



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

March 16, 2000

Kayla J. Gillan
General Counsel
California Public Employees' Retirement System
400 P Street, Suite 3340
Sacramento, California 95814

**Re: Your Request for Advice
Our File No. A-00-033**

Dear Ms. Gillan:

This letter is in response to your request for advice on behalf of the California Public Employees' Retirement System ("CalPERS") regarding the Political Reform Act (the "Act")¹ as amended by Senate Bill 1753 (Stats. 1998, ch. 923).

QUESTIONS

1. Do the campaign requirements in Chapter 4, Article 1 (Sections 84100-84105) apply to candidates for the CalPERS board?
2. If so, do the contributions received before the effective date of SB 1753 trigger a duty to comply with Sections 84100 and 84101? Do the contributions received before the adoption of Regulations 18451 and 18452 trigger a duty to comply with Sections 84100 and 84101?
3. When must a current elected board member² file a statement of intention to be a candidate (Form 501)?
4. When must a current elected board member open a campaign bank account?

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

² As used here, "elected board member" refers to the six members of the CalPERS board who are elected to the board. It does not refer to the State Treasurer, the State Controller, or any other member of the board who holds elective office separate from the board since SB 1753 did not change their duties under the Act.

5. Do the campaign restrictions in Chapter 4, Article 3 (Sections 84300-84307, excluding Section 84308) apply to candidates for the CalPERS board?
6. Does the inter-candidate transfer ban in Section 85304 apply to candidates for the CalPERS board?
7. Are the contributions received in a CalPERS election subject to the contribution restrictions in Section 84308?
8. Does the special election contribution limit in Section 85305 apply to candidates in a CalPERS election held outside the normal election cycle?
9. Are the elected board members of CalPERS subject to the revolving door laws in Section 87406(c)?
10. Are the elected board members of CalPERS subject to the prohibition on mass mailing at public expense in Section 89001?
11. If so, may CalPERS distribute a group photo that includes every CalPERS board member under the roster listing exception of Regulation 18901(b)(1) or (b)(8)?
12. When does the Act require an elected board member of CalPERS to file his or her annual statement of economic interest (Form 700)?

CONCLUSIONS

1. Yes. As “candidates” defined in Section 82007, CalPERS candidates must comply with the campaign requirements in Chapter 4, Article 1 (Sections 84100-84105).
2. Contributions made or received before January 1, 1999, to influence a CalPERS election do not count toward qualifying a CalPERS candidate as a committee. However, if a CalPERS candidate received contributions of \$1,000 or more after that date, the candidate must have a treasurer, and file a statement of organization within 10 days of qualifying as a committee.
3. A current elected board member must file a Form 501 if the member intends to run in the next election. The member must file this form before soliciting or accepting any contributions, or making any expenditures from personal funds on behalf of his or her candidacy.
4. A current elected board member must open a campaign bank account after he or she files a Form 501 and before making any expenditures.

5. Yes. As “candidates” defined in Section 82007, CalPERS candidates must comply with Sections 84300-84307.

6. The inter-candidate transfer ban does not apply to CalPERS candidates, unless the CalPERS board has imposed valid contribution limits applicable to CalPERS elections.

7. No. Contributions made or received to influence a CalPERS election are not subject to the contribution restrictions in Section 84308 since they are not “contributions” as defined by Section 84308(a)(6).

8. No. The special election contribution limits do not apply to CalPERS elections held outside the normal election cycle.

9. Yes. As “elected state officers,” the six elected members of the CalPERS board are subject to Section 87406(c).

10. Yes. As “elected officers,” the mass mailing prohibition in Section 89001 applies to the six elected members of the CalPERS board.

11. No. The roster listing exception does not apply to photographs.

12. An elected board member must file his or her Form 700 by April 1 each year.

FACTS

CalPERS administers the public retirement system for California’s state employees, classified school employees, and employees of public agencies that elect to contract with CalPERS. In this capacity, CalPERS holds in trust and is responsible for the investment of approximately \$140 billion. The CalPERS’ Board of Administration invests the bulk of these funds in the public markets; it also invests some of these funds in private equity and real estate.

By statute, the CalPERS board consists of thirteen members. Of these, six are elected from the membership under the board’s supervision. (Section 20100(g).) Of the remaining seven board members, two, the State Treasurer and the State Controller, hold office by virtue of holding statewide elected office. (Section 20100(c) and (d).) The rest of the board members hold office by appointment. (Section 20100(a), (b), (e), and (f).)

