

May 29, 2014

Gina M, Ratto  
Interim General Counsel  
California Public Employees' Retirement System  
PO Box 942707  
Sacramento, CA 94119-2707

**RE: Your Request for Informal Assistance  
Our File No. I-14-057**

Dear Ms. Ratto:

This letter responds to your request for advice on behalf of the California Public Employees' Retirement System ("CalPERS") regarding the reporting provisions of Regulation 18950.1 of the Political Reform Act (the "Act").<sup>1</sup> Because you are seeking general guidance, we are providing informal assistance.<sup>2</sup>

**FACTS**

CalPERS is a public pension fund responsible for managing approximately \$280 billion in assets on behalf of more than 1.6 million members. CalPERS contracts with a variety of third parties to enable CalPERS to prudently invest these assets and administer the system.

CalPERS seeks guidance about the newly adopted travel regulations found in Regulation 18950 et seq. Specifically, you have questions concerning CalPERS' reporting obligations, and the timing thereof, pursuant to Regulation 18950.1, subdivision (f). You have identified five examples where there is uncertainty about CalPERS' reporting obligations when receiving a payment for travel from a third party.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3).)

**(1) Reporting travel when reimbursement is received at a later date**

CalPERS commonly negotiates terms in its contracts with third parties that provide for reimbursement to CalPERS for the lodging, meals, and travel costs associated with CalPERS participation in the contract. The timing of travel expenses and reimbursement can occur at a variety of times.

Travel expenses are incurred in advance by both CalPERS and the official, and reimbursement is sought by the official from CalPERS and in turn by CalPERS from the third party. Airfare, for example, is generally paid for in advance by CalPERS, whereas the official might pay for the lodging at the time it is provided and later seek reimbursement from CalPERS. Meals are generally accepted by the official at the event. The third party, thereafter, would reimburse CalPERS for the cost of the airfare and lodging and provide the cost of any meals received in connection with the travel.

Occasionally, several weeks or months may elapse between the date CalPERS pays for this travel and the date the third party remits payment to reimburse CalPERS for the travel. Until such time as the reimbursement has been received and accepted by CalPERS, CalPERS questions if any “payment for travel” within the meaning of Regulation 18950 et seq. has occurred. In the event that a third party never reimburses CalPERS for such travel, you suggest that no payment will ever occur.

For purposes of reporting these payments for travel on the Form 801, CalPERS requests that it be provided the flexibility to report all of the payments for travel related to a particular instance of travel when the final reimbursement is received from the third party, even though some payments for travel may have occurred in an earlier quarter. For example, rather than reporting airfare, lodging and meals in the quarter in which they are incurred, CalPERS would like to report each together once the third party has reimbursed CalPERS for the full cost of payments for travel. You suggest that this will not only ease the administrative burden on CalPERS staff, but “would also ensure the information disclosed on the Form 801 is more meaningful to the public, as the proposed disclosure would encompass all related portions of the instance of travel as opposed to isolated snapshots of the travel that would require the comparison of multiple Form 801 reports.”

**(2) Trips that begin in one quarter and end in the next quarter**

Related to the previous example, CalPERS staff at time begins travel at or near the end of a quarter and do not complete the travel until the next quarter. Assuming that the travel is reportable on the Form 801; may CalPERS report the travel in either quarter?

**(3) Aggregating and reporting “other” payments for travel**

The Form 801 places payments for travel into several different categories, such as “Rail, Air, Bus, Auto, or Other.” The instructions on the Form 801 note that payments for taxi rides, gratuities, and rental cars should be totaled and place in the “other” field, along with a description

of these payments in the comments section. Regarding the accompanying comments, is it sufficient to describe the specific type of payment or does each individual business need to be identified? For example, would it be sufficient to disclose the primary mode of transportation (e.g. air travel provided by United Airlines) and separately note in the comments that the “other” payments included a taxi ride, subway ride, rail ride, and rental car, or would CalPERS need to list, for example a “taxi ride from Sunshine Taxi Company, subway tickets on the Chicago Transit Authority, rail tickets on the Hogwarts Express, or a rental car from Lemon Rental Car?”

#### **(4) Membership Fees**

CalPERS occasionally pays a membership fee to belong to a non-profit organization that furthers the interests of the institutional investor community, such as the Council of Institutional Investors. Part of this membership payment includes the option to send CalPERS Representatives to meetings and conferences held by these organizations and to receive related meals. Gaining access to these meetings and conferences is a significant factor in CalPERS’ decision to pay the membership fee.

