



PersWatch

**Enhancing Benefits Through
Increased Accountability**

Joe Parilo, Acting Regulations Coordinator
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Dear Mr. Parilo:

On behalf of the PERSWatch e-mail group with several hundred CalPERS members, thank you for the opportunity to comment on California Public Employees' Retirement System (CalPERS) proposed amendments to California Code of Regulations (CCR), title 2, sections 554.2 and 554.3.

We are primarily concerned with the likelihood of identity theft because of the rulemaking's apparent use of the last six digits of Social Security numbers and with CalPERS' continued refusal or inability to recognize when it is required to go through the Administrative Procedure Act (APA).

For many years, CalPERS argued it was exempt from such laws because of Constitutional provisions granting it "plenary authority and fiduciary responsibility for investment of moneys and administration of the system." That argument was thoroughly rejected by the Superior Court in *Connell v. CalPERS* and [1999 OAL Determination No. 18](#), filed by James McRitchie. Yet, now CalPERS proposes regulations authorizing the Board to change the criteria used to qualify as a Board nominee without going through the rulemaking process, as if such changes were neither rules of general application nor of public importance.

The following outlines the rationale behind four concerns leading to our suggested amendments ([Attachment 1](#), in double underline and double strikeout format). We hope you will take these under serious consideration and believe these suggested amendments constitute a reasonable alternative that is potentially less costly to members who risk identity theft if they comply with the regulations proposed by CalPERS. The proposed alternative should be addressed under the provisions of Government Code sections 11346.2(b)(3) and 11346.5(a)(13).

1. Incorporation of Forms

The Notice of Proposed Regulatory Action (Notice) says, "the proposal incorporates by reference both the Nomination Petition and Nomination

Acceptance/Ballot Designation forms.” First, since CalPERS failed to actually include this provision in its proposed regulation text, this appears to be a violation of CCR, title 1, section 20.

Second, and more importantly, the Board should have flexibility to change these forms without going through the rulemaking process. If CalPERS insists on incorporating them by reference, then each time a form needs to be changed it must go through the entire rulemaking process.

Because of this inconvenience, a preferred alternative is to specify the information required in the regulation’s text. Note: under this option members are under no obligation to use CalPERS’ forms, although most will probably choose to do so. If they do, they would be only obligated to provide those items on the form that are specifically required by the regulation text. See Government Code section 11340.9(c).

2. License to Write Underground Regulations

In its determination that certain CalPERS election forms and procedures constitute underground regulations ([2007 OAL Determination No. 1](#), filed by James McRitchie), the Office of Administrative Law (OAL) noted that CalPERS could adopt a regulation “establishing the criteria for setting the dates for submission of documents and the election itself.” They provided an example of the date of the election, which could be set at “three months before expiration of the term for which the election is held.” However, OAL warned that “to the extent that requirements in the Notice of Elections meet the definition of a ‘regulation’ that information must be adopted pursuant to the APA.”

In proposed amendments to CCR, title 2, section 554.3, subdivisions (b), (c) and (d), CalPERS includes language to allow the Board to amend its regulations without going through the requirements of the Administrative Procedure Act (APA). Use of the phrases “shall be determined at a noticed public meeting of the Board” and “may include, but is not limited to” seek to sanction future violations of the APA, since setting the requirements to validate a nominee’s eligibility or a member’s eligibility to nominate, the number of signatures required to run for office, and delineating what part of a Social Security number will be required on petitions are all clearly regulations.

For example, if the Board decides to require the last 6 digits of the Social Security number for petitions, it is setting a “standard of general application” that applies to the whole class of CalPERS members eligible to sign such petitions. Second, the rule implements, interprets or makes specific the law administered by CalPERS, since requiring the last 6 digits is not something specified in law. Third, pursuant to Government Code section 11346, the procedures established in the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” The proposed

amendments are not rules relating only to “internal management,” as that term is used in Government Code section 11340.9, subdivision (d), since neither nominees nor members are part of “internal management.” Additionally, in the words of *Poschman v. Dumke*, these are matters of “serious consequence involving an important public interest,” since the Board’s actions impact all Californian’s, as well as people throughout the world. CalPERS cites no exception to the need to meet APA requirements and none apply.

3. Partial Social Security Number

Section 554.3, subdivisions (b) and (c) are unclear with reference to the term “partial Social Security number.” The August 1, 2007 version of AB 1168, for example, defines “truncated social security number” to mean a social security number that displays only the last four digits of the number. No such clear definition is included in the proposed CalPERS rules. Again, the proposed CalPERS rules have apparently been left ambiguous in anticipation of future underground regulations to be promulgated, without complying with the APA, “at a noticed public meeting of the Board.” “Partial Social Security number” fails to meet the clarity standards of CCR, title 1, section 16. On its face, it can reasonably be interpreted to have more than one meaning (from 1 digit to 8 digits). In conclusion, the term has no clear meaning to those “directly affected” by the rule.

