NOTICE OF SPECIAL MEETING

Notice is hereby given, pursuant to Section 54956 of the California Government Code, that the Board of Directors of the Rancho Simi Recreation and Park District, by call of the Chair of the Board of Directors, has ordered that it will hold a Special Meeting on Thursday, December 4, 2014, beginning at 6:15 p.m., at the Sycamore Drive Community Center, 1692 Sycamore Drive, Simi Valley, California. The purpose of the Special Meeting is to conduct the business listed on the attached Agenda.

Larry Peterson, District Clerk

Dated: December 3, 2014
RANCHO SIMI RECREATION AND PARK DISTRICT
INTEROFFICE MEMORANDUM

DATE: December 4, 2014

TO: Board of Directors

FROM: District Manager

SUBJECT: Approval of a Resolution Adopting Preliminary Guidelines to Comply with the Patient Protection and Affordable Care Act Employer Mandate for “Ongoing” Employees

SUMMARY

The Patient Protection and Affordable Care Act (“ACA”) was enacted on March 23, 2010. Approval of the attached resolution will advance the District’s implementation and compliance with the ACA. Among other things, approval of the Resolution will fix measurement, administrative and stability periods. These will allow the District to determine which employees are eligible to receive an opportunity to enroll in health insurance from the District, when that offer should be made and for what period any accepted offer of enrollment in health insurance shall continue. The resolution will also permit the District the option to rely on one of three “safe harbors” for purposes of determining whether an employee’s share of health premiums is “affordable” within the meaning of the ACA.

The ACA added Section 4980H regarding Shared Responsibility for Employers Regarding Health Care Coverage to Title 26 of the United States Code, the Internal Revenue Code (the “Employer Mandate under Section 4980H”). The Employer Mandate under Section 4980H imposes an assessable payment on an “applicable large employer” when (1) it fails to offer “substantially all” of its “full-time” employees (and their dependents) the opportunity to enroll in minimum essential coverage or offers coverage to “substantially all” of its “full-time” employees (and their “dependents”) that is not “affordable” or that does not provide “minimum value” and (2) any “full-time” employee is certified to the employer as having received a subsidy for coverage through Covered California (“Assessable Payment”).

Section 4980H of the ACA defines a “full-time” employee as an employee who performs an average of at least 30 hours of service per week. The District is considered an “applicable large employer” for 2015 because it will have employed an average of at least 50 “full-time employees” (including “full-time equivalents” as defined in the ACA) on business days during 2014. Further, because the District will have employed an average of at least 100 “full-time employees,” during 2014, the District is not eligible for transition relief by the Department of the Treasury that extends...
the compliance deadline for “applicable large employers” with more than 50, but fewer than 100 “full-time employees” until 2016.

The Department of the Treasury issued final regulations on February 12, 2014 (“Final Regulations,”) regarding the Employer Mandate under Section 4980H that permit the District to adopt a Look-Back Measurement Method Safe Harbor (“Look Back Safe Harbor”) in order to determine the status of an employee as Full-Time for purposes of determining and calculating the Assessable Payment. Staff recommends the District adopt the provisions of the Look-Back Safe Harbor in order to determine the full-time status of “ongoing” employees for purposes of the Assessable Payment.

Finally, the Department of the Treasury’s Final Regulations regarding the Employer Mandate under Section 4980H permit the District to use one of three safe harbors for any reasonable category of employees to determine whether an opportunity to enroll in “affordable” coverage has been offered, (“Affordability Safe Harbors”) as long as the selected safe harbor is applied on a uniform and consistent basis for all employees in the same category. The District intends to use the Affordability Safe Harbors as contemplated in the Final Regulations. The safe harbor alternatives are included within the attached resolution.

The ACA allows a large employer to phase in compliance. That is, in 2015, the District must offer health insurance to 70% of the total “full-time employees.” Currently, there are 79 District employees who are considered full-time under District policy, and 38 additional District employees who are now considered “full-time” under the ACA, for a total of 117 “full-time” employees. This number, multiplied by the requisite 70%, equals 82. So, in calendar year 2015 the District must offer an opportunity to enroll in health insurance to 82 of its employees or pay a penalty under the ACA. In calendar year 2016, the District must offer health insurance to 95% of its “full-time” employees. That is, assuming a continued total of approximately 117 “full-time” employees, the District must offer an opportunity to enroll in health insurance to at least 32 additional employees in calendar year 2016.

Within the next week or two staff hopes to arrive at a recommendation as to which positions should receive an opportunity to enroll in health insurance for calendar year 2015. Under current practices, accepted offers of health insurance result in an increase in the District’s obligation for health insurance of up to $438 per month, or $5,256 per year, per employee. Staff’s recommendation will be placed onto the Board’s meeting agenda on December 18, 2014.

**RECOMMENDATION**

Staff recommends approval of the attached resolution adopting guidelines to comply with preliminary requirements under the Patient Protection and Affordable Care Act employer mandate for “ongoing” employees.