The six elected CalPERS board members are elected by the following constituencies: (1) two are elected by members of the system (i.e., elected by all active and retired CalPERS members, or “members at large”); (2) one is elected by active state members; (3) one is elected by active school members; (4) one is elected by active local (except school) members; and (5) one is elected by retired members. (Section 20100(g).)

Board members are elected for four-year terms. These terms are staggered. In the first year of the cycle, CalPERS holds an election for the three seats representing active state, school, and local members. In the second year, CalPERS holds an election for the retiree representative. There is no election in the third year, and, in the fourth year, CalPERS holds an election for the two member-at-large positions. If a seat becomes vacant during a term, CalPERS conducts a special election. Before SB 1753, CalPERS developed all of its own election procedures and policies.

ANALYSIS

Campaign Reporting Provisions and Related Restrictions

Under the Act, candidates are subject to several rules. For example, they must file a statement of intention to be a candidate, and maintain a separate campaign bank account for each office to which they seek election. (Sections 85200, 85201.) In addition, they must file various campaign-related reports concerning the monetary activities of their committees. (See e.g., Sections 84100-84105, 84225.) Finally, they must comply with laws that restrict the handling and receipt of contributions, the making of expenditures, and the distribution of campaign literature. (Sections 84300-84309.)

Before 1999, candidates in CalPERS elections were not subject to the Act's provisions regulating election campaigns. (See *Koppes* Advice Letter, No. A-94-121.)³ However, in 1998, the Legislature passed SB 1753 that, among other things, amended the Act to require candidates for the CalPERS board to file campaign statements with the Secretary of State. (Stats. 1998, ch. 923.) Therefore, like other candidates for elective office, candidates for the CalPERS board are now required to report the monetary activities of their campaign committees. (Section 84225.) CalPERS candidates, however, are not subject to the same disclosure rules as other candidates.

Section 84225, which imposes the new reporting requirements on CalPERS candidates, exempts these candidates from Chapter 4, Article 2 of the Act (Sections 84200-84216.5). (Section 84225(b).) Along with other parts of the Act, Chapter 4, Article 2 sets forth campaign disclosure requirements applicable to all candidates. The disclosure obligations that apply only to CalPERS candidates are set forth in Regulations 18451 and 18452. Regulations 18451 and 18452 impose limited reporting requirements relative to other candidates.⁴

³ The *Koppes* Advice Letter, No. A-94-121 is hereby superseded in its entirety since an intervening change in law has rendered its advice inapplicable.

⁴ Under these regulations, CalPERS candidates must file two semi-annual statements disclosing only the information specified in the regulation.

In addition to adding Section 84225 to the Act, SB 1753 amended the Act's definitions of "elective office" and "elective state office" to include elected CalPERS members. (Sections 82023, 82024.) Your questions concern the consequences of including elected CalPERS members in the Act's definitions of "elective office" and "elective state office." The legislative history of SB 1753 does not reveal the legislative intent behind amending these definitions.⁵ In addition, at a public meeting in October 1999, the Commission declined to narrowly interpret SB 1753 by rejecting proposed Regulation 18450.⁶ The proposed regulation would have provided that the elected members of CalPERS hold an "elective office" and an "elective state office" solely for purposes of Section 84225.

Therefore, under a plain reading of the two statutes, the six elected members of the CalPERS board are subject to all of the Act's statutes using the terms "elective office" or "elective state office," except Chapter 4, Article 2 as described in Section 84225(b).

The first consequence of the new law concerns the Act's definition of "candidate." Section 82007 defines a "candidate" as "an individual who is listed on the ballot for election to any *elective office*." (Emphasis added.) Thus, we conclude that anyone listed as a candidate on a CalPERS ballot is a "candidate" for purposes of the Act, except as limited by Section 84225(b) and Regulations 18451 and 18452.

Section 82007 also defines "candidate" to include anyone who receives a contribution or makes an expenditure "with a view to bringing about his or her nomination or election to any *elective office*." (Emphasis added.) Under this second definition, an individual who *intends* to become a candidate will be considered one if he or she receives a contribution or makes an expenditure. This is true even if the individual has not announced his or her candidacy. (*Id.*) Accordingly, anyone who intends to run for the CalPERS board will be considered a "candidate" when he or she receives a contribution or makes a campaign expenditure.⁷

In general, a "contribution" is a payment made to a "candidate" for the purpose of influencing the election of the candidate, including a candidate's use of personal funds. (Section 82015; Regulation 18215.) In addition, a payment made by a candidate to influence the election of the candidate is an "expenditure." (Section 82025; Regulation 18225.) Since we have

⁵ See Senate Rules Committee, Unfinished Business, Analysis of SB 1753 (August 13, 1998) (stating that SB 1753 "includes members elected to the governing board of CalPERS in the definition of 'elective office' and 'elective state office' for purposes of the Political Reform Act," but providing no other information).

