

J.J. Jelincic
366 Jane Court
Hayward, CA 94544

Anthony Martin, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942702
Sacramento CA 94229-2702

Re: Proposed Regulatory Action Amending Section 554.7

Dear Mr. Martin:

The regulatory change being proposed is an improvement but is very incomplete. The drafting is also just sloppy. The purpose of a regulation is to implement the law; not change or supersede it.

The California Constitution Article II Section 7 says:
"Voting shall be secret."

Section 19205 of the Election Code provides:

A voting system shall comply with all of the following:

- (a) No part of the voting system shall be connected to the Internet at any time.
- (b) No part of the voting system shall electronically receive or transmit election data through an exterior communication network, including the public telephone system, if the communication originates from or terminates at a polling place, satellite location, or counting center.
- (c) No part of the voting system shall receive or transmit wireless communications or wireless data transfers.

Section 14287 of the Election Code provides:

No voter shall place personal information upon a ballot that identifies the voter.

"Personal information" includes all of the following:

- (a) The signature of the voter.
- (b) The initials, name, or address of the voter.
- (c) A voter identification number.
- (d) A social security number.
- (e) A driver's license number.

Section 20096 of the Government Code provides:

The board shall cause ballots to be distributed to each active and retired member of the system in advance of each election, and shall provide for the return of the voted ballots to the board without cost to the member, and shall develop election procedures. The results shall be certified by the Secretary of State. The board may require all persons who perform election duties to certify, under penalty of perjury, that they properly performed those duties.

CalPERS has asserted that GC 20096 exempts it from compliance with the Constitution, the Election Code or any other provision of law that is not included within the Public Employees' Retirement Law (PERL).

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Section 20096 contains no supersession language. Such an interruption is an absurd and irresponsible position. It is difficult to believe the assertion is even being made in good faith. Even CalPERS implicitly acknowledges the falseness of that position by proposing to amend its regulations through the process of the Administration Procedures Act.

The CalPERS staff has insisted publicly and explicitly that requiring the voter to sign the ballot does not and did not violate the constitutional provision that "Voting shall be secret."

It is interesting to note that on March 14, 2016 the Secretary of State's Office and the California Public Employees' Retirement System (CalPERS) negotiated and agreed to language of the required certification which specifically excluded approval of the voting process. An agreement that would have been unnecessary if GC 20096 actually superseded all other law.

The proposed amendment to the regulation is a step in the right direction.

§ 554.7. Ballot Distribution.

- (a) Except as provided in paragraph (b), below, the Election Coordinator shall cause ballots, candidate statements, postage paid return envelopes, and online/telephone voting instructions to be mailed by CalPERS directly to the mailing or physical address of each retired member, and to each eligible active member for whom the Board has a residence address and is permitted by law to use such address to mail these election materials. The Election Coordinator shall provide the means for eligible active and retired members for whom CalPERS does not have a valid mailing or physical address recorded to request ballots. Paper marked ballots shall be returned to the location designated by CalPERS in the postage paid return envelope provided by CalPERS, or another comparable envelope, and the ~~ballot~~ reverse side of the envelope shall be signed by the voter certifying under penalty of perjury that the voter is eligible to vote in the election; otherwise the paper ballot shall not be valid. CalPERS will allow online and telephone voting. Voters submitting an online or telephone vote are required to enter a pin number provided by CalPERS, and a unique identification number, and agree to electronically certify under penalty of perjury that the voter is eligible to vote in the election; otherwise the online or telephone vote shall not be valid.

The proposed amendment to § 554.7, as presented to the Board and in the rulemaking file, leaves it unclear what happens to the rest of the rule namely subsection (b). The proposed amended regulation cites (b) but there is no (b) included. This should be clarified and made part of the rulemaking file.

The requirement that the voter provides a "unique identification number" to vote by phone or on the internet remains problematic. The regulation does not forbid a unique identifier from being on the actual ballot. However, staff has indicated that may be dealt staff action and/or with in a future regulatory change. The proposed regulation is clearly not consistent with Article II Section 7 of the constitution. It is clearly not consistent with the Election Code sections 14287 and 19205.

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The Board and the staff are aware that § 554.8 (a) (2) continues to require that a voter signs the ballot in order for a ballot to count. It is unclear why the proposed regulation change fails to deal with this.

§ 554.8. Ballot Counting and Runoff Election.