Larry Peterson  
District Manager
RANCHO SIMI RECREATION AND PARK DISTRICT

RESOLUTION NO. ______

A RESOLUTION ADOPTING GUIDELINES TO COMPLY WITH THE PATIENT PROTECTION AND AFFORDABLE CARE ACT EMPLOYER MANDATE FOR "ONGOING" EMPLOYEES

WHEREAS, The Patient Protection and Affordable Care Act ("ACA") was enacted on March 23, 2010;

WHEREAS, the ACA added Section 4980H regarding Shared Responsibility for Employers Regarding Health Care Coverage to Title 26 of the United States Code, the Internal Revenue Code (the "Employer Mandate under Section 4980H");

WHEREAS, the Employer Mandate under Section 4980H imposes an assessable payment on an "applicable large employer" when (1) it fails to offer "substantially all" of its "full-time" employees (and their dependents) the opportunity to enroll in minimum essential coverage or offers coverage to "substantially all" of its "full-time" employees (and their "dependents") that is not "affordable" or that does not provide "minimum value" and (2) any "full-time" employee is certified to the employer as having received a subsidy for coverage through Covered California ("Assessable Payment");

WHEREAS, Section 4980H of the ACA defines a "full-time" employee as an employee who performs an average of at least 30 hours of service per week;"

WHEREAS, the District is considered an "applicable large employer" for 2015 because it will have employed an average of at least 50 Full-Time Employees" (including "full-time equivalents") on business days during 2014;

WHEREAS, the Department of Treasury issued final regulations on February 12, 2014 ("Final Regulations,")) regarding the Employer Mandate under Section 4980H that permit the District to adopt a Look-Back Measurement Method Safe Harbor ("Look Back Safe Harbor") in order to determine the status of an employee as Full-Time for purposes of determining and calculating the Assessable Payment;

WHEREAS, the District intends to adopt the provisions of the Look-Back Safe Harbor in order to determine the Full-Time status of "ongoing" employees for purposes of the Assessable Payment;

WHEREAS, the Department of Treasury's Final Regulations regarding the Employer Mandate under Section 4980H permit the District to use one of three safe harbors for any reasonable category of employees to determine whether an opportunity to enroll in "affordable" coverage has been offered, ("Affordability Safe Harbors") as long as the
selected safe harbor is applied on a uniform and consistent basis for all employees in the same category; and

WHEREAS, the District intends to use the Affordability Safe Harbors as contemplated in the Final Regulations.

NOW THEREFORE, BE IT RESOLVED by the Board of Directors as follows:

SECTION ONE: The District hereby establishes a Look-Back Safe Harbor with regard to all “ongoing employees” for the 2015 calendar year, as follows:

A. Ongoing Employees: For 2015, the term “ongoing employees” shall refer to all Full-Time employees who were hired prior to the start of the Measurement Period and have been employed for at least as long as the Measurement Period.

1. Effect of Unpaid Leave of Absence on Ongoing Status

   a. When an Ongoing employee undergoes a period of employment in which less than one “hour of service” is provided, the employee will no longer be treated as an Ongoing employee, and will instead be treated as a “new” employee, if one of the following criteria also applies:

      i. The employee resumes employment after a period of more than 13 consecutive weeks;

   or

      ii. The employee’s break in service is at least four consecutive weeks long and the length of the break in service exceeds the length of the employee’s period of employment directly preceding the break in service.

B. Hours of Service: An employee’s Hours of Service shall include each hour for which an employee is entitled to receive pay for the performance of duties for the District, or is entitled to compensation, despite no duties being performed, due to eligibility for paid vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military, or other leave of absence, as required by law.

C. Measurement Period: The standard Measurement Period is the period during which the Hours of Service” of an Ongoing Employee are measured, and an average is taken, for purposes of determining the employee’s Full-Time status for purposes of calculating a potential Assessable Payment and compliance with IRS reporting requirements.
1. The District hereby establishes a twelve (12) month standard measurement period for Ongoing Employees.


3. In averaging an Ongoing Employee’s Hours of Service for the Measurement Period, the District shall exclude any hours of special unpaid leave, as required by law, including, but not limited to, unpaid leave under the Family and Medical Leave Act of 1993, unpaid leave under the Uniformed Services Employment and Reemployment Rights Act of 1994, and unpaid leave on account of jury duty.

4. The determination of an employee’s Full-Time status, alone, does not govern the employee’s eligibility for an opportunity to enroll in medical coverage, or the terms of health coverage under which the District may offer an opportunity to a Full-Time employee to enroll.

   a. All represented employees’ eligibility to receive an opportunity to enroll in medical coverage, and the terms of such coverage, shall be governed by the provisions of any applicable memorandum of understanding.

D. Administrative Period: The Administrative Period is an interim period following directly upon the last day of the Measurement Period and directly preceding the first day of the Stability Period.

1. The District hereby establishes an Administrative Period of 56 days.


E. Stability Period: The Stability Period is the timeframe during which Ongoing Employees who qualify as Full-Time at the end of the Measurement Period, will be considered Full-Time despite any variation in their Hours of Service.

1. The District hereby establishes a twelve (12) month Stability Period for Ongoing Employees.

2. The Stability Period for Ongoing Employees for 2015 will run from January 1, 2015 through December 31, 2015.

3. If an Ongoing Employee’s employment status changes before the end of the Stability Period, the change in status will not affect the classification
of the employee (as "Full-Time" or not "Full-Time") for the remaining portion of the Stability Period.

SECTION TWO: The District hereby establishes its intent to adopt, in its sole discretion, one of the three following permissible "Safe Harbor" approaches for each reasonable category of employees, on a uniform and consistent basis for all of the employees in that category. The District will then use the selected Safe Harbor approach to determine the "affordability" of minimum essential coverage for which eligible Full-Time employees within the reasonable category receive an opportunity to enroll.

