

Law Offices of John Michael Jensen
11500 West Olympic Blvd Suite 550, Los Angeles CA 90064-1524
johnjensen@johnmjensen.com tel. 310.312.1100

April 21, 2015

VIA EMAIL AND U.S. MAIL AND FAX

Karen Pales,
Adeeb Alzanoon, 916.795.7821
Kelly Dotters-Rodriguez, 916.795.0128 ,
Anthony Martin (916) 795-9347
CalPERS

Request for Public hearing and Comments on Proposed Regulation 555.5

To CalPERS

Regarding the Proposed Regulatory Action by CalPERS concerning the adoption of Section 555.5 in Article 2 of Subchapter 1, Chapter 2 of Division 1 of Title 2 of the California Code of Regulations, 555.5, a copy of which is attached hereto,

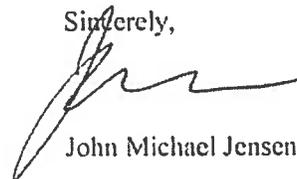
I request:

- (1) To be informed of all information related to the Proposed Regulation 555.5,
- (2) To receive notice of regulatory action, and the notice, text, and Initial Statement of Reasons related to Proposed Regulation 555.5. See Government Code section 11346.5
- (3) I wish to be involved in pre-notice public discussions to Proposed Regulation 555.5 if there were any, including pursuant to Government Code section 11346.45
- (4) I request a public hearing on Proposed Regulation 555.5 including pursuant to Government Code section 11346.8, as I am an interested person who represents class action claimants in the *Kesterson, et al. v. CalPERS, et al.* (Los Angeles County Superior Court No. BC502628) case, see April 2015 CalPERS Board of Administration agenda item 12.
- (5) I request to submit written material or otherwise provide comment on Proposed Regulation 555.5, including within the 45-day opportunity to comment to the agency in writing on the proposed regulation,
- (6) I request to be notified of and comment on any changes in the Proposed Regulation 555.5
- (7) I request all other information or opportunity to comment on to Proposed Regulation 555.5

If you have any questions, please contact my office at 310-312-1100.

Thank you.

Sincerely,



John Michael Jensen

cc: Jeff Rieger



Finance & Administration Committee

California Public Employees' Retirement System

Agenda Item 6b

April 14, 2015

ITEM NAME: Proposed Regulatory Changes – Payment of Interest

PROGRAM: Customer Account Services

ITEM TYPE: Action

RECOMMENDATION

Approve the initiation of the rulemaking process to establish rules and procedures by which interest payments would be made to a defined benefit plan participant when a defined benefit plan has delayed payment in the correct amount owed to a participant beyond a reasonable administrative processing time.

EXECUTIVE SUMMARY

The proposed regulation would (1) define the circumstances under which interest should be included in retroactive payments to participants of a defined benefit plan, (2) establish what interest rate should apply, and (3) establish a fair administrative appeal process for participants to pursue claims that a defined benefit plan has failed to pay interest when required under the regulation.

STRATEGIC PLAN

This agenda item supports Strategic Goal A by making explicit certain processes and procedures for the efficient administration of pension benefits.

BACKGROUND

Under Government Code section 20160(b), "the board shall correct all actions taken as a result of errors or omissions of ... this system." Under section 20160(e), in general, "[c]orrections of errors or omissions ... shall be such that the status, rights, and obligations of all parties ... are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time ..."

In the vast majority of cases, the defined benefit plans administered by the Board pay benefits in the correct amount within a reasonable administrative processing time (usually far less than 90 days). From time to time, however, benefits are underpaid due to a system delay that might fairly be characterized as unreasonable. In those instances, it may be appropriate to include interest with the retroactive payments owing to the participants. Including interest in such payments is consistent with the

statutory directive that "the status, rights, and obligations of all parties ... are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time."

In some situations, statutory law provides clear direction as to when interest should be paid to members and which interest rate should be used (for example refunds of member accounts and payments of death benefits more than 45 days after the system receives all of the information it needs to pay the death benefits). In many situations, however, statutory law does not provide clear direction as to when interest should be paid and at what rate.

ANALYSIS

The proposed regulation is intended to define the circumstances under which interest should be included in retroactive payments to participants of a defined benefit plan by drawing a distinction between ordinary administrative processing time and "wrongfully withheld" payments, as those concepts reasonably apply to the defined benefit plans administered by the Board in particular.