(a) **The following are declared to be invalid ballots and shall not be counted in the election:**

- (1) **Votes cast for individuals not listed as candidates on the official ballot.**
- (2) **Paper ballots not signed by the eligible voter, in accordance with the CalPERS instructions.**
- (3) **A duplicate ballot (paper ballot, online, telephone) received from the same voter. First ballot received is the only valid ballot.**
- (4) **Votes cast in excess of that allowed on the ballot.**
- (5) **Ballots not received within the time period prescribed by the Notice of Election.**

(b) Returned Paper ballots shall be opened, and ballots securely scanned solely for the purpose of validating the ballots and to ensure only one vote is cast per voter. Online and telephone votes will be tracked to ensure there are no duplicate votes between voting methods. On the date specified in the Notice of Election at the location designated by CalPERS, the validated paper ballots shall be tabulated publicly by an independent, neutral agent appointed by CalPERS for that purpose. Online and telephone votes will be tabulated on the date specified in the Notice of Election and be auditable by an independent, neutral agent appointed by CalPERS for that purpose. The candidate having a majority of the valid votes cast, or the winning lot as drawn by the Secretary of State in case of a tie vote, or the single candidate as provided in section 554.7(b), shall be certified by the Secretary of State as having been elected.

(c) Where the Board members elected under Government Code section 20090, subdivision (g)(1) are elected in the same election, the two positions shall be separately designated Position A and Position B. The position held by Charles Valdes on November 15, 2000 shall thereafter be designated Position A. The position held by William B. Rosenberg on November 15, 2000 shall thereafter be designated Position B.

(d) The candidate receiving the majority vote for each position shall be certified by the Secretary of State as having been elected. In the event that no candidate for any position receives a majority of all valid votes cast, a runoff election will be conducted involving the two candidates who received the highest number of votes.

As proposed § 554.7 requires the voter to sign the back of the return envelope while § 554.8 requires that the voter must sign the ballot in order for the ballot to be counted. The impact require the voter to sign BOTH the return envelope and the ballot in order to comply and have their ballot count.

I find it difficult to believe that is the intention of the Board yet that is what the regulations would now require. If that is not the intent of the proposed amendment it should be corrected.

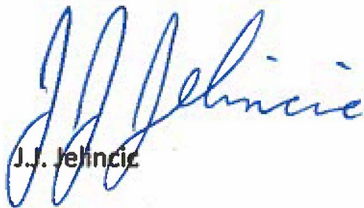
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I have attached and incorporate my prepared remarks for the January 2018 meeting at which the Board proposed the regulations.

I have also submitted a request for a public hearing.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "JJ Jelincic". The signature is written in a cursive style with a large initial "J".

J.J. Jelincic

Encl.

I would like to publicly congratulate David and Margaret. I wish you both good luck and great success.

The revised election process has a number of flaws. The US has a long history of the secret ballot. The state constitution calls for votes to be secret. The election code forbids internet voting. The election code forbids personal identifying material on the ballot.

The contract staff entered into requires that the ballot (not the envelope) has a printed identifier that identifies the individual voter. It requires that the vendor capture and make available how individual members voted. These could be fixed by staff.

I added that it could be fixed by direction of the chair. Priya directed that the bar code be moved to the envelope but did not do anything about the vendor tracking who voted how.

The regulations require the use of the internet. The regulations currently require that the ballots be signed. The regulations require that the ballots be opened and scanned as they come in.

I agree the signing of the ballots is the biggest flaw and the easiest to fix, which this proposal does IN PART. Amending 554.7 to require the return envelope and not the ballot as proposed begins to address this.

Regulation 554.8 (formerly point 6) provides in (a) (2) that a ballot is valid only if signed. That should be corrected. The Board also deleted the former provision (a)(6) in that section that the ballots not be opened until after the voting deadline. That should be restored. Currently section (b) requires that ballots be opened and scanned to validate and make sure that only one vote is cast per voter. If the identifier is on the return envelope, rather than the actual ballot, this early opening would not be necessary and secrecy could be maintained. I recommend those corrections also be made.

A general lack of participation is a problem. It needs to be studied and addressed but that probably can not be done well, in time to impact the next elections. However, these immediate changes can be made quickly and should not have problems being approved by the OAL. I urge the Board to adopt them.

I know the system's legal position is that only the PERL binds CalPERS. I would point to Government Code 1090, the civil service system, the Dills Act, the Administrative Procedures Act, Bagley-Keene, the Public Record Act, Connell vs CalPERS and others to establish the unlikelihood of that position prevailing in a legal fight.

Thank you.