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Date: April 23, 2013

To: Human Resources Officers

From: Steven Bruckman  
Executive Vice Chancellor and General Counsel

Re: CalSTRS Audit of Academic Positions at SFCCD  
**Legal Advisory 13-01**

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On August 10, 2012, the California State Teachers' Retirement System (CalSTRS) issued a Final Audit Report (Report) finding that current and retired employees of the San Francisco Community College District (SFCCD) were improperly classified as employees entitled to CalSTRS benefits. The Report indicates an intent by CalSTRS to terminate CalSTRS employment benefits for current and retired employees of SFCCD. A copy of the Report can be found at the following hyperlink: (use "ctrl+click" or right click on the link and select 'Open Hyperlink')

[http://www.calstrs.com/sites/main/files/file-attachments/sanfrancisco\\_city\\_college.pdf](http://www.calstrs.com/sites/main/files/file-attachments/sanfrancisco_city_college.pdf)

Upon the conclusion of its investigation, CalSTRS found that SFCCD:

1. Erroneously reported employees who are ineligible for CalSTRS membership.
2. Incorrectly reported compensation during the 2009-2010 school year to CalSTRS for ten retired employees.
3. Incorrectly reported to CalSTRS non-creditable compensation as creditable for one member.
4. Incorrectly reported to CalSTRS six employees' compensation to the Defined Benefit (DB) Program.
5. Incorrectly reported members' earnings as non-member earnings.

CalSTRS has required SFCCD to undertake a series of corrective actions which include:

- Removal of employees from CalSTRS membership.
- A comprehensive review of all non-educational positions hired on or after August 11, 1995.

- Collection of all overpayments from each member, former member, or beneficiaries.
- Adjustment to all impacted members' creditable compensation.
- Re-verification of all part-time employees who worked in certificated positions.

While the findings and actions are currently limited to SFCCD, the Report conclusions may be of concern to other districts, particularly as it relates to CalSTRS eligibility. Education Code section 22206(a) authorizes a review of the administration of the State Teachers' Retirement Fund as often as "necessary" of any "public agency". CalSTRS could initiate audits on an individual district or system wide to check for compliance with applicable reporting requirements.

The Report raises two major areas of concern for districts. First, districts must carefully review which positions are designated as academic positions for purposes of CalSTRS membership. Second, employees who transfer from an academic position to a non-academic position must actively and on a timely basis elect to remain in CalSTRS if they wish to remain in CalSTRS.

As a follow-up to its audit findings, CalSTRS issued an Employer Information Circular dated August 29, 2012, which includes the following:

Examples of positions that are not reportable to CalSTRS are:

- Chief of Police
- Director of Building, Grounds, and Maintenance
- Director of Human Resources
- Chief Information Technology Officer
- Director of Payroll Services
- Chief Financial Officer

### **Designating Academic Employees and their Eligibility with CalSTRS**

Education Code section 87001 states:

(a) "Academic employee" refers to a person employed by a community college district in an academic position.

(b) "Academic position" includes every type of service, excluding paraprofessional service, for which minimum qualifications have been established by the board of governors pursuant to [s]ection 87356.

(c) Wherever in this code or any other code, the term "certificated employee" or any similar term is used in reference to community college employees, it shall be deemed a reference to academic employees of the community colleges.

(d) Wherever in this code or any other code, the phrase "position requiring certification qualifications," or any similar phrase is used in reference to positions in the community colleges, it shall be deemed a reference to academic positions in the community colleges. Nothing in this part shall be construed as repealing or negating any provisions in this code or any other code concerning employees of community college districts for purposes of retirement benefits under the State Teachers' Retirement System by referring to those employees as academic employees.

In its response to CalSTRS, SFCCD has asserted that the Education Code provides community college districts with broad authority over determining what types of service constitute an "academic position" versus a non-academic position. Section 87001(b) defines "academic positions" as service "for which minimum qualifications have been established by the board of governors pursuant to section 87356." However, in its Report, CalSTRS rejects this argument citing section 87001(d) which states that:

Nothing in this part shall be construed as repealing or negating any provisions in this code or any other code concerning employees of community college districts for purposes of retirement benefits under the State Teachers' Retirement System by referring to those employees as academic employees.

As a result, in its Report, instead of accepting the SFCCD's Board of Trustees classifications for academic positions, CalSTRS considered only those positions meeting the CalSTRS definition for creditable service. If a position did not perform duties under the definition of "creditable service", then that position would not be eligible, regardless of the determinations made at the local community college district level.