You state that meals received in this manner could be considered payments for travel received pursuant to a contract, but that CalPERS does not believe that the Commission intended to capture these types of payments for reporting on the Form 801. CalPERS believes these payments for travel are more akin to the benefits associated with paying a fee to attend a conference (a typical conference fee often covers the educational benefits of the conference and related meals). CalPERS believes that travel expenses associated with a conference fee (for which CalPERS pays an admission fee) do not need to be reported on a Form 801, and for the same reason does not believe that travel expenses need to be reported on a Form 801 when the expenses are associated with meetings to conferences where CalPERS is a member of the organization hosting the event.

#### **(5) Over-reporting estimates**

As with any filing where there is uncertainty regarding the value of a payment, CalPERS’ staff will make a reasonable estimate of the value of the payments for travel provided by the third party and report that amount on Form 801. In many cases it is impossible to know the actual cost of a payment for travel (e.g., meal) unless and until the value is specifically reported to CalPERS. Additionally, the actual value of the payment for travel may not be known or provided to CalPERS until after that quarter’s Form 801 is due. In these situations, CalPERS proposes that it provide the estimate value on a Form 801 and that Cal PERS would only amend the Form 801 in the event that the actual value of the payment for travel expenses exceeded the estimate amount previously reported. If CalPERS is required to file an amended Form 801 to reflect the fact that the estimate exceeded the value of the payment for travel is there a threshold value (e.g. \$50) below which amendments would not be required in this situation?

## ANALYSIS & CONCLUSIONS

Section 82028(a) defines a gift as:

“Gift means, except as provided in subdivision (b),<sup>3</sup> any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”

Section 82030 defines income in part to include:

“a payment received, including ... any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness, or payment of indebtedness received by the file, reimbursement for expenses, per diem ...”

Section 87200 identifies certain officials, including “public officials who manage public investments.” Section 87203 requires “[e]very person who holds an office specified in Section 87200” to file annual statements (Form 700) disclosing his [or her] investments, his [or her] interests in real property and his [or her] income.” Income includes gifts.<sup>4</sup> Additionally, Section 87203 requires each agency to adopt a conflict of interest code that identifies all positions within the agency that engage in the making or participating in the making of governmental decisions and requires persons holding those positions to disclose, also on a Form 700, any interest in real property, investments, and income that may reasonably foreseeably be materially financially affected by any decisions in which the employee makes or participates. These employees, referred to as designated employees or code filers, are required to disclose gifts from sources as identified in the conflict of interest code while those positions identified in Section 87200, referred to as statutory filers, are required to disclose gifts from any source.

Last year, in an effort to provide some guidance as to what does, or more accurately does not constitute a personal benefit, the Commission adopted Regulation 18950 et seq. to identify certain payments made in the course of conducting agency business that are not reportable on an employee’s Form 700 when they meet certain specified qualifications and when the agency identifies these payments and reports them alternatively on a Form 801. As a result of the reporting of these payments on a Form 801, the employee is no longer required to report the payments as either gifts or income on

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<sup>3</sup> Additional exceptions to the definition of gift are provided in Regulation 18942.

<sup>4</sup> Section 82030.

his or her Form 700 when a third party pays for his or her travel expenses, including certain meals and lodging.<sup>5</sup>

(1) Your first issue questions whether, until such time as a reimbursement has been received by CalPERS from a third party as payment for a travel expense, any “payment for travel” within the meaning of Regulation 18950 et seq. has, in fact, occurred. Section 87103(c) and (e), which identifies, respectively, income and gift as financial interests includes “promised” income and gifts. Regulation 18941(b) states that “a gift is ‘promised’ on the date it is offered to the official provided he or she thereafter obtains actual possession of the gift or takes any action exercising discretion or control over the gift.” Promised income is, likewise, treated as received as of the date of the promise.

CalPERS would like to report all payments together once the third party has reimbursed CalPERS for the full cost of payments for travel. You suggest that this will not only ease the administrative burden on CalPERS staff, but “would also ensure the information disclosed on the Form 801 is more meaningful to the public, as the proposed disclosure would encompass all related portions of the instance of travel as opposed to isolated snapshots of the travel that would required the comparison of multiple Form 801 reports.

Regulation 18950.1(f) provides, with respect to the Form 801 reporting of these payments:

“...within 30 days after the end of a quarter year in which aggregated travel payment received by the governmental employer since the last required filing totaling \$2,500 or more, a copy of the form(s) or a summary of the information must be filed with the Commission...”

We agree that the intent of the regulation was to have all travel payments related to a particular trip reported together rather than in separate pieces. However, the regulation also intended for this reporting to occur as close as possible to the time the trip was made and not be postponed by delayed reimbursement of the travel expenses. Accordingly, because promised payments are treated as received when the promise is made, once the travel has taken place, the payment should be reported within 30 days after the close of the quarter in which the travel took place, even if the payment was promised in a previous quarter or year or actually received in a later quarter.