The proposed regulation establishes 90 days as a reasonable administrative processing time. That 90 days would not start running until (1) the right to the payment has accrued, and (2) the defined benefit plan has all of the information it needs to determine the proper amount of the payment. This 90-day processing time is more time than is needed in most circumstances. This regulation will not impact the goal to make all payments owing to participants as quickly as practicable. Most payments to participants from defined benefit plans are made well before any interest would accrue under this regulation. That would continue to be the case if this regulation is adopted by the Board.

The proposed regulation establishes a seven percent per annum simple (non-compounding) interest rate as the appropriate interest rate for delayed payments. This is the default interest rate established by Article XV, Section 1 of the California Constitution.

The proposed regulation specifies a process for participants to pursue claims that a defined benefit plan has failed to pay interest when required by the regulation. This aspect of the proposed regulation is important, because a decision as to whether interest is owed may turn on individualized factual scenarios that can vary substantially from case to case. The regulation makes use of the Board's existing administrative appeal procedures under Board Regulation 555, *et seq.*, to ensure that there is a fair process available to participants who believe they have been denied interest owing to them.

The proposed regulation delegates authority to the Executive Officer or his or her designee to grant a participant's claim for interest under this regulation for \$2,000 or

less, if the Executive Officer or his or her designee determines that the claim has merit. This delegation of authority is proposed so that staff need not expend unwarranted resources on administrative appeals under this regulation.

The proposed regulation specifies that a participant must make a claim for interest under this regulation within three years of receiving the payment that the participant claims should have included interest. This provision will help staff avoid expending resources on stale claims.

Additionally, while not addressed in this proposed regulation, staff will be evaluating whether there should be another regulation to address the collection of interest from participants who receive overpayments from funds administered by the board.

BUDGET AND FISCAL IMPACTS

The fiscal impact of the proposed regulation, if adopted, is difficult to quantify, but likely minimal. The proposed regulation would result in interest payments on some payments to participants that would not otherwise be made. The instances in which payments would be subject to the accrual of interest should be rare, however, as the vast majority of all participant payments that would be subject to this regulation are made within the time frames contemplated by the proposed regulation. Further, the additional costs associated with the regulation may be offset by the savings resulting from the efficiency and predictability that the regulation would bring to the defined benefit plans administered by the Board.

BENEFITS/RISKS

The primary benefit of approving the proposed regulation is that it will provide clear and transparent guidelines for staff and participants of defined benefit plans administered by the Board. Further, it should help resolve legal disputes with members and beneficiaries claiming entitlement to interest.

The primary risk of the proposed regulation is that administration of the regulation will consume staff time and resources, but staff believes that this risk can be mitigated through an efficient and reasonable administration of the proposed regulation.

ATTACHMENTS

Attachment 1 – Proposed Regulatory Action by CalPERS

Agenda Item 6b
Finance & Administration Committee
April 14, 2015
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ANTHONY SUINE
Interim Chief, Customer Services Account Division

DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

CHERYL EASON
Chief Financial Officer

PROPOSED REGULATORY ACTION BY CALPERS

Adoption of Section 555.5 in Article 2 of Subchapter 1, Chapter 2 of Division 1 of
Title 2 of the California Code of Regulations

§ 555.5. Accrual of Interest on Certain Delayed Payments

- (a) Board Finding and Declaration. The board finds and declares that members, beneficiaries and those persons defined by Government Code section 21291 (together, "participants") should receive appropriate interest when any payment owed to a participant from a defined benefit plan has been delayed beyond a reasonable administrative processing time. The purpose of this regulation is to distinguish between correct payments that are made to participants within a reasonable administrative processing time (see *Weber v. Board* (1998) 62 Cal.App.4th 1440) and payments that are owed to participants, but which have been "wrongfully withheld" beyond a reasonable administrative processing time (see *Olson v. Cory* (1983) 35 Cal.3d 390).
- (b) Applicability. This regulation applies to all payments owed to participants from a defined benefit plan established under the Public Employees' Retirement Law, the Judges' Retirement Law, the Judges' Retirement Law II or the Legislators' Retirement Law, except for those payments that are expressly excluded hereafter. This regulation does not apply to:
- (1) Any payment owed to any person or entity who is not a participant.
 - (2) Any payment owed to any person or entity from any defined contribution plan, money purchase pension plan or any tax-preferred retirement savings program (e.g., Government Code sections 21670, 22960 and 22970).
 - (3) Any payment owed to any person or entity from any fund created under the Public Employees' Medical and Hospital Care Act, or any similar fund established for the purposes of administering health benefits.
 - (4) Any payment owed a participant for which the terms and conditions of interest accrual are governed by applicable provisions of the Public Employees' Retirement Law, the Judges' Retirement Law, the Judges' Retirement Law II, or the Legislators' Retirement Law (e.g., Government Code sections 9353.3, 21499, 20178, 20734 and 75520).
- (c) Reasonable Administrative Processing Time. Subject to the limitations set forth in subdivision (b), all payments owed to a participant from a defined benefit plan shall be authorized by the board to the Controller within 90 calendar days after receipt of all information necessary to make the payment. Provided, however, that if the 90th day falls on a weekend or holiday, the board may authorize the payment to the Controller on the next business day.

