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Circular Letter

May 16, 2013

TO: ALL PUBLIC AGENCIES AND SCHOOL EMPLOYERS

SUBJECT: NEW APPLICANT QUESTIONNAIRE FOR ENTITIES REQUESTING TO PARTICIPATE IN CALPERS BENEFIT PLANS

This Circular Letter is a follow-up to Circular Letter 200-013-12, dated April 20, 2012, entitled Internal Revenue Service Advance Notice of Proposed Rulemaking Regarding Definition of a Governmental Plan (CL-200-013-12). Internal Revenue Code ("IRC") section 414(d) generally defines the term "governmental plan" as a plan established and maintained for its employees by the government of the United States, the government of any State or political subdivision thereof, or by any of their agencies or instrumentalities. As discussed in CL-200-013-12, the Internal Revenue Service ("IRS") and the Treasury Department initiated a rulemaking process pursuant to IRC section 414(d) in order to provide additional clarity and guidance to employers regarding their status under IRC section 414(d) and their eligibility to participate in governmental plans. The first step in this process was the issuance of the Advance Notice of Proposed Rulemaking (the "Notice") and the draft proposed regulations included in the Notice (the "Proposed Regulations").

This Circular Letter is intended to provide you with additional information regarding how the Notice and the Proposed Regulations impact the application process for entities' requesting to participate in CalPERS benefit plans (collectively the "CalPERS Plans"). This Circular Letter is not intended to be an analysis of the Proposed Regulations or a definitive statement of their impact on CalPERS or its members and employers, nor should it be relied upon as such.

When an entity requests to participate in a CalPERS Plan, that entity's eligibility must be established. Therefore, each applicant is reviewed individually against CalPERS' eligibility criteria to determine whether it may participate in the CalPERS Plans. Although the Proposed Regulations are not final, and could be revised during the official regulatory process, in order to mitigate potential risks to the CalPERS Plans, its members and employers, CalPERS has decided to incorporate the Proposed Regulations into our existing eligibility review process.

As discussed in CL-200-013-12, the Proposed Regulations include a “facts and circumstances test” to determine whether an entity is an “agency or instrumentality of a State or a political subdivision of a State,” for purposes of IRC section 414(d). Below is a brief summary of the main and other factors that make up this facts and circumstances test.

The first group of the following five factors, which are categorized as “main factors,” include whether:

- The entity’s governing board or body is controlled by a State or political subdivision thereof;
- The members of the governing board or body are publicly nominated and elected;
- A State (or political subdivision thereof) has fiscal responsibility for the general debts and other liabilities of the entity (including funding responsibility for the employee benefits under the entity’s plan);
- The entity’s employees are treated in the same manner as employees of the State (or political subdivision thereof) for purposes other than providing employee benefits (for example, the entity’s employees are granted civil service protection); and
- In the case of an entity that is not a political subdivision, the entity is delegated, pursuant to a statute of a State or political subdivision, the authority to exercise sovereign powers of the State or political subdivision (such as, the power of taxation, the power of eminent domain, and the police power).

The second group of the following eight factors, which are categorized as “other factors,” include whether:

- The entity’s operations are controlled by a State (or political subdivision thereof);
- The entity is directly funded through tax revenues or other public sources;
- The entity is created by a State government or political subdivision of a State pursuant to a specific enabling statute that prescribes the purposes, powers, and manners in which the entity is to be established and operated;
- The entity is treated as a governmental entity for Federal employment tax or income tax purposes (such as, the authority to issue tax-exempt bonds under section 103(a)) or under other Federal laws;
- The entity is determined to be an agency or instrumentality of a State (or political subdivision thereof) for purposes of State laws;
- The entity is determined to be an agency or instrumentality of a State (or political subdivision thereof) by a State or Federal court;
- A State (or political subdivision thereof) has the ownership interest in the entity and no private interests are involved; and
- The entity serves a governmental purpose.

CalPERS has developed a revised Applicant Questionnaire based on the Proposed Regulations that agencies will be required to complete as a first step in the application process. Though at this time we are not asking existing participating agencies in the CalPERS Plans to complete the Applicant Questionnaire, we are providing you with a copy as an attachment to this Circular Letter. In addition, the Applicant Questionnaire will be available on the CalPERS website. CalPERS recommends that all applicants consult with independent legal counsel if they have questions regarding the Applicant Questionnaire or their eligibility to participate in the CalPERS Plans.

The Applicant Questionnaire is only the first step in the eligibility review process and we may require additional documentation from entities during the application process. CalPERS' receipt and review of the Applicant Questionnaire and/or supporting documentation is not an offer to contract, nor is there any guarantee that an applicant will be eligible to participate in the CalPERS Plans.

If you have any questions, please call our CalPERS Customer Contact Center at **888 CalPERS** (or **888-225-7377**).

KAREN DeFRANK, Chief
Customer Account Service Division

Enclosure:

[Applicant Questionnaire](#)