



California Fair Political Practices Commission

February 9, 1989

Richard H. Koppes
Public Employees' Retirement System
400 P Street
Sacramento, CA 95814

Re: Your Request for Advice
Our Advice File No. A-88-408

Dear Mr. Koppes:

We have received your request for advice concerning the conflict of interest code provisions of the Political Reform Act.^{1/} Since your letter poses several questions which require lengthy discussion and analysis, I will respond to each individually.

QUESTION A

May PERS adopt the definition of "jurisdiction" set forth in Section 82035 in its conflict of interest code, or is PERS required to use the broader definition of "jurisdiction" which is currently in its code?

CONCLUSION

Since there is currently no authority which would require the broader definition of "jurisdiction" to be used in PERS' conflict of interest code, PERS may amend its code to delete that broad definition.

ANALYSIS

Section 82035 defines "jurisdiction" to mean the state with respect to a state agency and, with respect to a local government agency, the region, county, city, district or

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

other geographical area over which it has jurisdiction. The code for PERS contains a much broader definition of "jurisdiction" which reads:

"Exceptions: As provided in Section 1 of the standard code, 2 Cal. Adm. Code Section 18730(b)(1), the definitions contained in the Political Reform Act of 1974 shall apply to the terms used in this Code except that "jurisdiction" shall not be limited to the State, for the purposes of disclosure and disqualification, for designated employees assigned to Category 1 of the Appendix."

This broader definition was placed in the PERS code, as previously approved by the Commission, in 1979. In reviewing the PERS' files of previous Commission action, it is difficult to determine which agency initiated the broad definition. However, the Commission does not have the authority to require agencies to disclose interests which go beyond the requirements of the Political Reform Act. Therefore, PERS may amend its code to delete the broad definition of "jurisdiction."

QUESTION B

To what extent must PERS Board Members disclose income, including gifts?

CONCLUSION

The disclosure categories as presently written should be expanded to require disclosure of income from each of the sources presently contained in Category 1.

ANALYSIS

Disclosure Category 1 is assigned to the Legal Office, Investments Office and Administration. It requires disclosure of:

(1) All investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund may by statute be invested which have a common stock market capitalization, as of the date of the lowest Dow Jones average of Industrial Stocks (aka Dow Jones Industrial Index) during the previous calendar year, in excess of 90% of the common stock market capitalization of that Company held in the Public Employees' Retirement Fund and the Legislators' Retirement Fund, as of the above date, which represents the smallest market capitalization of all common stocks held in the Public Employees'

Retirement Fund and in the Legislators' Retirement Fund.

In addition, designated employees must report investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund were actually invested during the period covered.

(2) All investments in California real estate in which funds of the Public Employees' Retirement System and the Legislators' Retirement System may by statute be invested.

(3) All investments in business entities and income from sources which are security dealers or brokers.

One of the amendments that PERS is considering is to require the disclosure of income. Category 1 as written only requires disclosure of income from sources which are security dealers or brokers. The PERS board is concerned that expanding the disclosure of income to include all sources would be overbroad as disclosure would be required of income, including gifts, from sources who have no connection whatsoever to PERS decision-making. We agree. Disclosure of interests which cannot be affected by PERS is not required.

It has already been established that the types of interests outlined in Category 1 are the types of interests which may be affected. If a board member holds an investment in issuers of securities as defined in subsection (1) of Category 1, that investment interest may prompt disqualification from participation in decisions affecting that entity. Any income received from that entity may also be potentially disqualifying, and this income interest should be disclosed. Accordingly, Category 1 should be amended in each paragraph requiring the disclosure of investments to also require the disclosure of income.

The language you propose would suffice, but we do have a suggestion. Rather than set out five separate paragraphs, the category could be condensed to read:

"All investments and business positions in business entities, and income from sources which are of the type (1) to contract with PERS, or (2) in which funds administered by the Board may be invested (including securities, real estate and business entities)."

"All interests in real estate co-owned with, or purchased from, the above sources."

This suggested disclosure category would reduce the amount of reading imposed on employees assigned Category 1 and accomplishes the same end result.

In addition, the statute governing the contents of codes was changed last year to require disclosure categories to specifically require the disclosure of business positions. Each of the categories, not just Category 1, should be amended at each place where it asks for investments to be disclosed to read "Investments and business positions in, and income from..."

QUESTION C

Is an individual who does not directly contract with PERS, but who works for a firm that contracts with PERS to provide consulting services, a "consultant" within the meaning of the Political Reform Act to the extent the individual performs consulting services for PERS?

CONCLUSION

Yes. A consultant is the natural person within the firm who provides, under contract, information, advice, recommendation or counsel to a state or local governmental agency.

ANALYSIS

In its conflict of interest code, each agency must designate those positions that involve the making of, or participation in, decisions which may foreseeably affect any financial interest. (Section 87302.) Both the definitions of "designated employee" and "public official" in the Act include any consultants to an agency who make or participate in such agency decisions. (Sections 82019 and 82048.)

A "consultant," within the meaning of the Act, includes "any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency...." (Regulation 18700(a)(2).)

While contracts are generally with a business firm, it is not the firm which accomplishes the tasks or makes the decisions, but rather it is the individuals within the firm. We have long advised that the individuals who provide these services are the consultants.

For example, in the Hayden Advice Letter, No. A-84-319 (copy enclosed), the requestor contended that since its retirement board's contract was with a company, not the employees of the company, and since a company is not a "natural person", there was no "consultant" within the

meaning of the Act. The Commission advised that use of the term "natural person" in subdivision (a)(2) of Regulation 18700 was for the purpose of clarifying that corporate entities need not file statements of economic interests. If Mr. Hayden's argument were to have been accepted, consultants would be able to circumvent the disclosure and disqualification laws by incorporating. (See also advice letters to Gerard Rose, No. A-84-306, and to David Kaplan, No. A-82-108, copies enclosed.)

QUESTION D

Are members of the following firms "consultants" within the meaning of the Political Reform Act?

1. Master Custodian

PERS contracts with Boston Safe Deposit and Trust Company which acts as PERS' agent custodian for assets which PERS deposits with it. Staff of Boston Safe do not make recommendations or give advice to the Board. Boston Safe staff have established custodial accounts for PERS and they act in accordance with the direction of the PERS investment managers or the PERS Board. In fact, the master custodian receives direction for each and every transaction from either the investment managers or the Board. It does not have the authority to act at its own discretion.

Conclusion

The master custodian does not make or participate in the making of decisions, but rather obtains direction for each and every transaction from other sources. The master custodian functions in a ministerial position and need not be designated.

2. International Investment Managers

PERS presently contracts with eleven international investment managers and is in the process of contracting with the twelfth manager. Pursuant to Section 20206, the Board is authorized to contract with qualified investment managers to render services in connection with the investment program of the Board. The 12 international investment managers provide services in connection with PERS' international investment program.

The contract requires the international managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the fund being managed by the Manager..." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the

Board..." The international investment managers must also provide the Board with "an analysis of the investment results realized by the Board during said quarterly or monthly period", and they "shall not under any circumstances have custody of any assets of the Fund."

Analysis

The international investment managers manage and invest the portion of the assets of the Fund held by the master custodian; the manager has the authority to direct the custodian with respect to the acquisition or disposition of securities. The manager has complete authority and discretion to establish accounts with securities brokers or dealers. Voting on issues of mergers or acquisitions is directed by the managers.

Conclusion

The international investment managers make decisions which may have an effect on financial interests. They are the type of consultants who should disclose their financial interests under Category 1 of the PERS conflict of interest code.

3. Domestic Investment Managers

PERS also presently contracts with nine domestic investment management firms pursuant to Section 20206. The nine domestic managers provide services in connection with PERS' domestic investment program.

Analysis

The contracts require the domestic investment managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the Fund being managed by the Manager..." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the Board...." The domestic investment managers must also provide the Board with "an analysis of the investment results realized by the Board during said quarterly or monthly period", and they "shall not under any circumstances have custody of any assets of the Fund."

Conclusion

The domestic investment managers have the same general powers and duties as the international investment managers and are the type of consultants who should disclose their financial interests under Category 1 of the PERS conflict of interest code.

4. Real Estate Advisors

PERS presently contracts with six real estate advisor firms pursuant to Section 20216.5. The function of the real estate advisors is "to furnish advice and investment services to the System with respect to the investment and reinvestment of certain assets of the System pursuant to the terms of the Agreement and in accordance with the System's formal Statement of Investment Objectives, Policies, and Asset Guidelines for the Equity Real Estate Portfolio ... and such directions or other guidelines as may be delivered, from time to time, to the Advisor by the Board or the staff."

Analysis

The real estate advisors advise the staff with respect to investments and make recommendations regarding the selection of investments. The advisor reviews investment opportunities proposed to the system by brokers, bankers and others and additionally seeks out investments that meet the system's investment policies. Investments include equity investments in real estate, including interests in corporations, partnerships, and other joint ventures or other entities having an interest in real property, options to purchase real estate, leaseholds and leasebacks.

The advisor further assists in the selection and supervision of local property managers, consultants, technical advisors, brokers, banks, insurance agents, builders, developers and any other persons or entities acting in any capacity necessary or desirable to further the interests of the system.

Conclusion

The real estate advisors make or participate in the making of decisions which could affect real property, builders, contractors, property managers, etc. These advisors are the type of consultants who should disclose interests in real property as well as investments and business positions in business entities, and income from sources, which are of the type to provide any services utilized by PERS. This would include, but not be limited to, banks, savings and loans, property managers, brokers, escrow agents, insurance agents, builders, land developers, etc.

5. Real Estate Investment Consultant

PERS contracts with one real estate investment consulting firm. The real estate consultant assists the Board with its real estate investment policies and objectives.

