



PersWatch

**Enhancing Benefits Through
Increased Accountability**

September 11, 2007, testimony of James McRitchie on behalf of the PERSWatch e-mail group with several hundred CalPERS members.

Regarding: Proposed Amendments to Board of Administration Election Regulations, California Code of Regulations (CCR), title 2, sections 554.2 and 554.3.

Thank you for the opportunity to supplement our written comments. Our concerns are in four areas:

1. Technical concerns regarding incorporation of forms by reference. The Notice, for example says the rulemaking “incorporates by reference both Nomination Petition and the Nomination Acceptance/Ballot Designation forms. However, while the actual regulations text mentions these forms, it fails to meet the standards required by CCR, title 1, section 20. Paragraph (4) of subdivision (c), for example, requires the text to specify the document by title and date of publication. With over 30 years of experience in writing and reviewing hundreds of rulemaking packages, I’d be happy to meet with your staff to advise them on how to either do this correctly...or to use another option that would give CalPERS more flexibility.
2. In several places the rulemaking fails to meet the clarity standards required by CCR, title 1, section 16 when it references “partial Social Security number. “ What is a “partial Social Security number”? Is it one digit or 8? Because of that ambiguity, the proposed rule fails to meet the requirement of subparagraph (a)(1). Persons directly affected by the rule, as defined in section 16, subparagraph (b), don’t know how many digits will be required and such standards must be in the rules. I’ll talk more about that in a minute. My written comments discuss the need for limiting the use of Social Security digits and specifying very clearly what is required and why. The

- recent problem of whole numbers appearing on address labels certainly highlighted the risk of identity theft for all of us. According to a September 3, 2003, Federal Trade Commission report (see <http://www.ftc.gov/os/2003/09/synovatereport.pdf>), 9.91 million people or 4.6% of the population in 2002 were victims of identity theft. Losses to businesses and financial institutions totaled \$47.6 billion and consumer victims reported \$5 billion in out-of-pocket expenses. That was five years ago; the problem has only gotten worse. CalPERS should be protecting our assets, not opening up members who sign candidate petitions to increased risk from identity theft.
3. The rulemaking also fails to meet the clarity standards required by CCR, title 1, section 16 with regard to the number of signatures required on candidate petitions. Proposed section 554.3, subdivision (d) says that no less than 250 signatures will be required. Further guidance that “the Board will consider the goals of ensuring candidates have a minimum level of support and providing members and retirees access to candidacy” doesn’t offer enough clarity for the rules be unambiguous to those directly affected by them. I can’t tell if the Board will require 250 signatures or 2,500 signatures.
 4. As important as these items are, the most troublesome concern involves a failure to meet the authority standards required by CCR, title 1, section 14. In proposed amendments to CCR, title 2, section 554.3, subdivisions (b), (c) and (d), CalPERS includes language that the requirements to validate a nominee’s eligibility or a member’s eligibility to nominate, and the number of signatures required to run for office “shall be determined at a noticed public meeting of the Board.” The procedure thus specified belies the fact that such rules must be promulgated through the process specified in the Administrative Procedure Act (APA). The Notice cites as authority and reference, Government Code sections 20090, 20095 and 20096. However these all appear to be reference sections, which the regulations seek to make specific. I think the authority section CalPERS meant to cite, and which appears in the text, is Government Code section 20121. That section states, “The board may make such rules as it deems proper.”

That is very broad authority, indeed. However, Government Code section 11346, subdivision (a) says that all regulations issued by state agencies are required to be adopted pursuant to the APA unless expressly exempted by statute. Government Code section 20121 contains no such exemption.

For many years, CalPERS argued it was exempt from the APA because of Constitutional provisions granting it “plenary authority and fiduciary responsibility for investment of moneys and administration of the system.” That argument was thoroughly rejected by the Superior Court in *Connell v. CalPERS* and upheld in appellate court. I beg of you, don’t waste the System’s time and money by continuing to insist that CalPERS can set standards, such as the criteria used to qualify as a Board nominee, without going through the rulemaking process. Such changes would rules of general application of major public importance, since they potentially impact who will run for office.

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

1. Allow CalPERS to change forms in the future without going through the rulemaking process. Don’t incorporate forms by reference.
2. Delete provisions, which appear to assert that CalPERS has the authority to amend its regulations at any “noticed public meeting of the Board.”
3. Clarify exactly what is required for verification member eligibility for nomination and to sign nomination petitions.
4. Clarify how many validated signatures are required to meet the requirements for nomination.

All of these changes can be made in a 15-day notice. I would be happy to work with staff to ensure the final package meets our concerns, as well as all APA standards.