ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
April 29, 2019

Via Facsimile & U.S. Mail

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Re: Respondent's Argument
In The Matter Of The Application To Participate In The
California Public Employees' Retirement System Pension Plan Of
Golden Gate Regional Center, Inc., Respondent

Dear Members Of The Board Of Administration:

Our law firm represents Golden Gate Regional Center, Inc. (GGRC) with respect to the appeal of the decision by CalPERS to deny GGRC's request to participate in the CalPERS pension plan. GGRC has received the Administrative Law Judge's Proposed Decision denying GGRC's appeal. GGRC understands that the Board is going to consider the Proposed Decision at the Board's regular meeting on May 15, 2019. This letter presents GGRC's arguments against the Proposed Decision and GGRC's arguments against designating the decision as Precedent if the Board decides to adopt the Proposed Decision.

Arguments Against The Proposed Decision

The Proposed Decision is very much a "facts and circumstances" analysis of the extent of the control that the State of California has over GGRC's structure and operation in order to determine if GGRC qualifies as an "agency or instrumentality" of the State within the meaning of section 414(d) of the Internal Revenue Code (Code). In order for any such analysis to be thorough and accurate, a thorough and accurate understanding of the relevant facts is essential. GGRC believes that a number of factual statements in the Proposed Decision are not entirely thorough and accurate and wishes to clarify these statements so that the Board's understanding of the relevant facts is thorough and accurate. The following statements in the Proposed Decision's Factual Findings require clarification (by paragraph number):

[Attachment C]
The last sentence accurately states that the State of California, Department of Developmental Services (DDS) is a signatory on bank accounts holding funds used by GGRC for operations, which demonstrates one aspect of the control that DDS has over GGRC. The last sentence continues by stating that DDS is not a signatory on accounts holding funds used to administer "standard employee benefits." One could infer from this portion of the sentence that DDS has no control over the funds that are used to provide employee benefits for GGRC's employees. This is not true for at least two reasons:

1. GGRC uses the funds in the accounts on which DDS is also a signatory to pay for the employee benefits for GGRC's employees. These funds are sent by GGRC to the appropriate third parties who administer the employee benefit plans either as premiums (e.g., to the insurance company for group health plan benefits) or to be held for the benefit of the employees who participate in an employee benefit plan (e.g., to the custodian of the tax-sheltered annuities under the Code section 403(b) plan).

2. GGRC's budget that is approved by DDS clearly contemplates that a portion of the funds provided by DDS to GGRC, as to which DDS also has signatory authority, are to be used to provide employee benefits for GGRC's employees.

While it is true that DDS does not have signatory authority over the funds held by the third parties to whom GGRC's funds have been sent to provide employee benefits for GGRC's employees, neither does GGRC. Of course, this is very typical of how all employee benefit plans work – once the funds are sent to such a third party, they either become the assets of that third party (e.g., the insurance company) or are held by the third party for the benefit of the employees (e.g., the Code section 403(b) plan participants) and, as a result, are beyond the control of the employer sponsoring the plan.

This paragraph discusses the IRS's advance notice of proposed rulemaking (ANPRM) and refers to the text in the appendix to the ANPRM as "proposed regulations." As GGRC has repeatedly pointed out, these are not "proposed regulations" – the ANPRM is nothing more than an announcement of what the IRS was thinking about doing in November 2011. The IRS has done virtually nothing further in the last seven plus years — no regulations have ever been proposed. The ANPRM has no force of law – regulations need to be proposed, go through the comment and hearing processes, and be finalized.
This paragraph discusses the first major factor in the ANPRM regarding State control over an entity's governing board. One could infer from this paragraph that this factor is met only if the State has the authority to appoint, remove or replace a member of an entity's board of directors. This is not accurate – that authority is an example or a safe harbor only, not the exclusive means of satisfying this factor. The focus of the factor in the ANPRM is control. The factor is stated in the ANPRM as follows (emphasis in bold added):

The entity's governing board or body is controlled by a State (or political subdivision thereof). For example, an entity's governing board or body is controlled by a State (or political subdivision thereof) if the public officials of the State (or political subdivision thereof) have the power to appoint, and to remove and replace, a majority of the entity's governing board or body.

The second sentence states that DDS does not have the authority to appoint, remove or replace a member of GGRC's board of directors. As GGRC has demonstrated, while it may be true that this statement is largely true, the Lanterman Act, codified in California Welfare and Institutions Code sections 4500 et seq., gives DDS quite a bit of power over GGRC's board of directors. For example:

1. California Welfare and Institutions Code section 4626(a) requires that DDS "must give a very high priority to ensuring that regional center board members and employees act in the course of their duties solely in the best interest of the regional center consumers and their families" and be free from conflicts of interest.

2. California Welfare and Institutions Code section 4626(l) requires DDS and each regional center board to review the regionals center's conflict-of-interest statement of each regional center board member to ensure that no conflict exists and to mitigate any such conflicts of interest. This could include the resignation and replacement of such a regional center board member.

3. California Welfare and Institutions Code section 4626.5 requires that each regional center submit a conflict-of-interest statement to DDS and California Welfare and Institutions Code section 4627(b) provides for the enforcement of section 4626.5 as well as section 4626. Any failure under these provisions "may be considered grounds for removal from the board or for termination of employment."
Paragraph 36
This paragraph discusses an example in the ANPRM where an entity's board was not chosen by the State. See the discussions under ¶32 and ¶34 above. This is just an example and there is no mention in this example of the additional factors that exist in GGRC's situation that demonstrate the control by the State through DDC over GGRC's board.