Analysis

According to the written contract with the real estate investment consultant, the consultant, among other things, provides written recommendations for amendments or modifications to the PERS' real estate investment policy and portfolio structure; prepares evaluation reports on the performance of PERS' real estate advisors or managers; provides analysis and assists in hiring external advisors and managers; evaluates and makes recommendations on purchases of software to aid in internal analysis of transactions and performance of properties; and performs other services as identified.

Conclusion

The real estate investment consultant (1) participates in the making of system policy; (2) can affect entities and persons who serve PERS as real estate advisors and managers; and (3) participates in purchasing decisions by making recommendations regarding appropriate software. This consultant should be disclosing interests in real property as well as investments and business positions in business entities, and income from sources, which provide real estate advisory or management services of the type utilized by PERS. Disclosure also should include investments and business positions in business entities, and income from sources, providing software of the type utilized by the PERS' real estate investment program.

6. Outside Legal Counsel

PERS contracts with six law firms. Three of these firms provide real estate services; one firm provides securities services; one firm provides fiduciary services; and one firm provides services regarding Lincoln Plaza, the building owned and occupied by PERS.

The contracts with the counsel who provide real estate services and securities services are the same. The services provided by these firms include representing PERS in litigation involving PERS' real estate holdings, preparation of legal opinions concerning real property and related issues, representing PERS in acquisitions and dispositions of real estate assets, and providing for other services as requested by PERS' chief counsel.

The contract with outside counsel who provides fiduciary services to PERS is almost identical to the contracts with counsel who provide real estate and securities services. The services provided by fiduciary counsel include preparation of legal opinions, oral presentations to the Board and PERS staff, review and analyses of federal law and legislation, and other services as requested by PERS' chief counsel.

The services provided by outside counsel who provides services regarding Lincoln Plaza include reviewing construction contractors' claims; reviewing files and records of construction contracts; reviewing and evaluating construction documents; formulating technical opinions regarding the validity of construction contractors' claims and the strength of PERS' counter-claims; consulting with PERS' project personnel, consultants, and attorneys; and assisting with trial preparation and providing expert testimony.

Analysis

In your contracts with respective law firms, the firms generally agree to represent the agency in litigation involving that firm's contracted subject matter, prepare legal opinions, represent the agency in acquisitions or dispositions, and to provide other services as requested by the agency's chief counsel. When a law firm is retained under contract to provide general advice and assistance to an agency on an on-going basis, the attorneys of the law firm who provide those services are "consultants" within the meaning of the Political Reform Act.

The contract law firms who provide legal services to PERS provide advice and assistance on all matters within their respective areas of expertise, and thus are part of the decision-making process. If PERS' employees were to provide these services, financial disclosure would be required.

In contrast, when an agency contracts with a law firm to perform legal services for a specific matter (e.g., a particular piece of litigation), the attorneys providing those legal services fall within the exception in Regulation 18700(a)(2), and are not "consultants" within the meaning of the Political Reform Act. Under such circumstances, the attorneys use their own judgment and expertise to render professional services, and their decisions are not subject to on-going review or direction by the agency. Essentially, the attorneys are asked to deliver a finished product, such as a settlement agreement, and not to participate in or advise the agency on general on-going decisions requiring legal expertise. (See In re Maloney (1977) 3 FPPC Ops. 69.)

Conclusion

The outside real estate, securities and Lincoln Plaza counsel are the type of consultants who should disclose those interests which might create a potential conflict. The real estate counsel should disclose interests in real property, and should disclose investments and business positions in

business entities, and income from sources, which are of the type to provide services to PERS. They would include, but not be limited to, property managers, brokers, escrow agents, builders, land developers, etc.

The securities counsel should disclose under Category 1 of the PERS' conflict of interest code.

The Lincoln Plaza counsel should disclose investments and business positions in business entities, and income from sources, which are building contractors or land developers.

7. Federal Lobbyist

PERS contracts with a federal lobbying firm. This firm provides PERS with the following services:

A. Representation on tax, pension, investment, and health insurance issues, especially those involving public pension plans, before the various House and Senate committees.

B. Develops and cooperates with coalitions having similar interests.

C. Works with various organizations, financial institutions, employee representatives, the California Governor's Office, constitutional officers, leaders in the California State Legislature, and PERS staff.

Analysis

The federal lobbyist represents PERS on various issues before House and Senate Committees. In this respect, the lobbyist exercises his or her own judgment to influence a particular decision on behalf of PERS before these committees. The lobbyist also works with various organizations and financial institutions. (It is unclear just what work is accomplished with these organizations.)

Conclusion

The federal lobbyist is making on the spot decisions to influence a particular result before House and Senate committees on behalf of PERS. This consultant is the type to be covered by the conflict of interest code for PERS. Since the duties are broad and undefinable, full disclosure of financial interests would be warranted. (Section 87310.)

8. Investment Advisory Committee Members

PERS contracts with five investment advisory committee members. The investment advisory committee members "serve as special advisors to the Board, as members of the Investment

Advisory Council, with regard to issues affecting pension investments, changes in the investment environment regarding new products or methodologies, asset allocation, performance evaluation and other investment issues of special interest to the Board or its Investment Staff." The contract further states that "Contractor shall meet with the Board of Administration, PERS and its staff as requested." The advisors are unsalaried and receive only expenses for each meeting.

Conclusion

Section 82019 defines a designated employee as any officer, employee, member or consultant of any agency who possesses decisionmaking authority. The term "designated employee" does not include any unsalaried member of a board or commission which performs a solely advisory function.

A committee possesses decisionmaking authority if:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Regulation 18700(a)(1).

If over time recommendations made by this committee have been rejected or significantly amended or modified by the final decision-makers, then this committee is solely advisory in nature. If you are not sure whether or not this committee possesses decisionmaking authority, please contact us for further advice.

QUESTION E

Is PERS required to individually designate its consultants, or may PERS designate its consultants as a class?

CONCLUSION

PERS may utilize the Commission-developed consultant disclosure category which permits the chief executive officer of PERS to determine on a case-by-case basis which consultants will be covered by the code or PERS may designate its consultants individually.

ANALYSIS

Section 82019(c) provides that a designated employee is any officer, employee, member or consultant of any agency whose position with the agency is designated in a conflict of interest code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.

The Commission realizes that not all consultants participate in the making of decisions on behalf of public agencies. Rather than amend your code each time you retain a consultant that is in a decision-making capacity, you may use a specialized disclosure category that provides that the disclosure required of consultants is to be determined on a case-by-case basis by the chief executive officer for the agency. The executive officer may make a determination as to what disclosure, if any, is required by any particular consultant. A copy of this consultant disclosure category language is enclosed and should be incorporated into your code.

The position "Consultant*" would be the last position designated in the appendix. The asterisk would bring the reader down to the consultant disclosure category at the bottom of that page.

The Commission promotes the use of this consultant disclosure category in each and every code coming before it for review. Certain agencies have opted to specifically designate its consultants to alleviate any question. PERS can either use the consultant disclosure category or specifically designate its consultants.

QUESTION F

What statements would designated individuals be required to file if PERS (1) amends its conflict of interest code; or (2) simultaneously repeals its present code and enacts a new code?

CONCLUSION

Any designated employee whose disclosure obligations expand as a result of amendments to your code would, on the next annual filing of the statement of economic interests, disclose his or her interests under the old category up to the effective date of the amendments. Those interests made reportable under the new broader category would be reported from the effective date of the amendments through the balance of the reportable year.

Any newly designated employee (one who had not previously been designated) would file an initial statement of economic interests 30 days from the effective date of the amendments.

Persons whose positions have been deleted from the code would file leaving office statements 30 days from the effective date of the amendments deleting that position.

Should PERS decide to repeal its code in its entirety, and adopt a new code, those positions designated in both codes would not be expected to file either leaving office or assuming office statements of economic interests. Newly designated positions or deleted positions would file as described above.

ANALYSIS

Section 87302(b) provides in part that an initial statement of economic interests shall be filed by each designated employee within 30 days after the effective date of the conflict of interest code. Thereafter, each new designated employee shall file a statement within 30 days of assuming office. Statements are filed annually thereafter and every designated employee who leaves office must file a statement within 30 days of leaving office.

Commission Regulation 18735 provides that a designated employee who transfers from one designated position to another designated position within the same agency is not deemed to have assumed or left office within the meaning of Section 87302.

This regulation covers employees who are promoted from one position to another within the same agency. It would not serve any useful purpose to require such an employee to file either a leaving office or an assuming office statement of economic interests.

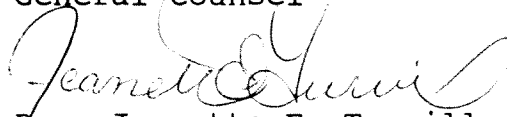
The same rationale would apply when an agency repeals a code in its entirety and simultaneously adopts a new conflict of interest code which covers the same designated employee. Those employees who are not affected by amendments or changes would not be expected to file either a leaving office or an assuming office statement of economic interests, but would merely continue to file statements on an annual basis.

Richard H. Koppes
February 9, 1989
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I hope this resolves the questions you had regarding your conflict of interest code. If I can be of further assistance to you, please feel free to call me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

A handwritten signature in cursive script, appearing to read "Jeanette E. Turvill".