A. Form W-2 Safe Harbor

1. The District measures whether the employee’s required contribution for the calendar year for the lowest cost self-only coverage that provides minimum value exceeds 9.5 percent of the Form W-2 wages (as reported in Box 1) for the employee from the District for the calendar year in which coverage is offered.

2. The coverage offered by the District will be deemed affordable if the employee’s contribution is equal to or less than 9.5% of the employee’s Form W-2 wages as reported in Box 1.

B. Rate of Pay Safe Harbor

1. The District measures whether the employee’s required contribution for the calendar month for the lowest cost self-only coverage that provides minimum value exceeds 9.5 percent of an amount equal to 130 hours multiplied by the employee’s hourly rate of pay as of the first day of the coverage period.

   a. For salaried employees, the monthly salary amount will be used instead of 130 multiplied by the hourly rate of pay.

2. The District may use this safe harbor only if the District does not reduce the employee’s wages (with respect to the employees for whom the District applies the safe harbor).

   a. If an employee’s rate of pay increases during the year, the District will use the lowest rate of pay for the year in the calculation.

   b. The coverage offered by the District will be deemed affordable if the employee’s monthly contribution is equal to or less than 9.5 percent of the monthly wage as calculated in Section 2.B., above.
C. **Federal Poverty Line Safe Harbor**

1. The District measures whether the employee’s required contribution for the calendar month for the lowest cost self-only coverage that provides minimum value exceeds 9.5 percent of a monthly amount determined as the Federal Poverty Line (FPL) for a single individual for the applicable calendar year.

2. The coverage offered by the District will be deemed affordable if the employee’s monthly contribution does not exceed 9.5 percent of the monthly FPL for a single individual for the applicable calendar year.

**SECTION THREE.** The Board of Directors hereby delegates authority to the District Manager, or duly authorized designee, to take all necessary administrative steps to implement the designated Measurement Period, Administrative Period, and Stability Period for 2015, to track employees’ hours, and/or otherwise establish procedures, in accordance with all applicable laws, to comply with the ACA Employer Mandate.

The foregoing Resolution was approved by the Board of Directors of the Rancho Simi Recreation and Park District at a special meeting held on December 4, 2014, at 1692 Sycamore Drive, Simi Valley, California, on motion made by Director ____________________________ seconded by Director ____________________________ and duly carried on the following roll call vote.

Ayes:

Noes:

Absent:

Abstain:

______________________________
Chair of the Board of Directors
Rancho Simi Recreation and Park District
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RANCHO SIMI RECREATION AND PARK DISTRICT
INTEROFFICE MEMORANDUM

Date: December 4, 2014
TO: District Manager
FROM: Director of Administration
SUBJECT: Approval of: (1) Resolution to Tax Defer Member Paid Contributions – IRC 414(h)(2) Employer Pick-Up, and (2) Resolution of the Board of Directors of the Rancho Simi Recreation and Park District for the Affirmation and Implementation of the Provisions of Section 414(h)(2) of the Internal Revenue Code to Tax Defer Employee Retirement Contributions to CalPERS

SUMMARY

On December 16, 1999, the Rancho Simi Recreation and Park District Board adopted Resolution # 1394, authorizing Rancho Simi Recreation and Park District to pay 100% of employees’ CalPERS normal member contributions as Employer Paid Member Contributions (EPMC), pursuant to Section 20691 of the Government Code. However, with the California Public Employees’ Pension Reform Act of 2013 (“PEPRA”), new members are now required to pay a portion of the member contribution, which raises the question as to whether their payroll deductions are “Pre-Tax” or “Post-Tax.” Currently the District is withholding these contributions from new members as Post-Tax deductions. Therefore these contributions could potentially be taxed twice, as earnings now and also when paid as retirement benefits in the future.

There is an IRS Code Section 414(h)(2) that allows the District to designate these employee contributions as being “picked-up” by the employer and paid by the employer to CalPERS. For tax purposes, this treatment would allow these deductions to be Pre-Tax or tax deferred for the employee and instead taxable to the employee when they retire and receive retirement benefits. This is consistent with existing retirement benefits.

To better analyze the taxable issue of CalPERS employee paid contributions, the District retained the Best Best & Krieger Law Firm, and in particular, Isabel Safie, who is an expert on employee benefit law. She reviewed the District’s CalPERS contract and other pertinent documentation and recommends that the Board not only adopt the CalPERS template resolution, but that the Board also adopt the attached second Resolution that further clarifies the District’s position, as it relates to IRS Code Section 414(h)(2).

A memo form Ms. Safie is attached along with a CalPERS circular letter, an IRS Private Letter Ruling and the two resolutions, all related to this issue and provided by Ms. Safie. Ms. Safie will attend the December 4 Board Meeting to further clarify the issue and answer any questions.
RECOMMENDATION

Staff recommends approval of: (1) Resolution to Tax Defer Member Paid Contributions – IRC 414(h)(2) Employer Pick-Up, and (2) Resolution of the Board of Directors of the Rancho Simi Recreation and Park District for the Affirmation and Implementation of the Provisions of Section 414(h)(2) of the Internal Revenue Code to Tax Defer Employee Retirement Contributions to CalPERS

Karen Garber
Director of Administration
RESOLUTION TO TAX DEFER MEMBER PAID CONTRIBUTIONS – IRC 414(h)(2) 
EMPLOYER PICK-UP

WHEREAS, the governing body of the Rancho Simi Recreation and Park District (Name of 
Agency) has the authority to implement the provisions of section 414(h)(2) of the Internal 
Revenue Code (IRC); and