⁶ The FPPC's expertise of the Act is entitled to great weight unless clearly erroneous or unauthorized. (*People v. Snyder* (2000) 92 Cal.Rptr.2d 734, 737.)

⁷ Regulation 18451 defines "candidate" as an individual who qualifies for or accepts nomination pursuant to CalPERS Regulation 554.3 for an election conducted under Section 20096, which regulates CalPERS elections. By the express terms of Regulation 18451, this definition only applies to Section 84225 and Regulation 18452.

concluded that candidates for the CalPERS board are “candidates” as defined in Section 82007, the payments they receive and spend for the election are “contributions” and “expenditures” for purposes of the Act, except as limited by Section 84225(b).

Question 1 - Chapter 4, Article 1

You have asked whether candidates for the CalPERS board are subject to the campaign requirements in Chapter 4, Article 1 (Sections 84100-84105) of the Act.

Section 84100 requires every “committee” to have a treasurer, who must verify and sign the committee’s campaign statements. In addition, Sections 84101-84103 require recipient committees to file a statement of organization (Form 410) with the Secretary of State within 10 days after it has qualified as a committee. A candidate who receives contributions of \$1,000 or more in a calendar year qualifies as a recipient committee. (Section 82013(a).) As “candidates” defined by Section 82007, candidates for the CalPERS board are subject to Sections 84100-84103 if they receive contributions of \$1,000 or more in a calendar year.

Section 84104 requires candidates to maintain records that are necessary to comply with the Act. In addition, Section 84105 requires candidates and committees who have received \$5,000 or more from a contributor to notify the contributor that he or she may be required to file as a major donor committee. (See Section 82013(c).) Sections 84104 and 84105 apply to all “candidates.” Since candidates for the CalPERS board are “candidates” for purposes of the Act, they are subject to these provisions.

Question 2 - Sections 84100 and 84101

Section 84100 requires a CalPERS candidate to have a treasurer once the candidate qualifies as a committee. Under Section 84100, a candidate may serve as a treasurer. In addition, Section 84101 requires the candidate to file a statement of organization within 10 days after the candidate qualifies as a committee. A candidate qualifies as a committee if he or she receives contributions of \$1,000 or more in a calendar year. (Section 82013(a).)

You would like to know whether a contribution made to influence a CalPERS election triggers a CalPERS candidate’s duty to comply with Sections 84100 and 84101 if it was received before January 1, 1999, the effective date of SB 1753.⁸ Since the Act did not regulate these payments before that date, they do not trigger a duty to comply with Sections 84100 and 84101.

⁸ You have also asked about contributions made after the new law took effect, but before the Commission considered adopting a narrowing regulation. Any activity in relation to these payments is past conduct. The Commission does not provide advice regarding past conduct. (Regulation 18329.) Moreover, the Commission is not authorized to waive a statute. (*Caminetti v. State Mut. Life Ins. Co.* (1942) 52 Cal.App.2d 321, 325.) Therefore, whether a CalPERS candidate should have complied with the Act during that time is not a matter we can address.

However, any contributions received by a CalPERS candidate after January 1, 1999, do count toward qualifying the candidate as a committee. Therefore, current board members who intend to run in the next election must file a statement of organization within 10 days after receiving qualifying contributions totaling \$1,000 or more.

Question 3 - Section 85200

Section 85200 requires an individual, who intends to be a "candidate for elective office," to file a Statement of Intention to be a Candidate (Form 501) with the Secretary of State. As prospective "candidates for elective office," current members of CalPERS who intend to run in the next election are subject to this requirement. (See Section 82007.) They must file the form after they decide to run for reelection, but before they solicit or receive any contributions, or make expenditures from personal funds on behalf of their candidacy.

Question 4 - Section 85201

Section 85201 requires an individual, who intends to be a "candidate for elective office," to establish a campaign bank account. As prospective "candidates for elective office," current members of CalPERS who intend to run in the next election are subject to this requirement. (See Section 82007.) To comply, the candidate must establish a campaign bank account after filing a statement of intention, but before making an expenditure. In addition, all monetary contributions or loans made to the candidate must be deposited in the account.⁹ (Section 85201(c).) Any personal funds that the candidate intends to use for his or her election must also be deposited in the campaign bank account prior to expenditure. (Section 85201(d).)