By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

DMG:JET:aa

Enclosures



Memorandum

Date: • October 21, 1988

File No.:

California Public Employees' Retirement System

To: Diane Griffiths, General Counsel
Legal Department
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804

OCT 24 9 14 AM '88
FPPC

From: Board of Administration
Lincoln Plaza, 400 P Street
Sacramento, CA

Subject: REQUEST FOR WRITTEN ADVICE (Gov. Code Sec. 83114(b) and Cal. Code of Regs., Title 2, sec. 18329(b))

This is a request by the Board of Administration, Public Employees' Retirement System (PERS) for written advice made pursuant to Government Code section 83114(b) and California Code of Regulations, title 2, section 18329(b). Pursuant to Government Code sections 87300 and 87306, the Board is in the process of reviewing PERS' present Conflict of Interest Code and making determinations regarding revising and updating the Code. In the review process, several questions have arisen which must be resolved before the PERS Board can take further action to either amend its present Code, or repeal its present Code and simultaneously adopt a new Code. The issues on which the Board seeks advice are as follows:

Issue A

May PERS adopt the definition of "jurisdiction" set forth in Government Code section 82035 in a new or amended Conflict of Interest Code, or is PERS now required to use the definition of "jurisdiction" which is set forth in its current Code?

As you are aware, the FPPC has adopted a regulation, California Code of Regulations, title 2, section 18730 which contains the terms for the body of a standard Conflict of Interest Code. The body of the standard Code includes definitions of certain terms, including "jurisdiction."

The definitions contained in the Political Reform Act of 1974, regulations of the Fair Political Practices Commission (2 Cal. Code of Regs. sections 18110 et seq.), and any amendments to the Act or regulations, are incorporated by reference into this

Conflict of Interest Code. (Cal. Code of Regs., title 2, sec. 18730.)

The definition of "jurisdiction" states: "'Jurisdiction' means the state with respect to a state agency" (Gov. Code sec. 82035.)

Form 730, the Statement of Economic Interests, which must be completed by designated individuals, provides that various interests within the filer's jurisdiction must be disclosed. Pursuant to the standard code, only in-state interests are within the filer's jurisdiction.¹

However, PERS' present Conflict of Interest Code does not use the definition of "jurisdiction" as it is defined in the standard Conflict of Interest Code. PERS' present Conflict of Interest Code states as follows in pertinent part:

"Exceptions: As provided in Section 1 of the standard code, 2 Cal. Adm. Code Section 18730(b)(1), the definitions contained in the Political Reform Act of 1974 shall apply to the terms used in this Code except that 'jurisdiction' shall not be limited to the State, for the purposes of disclosure and disqualification, for designated employees

¹ PERS is aware of the exception to this general rule provided for in Government Code section 82030 which deals with income, including gifts. Government Code section 82030 states as follows in part:

"'Income,' other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title. (Gov. Code sec. 82030. Emphasis added.)

assigned to Category 1 of the Appendix."
(Emphasis added.)²

At this time, the PERS Board has not determined whether it wishes to retain the definition of "jurisdiction" which is set forth in its present Code, or whether it wishes to use the definition of "jurisdiction" which is set forth in Government Code section 82035 (and which is part of the standard code), in PERS' amended or new Code.

The PERS Legal Office has been orally advised by an FPPC staff member that PERS may not have the choice of using the definition of the term "jurisdiction" which is set forth in Government Code section 82035. The PERS Legal Office was advised that the FPPC may require PERS to continue to use the definition of "jurisdiction" found in its present Code.

It is PERS' position that it has the right and authority to reconsider this issue. It is further PERS' position that the FPPC has no authority to require PERS to adopt a definition of the term "jurisdiction" which is broader than the definition contained in Government Code section 82035.

PERS is aware of Government Code section 83112 which authorizes the Fair Political Practices Commission to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title" However, PERS is also aware that this statute further expressly states that: "These rules and regulations [adopted by the FPPC] . . . shall be consistent with this title and other applicable law." PERS further notes the well-settled legal principle that courts not only may, but have an obligation to strike down administrative regulations which alter, amend, enlarge, or impair the scope of a statute. (Handlery v. Franchise Tax Board (1972) 26 Cal.App.3d 970, 981.) Thus, to the extent FPPC's regulations alter, amend or enlarge the statutory definition of "jurisdiction," PERS believes they are unenforceable. PERS is unaware of any regulations adopted by the FPPC which : 1) would require PERS to adopt a definition of "jurisdiction" which is broader than the statutory definition; or 2) would prevent PERS from repealing its present definition of "jurisdiction" to the extent it exceeds the statutory definition.

² The PERS Board Members, Executive Officer, as well as other designated positions have been assigned to Category 1 of the Appendix in the present Code.

The PERS Board respectfully requests that the FPPC set forth its position with regard to whether PERS has the option to adopt the definition of "jurisdiction" set forth in Government Code section 82035 in a new or amended Code. If it is the FPPC's position that PERS must continue to use the definition of "jurisdiction" which is set forth in its present Code, PERS requests that the FPPC provide it with all legal authority upon which the FPPC relies to support its position.

Issue B

To what extent must PERS Board Members disclose their financial interests?

The PERS Board has the exclusive control of the administration and investment of the Retirement Fund. (Gov. Code secs. 20201 and 20205.6.) The Board may "make any investment authorized by law or sell any security, obligation, or real property in which moneys in the fund are invested. . . ." (Gov. Code sec. 20205.) Government Code section 20205.6 provides the Board with the power to "invest the assets of the fund through the purchase, holding, or sale thereof of any investment, financial instrument, or financial transaction when the investment, financial instrument, or financial transaction is prudent in the informed opinion of the board," except when "otherwise restricted by the California Constitution and by law."³

Under PERS' present Conflict of Interest Code, Board Members are assigned to Disclosure Category 1. That disclosure category requires the Board to report the following interests:

"(1) All investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund may by statute be invested which have a common stock market capitalization, as of the date of the lowest Dow Jones average of Industrial Stocks (aka Dow Jones Industrial Index) during the previous calendar year, in excess of 90% of the common stock market capitalization of that Company held in the Public

³ Government Code sections 22840, 22840.2, 50953, 75105 and 9354.1 respectively authorize the Board to invest: 1) the Public Employees' Contingency Reserve Fund, 2) the Public Employees' Health Care Fund, 3) the Volunteer Firefighters Length of Service Award Fund, 4) the Judges' Retirement System Fund, and 5) the Legislators' Retirement System Fund in accordance with the law governing investment of PERS funds.

Employees' Retirement Fund and the Legislators' Retirement Fund, as of the above date, which represents the smallest market capitalization of all common stocks held in the Public Employees' Retirement Fund and in the Legislators' Retirement Fund.

"In addition, designated employees must report investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund were actually invested during the period covered.

"(2) All investments in California real estate in which funds of the Public Employees' Retirement System and the Legislators' Retirement System may by statute be invested.

"(3) All investments in business entities and income from sources which are security dealers or brokers.

"The investments and income described in this category are not limited to those that are located in California, doing business in California, or have done business in California in the past two years."

Pursuant to PERS' present Conflict of Interest Code, designated individuals assigned to Category 1 are not required to report income, including gifts, which is unrelated to their service with PERS. The only "income"⁴ which individuals assigned to Category 1 must presently report is "income from sources which are security dealers or brokers." This present Code was, of course, approved by the FPPC.

While PERS is considering voluntarily expanding the reporting of income for individuals assigned to Disclosure Category 1, PERS seeks to avoid the situation where its Board Members would be required to report gifts worth over \$50 which have no connection to their service as PERS Board Members.

The FPPC has provided various agencies, including PERS, with sample disclosure categories for the Conflict of Interest Code.

⁴ PERS is aware that for purposes of Conflict of Interest Code disclosure and disqualification requirements, the definition of income includes gifts. (Gov. Code sec. 82030.)

The FPPC's sample disclosure category for "designated employees whose duties are broad and undefinable" states as follows:

"All investments, sources of income, interests in real property as well as business positions in which the designated employee is a director, officer, partner, trustee, employee, or holds any position of management." (Emphasis added.)

PERS believes that the FPPC's sample disclosure category for designated employees whose duties are "broad and undefinable" is broader than is required by law for PERS Board Members. It is PERS' opinion that the sample disclosure category suggested by the FPPC would include reporting interests by PERS Board Members which are unrelated to their service with PERS, because it requires the reporting of "all income."

The law does not require the reporting of "all" financial interests. Nor does the law require the reporting of financial interests which the designated individual "might" affect materially through the conduct of his or her office. The law only requires the reporting of financial interests which the designated individual "foreseeably can affect materially through the conduct of his or her office." (Emphasis added. Cal. Code of Regs., title 2, sec. 18730 (b)(3).)

Government Code section 87302 states in pertinent part that:

". . . [a]n investment, business position, interest in real property, or source of income shall be made reportable by the Conflict of Interest Code if the business entity in which the investment or business position is held, the interest in real property, or the income or source of income may foreseeably be affected materially by any decision made or participated in by the designated employee [⁵] by virtue of his or her position." (Emphasis added.)

California Code of Regulations, title 2, section 18730 (b)(3) states as follows in pertinent part:

⁵ Government Code section 82019 defines a "designated employee" in pertinent part as ". . . any officer, employee, member, or consultant of any agency. . . ." Title 2, California Code of Regulations, section 18700 defines "member" in part as ". . . salaried or unsalaried members of boards or commissions with decision-making authority. . . ."

"Such a designated employee shall disclose in his or her statement of economic interests those financial interests he or she has which are of the kind described in the disclosure categories to which he or she is assigned in the Appendix. It has been determined that the financial interests set forth in a designated employee's disclosure categories are the kinds of financial interests which he or she foreseeably can affect materially through the conduct of his or her office." (Emphasis added.)

Pursuant to the definition of "gift" contained in Government Code section 82028,⁶ if PERS were to use the FPPC's sample

⁶ Government Code section 82028 defines "gift" as follows:

"(a) 'Gift' means, except as provided in subdivision (b), any payment 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. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.