WHEREAS, the Rancho Simi Recreation and Park District (Name of Agency) has determined that 
even though the implementation of the provisions of section 414(h)(2) IRC is not required by 
law, the tax benefit offered by section 414(h)(2) IRC should be provided to all employees (All 
Employees, or All Employees in A Recognized Group or Class of Employment) who are 
members of the California Public Employees' Retirement System:

NOW, THEREFORE, BE IT RESOLVED:

I. That the Rancho Simi Recreation and Park District (Name of Agency) will implement the 
provisions of section 414(h)(2) Internal Revenue Code by making employee contributions 
pursuant to California Government Code Section 20691 to the California Public 
Employees' Retirement System on behalf of all its employees or all its employees in a 
recognized group or class of employment who are members of the California Public 
Employees Retirement System. "Employee contributions" shall mean those contributions 
to the Public Employees' Retirement System which are deducted from the salary of 
employees and are credited to individual employee's accounts pursuant to California 
Government Code section 20691.

II. That the contributions made by the Rancho Simi Recreation and Park District (Name of 
Agency) to the California Public Employees' Retirement System, although designated as 
employee contributions, are being paid by the Rancho Simi Recreation and Park District 
(Name of Agency) in lieu of contributions by the employees who are members of the 
California Public Employees' Retirement System.

III. That employees shall not have the option of choosing to receive the contributed amounts 
directly instead of having them paid by the Rancho Simi Recreation and Park District 
(Name of Agency) to the California Public Employees' Retirement System.

IV. That the Rancho Simi Recreation and Park District (Name of Agency) shall pay to the 
California Public Employees' Retirement System the contributions designated as 
employee contributions from the same source of funds as used in paying salary.

V. That the amount of the contributions designated as employee contributions and paid by 
the Rancho Simi Recreation and Park District (Name of Agency) to the California Public 
Employees' Retirement System on behalf of an employee shall be the entire contribution 
required of the employee by the California Public Employees' Retirement Law (California 
Government Code Sections 20000, et seq.).

VI. That the contributions designated as employee contributions made by Rancho Simi 
Recreation and Park District (Name of Agency) to the California Public Employees' 
Retirement System shall be treated for all purposes, other than taxation, in the same way
that member contributions are treated by the California Public Employees' Retirement System.

PASSED AND ADOPTED by the governing body of the Rancho Simi Recreation and Park District (Name of Agency)

this day of ___(Date)___, ___(Year)___.

BY

(Signature of Official)

RETURN ADDRESS:


FOR CALPERS USE ONLY

RESOLUTION TO TAX DEFER MEMBER PAID CONTRIBUTIONS - IRC 414(h)(2)

Approved by: ________________________________

Title: ________________________________
RESOLUTION OF THE BOARD OF DIRECTORS OF THE RANCHO
SIMI RECREATION AND PARK DISTRICT FOR THE
AFFIRMATION AND IMPLEMENTATION OF THE PROVISIONS OF
SECTION 414(h)(2) OF THE INTERNAL REVENUE CODE TO TAX
DEFER EMPLOYEE RETIREMENT CONTRIBUTIONS TO CALPERS

WHEREAS, the Board of Directors of Rancho Simi Recreation and Park District ("District") has the authority to implement the provisions of Section 414(h)(2) of the Internal Revenue Code ("IRC") whereby any amount contributed to a public employer pension plan, which is designated as an employee contribution, may be picked up on a pre-tax basis by the public employer and excluded from an employee’s gross income if the employer specifies that the contributions, although designated as employee contributions to the plan, are being paid by the employer in lieu of contributions by the employee, and the employee cannot choose to receive the amounts directly instead of having them paid into the plan; and

WHEREAS, the Board of Directors of District ("Board") adopted Resolution 1394 on December 16, 1999 to implement an employer paid member contribution as permitted by Government Code Section 20691 ("EPMC"); and

WHEREAS, Resolution 1394 was based on a template resolution which the California Public Employees’ Retirement System ("CalPERS") has represented is in compliance with the requirements of IRC Section 414(h)(2) when considered in conjunction with a resolution adopted by the CalPERS Board of Administration on September 18, 1985 as confirmed by the Internal Revenue Service in Private Letter Ruling 8609084; and

WHEREAS, the Board of Directors has determined that even though the implementation of the provisions of IRC Section 414(h)(2) is not required by law, the tax benefit offered by IRC Section 414(h)(2) in reducing taxable employee gross income should be provided to all District employees who are members of CalPERS; and

WHEREAS, Internal Revenue Service Revenue Ruling 2006-43 requires an employer take contemporaneous action evidencing an intent to establish a proper pick-up under IRC Section 414(h)(2); and

WHEREAS, concurrently with the adoption of this Resolution, the Board will adopt a resolution which CalPERS requires in order to tax-defer normal member contributions paid by employees pursuant to salary reduction but which fails to make the distinction between said contributions and the EPMC; and
WHEREAS, out of an abundance of caution, the Board has determined it is prudent to adopt this Resolution to distinguish between normal member contributions paid pursuant to employee salary reductions and the EPMC.

NOW, THEREFORE, be it resolved, determined and ordered by the Board of Directors of Rancho Simi Recreation and Park District as follows:

(a) Pursuant to IRC Section 414(h)(2), the Board hereby elects to reaffirm its implementation an employer pick-up pursuant to Resolution 1394, and to implement an employer pick-up pursuant to this Resolution, of employee retirement contributions on behalf of District employees who are members of CalPERS. “Employee retirement contributions” shall mean both those contributions paid by salary reduction and credited to individual employee’s account as normal member contributions and normal member contributions paid directly by an employer pursuant to Government Code Section 20691. This provision will apply to all employees of the District that are members of CalPERS.

