

DRAFT
PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: Alleged Underground Regulation
FROM: James McRitchie (Petitioner)
DATE: _____

Use of this form is entirely optional. It requests the information required by Title 1, California Code of Regulations, section 260, for a petition challenging an alleged underground regulation. Although you are not required to use this specific form, the mandatory information required by 1 CCR 260, including the supporting documentation, must be included somehow in your petition. If you create a separate petition, or if you use this form and need to add extra pages, be sure that each page is labeled clearly.

1. Identifying Information:

Your name: James McRitchie
Your address: 9295 Yorkship Court, Elk Grove, CA 95758
Your telephone number (if you have one): (916) 869-2402
Your email (if you have one): jm@perswatch.net

2. State agency or department being challenged: California Public Employees Retirement System (CalPERS)

3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

“Procedures for Becoming a Candidate” and the “Election Schedule,” both contained in the “Notice of Election” found at <http://www.calpers.ca.gov/eip-docs/about/organization/board/2006-elections/bd-election-staterrev.pdf>

Additionally, CalPERS requires the use of specific named forms, which have not been promulgated as regulations, such as the Nomination Petition form (CalPERS-BRD-74). According to the Notice of Election, “Only Nominations Petitions which are supplied by CalPERS or copies of that form will be acceptable.” Other required forms, which have not been promulgated as regulations, include the Nomination Acceptance/Ballot Designation Form, Candidate Statement Form, and Addendum to Candidate Statement.

- The election schedule of CalPERS is not published in regulations and is subject to change without notice. In fact, CalPERS actually pushed the final cut-off for voting back during the 2002 elections after one candidate (David Miller) had used up their campaign resources. I have no evidence this was done with any malicious intent toward Mr. Miller. However, without the schedule being in regulations, it is certainly open to abuse.
- Although California Code of Regulations, title 2, section 554.2 specifies that the Election Coordinator shall distribute a Notice of Election “containing candidate nomination and election procedures, eligibility criteria for candidates and voters,

and the schedule of events," no information concerning these procedures, criteria or schedule is included in that section or anywhere else in title 2.

- Underground regulations include the following:
 1. First name, middle initial, last name; the last name will be used to verify membership against CalPERS' database;
 2. Last six numbers of the Social Security Number which will be used to verify membership against CalPERS' database;
 3. Agency where currently employed;
 4. Address, telephone number, e-mail address and fax number;
 5. Signature of Nominee consenting to nomination.
 6. The Petition must contain original signatures, endorsed the Nominee: by at least two hundred and fifty (250) eligible active State members of CalPERS which includes:
 7. Clearly printed or typewritten name of each member; the last name will be used to verify membership against CalPERS' database;
 8. Clearly printed last six numbers of the Social Security Number which will be used to verify membership against CalPERS' database; and,
 9. Signature of each member beneath the printed or typewritten name, endorsing the Nominee.
 10. The Nomination Acceptance/Ballot Designation and Candidate Statement forms will be provided to the Nominee with the Nomination Petition when requested by phone or correspondence through the Board Elections Office, or, the forms are available on CalPERS' web site at www.calpers.ca.gov. The Nominee will be notified by phone as to whether or not the eligibility and nomination petition requirements have been met.
 11. Nomination Acceptance/Ballot Designation Form—Each candidate must certify on a form provided by CalPERS that he/she accepts the nomination and consents to serve if elected by a majority vote, 50 percent of votes cast plus one vote.
 12. Candidates must return the original Nomination Acceptance/Ballot Designation Form, which must be received at the CalPERS headquarters office in Sacramento no later than the April 10, 2006, 5:00 p.m. deadline.
 13. A candidate who decides to withdraw candidacy after submitting his/her certified Nomination Acceptance/Ballot Designation Form must notify the CalPERS Election Coordinator by phone and follow-up in writing within five (5) working days following the nomination acceptance deadline date in order to have his/her name removed from the ballot and Candidate Statement Booklet.
 14. The Candidate Statement Form is to be submitted with the Nomination Acceptance/Ballot Designation Form, which must be received at the CalPERS headquarters office in Sacramento no later than the April 10, 2006, 5:00 p.m. deadline.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

CalPERS utilizes the regulations contained in the Notice of Elections to supplement regulations contained in California Code of Regulations, title 2, sections 554 through 554.10. CalPERS is following the above procedures in the current CalPERS elections and at least somewhat similar procedures over the last several election cycles. The instructions were distributed to candidates and are available to the public on the Internet at <http://www.calpers.ca.gov/eip-docs/about/organization/board/2006-elections/bd-election-staterev.pdf>

These regulations are underground regulations, as that term is defined in California Code of Regulations, title 1, section 250, since these instructions governing CalPERS procedures and their applicability to candidates to office constitute standards of general application that are regulations as defined in Section 11342.600 of the Government Code, but have not been adopted as regulations and filed with the Secretary of State pursuant to the APA and are not subject to an express statutory exemption from adoption pursuant to the APA.

The procedures outlined above are clearly labeled by CalPERS as "Nomination Petition *Requirements*." (Emphasis added)

Each potential candidate *must* submit a Nomination Petition form...
Petitions containing original signature *must* be received...
nomination period for the position *shall* be extended... (Emphasis added)

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code AND that no express statutory exemption to the requirements of the APA is applicable.

Government Code section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures. (Emphasis added)

CalPERS is a state agency as defined by Government Code section 11000, which states in part, "state agency" includes every state office, officer, department, division, bureau, *board*, and commission.
(Emphasis added)

CalPERS is in the executive branch of state government. Thus, APA rulemaking requirements generally apply to the Board, except to the extent it has been expressly exempted from the APA. No specific exemption has been enacted. Therefore, the APA is generally applicable to the Board. Its codified regulations are printed in California Code of Regulations, title 2, division 1, chapter 2, sections 550 to 599.55.