"(b) The term 'gift' does not include:

"(1) Informational material such as books, reports, pamphlets, calendars, or periodicals. No payment for travel or reimbursement for any expenses shall be deemed 'informational material.'

"(2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

"(3) Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin

(Continued on next page.)

disclosure category for "designated employees whose duties are broad and undefinable," it appears that PERS Board Members would be required to report certain gifts from friends who had no connection with PERS. For example, if a PERS Board Member received a birthday gift valued at \$51 from his or her neighbor who had no PERS connections, and the Board Member did not give the neighbor a gift, it would appear that the Board Member would have to disclose the gift if the FPPC's sample disclosure category were to be adopted. It would also appear that a Board Member who received a Christmas gift valued at \$51 from a long-time friend with no PERS connections would have to disclose the gift even if the Board Member had given the long-time friend a gift of lesser value in exchange. The receipt of such gifts will not foreseeably materially affect any decisions reached by the PERS Board.

PERS Board Members are committed to avoiding conflicts of interests and to carrying out the goals of the Conflict of Interest Code. However, it appears those goals can be achieved while protecting the Board's right of privacy, by the adoption of language which is less broad than the FPPC's sample category set forth above. PERS believes the following language would achieve the purposes of the reporting requirements, as well as

or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary for any person not covered by this paragraph.

"(4) Campaign contributions required to be reported under Chapter 4 of this title.

"(5) Any devise or inheritance.

"(6) Personalized plaques and trophies with an individual value of less than two hundred fifty dollars (\$250)."

Government Code section 82044 defines "payment" as follows:

"'Payment' means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible."

comply with the provisions of Government Code section 87302 and California Code of Regulations, title 2, section 18730:

"Disclosure for Individuals Assigned to Category 1:

"All investments with any person or business entity of any type, which is contracting with PERS, or which at any time during the preceding two years has contracted with PERS, or which the designated individual knows or has reason to know is seeking to contract with PERS or which the designated individual knows or has reason to know is being solicited by PERS to contract with PERS.

"All investments including, but not limited to, those in securities, real estate or business entities, in which any funds administered by the Board are invested.

"All income derived from the above sources.

"All business positions held in any business entity described above.

"All interests in real estate co-owned with, or purchased from the above sources."

If it is the FPPC's conclusion that the language proposed by PERS will not be approved by the FPPC, please set forth the reasoning upon which the FPPC relies in not approving PERS' proposed language, as well as alternative language acceptable to the FPPC.

Issue C

Is an individual who does not directly contract with PERS, but who works for a firm that contracts with PERS to provide consulting services, a "consultant" within the meaning of the Political Reform Act to the extent the individual performs consulting services for PERS?

The Political Reform Act requires government agencies to adopt conflict of interest codes designating employees who must file periodic statements disclosing certain financial interests. Any position within the agency which involves participation in decisions which may have a material financial effect on any

financial interest must be designated. (Gov. Code sec. 87302 and Cal. Code of Regs., title 2, sec. 18730.2.)

The term "designated employee" includes "consultant" of the agency. (Gov. Code sec. 82019.) The term "consultant" is, in turn, defined as follows:

"(2) 'Consultant' shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that 'consultant' shall not include a person who:

"(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

"(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel." (Emphasis added. Cal. Code of Regs., title 2, sec. 18700 (a)(2).)

The FPPC's Advice Letter A-79-130 dated November 9, 1979 states as follows regarding this section of law which defines "consultant":

"The problems with this section are myriad, as you so aptly point out in your letter. One of the things it does clarify, however, (and perhaps the only one) is that the term refers to an individual, a 'natural person,' and not to an organization with which a governmental agency contracts. It is therefore the individuals who actually provide the services for the consultant firm who must disclose their interests, and if one individual provides engineering services and another bond services, they should be in appropriately different disclosure categories. . . ." (Emphasis added.)

FPPC's Advice Letter A-86-245 also interprets this regulation as follows:

"Two of the firms involved in the present question have argued that since the firms with which the District has contracted are not 'natural

persons,' no disclosure is required by the firms or their employees. The term 'natural persons' was used to clarify that corporate entities do not need to file statements of economic interests. If the argument presented by these firms was accepted, all consultants could avoid the provisions of the Act simply by incorporating themselves. The definition in subdivision (a)(2) of Regulation 18700 was not intended to provide such a loophole. We have consistently advised that natural persons working for consulting firms are subject to the Act's provisions in appropriate circumstances. See Advice Letter to Geoffrey L. Hayden, No. A-84-319; Advice Letter to Gerard Rose, No. A-84-307; and Advice Letter to David Kaplan, No. A-82-109. . . ."

The PERS Board is in agreement that the regulation which defines "consultant" is confusing and that the problems with this section are "myriad." However, PERS disagrees that the language of section 18700 as it is presently written includes natural persons who do not directly contract with PERS. The language of this regulation only includes natural persons who are under contract with a state or local agency, within the definition of "consultant." The regulation does not expressly include natural persons who work for businesses under contract with the agency.

PERS is aware of the case law which holds that the statutory construction of a statute by an agency charged with its enforcement and interpretation will be followed unless it is clearly unauthorized or erroneous. (Noroian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 655.) However, PERS is also aware that generally the same rules which apply to statutory construction also apply to ascertaining the meaning of regulations. (California State Restaurant Assoc. v. Whitlow (1976) 58 Cal.App.3d 340, 344 [129 Cal.Rptr. 824].) PERS respectfully notes that the court in Daley v. State Dept. of Social Welfare (1969) 276 Cal.App.2d 801, 804, stated as follows:

"Although escape from literal statutory words is sometimes possible to avoid absurd and unintended consequences, neither a court nor executive agency may supply omitted terms or rewrite a statute to conform to an unexpressed intent."

This regulation could have, but does not state:

"Consultant shall include:

"(1) Any natural person who directly contracts with a local or state government agency,; or (2) any natural person who works for a corporation or business entity that has contracted with a local or state government agency, to the extent that the natural person provides information, advice, recommendation or counsel to the government agency. . . ."

PERS respectfully suggests that the FPPC's present interpretation of regulation section 18700 (a)(2) reads language into the regulation which is not there.

PERS has found no indication that this regulation has been interpreted by the courts or by the Attorney General's Office. However, if you are aware of any court decision or Attorney General's opinions on this regulation, we would appreciate your providing us with the citations. PERS further respectfully requests that FPPC reconsider its present interpretation of this regulation.

Issue D

Are members of the following firms "consultants" within the meaning of the Political Reform Act to the extent they provide information, advice, recommendation or counsel to PERS?

As your staff notes, the regulation which defines consultant is extremely difficult to understand. The language which defines individuals who fall within the term "consultant," is very similar to the language which defines individuals who fall outside the term "consultant." Thus, individuals who appear to fall within the meaning of "consultant" also appear to fall within the exclusion.

If it remains the position of the FPPC that individuals who do not directly contract with PERS, but who work for firms who contract with PERS, are included within the definition of "consultant" to the extent that they provide information, advice, recommendation or counsel to PERS, PERS hereby requests the FPPC's opinion as to whether members of the firms listed

below are "consultants" within the meaning of the Political Reform Act.⁷

It is PERS' position that members of the firms listed below are not "consultants" within the meaning of the Political Reform Act, because they fall within the exception set forth in regulation section 18700.

By way of background, Government Code section 20201 gives the PERS Board "exclusive control of the administration and investment of the Retirement Fund." Government Code section 20205.6 also states that "[t]he board has exclusive control of the investment of the retirement fund." Government Code section 20205 states as follows:

"The board may itself make any investment authorized by law or sell any security, obligation, or real property in which moneys in the fund are invested, by affirmative vote of at least seven members of the board, or by such an affirmative vote may from time to time adopt an investment resolution which shall contain detailed guidelines by which to designate those securities and real property which are acceptable for purchase. While the resolution is in effect, securities and real property may be purchased for investment by an officer or employee of the board designated by it for such purpose, and sales of securities may be consummated by such officer or employee under the conditions prescribed. Purchases and sales of securities shall be reported

⁷ California Code of Regulations, title 2, section 18329 (b)(2) states as follows in part:

"(2) Requests for formal written advice will not be acted upon unless the following requirements are met:

"(A) The name, title, or position, and mailing address of the person whose duties are in question are provided. In addition, if the request is submitted by an authorized representative, it shall contain a specific statement that such authorization has been made."

This information is set forth in Appendix A which is attached hereto.

to the board, on a monthly basis, at its next regular meeting."

Other statutes authorize the Board to retain a bank or trust company to serve as custodian in connection with investment of the fund (Gov. Code sec. 20202), and to "employ investment counsel on its staff or on a consulting basis or trust companies or trust departments of banks to render service in connection with the board's investment program. . . ." (Gov. Code section 20206.)

Outside firms retained by the Board include:

1. Master Custodian

PERS contracts with Boston Safe Deposit and Trust Company which acts as PERS' agent custodian for assets which PERS deposits with it. This contract is attached as Exhibit 1. Staff of Boston Safe do not make recommendations or give advice to the Board. Boston Safe staff have established custodial accounts for PERS (see p. 6 of the contract) and they act in accordance with the direction of the PERS investment managers or the PERS Board. (See pp. 6, 7 and 10 of the contract.)

2. International Investment Managers

PERS presently contracts with eleven international investment managers and is in the process of contracting with the twelfth manager. Pursuant to California Government Code section 20206, the Board is authorized to contract with qualified investment managers to render services in connection with the investment program of the Board. The 12 international investment managers provide services in connection with PERS' international investment program. They have the same contract except for the schedules which deal with items specific to each manager. A copy of the standard contract is attached as Exhibit 2.