Section 85201, however, does not require a prospective candidate to open a campaign bank account if he or she only receives nonmonetary contributions. In addition, Section 85201 does not apply to candidates who will not receive contributions from others, and will make expenditures of personal funds of less than \$1,000. (Section 85201(g).)

Question 5 - Chapter 4, Article 3

You have also asked about Chapter 4, Article 3 (Sections 84300-84307, excluding Section 84308). These sections prohibit cash contributions of \$100 or more, anonymous contributions, money laundering, and the commingling of contributions with personal funds. (Sections 84300, 84301, 84304 and 84307.) In addition, contributors and intermediaries must disclose specified personal information when making a contribution, and an agent of a candidate

⁹ Before a CalPERS candidate can use pre-effective date contributions in a future election, he or she must first deposit them in their campaign bank account. For campaign reporting purposes, such payments will be considered a contribution from the candidate to his or her committee.

must promptly report any contribution made to the candidate. (Sections 84302 and 84306.) Since a “contribution” includes contributions made to influence a CalPERS election, these provisions apply to candidates for the CalPERS board who receive these contributions.

Section 84303 requires candidates and committees to report any expenditure made by an agent or independent contractor on behalf of the candidate or committee. Since an “expenditure” includes payments made to influence a CalPERS election, candidates for the CalPERS board must report these payments.

Finally, Section 84305 requires candidates to disclose specified information on campaign mailers. This sender identification requirement applies to “candidates ” as defined in Section 82007, and therefore applies to CalPERS candidates.

Question 6 - Section 85304

This question relates to the Act’s inter-candidate transfer ban. Section 85304 prohibits “candidates for elective office” from transferring funds to other candidates in special elections, and in elections subject to valid contribution limits.¹⁰ (*Larocque* Advice Letter, No. I-98-262.) As candidates for elective office, current members of CalPERS who plan to run in the next election are subject to Section 85304. (See Section 82007.) The inter-candidate transfer ban in Section 85304 does not apply in CalPERS elections unless the CalPERS board has established valid contribution limits.¹¹

Question 7 - Section 84308

Section 84308 prohibits board members from soliciting or receiving contributions from parties and participants in specified proceedings before the board. (Section 84308(b).) In addition, it requires board members to recuse themselves from participating in these proceedings if they have received contributions of more than \$250 from a party or participant within the 12 months before the decision. (Section 84308(c).) Lastly, it requires board members to disclose such contributions. (*Id.*)

You would like to know whether contributions to CalPERS members for election to the CalPERS board are “contributions” within the coverage of Section 84308. Section 84308 is a unique provision because it contains definitions that do not apply to any other statutes in the Act.

¹⁰ Proposition 208 repealed Section 85304. However, Section 85304 is operative while Proposition 208 is enjoined.

¹¹ In *Service Employees International Union v. Fair Political Practices Commission* (9th Cir. 1992) 955 F.2d 1312, cert. den. 505 U.S. 1230, the court struck down contribution limits based on a fiscal year cycle.

For example, Section 84308 has its own definition of “contribution.” Under Section 84308, a “contribution” is a “contribution to candidates and committees in federal, state, or local elections.” (Section 84308(a)(6).)

Unlike other provisions of the Act, Section 84308 does not apply to contributions received by “candidates for elective office.” Rather, the statute only applies to contributions received by candidates in “*federal, state, or local elections.*” (Section 84308(a)(6).) Section 82022 defines the term “election” as “*any primary, general, special or recall election held in this state.*” A CalPERS election is not an election as defined in Section 82022. Consequently, contributions made or received to influence a CalPERS election are not subject to Section 84308.

Question 8 - Section 85305

The contribution limit in Section 85305 only applies to “candidates who seek elective office during a special election, or a special runoff election.” (Section 85305(a).) While the elected members of CalPERS hold “elective office,” a CalPERS election is not an “election” under the Act, as discussed above. (Section 82022.) Therefore, a CalPERS election held outside CalPERS’ normal election cycle is not a “special election” or “special runoff election” for purposes of Section 85305. As such, candidates for CalPERS are not subject to this statute. Accordingly, contributions made and received to influence a CalPERS election are not subject to the contributions limits in Section 85305.