In the event that a third party never reimburses CalPERS for such travel, you suggest that no payment will ever occur. In that case, once CalPERS has determined to abandon any efforts to recoup the payment, it may file an amended form indicating that the payment was never received.

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<sup>5</sup> Please note, that when necessary travel payments are provided pursuant to an arms length contractual agreement between CalPERS and the providing party, equal consideration has been provided and no reporting obligation, on the part of CalPERS or the employee, is necessary.

(2) Next, you ask for travel that begins in one quarter and is completed in another, may CalPERS report payments on the Form 801 either within 30 days after the quarter in which the travel began or within 30 days of the quarter in which it ended? Regulation 18950.1 (f) states that the payment is to be reported;

“ . . . within 30 days after the end of a quarter year in which aggregated travel payment received by the governmental employer since the last required filing total \$2,500 or more . . . .”

For purposes of complying with subdivision (f) above, the payments reported may be considered received in either the quarter the travel began or in the quarter the travel ended so long as all similar agency travel is treated in the same manner so as not to avoid the \$2,500 reporting threshold.

(3) Your third question is in reference to the comments section of the Form 801 where additional travel is to be identified. You ask if it is sufficient to describe the specific type of payment or does each individual business need to be identified? Regulation 18950.1(f) requires travel payments to be reported on a Commission form. Paragraph (f)(2) states that the payment identify “[t]he name of the transportation provider, the type of transportation, and the name of the business where the lodging was provided.”

The intent of the regulation was to identify the major portions of the travel, such as the air fare and lodging. It was not intended to identify each cab company or local means of transportation use during the stay. For those purposes, a general description of the travel is sufficient, such as rental care, limousine service, miscellaneous cab fare, or public transit fees. You do not need to identify the cab company rental car company, or any public transportation provider. If the transportation, however, is provided by other than a commercial transportation provider, you would need to identify the individual or entity providing the transportation.

(4) Your next question concerns benefits received from membership fees. You have indicated that CalPERS occasionally pays a membership fee to belong to organizations that further the interests of the institutional investor community. Part of this membership payment includes “the option to send CalPERS Representatives to meetings and conferences held by these organizations and to receive related meals.” You state that meals received in this manner “could be considered payments for travel received pursuant to a contact.” However, CalPERS does not believe that the Commission intended to capture these types of payments for reporting on the Form 801. CalPERS believes these payments for travel are more akin to the benefits associated with paying a fee to attend a conference (a typical conference fee often covers the educational benefits of the conference and related meals).

If the meals at these meetings are included as part of the membership fee as you have indicated and, assuming the membership fee is not discounted for CalPERS, they are not payments for travel because CalPERS has provided consideration-- the full membership fee -- for everything that is included in the membership. Gifts do not include something for which you

have provided equal consideration. If the meals are not included with the membership, but are purchased separately by a third party, then they would be considered a payment for travel.<sup>6</sup>

(5) Finally, your last question concerns estimating values. You state that in “many cases it is impossible to know the actual cost of a payment for travel (e.g., meal) unless and until the value is specifically reported to CalPERS.” Accordingly, you propose that CalPERS provide the estimated value on a Form 801 and that CalPERS would only amend the Form 801 in the event that the actual value of the payment for travel expenses exceeded the estimate amount previously reported. You then ask, if CalPERS is required to file an amended Form 801 to reflect the fact that the estimate exceeded the value of the payment for travel, is there a threshold value (e.g. \$50) below which amendments would not be required in this situation?

First, we would like to point out that public officials holding certain positions have had the responsibility of tracking and, in some cases, reporting the value of meals (as well as other gifts) they have received since the inception of the Act. While it may be impossible for CalPERS to know the exact cost of a payment for travel, it is certainly reasonable to expect that a good faith estimate be made in reporting the cost. This method would subject CalPERS to the same obligation that the individual employee would otherwise be held to when the payment would have to be reported on that employee’s Form 700. The reporting on the Form 801 is in lieu of reporting the payment on the Form 700.

That being said, there is no violation or penalty for over-reporting. CalPERS may therefore, make a good faith estimate that provides a value higher than the actual value. However, if CalPERS underreports the value of the payment, because it had accepted responsibility for the reporting of the entire value of the payment, it must amend the report to reflect the higher actual value at any meaningful amount.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: William J. Lenkeit  
Senior Counsel, Legal Division

WJL:jgl

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<sup>6</sup> In some cases, given your description of a payment for admission to a conference in which a meal is provided, the meal may be the only reportable expenses as the conference itself would be considered informational material and therefore, an exception to the definition of gift. Additionally, there is an exception to the definition of “gift” for a rebate or discount in the price of anything that is made in the regular course of business to members of the public without regard to official status. We have interpreted rebate or discount to include rewards when made in the general course of business to members of the public without regard to official status.