The contract requires the international managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the fund being managed by the Manager . . ." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the Board. . . ." (P. 2 of the contract.) The international investment managers must also provide the Board with "an analysis of the investment results realized

by the Board during said quarterly or monthly period" and they "shall not under any circumstances have custody of any assets of the Fund." (P. 3.)

3. Domestic Investment Managers

PERS presently contracts with nine domestic investment management firms pursuant to Government Code section 20206, which provides that the Board may appoint one or more investment managers. The nine domestic managers provide services in connection with PERS' domestic investment program. They have the same contracts, except for the schedules which deal with items specific to each manager. A copy of the standard contract is attached as Exhibit 3.

The contract requires the domestic investment managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the Fund being managed by the Manager . . ." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the Board. . . ." (P. 2 of the contract.) The domestic investment managers must also provide the Board with "an analysis of the investment results realized by the Board during said quarterly or monthly period" and they "shall not under any circumstances have custody of any assets of the Fund." (P. 3.)

4. Real Estate Advisors

PERS presently contracts with six real estate advisor firms pursuant to Government Code section 20216.5. The six contracts are the same. A copy of the standard contract is attached as Exhibit 4. The function of the real estate advisors is "to furnish advice and investment services to the System with respect to the investment and reinvestment of certain assets of the System pursuant to the terms of the Agreement and in accordance with the System's formal Statement of Investment Objectives, Policies, and Asset Guidelines for the Equity Real Estate Portfolio . . . and such directions or other guidelines as may be delivered, from time to time, to the Advisor by the Board or the staff." (P. 2 of the contract.)

5. Real Estate Investment Consultant

PERS contracts with one real estate investment consultant firm. This contract is attached as Exhibit 5. The real

estate consultant assists the Board with its real estate investment policies and objectives.

6. Outside Legal Counsel

PERS contracts with six law firms. Three of these firms provide real estate services; one firm provides securities services; one firm provides fiduciary services; and one firm provides services regarding Lincoln Plaza, the building owned and occupied by PERS.

The contracts with the counsel who provide real estate services are the same. A copy of this contract is attached as Exhibit 6a. The services provided by these firms include representing PERS in litigation involving PERS' real estate holdings, preparation of legal opinions concerning real property and related issues, representing PERS in acquisitions and dispositions of real estate assets, and providing for other services as requested by PERS' Chief Counsel.

The contract with outside counsel who provide securities services is attached as Exhibit 6b. The services provided by this firm include preparation of legal opinions concerning corporate and securities law, shareholder rights and corporate governance; representation of the Board before state and federal governmental agencies, representation in litigation involving the Board's securities holdings; submission of periodic reports, describing the status of all matters hereunder pending before the Contractor; and other services as requested by the Board's Chief Counsel.

The contract with outside counsel who provides fiduciary services to PERS is almost identical to the contracts with counsel who provide real estate and securities services. The services provided by fiduciary counsel include preparation of legal opinions, oral presentations to the Board and PERS staff, review and analyses of federal law and legislation; and other services as requested by PERS' Chief Counsel.

The contract with outside counsel who provides services regarding Lincoln Plaza is attached as Exhibit 6c. The services provided by this firm include reviewing construction contractors' claims; reviewing files and records of construction contracts; reviewing and evaluating construction documents; formulating technical opinions regarding validity of construction contractors' claims and strength of PERS' counter-claims; consulting with PERS'

project personnel, consultants, and attorneys; and assisting with trial preparation and providing expert testimony.

7. Federal Lobbyist

PERS contracts with a federal lobbyist firm. This contract is attached as Exhibit 7. This firm provides PERS with the following services:

- A. Represent tax, pension, investment, and health insurance issues, especially those involving public pension plans, before the various House and Senate committees.
- B. Effectively develop and cooperate with coalitions having similar interests.
- C. Work with various organizations, financial institutions, employee representatives, the California Governor's Office, constitutional officers, leaders in the California State Legislature, and PERS staff.

8. Investment Advisory Committee Members

PERS contracts with five investment advisory committee members. This contract is attached as Exhibit 8. The investment advisory committee members "serve as special advisers to the Board, as members of the Investment Advisory Council, with regard to issues affecting pension investments, changes in the investment environment regarding new products or methodologies, asset allocation, performance evaluation and other investment issues of special interest to the Board or its Investment Staff." The contract further states that "Contractor shall meet with the Board of Administration, PERS, and its staff as requested." The advisors are unsalaried and receive only expenses for each meeting.

If it is your opinion that any of the above-listed firms or individuals are "consultants" within the meaning of the law, please set forth your reasoning.

Issue E

Will PERS be required to individually designate its consultants, or will PERS be permitted to designate its consultants as a class?

PERS' present Code, which was approved by the FPPC, does not designate any of PERS' consultants, either as a class, or individually. Jeanette Turville of the FPPC has advised PERS staff that PERS may be required to individually designate certain of its consultants in its new or amended Conflict of Interest Code, rather than simply designating "consultants" as a class. However, it appears that the FPPC permits most agencies to designate their consultants as a class.

The FPPC's written "Instructions for the Adoption of a Conflict of Interest Code" suggest the following language regarding the designation of "consultants" in a Conflict of Interest Code:

"Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation:

"The Executive Director/Officer may, determine in writing that a particular consultant although a 'designated position,' is hired to perform a range of duties that are limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Executive Director's/Officer's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code."

The FPPC's Advice Letter A-79-130, states as follows:

"Because of the difficulty of predicting what kinds of consultants an agency may hire in the future, we generally make the position of a 'consultant' a designated one and assign it to the same disclosure categories as the head of the agency, i.e., we initially require the broadest possible disclosure of all consultants. [Fn. omitted.] We also provide, however, that in the case of any particular consultant, the head of the

agency may make a written finding that the duties of the consultant are limited in scope and that the consultant's disclosure obligations should consequently be waived."

Thus, it appears that the FPPC permits most agencies the discretion to make determinations regarding which of their consultants fall within the meaning of California Code of Regulations section 18700 (a)(2), title 2. PERS staff has reviewed the Conflict of Interest Statements of different agencies, including the FPPC's own Conflict of Interest Code. None of the Codes which PERS staff has reviewed, with the exception of the State Teachers' Retirement System's,⁸ specifically designate individual consultants.

PERS respectfully requests the following information:

1. Is it the formal opinion of the FPPC that PERS must specifically designate certain consultants?
 - a. If so, which consultants must be specifically designated?
2. Other than STRS, has the FPPC required any other state or local governmental agency to specifically name its consultants?
 - a. If so, which agencies have been required to specifically designate their consultants?
 - b. Why have these agencies been required to specifically designate their consultants?
3. If the FPPC has not required any agency other than STRS to specifically designate their consultants, what legal authority does the FPPC rely upon to treat STRS (and PERS?) differently than all other state and local agencies?

PERS is aware that the FPPC is entitled to make an administrative interpretation of the statutes and regulations

⁸ According to Jeanette Turville of the FPPC, it was the FPPC which required STRS to specifically designate certain outside consultants, including: 1) authorized personnel of external investment managers - equity; 2) authorized personnel of external investment managers - debt; and 3) authorized personnel of external investment managers - real estate. (5 Cal. Code of Regs., sec. 22000.)

it administers. However, it appears that the FPPC's own interpretation of the law (presumably embodied in the FPPC's "Instructions for the Adoption of a Conflict of Interest Code") only requires reporting of "consultants" as a class. Thus, it would appear that requiring PERS to specifically designate its consultants would go beyond the FPPC's own interpretation of the pertinent statutes and regulations. Furthermore, PERS is unaware of any authority which would permit the unequal application of the law without a rational basis for doing so.

Issue F

What statements would designated individuals be required to file if PERS 1) amends its Conflict of Interest Code; or 2) simultaneously repeals its present Code and enacts a new Code?

PERS is considering making extensive changes to its present Code. Thus, PERS is considering simultaneously repealing its present Code and adopting a new Code, rather than amending its present Code. However, we were advised by Jeanette Turville to request written advice as to whether repeal of the old Code and adoption of the new Code might subject employees designated in both Codes to filing: 1) an annual statement under the present Code; 2) a leaving office statement upon the repeal of the Code presently in effect; and 3) an assuming office statement upon the enactment of the new Code.

We were advised by Ms. Turville that if PERS treated the changes to its Code as an amendment, rather than as a repeal and adoption, employees designated in both the present Code and the amended Code would not need to file leaving office and assuming office statements. We were further advised by Ms. Turville that if we made the changes by way of repeal and adoption of a new Code, designated employees might be required to file multiple statements.

Please advise PERS what statements would need to be filed by: 1) employees designated in the present Code but (because of changes in their job duties) not designated in the new Code; 2) employees designated in the present Code and redesignated in the new Code; 3) employees not designated in the present Code but designated in the new Code.

It is PERS' position that employees who are designated in both the present Code and in the new Code should only be required to file the annual statement. Requiring the filing of multiple statements in this situation would be burdensome on designated employees, would not carry out the intent of the Conflict of

Diane Griffiths

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October 21, 1988

Interest Code, and would put form over substance. If you disagree with PERS' position in this regard, please set forth the legal authority upon which you rely.

Thank you for your anticipated timely response to the request for legal advice. If you need further information, please do not hesitate to contact me or Margaret Hoehn, PERS Senior Staff Counsel.