Other Provisions

Question 9 - Section 87406(c)

The Act places certain restrictions on the activities of certain state officials who are leaving state service. You have specifically requested advice regarding the one-year ban in Section 87406(c). Section 87406(c) prohibits former “elected state officers” from being paid to influence specified proceedings before any state administrative agency for one year. The term “elected state officer” means any person who holds “elective state office” or has been elected to an “elective state office.” (Section 82021.) Under SB 1753, the six elected members of the 13-member CalPERS board hold an “elective state office” by virtue of their position on the CalPERS board. (Section 82024.) Therefore, these six members are subject to the prohibition in Section 87406(c).

Question 10 - Section 89001

Section 89001 provides that “[n]o newsletter or other mass mailing shall be sent at public expense.” The purpose of this law is to ensure that incumbents do not receive an unfair advantage over challengers in the next election. (Section 81002(e).)

This prohibition applies to mass mailings that feature or make reference to an “elected officer” affiliated with the agency that produces or sends the mailing. (Regulation 18901(a)(2).) The term “elected officer” means any person who holds an “elective office” or has been elected to an “elective office” but has not yet taken office. (Section 82020.) Under SB 1753, the six elected members of the 13-member CalPERS board hold an “elective office” by virtue of their position on the CalPERS board. (Section 82023.) Therefore, any mass mailing that features or makes reference to these six members is subject to Section 89001.

Question 11

Since the elected board members of CalPERS are subject to the mass mailing prohibition, you would like to know whether, under the roster listing exception, CalPERS may distribute a group photo that includes every CalPERS board member .

Under Section 89001, a mass mailing may not be sent at public expense if all of the following four criteria are met, and an exception in Regulation 18901(b) does not apply:

1. The item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box; and the item is a tangible item, such as a videotape, record, or button, or a written document.
2. The item sent either: (1) includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer, or (2) features an elected officer affiliated with the agency which produces or sends the mailing.
3. Any of the costs of distribution are paid for with public moneys; or the costs of design, production, and printing exceeding \$50 are paid for with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted.
4. More than 200 substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request. (Regulation 18901(a).)

You have asked about the roster listing exception in subdivision (b) of Regulation 18901. Under the roster listing exception, a mass mailing that meets all of the requirements above is not prohibited if: (1) the elected officer’s name only appears in a roster listing containing the names of all of the elected officers of the agency, (2) the elected officer’s name appears in the same type size, typeface, type color, and location as the names of all of the elected officers of the agency, and (3) the mailing makes no other impermissible reference to the elected officer, including a photograph of the elected officer. (Regulation 18901(b)(1).)

The roster listing exception only applies to the name of the elected officer. Thus, you may not include a photograph of the elected officer in a mass mailing that meets the requirements in subdivision (a), unless another exception to the mass mailing prohibition applies.

Question 12 - Filing Deadlines for Statements of Economic Interests

Under the Act, public officials must disclose their economic interests each year on a statement of economic interests ("SEI" or "Form 700"). Section 87200 lists the public officials who must report all of their economic interests. (Chapter 7, Article 2.) These officials include, among others, "elected state officers," and "officials who manage public investments." All other officials must report only those economic interests described in their agency's conflict of interest code. (Chapter 7, Article 3.) Thus, those who file SEIs under the Act fall into two categories: Article 2 filers and Article 3 filers.

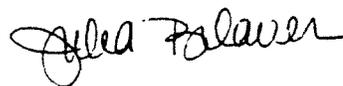
As "other public officials who manage public investments," all of the CalPERS board members were Article 2 filers before the passage of SB 1753. (*Koppes* Advice Letter, No. I-90-517.) In addition to "other public officials who manage public investments," Section 87200 lists "elected state officers." Under SB 1753, the six elected members of the CalPERS board are now elected state officers.

Section 87203 requires the Commission to specify the filing deadline for SEIs filed pursuant to Article 2. Regulation 18723 specifies these deadlines. Subdivision (b)(1) of the regulation lists the specific state officers who must file by March 1. Subdivision (b)(2) provides that local officers must file by April 1. Finally, subdivision (b)(3) provides that "other public officials who manage public investments" must file by April 1. The six elected members of the CalPERS board do not fit within any of these three subdivisions. They are not listed in subdivision (b)(1), and subdivision (b)(3) does not apply because they are no longer "other public officials who manage public investments." Nevertheless, until the Commission decides to amend Regulation 18723, we advise that the elected members of the CalPERS board must file their SEIs by April 1, which is the same deadline for all other members of the CalPERS board.

If you have other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: Julia Bilaver
Staff Counsel, Legal Division