Paragraph 41
The penultimate sentence repeats the statement discussed under ¶9 above regarding DDS not being a signatory on accounts used to administer employee benefits. The comments made under ¶9 above are equally relevant here. In addition, it is clear that the Proposed Decision used this statement in reaching the conclusion that GGRC had not met the third major factor under the ANPRM.

Paragraph 49
This paragraph discusses the third factor in the ANPRM regarding the establishment of an entity. While it is true that the Lanterman Act did not create GGRC of its own motion, the Lanterman Act did not create any vehicle for fulfilling the State's obligations to its developmentally disabled citizens. It could have done so and perpetuated the provision of its services by the State directly (just like all other States do). Instead, the Lanterman Act was purposefully enacted to rely solely on the creation of regional centers to provide such services, each with its own exclusive territory. GGRC would not have been created but for the Lanterman Act; it is GGRC's sole reason for being. There is a symbiotic relationship between the Lanterman Act and the regional centers—neither can exist without the other.

GGRC also disagrees with the lack of weight given by the Proposed Decision to the private letter ruling (PLR) that the IRS issued to GGRC that concluded that GGRC is "a wholly owned instrumentality of the State" under Code section 3121(b)(7). See ¶27 of the Factual Findings and ¶4 of the Legal Conclusions. First, the language of Code section 3121(b)(7) is identical to the language of Code section 414(d) as relevant here. In fact, the language of Code section 3121(b)(7) is more restrictive than the language under Code section 414(d) because of the "wholly owned" qualifier in Code section 3121(b)(7) that is not present in Code section 414(d). Second, the PLR is binding on the IRS with respect to GGRC's status as an "instrumentality of the State" until it is revoked by the IRS. Absent the revocation of the PLR and absent final regulations under Code section 414(d), the IRS would have an almost impossible time trying to take the position that that GGRC was an instrumentality of the State under one Code section but not under another when the language of the two sections is identical.
Arguments Against The Designation As Precedent

GGRC does not believe that the Proposed Decision ought to be designated as Precedent if the Board decides to adopt the Proposed Decision for the following reasons:

1. The Proposed Decision relies so heavily on the ANPRM. As discussed above, the ANPRM does not establish "proposed regulations." Why not wait to designate decisions about what entities are within Code section 414(d) as Precedent until the IRS issues its final regulations under Code section 414(d) so that any such decisions have an accurate statement of the IRS's final position under Code section 414(d)?

2. The Proposed Decision fails to give any weight to the likely reality, as evidenced by the ANPRM, that the IRS will provide transitional relief to plans such as CalPERS in the event that the IRS does ever get around to proposing and finalizing regulations under Code section 414(d). Why not wait to designate decisions about what entities are within Code section 414(d) as Precedent until the IRS issues its final regulations under Code section 414(d) so that the transition rules are known?

3. ¶15 of the Factual Findings states that GGRC's failure to obtain an opinion from the U.S. Department of Labor (DOL) as allegedly required under Government Code section 20057.1 is not the reason that CalPERS denied GGRC's application. ¶56 of the Factual Findings reiterates this fact. However, ¶4 of the Legal Conclusions states this fact as a basis for rejecting GGRC's position that it is a public agency under Government Code section 20057. This entire aspect of the Proposed Decision raises issues that need to be more fully examined before any decision based on Government Code section 20057.1 ought to be designated as Precedent. In particular:

   - Government Code section 20057.1 was never mentioned by CalPERS until the hearing on GGRC's appeal. It does not appear in any of the materials that CalPERS provided to GGRC to apply for participation in the CalPERS pension plan, it did not come up in any of the e-mails between CalPERS and GGRC or any conversations between them, and it certainly was not mentioned in the denial letter that CalPERS sent to GGRC dated March 26, 2018. Therefore, GGRC had no knowledge of this requirement and no opportunity to request such a letter, which it easily could have requested during the 19 months that CalPERS had GGRC's application before denying it.
GGRC had no opportunity to examine how CalPERS has addressed Government Code section 20057.1 over the years. For example, how many agencies described in Government Code section 20057 have been accepted to participate in the CalPERS pension plan without obtaining a DOL opinion pursuant to Government Code section 20057.1? Has CalPERS effectively waived this requirement?

Would the DOL even issue such a letter or would it decline to do so in light of the ANPRM?

The plain meaning of Government Code section 20057.1 and the legislative history behind Government Code section 20057.1 ought to be examined in order to determine whether it even applies to a regional center. Government Code section 20057.1 contains the curious phrase that limits the applicability of the requirement to obtain a letter from the DOL to an "organization that qualifies under amendments to the definitions of 'public agency' effective on or after January 1, 2002." Every regional center clearly qualified as a "public agency" under Government Code section 20057 prior to amendments effective on or after January 1, 2002 - a regional center is not an "organization that qualifies under amendments to the definitions of 'public agency' effective on or after January 1, 2002" and, as a result, should not have to comply with this requirement.

Thank you for your consideration.

Very truly yours,

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Folsom Office

KWR/im
cc: Lop Hou, Chief, Administration and Finance

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### Original

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**Re:** Respondent's Argument  
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