RICHARD H. KOPPES
Chief Counsel

RHK:cl

Attachments



Memorandum

Date: October 21, 1988

File No.:

California Public Employees' Retirement System

To: Diane Griffiths, General Counsel
 Legal Department
 Fair Political Practices Commission
 P.O. Box 807
 Sacramento, CA 95804

From: Board of Administration
 Lincoln Plaza, 400 P Street
 Sacramento, CA

Subject: REQUEST FOR WRITTEN ADVICE (Gov. Code Sec. 83114(b) and Cal. Code of Regs., Title 2, sec. 18329(b))

OCT 21 9 14 AM '88

FPPC

This is a request by the Board of Administration, Public Employees' Retirement System (PERS) for written advice made pursuant to Government Code section 83114(b) and California Code of Regulations, title 2, section 18329(b). Pursuant to Government Code sections 87300 and 87306, the Board is in the process of reviewing PERS' present Conflict of Interest Code and making determinations regarding revising and updating the Code. In the review process, several questions have arisen which must be resolved before the PERS Board can take further action to either amend its present Code, or repeal its present Code and simultaneously adopt a new Code. The issues on which the Board seeks advice are as follows:

Issue A

May PERS adopt the definition of "jurisdiction" set forth in Government Code section 82035 in a new or amended Conflict of Interest Code, or is PERS now required to use the definition of "jurisdiction" which is set forth in its current Code?

As you are aware, the FPPC has adopted a regulation, California Code of Regulations, title 2, section 18730 which contains the terms for the body of a standard Conflict of Interest Code. The body of the standard Code includes definitions of certain terms, including "jurisdiction."

The definitions contained in the Political Reform Act of 1974, regulations of the Fair Political Practices Commission (2 Cal. Code of Regs. sections 18110 et seq.), and any amendments to the Act or regulations, are incorporated by reference into this

Conflict of Interest Code. (Cal. Code of Regs., title 2, sec. 18730.)

The definition of "jurisdiction" states: "'Jurisdiction' means the state with respect to a state agency" (Gov. Code sec. 82035.)

Form 730, the Statement of Economic Interests, which must be completed by designated individuals, provides that various interests within the filer's jurisdiction must be disclosed. Pursuant to the standard code, only in-state interests are within the filer's jurisdiction.¹

However, PERS' present Conflict of Interest Code does not use the definition of "jurisdiction" as it is defined in the standard Conflict of Interest Code. PERS' present Conflict of Interest Code states as follows in pertinent part:

"Exceptions: As provided in Section 1 of the standard code, 2 Cal. Adm. Code Section 18730(b)(1), the definitions contained in the Political Reform Act of 1974 shall apply to the terms used in this Code except that 'jurisdiction' shall not be limited to the State, for the purposes of disclosure and disqualification, for designated employees

¹ PERS is aware of the exception to this general rule provided for in Government Code section 82030 which deals with income, including gifts. Government Code section 82030 states as follows in part:

"'Income,' other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title. (Gov. Code sec. 82030. Emphasis added.)

assigned to Category 1 of the Appendix."
(Emphasis added.)²

At this time, the PERS Board has not determined whether it wishes to retain the definition of "jurisdiction" which is set forth in its present Code, or whether it wishes to use the definition of "jurisdiction" which is set forth in Government Code section 82035 (and which is part of the standard code), in PERS' amended or new Code.

The PERS Legal Office has been orally advised by an FPPC staff member that PERS may not have the choice of using the definition of the term "jurisdiction" which is set forth in Government Code section 82035. The PERS Legal Office was advised that the FPPC may require PERS to continue to use the definition of "jurisdiction" found in its present Code.

It is PERS' position that it has the right and authority to reconsider this issue. It is further PERS' position that the FPPC has no authority to require PERS to adopt a definition of the term "jurisdiction" which is broader than the definition contained in Government Code section 82035.

PERS is aware of Government Code section 83112 which authorizes the Fair Political Practices Commission to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title" However, PERS is also aware that this statute further expressly states that: "These rules and regulations [adopted by the FPPC] . . . shall be consistent with this title and other applicable law." PERS further notes the well-settled legal principle that courts not only may, but have an obligation to strike down administrative regulations which alter, amend, enlarge, or impair the scope of a statute. (Handlery v. Franchise Tax Board (1972) 26 Cal.App.3d 970, 981.) Thus, to the extent FPPC's regulations alter, amend or enlarge the statutory definition of "jurisdiction," PERS believes they are unenforceable. PERS is unaware of any regulations adopted by the FPPC which : 1) would require PERS to adopt a definition of "jurisdiction" which is broader than the statutory definition; or 2) would prevent PERS from repealing its present definition of "jurisdiction" to the extent it exceeds the statutory definition.

² The PERS Board Members, Executive Officer, as well as other designated positions have been assigned to Category 1 of the Appendix in the present Code.

The PERS Board respectfully requests that the FPPC set forth its position with regard to whether PERS has the option to adopt the definition of "jurisdiction" set forth in Government Code section 82035 in a new or amended Code. If it is the FPPC's position that PERS must continue to use the definition of "jurisdiction" which is set forth in its present Code, PERS requests that the FPPC provide it with all legal authority upon which the FPPC relies to support its position.

Issue B

To what extent must PERS Board Members disclose their financial interests?

The PERS Board has the exclusive control of the administration and investment of the Retirement Fund. (Gov. Code secs. 20201 and 20205.6.) The Board may "make any investment authorized by law or sell any security, obligation, or real property in which moneys in the fund are invested. . . ." (Gov. Code sec. 20205.) Government Code section 20205.6 provides the Board with the power to "invest the assets of the fund through the purchase, holding, or sale thereof of any investment, financial instrument, or financial transaction when the investment, financial instrument, or financial transaction is prudent in the informed opinion of the board," except when "otherwise restricted by the California Constitution and by law."³

Under PERS' present Conflict of Interest Code, Board Members are assigned to Disclosure Category 1. That disclosure category requires the Board to report the following interests:

"(1) All investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund may by statute be invested which have a common stock market capitalization, as of the date of the lowest Dow Jones average of Industrial Stocks (aka Dow Jones Industrial Index) during the previous calendar year, in excess of 90% of the common stock market capitalization of that Company held in the Public

³ Government Code sections 22840, 22840.2, 50953, 75105 and 9354.1 respectively authorize the Board to invest: 1) the Public Employees' Contingency Reserve Fund, 2) the Public Employees' Health Care Fund, 3) the Volunteer Firefighters Length of Service Award Fund, 4) the Judges' Retirement System Fund, and 5) the Legislators' Retirement System Fund in accordance with the law governing investment of PERS funds.

Employees' Retirement Fund and the Legislators' Retirement Fund, as of the above date, which represents the smallest market capitalization of all common stocks held in the Public Employees' Retirement Fund and in the Legislators' Retirement Fund.

"In addition, designated employees must report investments in issuers of securities in which the funds of the Public Employees' Retirement Fund and the Legislators' Retirement Fund were actually invested during the period covered.

"(2) All investments in California real estate in which funds of the Public Employees' Retirement System and the Legislators' Retirement System may by statute be invested.

"(3) All investments in business entities and income from sources which are security dealers or brokers.

"The investments and income described in this category are not limited to those that are located in California, doing business in California, or have done business in California in the past two years."

Pursuant to PERS' present Conflict of Interest Code, designated individuals assigned to Category 1 are not required to report income, including gifts, which is unrelated to their service with PERS. The only "income"⁴ which individuals assigned to Category 1 must presently report is "income from sources which are security dealers or brokers." This present Code was, of course, approved by the FPPC.

While PERS is considering voluntarily expanding the reporting of income for individuals assigned to Disclosure Category 1, PERS seeks to avoid the situation where its Board Members would be required to report gifts worth over \$50 which have no connection to their service as PERS Board Members.

The FPPC has provided various agencies, including PERS, with sample disclosure categories for the Conflict of Interest Code.

⁴ PERS is aware that for purposes of Conflict of Interest Code disclosure and disqualification requirements, the definition of income includes gifts. (Gov. Code sec. 82030.)

The FPPC's sample disclosure category for "designated employees whose duties are broad and undefinable" states as follows:

"All investments, sources of income, interests in real property as well as business positions in which the designated employee is a director, officer, partner, trustee, employee, or holds any position of management." (Emphasis added.)

PERS believes that the FPPC's sample disclosure category for designated employees whose duties are "broad and undefinable" is broader than is required by law for PERS Board Members. It is PERS' opinion that the sample disclosure category suggested by the FPPC would include reporting interests by PERS Board Members which are unrelated to their service with PERS, because it requires the reporting of "all income."

The law does not require the reporting of "all" financial interests. Nor does the law require the reporting of financial interests which the designated individual "might" affect materially through the conduct of his or her office. The law only requires the reporting of financial interests which the designated individual "foreseeably can affect materially through the conduct of his or her office." (Emphasis added. Cal. Code of Regs., title 2, sec. 18730 (b)(3).)

Government Code section 87302 states in pertinent part that:

". . . [a]n investment, business position, interest in real property, or source of income shall be made reportable by the Conflict of Interest Code if the business entity in which the investment or business position is held, the interest in real property, or the income or source of income may foreseeably be affected materially by any decision made or participated in by the designated employee [⁵] by virtue of his or her position." (Emphasis added.)

California Code of Regulations, title 2, section 18730 (b)(3) states as follows in pertinent part:

⁵ Government Code section 82019 defines a "designated employee" in pertinent part as ". . . any officer, employee, member, or consultant of any agency. . . ." Title 2, California Code of Regulations, section 18700 defines "member" in part as ". . . salaried or unsalaried members of boards or commissions with decision-making authority. . . ."

"Such a designated employee shall disclose in his or her statement of economic interests those financial interests he or she has which are of the kind described in the disclosure categories to which he or she is assigned in the Appendix. It has been determined that the financial interests set forth in a designated employee's disclosure categories are the kinds of financial interests which he or she foreseeably can affect materially through the conduct of his or her office." (Emphasis added.)

Pursuant to the definition of "gift" contained in Government Code section 82028,⁶ if PERS were to use the FPPC's sample

⁶ Government Code section 82028 defines "gift" as follows:

"(a) 'Gift' means, except as provided in subdivision (b), any payment 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. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.