These provisions also fail the “necessity” standard of Title 1, section 10, since the Initial Statement of Reasons contains no substantial evidence as to why six Social Security number digits are needed to validate eligibility instead of four or any of a number of other options.

CalPERS’ Exhibit B, which is implied by the Notice to be incorporated by reference – although the text fails to do so, requires nominees and members to list the last six “positions” of their social security number, by which CalPERS appears to mean the last six digits. To add to the confusion, the Initial Statement of Reasons terms the forms incorporated by reference “sample forms.” It is, therefore, unclear if these are the “real” forms or if they are included simply to give a “flavor” of what they Board may promulgated “at a noticed public meeting of the Board.”

CalPERS staff analysis, dated May 16, 2006 (Attachment 2) asks, “Is there an alternative method for verifying system membership, for purposes of candidate endorsement, than using the last six digits of the individual’s Social Security number?” (page 5) Out of a sample of 364, 304 could be verified using six digits, whereas only 200 could be verified using three digits. The staff report also says using the six SSN digits “provides the best opportunity to validate CalPERS membership without breaching the confidentiality of the member’s identity” and recommends the “Board should continue to use last name and six digits of the SSN for purposes of validation of CalPERS membership.”

However, as I testified to the Benefits and Program Administration Committee on May 16, 2007 ([Attachment 3](#)), using the last 6 digits does breach confidentiality, since the first digits are assigned based on the region in which you apply for an SSN. Up until 1972, the first three digits were assigned based on the local Social Security office. After 1972 they were assigned based on zip code. (See <http://www.ssa.gov/history/ssn/geocard.html>, Attachment 4) If you know, or can guess, where a person lived when they registered and you have access to the last six digits, you know their entire number.

A recent Federal Trade Commission survey reported that between 1998 and 2003, 27.3 million Americans were victims of identity theft. A report by CALPIRG and the Privacy Rights Clearinghouse (<http://www.pirg.org/consumer/credit/theft.htm>, Attachment 5) finds the average consumer spends 175 hours and \$808 “out-of-pocket” to remedy identity theft. Many cases run considerably higher. Total costs to society are \$50 billion annually.

The Constitution provides the Board of Administration with sole fiduciary duty over the system. “Participants and their beneficiaries shall take precedence over any other duty.” Yet, in this rulemaking the Board places more importance on having to collect a few less signatures than it does on protecting the financial solvency of its members from identity theft. Even this sad logic is not included in the Initial Statement of Reasons, which fails the necessity test. Please urge the Board not to breach their fiduciary duty to members. Require the last four digits of the SSN, not up to eight as proposed.

4. Number of Petition Signatures Required

Section 554.3, subdivision (d) is unclear with reference to how many signatures shall be required on nomination petitions. Again, the proposed CalPERS rules have apparently been left ambiguous in anticipation of future underground regulations to be promulgated without complying with the APA, “at a noticed public meeting of the Board.” At that meeting the Board must “consider the goals of ensuring candidates have a minimum level of support and providing members and retirees access to candidacy.” While the Initial Statement of Reasons provides some elaboration, stating that 96 candidates is unmanageable, it offers no real clarity as to how the number of signatures is to be determined.

The clarity standards of Title 1, section 16, require that terms used in the regulations should be meaningful to those “directly affected” by the rule. It is highly unlikely that any two people reading this provision requiring specified considerations would arrive at the same number of required signatures. The provision has no real meaning, since one person could be interpreted as lending a “minimal level of support” and a requirement of one signature would certainly provide “members and retirees access to candidacy.” The only provision needed

it also the only one contemplated that meets the clarity standard – 250 “valid” signatures. Adding the word “valid” would clarify that signatures that can’t be validated don’t count.

These provisions also fail the “necessity” standard of title 1, section 10, since the Initial Statement of Reasons contains no substantial evidence as to why the same number of signatures cannot be applied to all Board elections. In fact, since 1993 every Board election has required 250 signatures and that number has not varied based on the type of election.

It is highly unlikely that CalPERS will ever again see anything like 96 candidates in one election because candidates are now required to comply with the Political Reform Act (at Government Code section 81000 et seq.) and to file campaign statements of contributions and expenditures, among other things. CalPERS offers no substantial evidence or even speculation as to the necessity of why more than 250 signatures would ever be needed to ensure a minimum level of support and provide access to candidacy.

California Code of Regulations, title 2, sections 554.3, should be amended to:

1. Allow CalPERS to change forms in the future without going through the rulemaking process.
2. Delete provisions, which appear to assert that CalPERS has the authority to amend its regulations at any “noticed public meeting of the Board.”
3. Clarify what part of the Social Security number is required for verification of nominee and member eligibility for nomination and to sign nomination petitions.
4. Clarify how many validated signatures are required to meet the requirements for nomination.

The CalPERS Board of Administration has authority to make these amendments under Government Code section 20096. Presented in [Attachment 1](#) are our suggested changes. Thank you for your consideration. Please contact me at (916) 869-2402 with any questions you may have concerning these comments or the suggested changes.

Sincerely,

James McRitchie

Attachments