"All information necessary to make the payment" for purposes of subdivision (c) includes, but is not limited to, any accurate and complete information that the board must receive from a participant, an employer or any other party, when such information may impact the amount owed to the participant. Such information includes, but is not limited to, the following:

(1) The participant's accrual of the right to receive the benefit (e.g., the member's retirement date).

(2) All final eligibility determinations that impact a participant's right to receive payments from a defined benefit plan. No interest shall accrue during the time it takes to make such final eligibility determinations. For example, no interest shall accrue during the time that it takes the Executive Officer, the board or the governing body of a member's employer to make a final determination that a member is or is not eligible to retire for disability or industrial disability. As a further example, no interest shall accrue during the time it takes the Executive Officer or the board to make a final determination that a participant satisfies the provisions of California Code of Regulations, title 2, section 570.5(b). In these contexts, a "final determination" is a determination that may be challenged in court after exhaustion of all administrative remedies.

(3) Direction received from a court in a dissolution of marriage proceeding.

(4) Information or payments that must be received from an employer before amounts can be paid to a participant from the Replacement Benefit Plan, established under Government Code section 21757. A payment from the Replacement Benefit Plan is not "owed to a participant" until that payment is required to be made under California Code of Regulations, title 2, sections 589.3(f)(1) and 589.4(f)(4).

(5) Information that must be received from a reciprocal retirement system in order to determine the amount owed to a participant.

(6) Information that must be received from an employer in order to determine the amount owed to a participant, such as information regarding a member's pay, service credit, conversion of sick leave, membership status, membership classification or any other information that impacts a member's "final compensation."

(7) Information that must be received from a participant in order to determine the amount owed to a participant or in order to facilitate payments to a participant, such as executed optional election forms, electronic funds deposit information, tax withholding information, address information, the withdrawal of a participant's prior demand that payments not be made to that participant or a participant's correction of inaccurate or incomplete information that the participant previously provided to the board.

(d) Appropriate Interest. If a payment owed a participant from a defined benefit plan is not authorized to the Controller within the time period established under subdivision (c), the payment shall include seven percent per annum simple (non-compounding) interest. Such interest shall run from the expiration of the time period established under subdivision (c) through the day that the board expects the Controller to issue the warrant for the amount owed.

(e) Administrative Remedies. Any participant who claims that interest has not been paid as required under this regulation must exhaust his or her administrative remedies with the board, subject to Government Code section 20134 and California Code of Regulations, title 2, sections 555-555.4, before seeking relief in any court. The Executive Officer or his or her designee is authorized to grant a participant's claim for interest under this regulation for \$2,000 or less, if the Executive Officer or his or her designee determines that claim has merit. When a participant has asserted a claim for interest under this regulation for \$2,000 or less and the Executive Officer or his or her designee has rejected that claim in writing, that participant shall be deemed to have exhausted his or her administrative remedies with the board.

(f) Time Limitation To Initiate Administrative Remedies. Any participant who claims that interest has not been paid as required under this regulation must assert his or her claim for such interest in a writing received by the board within three years after the participant received the payment that the participant claims should have included interest, or else that claim is forever barred. The board finds and declares that (1) a participant's delay in asserting a claim beyond this three-year time period will compromise the ability of the board to analyze the facts in order to make a sound determination on that claim, and (2) the claim will be time barred as a matter of law under all potentially applicable statutes of limitations.

Note: Authority cited: Section 20121, Government Code. Reference: California Constitution, Article XV, Section 1 and Article XVI, Section 17; Sections 9353, 20120, 20121, 20134, 20160, 75005 and 75505, Government Code.