"(b) The term 'gift' does not include:

"(1) Informational material such as books, reports, pamphlets, calendars, or periodicals. No payment for travel or reimbursement for any expenses shall be deemed 'informational material.'

"(2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

"(3) Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin

(Continued on next page.)

disclosure category for "designated employees whose duties are broad and undefinable," it appears that PERS Board Members would be required to report certain gifts from friends who had no connection with PERS. For example, if a PERS Board Member received a birthday gift valued at \$51 from his or her neighbor who had no PERS connections, and the Board Member did not give the neighbor a gift, it would appear that the Board Member would have to disclose the gift if the FPPC's sample disclosure category were to be adopted. It would also appear that a Board Member who received a Christmas gift valued at \$51 from a long-time friend with no PERS connections would have to disclose the gift even if the Board Member had given the long-time friend a gift of lesser value in exchange. The receipt of such gifts will not foreseeably materially affect any decisions reached by the PERS Board.

PERS Board Members are committed to avoiding conflicts of interests and to carrying out the goals of the Conflict of Interest Code. However, it appears those goals can be achieved while protecting the Board's right of privacy, by the adoption of language which is less broad than the FPPC's sample category set forth above. PERS believes the following language would achieve the purposes of the reporting requirements, as well as

or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary for any person not covered by this paragraph.

"(4) Campaign contributions required to be reported under Chapter 4 of this title.

"(5) Any devise or inheritance.

"(6) Personalized plaques and trophies with an individual value of less than two hundred fifty dollars (\$250)."

Government Code section 82044 defines "payment" as follows:

"'Payment' means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible."

comply with the provisions of Government Code section 87302 and California Code of Regulations, title 2, section 18730:

"Disclosure for Individuals Assigned to Category 1:

"All investments with any person or business entity of any type, which is contracting with PERS, or which at any time during the preceding two years has contracted with PERS, or which the designated individual knows or has reason to know is seeking to contract with PERS or which the designated individual knows or has reason to know is being solicited by PERS to contract with PERS.

"All investments including, but not limited to, those in securities, real estate or business entities, in which any funds administered by the Board are invested.

"All income derived from the above sources.

"All business positions held in any business entity described above.

"All interests in real estate co-owned with, or purchased from the above sources."

If it is the FPPC's conclusion that the language proposed by PERS will not be approved by the FPPC, please set forth the reasoning upon which the FPPC relies in not approving PERS' proposed language, as well as alternative language acceptable to the FPPC.

Issue C

Is an individual who does not directly contract with PERS, but who works for a firm that contracts with PERS to provide consulting services, a "consultant" within the meaning of the Political Reform Act to the extent the individual performs consulting services for PERS?

The Political Reform Act requires government agencies to adopt conflict of interest codes designating employees who must file periodic statements disclosing certain financial interests. Any position within the agency which involves participation in decisions which may have a material financial effect on any

financial interest must be designated. (Gov. Code sec. 87302 and Cal. Code of Regs., title 2, sec. 18730.2.)

The term "designated employee" includes "consultant" of the agency. (Gov. Code sec. 82019.) The term "consultant" is, in turn, defined as follows:

"(2) 'Consultant' shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that 'consultant' shall not include a person who:

"(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

"(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel." (Emphasis added. Cal. Code of Regs., title 2, sec. 18700 (a)(2).)

The FPPC's Advice Letter A-79-130 dated November 9, 1979 states as follows regarding this section of law which defines "consultant":

"The problems with this section are myriad, as you so aptly point out in your letter. One of the things it does clarify, however, (and perhaps the only one) is that the term refers to an individual, a 'natural person,' and not to an organization with which a governmental agency contracts. It is therefore the individuals who actually provide the services for the consultant firm who must disclose their interests, and if one individual provides engineering services and another bond services, they should be in appropriately different disclosure categories. . . ." (Emphasis added.)

FPPC's Advice Letter A-86-245 also interprets this regulation as follows:

"Two of the firms involved in the present question have argued that since the firms with which the District has contracted are not 'natural

persons,' no disclosure is required by the firms or their employees. The term 'natural persons' was used to clarify that corporate entities do not need to file statements of economic interests. If the argument presented by these firms was accepted, all consultants could avoid the provisions of the Act simply by incorporating themselves. The definition in subdivision (a)(2) of Regulation 18700 was not intended to provide such a loophole. We have consistently advised that natural persons working for consulting firms are subject to the Act's provisions in appropriate circumstances. See Advice Letter to Geoffrey L. Hayden, No. A-84-319; Advice Letter to Gerard Rose, No. A-84-307; and Advice Letter to David Kaplan, No. A-82-109. . . ."

The PERS Board is in agreement that the regulation which defines "consultant" is confusing and that the problems with this section are "myriad." However, PERS disagrees that the language of section 18700 as it is presently written includes natural persons who do not directly contract with PERS. The language of this regulation only includes natural persons who are under contract with a state or local agency, within the definition of "consultant." The regulation does not expressly include natural persons who work for businesses under contract with the agency.

PERS is aware of the case law which holds that the statutory construction of a statute by an agency charged with its enforcement and interpretation will be followed unless it is clearly unauthorized or erroneous. (Norioian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 655.) However, PERS is also aware that generally the same rules which apply to statutory construction also apply to ascertaining the meaning of regulations. (California State Restaurant Assoc. v. Whitlow (1976) 58 Cal.App.3d 340, 344 [129 Cal.Rptr. 824].) PERS respectfully notes that the court in Daley v. State Dept. of Social Welfare (1969) 276 Cal.App.2d 801, 804, stated as follows:

"Although escape from literal statutory words is sometimes possible to avoid absurd and unintended consequences, neither a court nor executive agency may supply omitted terms or rewrite a statute to conform to an unexpressed intent."

This regulation could have, but does not state:

"Consultant shall include:

"(1) Any natural person who directly contracts with a local or state government agency,; or (2) any natural person who works for a corporation or business entity that has contracted with a local or state government agency, to the extent that the natural person provides information, advice, recommendation or counsel to the government agency. . . ."

PERS respectfully suggests that the FPPC's present interpretation of regulation section 18700 (a)(2) reads language into the regulation which is not there.

PERS has found no indication that this regulation has been interpreted by the courts or by the Attorney General's Office. However, if you are aware of any court decision or Attorney General's opinions on this regulation, we would appreciate your providing us with the citations. PERS further respectfully requests that FPPC reconsider its present interpretation of this regulation.

Issue D

Are members of the following firms "consultants" within the meaning of the Political Reform Act to the extent they provide information, advice, recommendation or counsel to PERS?

As your staff notes, the regulation which defines consultant is extremely difficult to understand. The language which defines individuals who fall within the term "consultant," is very similar to the language which defines individuals who fall outside the term "consultant." Thus, individuals who appear to fall within the meaning of "consultant" also appear to fall within the exclusion.

If it remains the position of the FPPC that individuals who do not directly contract with PERS, but who work for firms who contract with PERS, are included within the definition of "consultant" to the extent that they provide information, advice, recommendation or counsel to PERS, PERS hereby requests the FPPC's opinion as to whether members of the firms listed

below are "consultants" within the meaning of the Political Reform Act.⁷

It is PERS' position that members of the firms listed below are not "consultants" within the meaning of the Political Reform Act, because they fall within the exception set forth in regulation section 18700.

By way of background, Government Code section 20201 gives the PERS Board "exclusive control of the administration and investment of the Retirement Fund." Government Code section 20205.6 also states that "[t]he board has exclusive control of the investment of the retirement fund." Government Code section 20205 states as follows:

"The board may itself make any investment authorized by law or sell any security, obligation, or real property in which moneys in the fund are invested, by affirmative vote of at least seven members of the board, or by such an affirmative vote may from time to time adopt an investment resolution which shall contain detailed guidelines by which to designate those securities and real property which are acceptable for purchase. While the resolution is in effect, securities and real property may be purchased for investment by an officer or employee of the board designated by it for such purpose, and sales of securities may be consummated by such officer or employee under the conditions prescribed. Purchases and sales of securities shall be reported

⁷ California Code of Regulations, title 2, section 18329 (b)(2) states as follows in part:

"(2) Requests for formal written advice will not be acted upon unless the following requirements are met:

"(A) The name, title, or position, and mailing address of the person whose duties are in question are provided. In addition, if the request is submitted by an authorized representative, it shall contain a specific statement that such authorization has been made."

This information is set forth in Appendix A which is attached hereto.

to the board, on a monthly basis, at its next regular meeting."

Other statutes authorize the Board to retain a bank or trust company to serve as custodian in connection with investment of the fund (Gov. Code sec. 20202), and to "employ investment counsel on its staff or on a consulting basis or trust companies or trust departments of banks to render service in connection with the board's investment program. . . ." (Gov. Code section 20206.)

Outside firms retained by the Board include:

1. Master Custodian

PERS contracts with Boston Safe Deposit and Trust Company which acts as PERS' agent custodian for assets which PERS deposits with it. This contract is attached as Exhibit 1. Staff of Boston Safe do not make recommendations or give advice to the Board. Boston Safe staff have established custodial accounts for PERS (see p. 6 of the contract) and they act in accordance with the direction of the PERS investment managers or the PERS Board. (See pp. 6, 7 and 10 of the contract.)

2. International Investment Managers

PERS presently contracts with eleven international investment managers and is in the process of contracting with the twelfth manager. Pursuant to California Government Code section 20206, the Board is authorized to contract with qualified investment managers to render services in connection with the investment program of the Board. The 12 international investment managers provide services in connection with PERS' international investment program. They have the same contract except for the schedules which deal with items specific to each manager. A copy of the standard contract is attached as Exhibit 2.

