It will be vitally important to public employees, Program participants, and taxpayers. During start-up, initial contracts could be noncompetitively bid and rules could be adopted as permanent "emergency" regulations. However, exemptions should be temporary. Don't sacrifice good governance for expediency.

Sincerely,

James McRitchie, Legislative Coordinator

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cc: Assemblymember De Leon and Senator Cox

Amend Government Code proposed section 100004, subdivision (b) as follows:

(b) Retain and contract with private financial institutions, other financial and service providers, consultants, third-party administrators, and other professionals as necessary, without regard to provisions regarding competitive bidding during the first two years of operation.

Amend Government Code proposed section 1000018 as follows:

100018. The board may initially adopt emergency regulations that implement this title. 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 initial adoption of implementing 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. Notwithstanding section 11346.1 of the Government Code, such emergency regulations shall remain in effect until subsequently amended or deleted in accordance with Chapter 3.5. The adoption, amendment, or repeal of a regulation authorized by this section is hereby exempted from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. 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.