In *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)*(1993), the court made clear OAL must focus on the content of the challenged agency rule, not the label placed on the rule by the agency.

"...the...Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it....*" (Emphasis added)

In the past CalPERS has asserted its unique status exempts it from the APA by virtue of passage of Proposition 162, which amended Article 16, section 17 of the Constitution. That assertion was found invalid by OAL in their response to my March 23, 1998 request (1999 OAL Determination No. 18) as well as by the courts in *Kathleen Connell for Controller v. CalPERS* (September 28, 1998).

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

CalPERS Board members are statewide office holders, governed by the Fair Political Practices Commission, having enormous potential impact not only on the internal operations of CalPERS but on all citizens of California. For example, if the Board of Administration fails to make investments that adequately cover legally obligated benefits, taxpayers must make up the difference.

Additionally, with a portfolio of more than \$200 billion, the CalPERS Board has fiduciary responsibility for approximately 1/2% of all US corporate equity, including the responsibility to vote proxies appurtenant to those shares of stock solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries. CalPERS elections have considerable public importance, not only to CalPERS employees and members but also to California taxpayers and everyone impacted by the thousands of corporations in which CalPERS is invested.

In 2003, for example, CalPERS joined with other funds in placing an ad in the Wall Street Journal to support shareholder access to the corporate proxy for the purpose of electing shareholder nominees. Included in the ad was the following sentence: "When boards control their own membership, directors can be unaccountable and inattentive - opening the door to abusive executive compensation, fraud and other misconduct...Investors deserve a true voice in director elections." (see <http://www.calpers-governance.org/news/2003/news092503.asp>) It is, therefore, important that CalPERS elections be conducted fairly with utmost integrity, in compliance with all California laws.

More specifically to the underground regulations in question:

- The nomination petition requirements open CalPERS members up to potential identity theft, since petitions, which are frequently openly passed from person to person or are even posted on bulletin boards, require petitioners to include the last six numbers of their Social Security Number. All one needs to do to complete the entire Social Security Number is to learn or even guess where the individual lived when he/she registered for Social Security, since those first three numbers are based on the geographic residence of the applicant.

During my own recent experience in collecting nomination petition signatures, many signers, especially those in the Attorney General's Office, were reluctant to include the required Social Security identification. This was most often the case among employees who must deal with confidential information, such as a legal counsel and those who work in human resources offices.

According to the Social Security Administration, "Identity theft is one of the fastest growing crimes in America. When a dishonest person has your Social Security number, the thief can use it to get other personal information about you. Most of the time identity thieves use your number and your good credit to apply for more credit in your name. Then, they use the credit cards and do not pay the bills. You do not find out that someone is using your number until you are turned down for credit, or you begin to get calls from unknown creditors demanding payment for items you never bought. Someone illegally using your Social Security number and assuming your identity can cause a lot of problems."

If CalPERS had gone through the required APA process, I have no doubt they would have received numerous comments from members objecting to the careless and unnecessary use of their Social Security Numbers, as is currently required by underground regulations.

The following summarizes my testimony at the May 16, 2006 meeting of the Benefits & Program Administration Committee on Agenda Item 11, A. 5. d. "Is there an alternative method of verifying membership than last six digits of SSN? Staff report says using the last 6 SSN digits provides the best opportunity to validate membership "without breaching the confidentiality of the member's identity."" The present method using member's first and last name and six digits of the SSN provides the best opportunity to validate CalPERS membership *without* breaching the confidentiality of the member's identity." (my emphasis)

1. 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. (was local office, after 1972 based on zip code) 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>) finds the average consumer spends 175 hours and \$808 "out-of-pocket" to remedy identity theft. Total costs to society are \$50 billion annually.

2. The requirement that nomination petitions include SSN is an underground regulation. "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (Government Code section 11342.600) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a "regulation" under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. (Government Code section 11340.5(a)) CalPERS is not exempt. (1999 OAL Determination No. 18, initiated by J. McRitchie)
 3. Your duty as board members isn't to make it easy for candidates. Your Constitutional duty to "participants and their beneficiaries shall take precedence over any other duty." Collecting an extra 100-200 signatures isn't that big of a deal compared to putting members at risk for identity theft. Perhaps date of birth and zip code would be a better means of verification.
- Additionally, the current underground regulations 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 Administrative Procedure Act (APA), or review by the Office of Administrative Law (OAL). As noted above, CalPERS actually pushed the final cut-off for voting back during the 2002 elections after one candidate (David Miller) had used up their campaign resources. I have no evidence this was done with any malicious intent toward Mr. Miller. However, without the schedule being in regulations, it is certainly open to abuse.

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Name: Fred Buenrostro, CEO

Agency: California Public Employees Retirement System (CalPERS)

Address: P.O. Box 942707, Sacramento, CA 94229-2707

Telephone number: 916-795-3952

I certify that all of the above information is true and correct to the best of my knowledge.

Signature of Petitioner Date

Additional information, including OAL's recommendations for submitting a petition, may be found on the OAL web site at www.oal.ca.gov.

If you have additional questions, contact the OAL Reference Attorney by calling (916) 323-6815, or by sending an e-mail message to staff@oal.ca.gov.

Deliver this petition, along with all supporting information, to:

Office of Administrative Law

300 Capitol Mall, Suite 1250

Sacramento, CA 95814

Attention: Chapter 2 Compliance Unit

OAL will only accept petitions and accompanying documentation delivered in hard copy, either through the mail, or by hand delivery in person or by a commercial delivery service (FedEx, UPS, etc). We do not accept petitions via e-mail or fax.

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