The contract requires the international managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the fund being managed by the Manager . . ." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the Board. . . ." (P. 2 of the contract.) The international investment managers must also provide the Board with "an analysis of the investment results realized

by the Board during said quarterly or monthly period" and they "shall not under any circumstances have custody of any assets of the Fund." (P. 3.)

3. Domestic Investment Managers

PERS presently contracts with nine domestic investment management firms pursuant to Government Code section 20206, which provides that the Board may appoint one or more investment managers. The nine domestic managers provide services in connection with PERS' domestic investment program. They have the same contracts, except for the schedules which deal with items specific to each manager. A copy of the standard contract is attached as Exhibit 3.

The contract requires the domestic investment managers to "act in a manner consistent with and likely to achieve the investment objectives and guidelines designated by the Board for the assets of the Fund being managed by the Manager . . ." and to "provide the Board with an appraisal of the assets in the Fund being managed by it as of the last day of each calendar quarter, or calendar month if requested by the Board. . . ." (P. 2 of the contract.) The domestic investment managers must also provide the Board with "an analysis of the investment results realized by the Board during said quarterly or monthly period" and they "shall not under any circumstances have custody of any assets of the Fund." (P. 3.)

4. Real Estate Advisors

PERS presently contracts with six real estate advisor firms pursuant to Government Code section 20216.5. The six contracts are the same. A copy of the standard contract is attached as Exhibit 4. The function of the real estate advisors is "to furnish advice and investment services to the System with respect to the investment and reinvestment of certain assets of the System pursuant to the terms of the Agreement and in accordance with the System's formal Statement of Investment Objectives, Policies, and Asset Guidelines for the Equity Real Estate Portfolio . . . and such directions or other guidelines as may be delivered, from time to time, to the Advisor by the Board or the staff." (P. 2 of the contract.)

5. Real Estate Investment Consultant

PERS contracts with one real estate investment consultant firm. This contract is attached as Exhibit 5. The real

estate consultant assists the Board with its real estate investment policies and objectives.

6. Outside Legal Counsel

PERS contracts with six law firms. Three of these firms provide real estate services; one firm provides securities services; one firm provides fiduciary services; and one firm provides services regarding Lincoln Plaza, the building owned and occupied by PERS.

The contracts with the counsel who provide real estate services are the same. A copy of this contract is attached as Exhibit 6a. The services provided by these firms include representing PERS in litigation involving PERS' real estate holdings, preparation of legal opinions concerning real property and related issues, representing PERS in acquisitions and dispositions of real estate assets, and providing for other services as requested by PERS' Chief Counsel.

The contract with outside counsel who provide securities services is attached as Exhibit 6b. The services provided by this firm include preparation of legal opinions concerning corporate and securities law, shareholder rights and corporate governance; representation of the Board before state and federal governmental agencies, representation in litigation involving the Board's securities holdings; submission of periodic reports, describing the status of all matters hereunder pending before the Contractor; and other services as requested by the Board's Chief Counsel.

The contract with outside counsel who provides fiduciary services to PERS is almost identical to the contracts with counsel who provide real estate and securities services. The services provided by fiduciary counsel include preparation of legal opinions, oral presentations to the Board and PERS staff, review and analyses of federal law and legislation; and other services as requested by PERS' Chief Counsel.

The contract with outside counsel who provides services regarding Lincoln Plaza is attached as Exhibit 6c. The services provided by this firm include reviewing construction contractors' claims; reviewing files and records of construction contracts; reviewing and evaluating construction documents; formulating technical opinions regarding validity of construction contractors' claims and strength of PERS' counter-claims; consulting with PERS'

project personnel, consultants, and attorneys; and assisting with trial preparation and providing expert testimony.

7. Federal Lobbyist

PERS contracts with a federal lobbyist firm. This contract is attached as Exhibit 7. This firm provides PERS with the following services:

- A. Represent tax, pension, investment, and health insurance issues, especially those involving public pension plans, before the various House and Senate committees.
- B. Effectively develop and cooperate with coalitions having similar interests.
- C. Work with various organizations, financial institutions, employee representatives, the California Governor's Office, constitutional officers, leaders in the California State Legislature, and PERS staff.

8. Investment Advisory Committee Members

PERS contracts with five investment advisory committee members. This contract is attached as Exhibit 8. The investment advisory committee members "serve as special advisers to the Board, as members of the Investment Advisory Council, with regard to issues affecting pension investments, changes in the investment environment regarding new products or methodologies, asset allocation, performance evaluation and other investment issues of special interest to the Board or its Investment Staff." The contract further states that "Contractor shall meet with the Board of Administration, PERS, and its staff as requested." The advisors are unsalaried and receive only expenses for each meeting.

If it is your opinion that any of the above-listed firms or individuals are "consultants" within the meaning of the law, please set forth your reasoning.

Issue E

Will PERS be required to individually designate its consultants, or will PERS be permitted to designate its consultants as a class?

PERS' present Code, which was approved by the FPPC, does not designate any of PERS' consultants, either as a class, or individually. Jeanette Turville of the FPPC has advised PERS staff that PERS may be required to individually designate certain of its consultants in its new or amended Conflict of Interest Code, rather than simply designating "consultants" as a class. However, it appears that the FPPC permits most agencies to designate their consultants as a class.

The FPPC's written "Instructions for the Adoption of a Conflict of Interest Code" suggest the following language regarding the designation of "consultants" in a Conflict of Interest Code:

"Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation:

"The Executive Director/Officer may, determine in writing that a particular consultant, although a 'designated position,' is hired to perform a range of duties that are limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Executive Director's/Officer's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code."

The FPPC's Advice Letter A-79-130, states as follows:

"Because of the difficulty of predicting what kinds of consultants an agency may hire in the future, we generally make the position of a 'consultant' a designated one and assign it to the same disclosure categories as the head of the agency, i.e., we initially require the broadest possible disclosure of all consultants. [Fn. omitted.] We also provide, however, that in the case of any particular consultant, the head of the

agency may make a written finding that the duties of the consultant are limited in scope and that the consultant's disclosure obligations should consequently be waived."

Thus, it appears that the FPPC permits most agencies the discretion to make determinations regarding which of their consultants fall within the meaning of California Code of Regulations section 18700 (a)(2), title 2. PERS staff has reviewed the Conflict of Interest Statements of different agencies, including the FPPC's own Conflict of Interest Code. None of the Codes which PERS staff has reviewed, with the exception of the State Teachers' Retirement System's,⁸ specifically designate individual consultants.

PERS respectfully requests the following information:

1. Is it the formal opinion of the FPPC that PERS must specifically designate certain consultants?
 - a. If so, which consultants must be specifically designated?
2. Other than STRS, has the FPPC required any other state or local governmental agency to specifically name its consultants?
 - a. If so, which agencies have been required to specifically designate their consultants?
 - b. Why have these agencies been required to specifically designate their consultants?
3. If the FPPC has not required any agency other than STRS to specifically designate their consultants, what legal authority does the FPPC rely upon to treat STRS (and PERS?) differently than all other state and local agencies?

PERS is aware that the FPPC is entitled to make an administrative interpretation of the statutes and regulations

⁸ According to Jeanette Turville of the FPPC, it was the FPPC which required STRS to specifically designate certain outside consultants, including: 1) authorized personnel of external investment managers - equity; 2) authorized personnel of external investment managers - debt; and 3) authorized personnel of external investment managers - real estate. (5 Cal. Code of Regs., sec. 22000.)

it administers. However, it appears that the FPPC's own interpretation of the law (presumably embodied in the FPPC's "Instructions for the Adoption of a Conflict of Interest Code") only requires reporting of "consultants" as a class. Thus, it would appear that requiring PERS to specifically designate its consultants would go beyond the FPPC's own interpretation of the pertinent statutes and regulations. Furthermore, PERS is unaware of any authority which would permit the unequal application of the law without a rational basis for doing so.

Issue F

What statements would designated individuals be required to file if PERS 1) amends its Conflict of Interest Code; or 2) simultaneously repeals its present Code and enacts a new Code?

PERS is considering making extensive changes to its present Code. Thus, PERS is considering simultaneously repealing its present Code and adopting a new Code, rather than amending its present Code. However, we were advised by Jeanette Turville to request written advice as to whether repeal of the old Code and adoption of the new Code might subject employees designated in both Codes to filing: 1) an annual statement under the present Code; 2) a leaving office statement upon the repeal of the Code presently in effect; and 3) an assuming office statement upon the enactment of the new Code.

We were advised by Ms. Turville that if PERS treated the changes to its Code as an amendment, rather than as a repeal and adoption, employees designated in both the present Code and the amended Code would not need to file leaving office and assuming office statements. We were further advised by Ms. Turville that if we made the changes by way of repeal and adoption of a new Code, designated employees might be required to file multiple statements.

Please advise PERS what statements would need to be filed by: 1) employees designated in the present Code but (because of changes in their job duties) not designated in the new Code; 2) employees designated in the present Code and redesignated in the new Code; 3) employees not designated in the present Code but designated in the new Code.

It is PERS' position that employees who are designated in both the present Code and in the new Code should only be required to file the annual statement. Requiring the filing of multiple statements in this situation would be burdensome on designated employees, would not carry out the intent of the Conflict of

Diane Griffiths

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October 21, 1988

Interest Code, and would put form over substance. If you disagree with PERS' position in this regard, please set forth the legal authority upon which you rely.

Thank you for your anticipated timely response to the request for legal advice. If you need further information, please do not hesitate to contact me or Margaret Hoehn, PERS Senior Staff Counsel.



RICHARD H. KOPPES
Chief Counsel

RHK:cl

Attachments