(b) Picked up contributions, although designated as employee contributions to CalPERS, will be picked up on a pre-tax basis, whether paid pursuant to salary reduction or directly by the District pursuant to Government Code Section 20691, in lieu of employee contributions so that such contributions are treated as employer contributions.

(c) Employees shall not have the option of choosing to receive the contributed amounts directly instead of having them paid by the District to CalPERS.

(d) Amounts picked up by the District shall be paid from the same sources of funds as used in paying salary.

(e) Amounts picked up by the District shall be treated for all purposes, other than taxation, in the same way that member contributions are treated by CalPERS. This treatment shall apply to all employees of the District.

(f) If any section, subsection, clause or phrase in this Resolution is for any reason held invalid, the validity of the remainder of this Resolution shall not be affected thereby. The Board hereby declares that it would have passed this Resolution and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases or the application thereof be held invalid.
The foregoing Resolution was approved by the Board of Directors of the Rancho Simi Recreation and Park District at a Special Meeting held on December 4, 2014, at 1692 Sycamore Drive, Simi Valley, California, on motion made by Director ________________, and seconded by Directors ________________ and duly carried on the following roll call vote:

Ayes:

Noes:

Absent:

Abstain:

__________________________
Chair, Board of Directors
Rancho Simi Recreation and Park District
Memorandum

To:       Karen Garber, Director of Administration  
          RANCHO SIMI RECREATION AND PARK DISTRICT

From:    Isabel C. Safie, BEST BEST & KRIEGER LLP

Date:    November 11, 2014

Re:      Tax-Deferred Employee Contributions

ISSUES

I. Whether Resolution 1394 adopted by the Rancho Simi Recreation and Park District ("District") electing to pay the entire CalPERS normal member contribution on behalf of classic members pursuant to Section 20691 of the Government Code ("Employer Paid Member Contributions" or "EPMC") meets the requirements of Section 414(h)(2) of the Internal Revenue Code as set forth in Revenue Ruling 2006-43 ("Revenue Ruling") such that the EPMC is properly paid and reported by the District as tax-deferred.

II. Whether the normal member contribution that new members are required to pay pursuant to the California Public Employees’ Pension Reform Act of 2010 ("PEPRA"), and the 50% of normal costs to be paid by classic members as of January 1, 2018, may be paid on a tax-deferred basis.

SHORT ANSWERS

I. The District can make a persuasive argument that Resolution 1394 meets the requirements of Section 414(h)(2) as set forth in the Revenue Ruling and, therefore, all EPMC payments have been properly treated as tax-deferred. Notwithstanding the preceding, there is a risk that the IRS may disagree with this position because Resolution 1394 is based on a CalPERS template resolution which, on its face, is not in compliance with the Revenue Ruling. Therefore, we recommend that the District adopt an internal resolution which meets the requirements of Section 414(h)(2) as set forth in the Revenue Ruling.

II. The District does not appear to have a resolution that supports its practice of reporting the normal member contribution paid by new members, and classic members beginning on January 1, 2018, pursuant to payroll deduction as tax-deferred. CalPERS has a Section 414(h)(2) template resolution that it requires that an employer adopt and file with CalPERS in order for it to recognize normal member contributions paid by payroll deduction as tax-deferred (a copy of this template resolution is included with this Memorandum). However, as explained below, that resolution does not comply with the Revenue Ruling and as such, we recommend that the District adopt an internal resolution which complies with the Revenue Ruling which covers the normal member contributions made by payroll deduction.

1 Unless stated otherwise, all section references are to the Internal Revenue Code.
30141.000019409255.2
We have drafted the internal resolutions referenced in I and II above, as a single
document, to cover both normal member contributions paid by the District as EPMC and normal
member contributions paid by employees pursuant to payroll deduction. The draft is enclosed
for your review.

**BRIEF STATEMENT OF FACTS**

On December 16, 1999, the District adopted Resolution 1394 electing to pay the 7% normal member contribution on behalf of employees pursuant to Section 20691 of the Government Code ("Code") which permits a contracting agency to pay all or a portion of the normal member contributions required to be paid by an employee. Contributions paid by the employer on behalf of an employee pursuant to Code Section 20691 are referred to as Employer Paid Member Contributions or EPMC. We understand that the EPMC is paid out of the District’s general funds and is not deducted from an employee’s salary nor is it provided in lieu of an increase in an employee’s salary.

In addition, District employees that are considered “new members,” as that term is defined under Code Section 7522.04(f) pay 6.25% of their own compensation towards their CalPERS retirement benefits as required by PEPEA.

**DISCUSSION**

Under Section 414(h)(2), designated employee contributions to a qualified government retirement plan, such as the normal member contribution to CalPERS, may be treated as employer contributions for purposes of avoiding current federal taxation of these amounts. In order to ensure that designated employee contributions to a governmental plan are treated as picked-up by the employer within the meaning of Section 414(h)(2), and thus succeeding in excluding such contributions from the current gross income of the employee, the following requirements must be met pursuant to the Revenue Ruling:

1. The employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of employee contributions;

2. The employee must not be able to choose to receive the contributed amounts directly instead of having them paid into the plan; and

3. The employer must take formal action with respect to requirement #1 (above) through a duly authorized body (e.g., the board of directors), applied prospectively and evidenced by a contemporaneous written document (e.g., meeting minutes, a resolution or an ordinance).
In order to ensure that contributions made to CalPERS that are designated as employee contributions, whether paid by the District or by employees, are properly treated as tax-deferred, the District must have resolutions on file that satisfy the foregoing requirements.