"Creditable service" is defined in Education Code section 22119.5 as follows:

(a) "Creditable service" means any of the following activities performed for an employer in a position requiring a credential, certificate, or permit pursuant to this code or under the appropriate minimum standards adopted by the Board of Governors of the California Community Colleges or under the provisions of an approved charter for the operation of a charter school for which the employer is eligible to receive state apportionment or pursuant to a contract between a community college district and the United States Department of Defense to provide vocational training:

(1) The work of teachers, instructors, district interns, and academic employees employed in the instructional program for pupils, including special programs such as adult education, regional occupation programs, child care centers, and prekindergarten programs pursuant to Section 22161.

(2) Education or vocational counseling, guidance, and placement services.

(3) The work of directors, coordinators, and assistant administrators who plan courses of study to be used in California public schools, or research connected with the evaluation or efficiency of the instructional program.

(4) The selection, collection, preparation, classification, demonstration, or evaluation of instructional materials of any course of study for use in the development of the instructional program in California public schools, or other services related to school curriculum.

(5) The examination, selection, in-service training, or assignment of teachers, principals or other similar personnel involved in the instructional program.

(6) School activities related to, and an outgrowth of, the instructional and guidance program of the school when performed in addition to other activities described in this section.

(7) The work of nurses, physicians, speech therapists, psychologists, audiometrists, audiologists, and other school health professionals.

(8) Services as a school librarian.

(9) The work of employees who are responsible for the supervision of persons or administration of the duties described in this section.

(b) "Creditable service" also means the work of superintendents of California public schools.

(c) The board shall have final authority for determining creditable service to cover any activities not already specified.

Applying this definition, CalSTRS conducted a review of all positions classified as CalSTRS eligible by SFCCD. From its initial review, the following positions previously classified as academic by SFCCD, were ruled by CalSTRS as ineligible for membership.

- Associate Vice-Chancellor, Facilities, Planning, and Management
- Director of Buildings, Grounds, and Maintenance
- Dean, Marketing & Public Information
- Dean of College Development
- Director, Payroll Services
- Chief Information Technology Officer
- Associate Director, Human Resources
- Interim Chief Financial Officer
- ADA Compliance Director/Assistant Legal Counsel
- Executive Assistant to the Chancellor

In addition to this list, CalSTRS identified 13 additional positions as potentially ineligible for membership pending further review. These positions were described as potentially non-educational administrative positions that SFCCD reported to CalSTRS as eligible. These positions are:

- Chief of Police
- Interim Vice-Chancellor, Research and Policy
- Associate Vice-Chancellor, Government Relations
- Assistant Director, Institutional Research
- Dean, Human Resources
- Management Analyst
- Interim Director of Human Resources
- Chief Financial Officer
- Director, Employee Relations
- Assistant Director, Affirmative Action
- Director, Information Technology
- Chief Legal Counsel
- Director, Administrative Services

Districts are advised to review both their current job postings and academic positions to see if they share similar titles to those reviewed above by CalSTRS. Districts are also advised to review all academic positions approved by their local boards that may not fall completely within the definition of “creditable service” as defined in Education Code section 22119.5.

#### **Active Election Necessary to Remain in CalSTRS When Transferring Positions**

The second area of concern raised by the Report deals with the active election that is necessary for a CalSTRS member to remain in that retirement program when transferring from an academic to non-academic position. Prior to 1996, when a CalSTRS member transferred out from an academic position, the option to remain in CalSTRS was assumed and no action was necessary. However, in 1996, Education Code section 22508(a) was enacted which changes the process requiring the individual to actively declare that an intent to remain in CalSTRS. Education Code section 22508(a) states:

(a) A member who becomes employed by the same or a different school district or community college district, or a county superintendent, or who becomes employed by the state in a position described in subdivision (b), to perform service that requires membership in a different public retirement system, and who is not excluded from membership in that public retirement system, may elect to have that service subject to coverage by the Defined Benefit Program of this plan and excluded from coverage by the other public retirement system. The election shall be made in writing on a form prescribed by this system within 60 days from the date of hire in the position requiring membership in the other public retirement system. If that election is made, the service performed for the employer after the date of hire shall be considered creditable service for purposes of this part.

Districts are advised to review their policies and procedures to determine if their employees who are transferring from academic to nonacademic positions are made aware of both the option of remaining in CalSTRS and the steps necessary to do so. CalSTRS appears to be taking the position that employees who did not follow the procedure are ineligible for CalSTRS membership.

### **Audit Consequences**

CalSTRS has directed the removal of current SFCCD employees from CalSTRS and the removal of individuals who have already retired from CalSTRS. While contributions would be refunded, this result would essentially leave the retirees without a retirement income. The retirees have sought and obtained a preliminary injunction while this matter is being appealed. In light of the very serious consequences, districts are advised to carefully consider these issues.