I. CLASSIC MEMBERS

We have reviewed Resolution 1394 and observed that the terms therein do not comply with the requirements of Section 414(h)(2) as set forth in the Revenue Ruling. However, the District is a participating employer in CalPERS. Therefore, the District is required to comply with all requirements of CalPERS as administered by the CalPERS Board of Administration ("CalPERS Board"). In this respect, we know from our experience with CalPERS that a participating employer is not permitted to modify any of CalPERS’ template resolutions. That is, an employer is required to adopt resolutions “as is” (other than inputting employer specific information such as agency name and employee group). For this purpose, CalPERS has several template resolutions, each one designed for a separate purpose, available on the CalPERS website. Resolution 1394 is based on the template identified as “Resolution for Employer Paid Member Contributions” which is a CalPERS-approved resolution designed to permit an employer to pay normal member contributions (i.e., the EPMC). Therefore, our analysis of whether Resolution 1394 meets the requirements of Section 414(h)(2) as set forth in the Revenue Ruling must take the preceding into consideration and include a review of CalPERS rules and guidance.

On the basis of our review and consideration of CalPERS laws and policies, we believe that the District can make a persuasive argument that Resolution 1394, in light of relevant CalPERS rules and guidance, meets the requirements of Section 414(h)(2) as set forth in the Revenue Ruling notwithstanding the fact that on its face the resolution appears deficient. Our conclusion is based on the following findings and interpretations. On October 3, 2008, CalPERS sent Circular Letter 200-049-08 ("Circular Letter") to all participating employers (a copy is enclosed) notifying said employers of the requirements of the Revenue Ruling. In the Circular Letter, CalPERS included a section entitled “Written Documentation” with the purpose of identifying the written documentation necessary to comply with the Revenue Ruling. In the two brief paragraphs comprising the “Written Documentation” section, CalPERS addressed arrangements in which a template resolution identified as Sample E (titled as Resolution to Tax Defer Member Paid Contributions – IRC 414(h)(2) Employer Pick-Up) was applicable and in which template resolutions identified as Sample A through D were applicable (representing several iterations of the EPMC resolution).

Since Resolution 1394 is modeled after Sample A, this Section will focus on CalPERS’ representations that the EPMC resolution complies with the Revenue Ruling. Specifically, CalPERS represented that after the issuance of a private letter ruling by the IRS it “provided

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additional *pick-up resolutions* for adoption by contracting agencies that distinguishes whether the pick-up was to be actually paid by the employer or by the employee.” (Emphasis added). In other words, if a participating employer was either just paying the EPMC (Sample A or B), rather than deducting it from salary, or paying the EPMC and reporting the value of the EPMC as additional compensation (Sample C or D), the template resolution Sample E was not applicable. Rather, the applicable resolutions were those identified as Sample A through Sample D. With respect to participating employers adopting any of the template resolutions Sample A through D, the Circular Letter represented that employers could “continue to rely on these resolutions but . . . should review them and validate that the resolution covers all of the employees whose contributions are reported as tax-deferred.” Although not explicitly saying so, CalPERS all but indicated that such employers did not need to adopt a new resolution in order to comply with the Revenue Ruling.

Therefore, on the basis of the preceding, it is our conclusion that the District can make a persuasive argument, should the IRS question whether Resolution 1394 complies with the requirements of Section 414(a)(2) as set forth in the Revenue Ruling, that it did comply with the Revenue Ruling because the resolution is based on a CalPERS resolution template which the CalPERS Board, the administrator of CalPERS, has represented meets the requirements of the Revenue Ruling.

Notwithstanding the preceding, there is a risk that the IRS may disagree with this position and we, therefore, recommend that the District adopt an internal resolution which meets the requirements of Section 414(h)(2) as set forth in the Revenue Ruling and which also incorporates recitals setting forth the foregoing position. We recommend the recitals in order to document the District’s position that although Resolution 1394 met the requirements of Section 414(h)(2) as set forth in the Revenue Ruling at the time it was adopted, it recognizes that the IRS can disagree with that position and, therefore, wishes to ensure the tax-deferral of the EPMC.

II. **NEW MEMBERS**

The District does not appear to have a resolution that supports its practice of reporting the normal member contribution paid by new members, and classic members beginning on January 1, 2018, pursuant to payroll deduction as tax-deferred. While CalPERS provides a template resolution, the resolution on its face does not satisfy the federal tax-deferred rules. However, CalPERS insists that any CalPERS employer wishing to deduct employee contributions to CalPERS on a pre-tax basis must adopt this resolution. Therefore, unless the District has already adopted a resolution consistent with the enclosed CalPERS template, it should move ahead with adopting the CalPERS template resolution and submit a copy to CalPERS.

However, the CalPERS template resolution has one significant error (Resolution I) and one potentially misleading statement (Resolution V). Though, the latter is not actually misleading in this instance. That is, the District would be adopting this resolution in order to allow those employees that must pay their own employee contribution as required by PEPRA to
do so on a pre-tax basis. In this case, these employees are in fact paying the entire contribution required. Where we have found it to be misleading is when it is being adopted because employees are paying some, but not all, of their employee contribution. This will be relevant to classic members beginning on January 1, 2018 when they begin paying 50% of the normal cost of retirement benefits which might be less than the 7% normal member contribution. A tax-deferred resolution is still necessary in this instance, but the same language at Resolution V is erroneously used in these situations even though employees may not be paying the "entire contribution" referenced in Resolution V of the template resolution.

The significant error relates to how the term "employee contributions" is defined in Resolution I of the template resolution. The purpose of the resolution is to ensure that normal member contributions can be paid by employees on a pre-tax basis. That is, but for the election permitted by Section 414(h)(2), normal member contributions are made after-tax. The template resolution, however, defines "employee contribution" with reference to Government Code Section 20691 (i.e., the EPMC section). The only purpose of Section 20691 is to allow an employer to pay for a portion, or all, of the normal member contribution that an employee would otherwise have to pay. This is contrary to the purpose of the resolution as described at the beginning of Resolution V (i.e., the District is not paying the normal member contribution for new members). Thus, the CalPERS template resolution does not serve its intended purpose.

We have previously researched the effect of this template resolution and crafted a detailed analysis of why the template resolution is sufficient even though it is deficient on its face. However, this requires tying together a private letter ruling issued to CalPERS by the IRS in the 1980s, a master CalPERS resolution (which CalPERS cannot seem to find) and the template resolution that the District is required to adopt. The Circular Letter, discussed in Section 1 above, referenced Private Letter Ruling 8609084 ("Private Ruling") (a copy is enclosed) and a resolution, Sample E, which had been approved by the IRS as meeting the requirements of Section 414(h)(2). The Circular Letter represented that employers could continue relying on the Private Ruling and did not need to adopt a new resolution in order to comply with the Revenue Ruling. The Private Ruling stated that the CalPERS Board had adopted a resolution on September 18, 1985 ("Board Resolution") which provided that it would accept employee contributions paid by a participating employer which "has implemented Code section 414(h)(2) pursuant to . . . Government Code section 20615." The Private Ruling indicates that the Board Resolution provides the following:

[If an employer does choose to implement Code section 414(h)(2) the employer must (1) specify that the contributions, although designed as employee contributions, are being paid by the employer in lieu of employee contributions, (2) not give the employees the option of receiving the contributed amounts directly instead of having them paid by the

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3 Sample E is identical to the enclosed CalPERS template resolution.
4 The Public Employees Retirement Law ("PERL") has been reorganized since 1985 and the referenced section 20615, which we believe should have been 20614, is now section 20691 under the reorganized PERL.
employer, (3) pay the contributions from the same source of funds as used in paying salary, and (4) satisfy administrative procedures as set forth by the Board.

In addition to the Board Resolution, the Private Ruling referenced a model resolution, identical to Sample E except in the Government Code references, which CalPERS submitted to the IRS for its approval and which CalPERS represented “must be adopted by all employers choosing to implement a pick up plan pursuant to” the Board Resolution. The IRS concluded that together, the Board Resolution and the model resolution, met the requirements of Section 414(h)(2) and that any participating employer could rely on the Private Ruling if it adopted the model resolution, Sample E, “as written and without change.”

However, the risk of a deficient Section 414(h)(2) resolution is that the IRS will find that it does not conform to the requirements of Section 414(h)(2) with respect to normal member contributions paid by employees by payroll deduction, and deem those contributions as having been made after-tax. Therefore, it is our opinion that the preceding risk can be avoided by the adoption of an accurate internal resolution alongside the template resolution. The internal resolution we have prepared satisfies the Revenue Ruling requirements with respect to classic members and new members whether the normal member contribution is paid by the District (for classic members until January 1, 2018) or by employees pursuant to payroll deduction.
Circular Letter

TO: PUBLIC AGENCIES, COUNTY SUPERINTENDENT OF SCHOOLS, SCHOOL DISTRICTS

SUBJECT: EMPLOYER "PICK-UP" - REVENUE RULING 2006-43 DECEMBER 31, 2008 DEADLINE FOR ACTION

ATTENTION: FINANCE DIRECTORS, HUMAN RESOURCE DIRECTORS

This Circular Letter is being sent to advise employers of Revenue Ruling 2006-43 concerning the pick-up of employee contributions to California Public Employees Retirement System (CalPERS), and of actions that an employer may be required to take before December 31, 2008 to ensure compliance with pick-up requirements.

BACKGROUND AND PURPOSE

Internal Revenue Code (IRC) Section 414(h)(2) allows public agencies and school employers to designate required employee contributions as being "picked-up" by the employer and treated as employer contributions for tax purposes. The effect of a pick-up is to defer tax on employee contribution amounts until the member retires and receives retirement benefits, or separates from employment and takes a refund of contributions. Absent the 414(h)(2) provision applicable to governmental plans, employee contributions to a defined benefit pension plan qualified under Section 401(a) would automatically be after-tax contributions (e.g. taxable income to the employee at the time the contribution was made).

Since the early 1980s, CalPERS has taken steps to ensure that contracting agency and school employers have adopted and submitted to CalPERS appropriate written evidence of pick-ups prior to reporting tax-deferred member contributions to CalPERS. This Circular Letter is being sent as a reminder of the federal tax reporting requirements, to encourage each contracting agency and school employer who reports tax-deferred member contributions to review their documents and, if necessary, adopt conforming documentation prior to the deadline set by Revenue Ruling 2006-43. To view the ruling, visit CalPERS online.
REVENUE RULING 2006-43

Revenue Ruling 2006-43 provides, in general, that an employee contribution will not be treated as "picked-up" under IRC 414(h)(2) unless:

(1) The employer specifies that the contributions, although designated as employee contributions, are being paid by the employer (this action must be memorialized in writing), and

(2) The employer does not permit participating employees to opt out of the pick-up or to receive the contributed amounts directly instead of having them paid by the employer to the plan.

Revenue Ruling 2006-43 allows employers who do not have written evidence of a pick-up, but their actions show that they intended to establish and carry out a pick-up, to be treated as meeting the requirements of 414(h)(2) for past pre-tax contributions if the employer takes formal action in writing prior to December 31, 2008 with respect to future picked-up contributions. If formal action is not taken prior to December 31, 2008, only contributions taken after the written documentation is in place may be treated as picked-up.

WRITTEN DOCUMENTATION

Many of you offer a pick-up of employee contributions under a resolution approved by the IRS in a private letter ruling issued to CalPERS on December 6, 1985, (PLR 8609084). If your agency has adopted the approved resolution to implement 414(h)(2) pick-ups, you may continue to rely on that ruling and need not adopt a new resolution. This approved form, which is Sample E---Resolution for Employer Pick-up can be viewed at CalPERS online. If you have not previously sent a copy of the resolution to us, or if you did not complete Sample E, but have other written documentation, please send a copy of your document or resolution to us immediately.

After 1985, CalPERS provided additional pick-up resolutions for adoption by contracting agencies that distinguishes whether the pick-up was to be actually paid by the employer or by the employee. When an employer pays the employee contributions, it is referred to as Employer Paid Member Contributions (EPMC). The employer may also report the value of EPMC as special compensation. Contracting agencies that adopted any of these resolutions were requested to submit the resolutions to CalPERS. Samples of Resolutions A through D can be viewed at CalPERS online. You may continue to rely on these resolutions but you should review them and validate that the resolution covers all of the employees whose contributions are reported as tax-deferred. If you have not previously sent a copy of the resolution to us, please do so immediately.
CALPERS NEW BUSINESS ENVIRONMENT

CalPERS is in the process of building and installing a new business reporting system. One of the design features will enhance CalPERS ability to maintain accurate and up to date information about contracting agency and school employer pick-ups. As a way of ensuring that our system will accurately record your agency’s pick-up provision, CalPERS requires all affected agencies to provide a copy of their existing or future pick-up resolutions or other written documentation. This will ensure ongoing compliance with federal tax reporting requirements. The new system will validate that you have documentation on file with CalPERS before accepting tax-deferred member contributions. If documentation is not on file, your records will be rejected and will be held until the appropriate documentation is received.

CONCLUSION

If you are submitting tax-deferred contributions on behalf of your members, we request that you review your files for documentary evidence authorizing such employer pick-up of employee contributions. If you do not have evidence, please take steps to have your governing board adopt an appropriate resolution prior to December 31, 2008.

Please send a copy of your pick-up documentation to:

CalPERS
Employer Services Division
Compensation Review Unit
P.O. Box 942709
Sacramento CA 94229-2709

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

Lori McGartland, Chief
Employer Services Division

Visit the CalPERS website at www.calpers.ca.gov (2008 Circular Letters) for more information on the following:

1 - Revenue Ruling 2006-43
2 - Sample Resolution E
3 - Sample Resolutions A - D
Private Letter Ruling 8609084, IRC Sec(s). 414

UIL No. 0414.09-00

Headnote:

Reference(s): Code Sec. 414;

Private Letter Ruling 8609084

Code Sec. 414(h) EMPLOYEE BENEFIT PLANS -- definitions and special rules -- pick-up of employee contributions.

Amounts picked-up by Employer M on behalf of employees who participate in Plan X will be treated as employer contributions and won't be includable in employees' income in year in which such amounts are contributed. Picked-up amounts will be includable in income of employees or their beneficiaries only in taxable year in which they are paid to extent that amounts represent contributions made by M. Picked-up amounts are excepted from definition of wages under Sec. 3401(a)(12)(A) and no part will be wages for withholding purposes in taxable year in which contributed to X. For purposes of Sec. 414(h)(2) it is immaterial whether employer picks up contributions through salary reduction, offset against future salary increases, or combination.

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Full Text:

Dec. 6, 1985

This letter is in response to your ruling request, dated October 4, 1985, concerning the federal income tax treatment, under section 414(h)(2) of the Internal Revenue Code, of certain contributions to Plan X.
State A established Plan X for the benefit of its officers, employees, and their beneficiaries. Employees of local public agencies in State A whose appointing powers have contracted with Plan X are participants as well. You state that Plan X meets the qualification requirements of Code section 401(a).

As far as the vast majority of school and local public agency employees are concerned, participation in Plan X is compulsory, pursuant to State A statute. However, certain school and local public agency officers, employees and others (including elected officers, and certain persons employed on a part-time, seasonal, or other irregular basis) are either not permitted or not required to be members.

Employee participant contribution rates are determined by the nature of the service performed, and whether the employee is a participant under the "Federal-State Agreement" entered into pursuant to section 218 of Title II of the Social Security Act, 42 U.S.C. Section 218. Employee contributions of up to 8 percent of the employee's salary are required, depending on the following membership categories, established in the State A Code: "school," "local miscellaneous," and "local safety."

The managing body of Plan X ("Board") is requesting this ruling on behalf of the 1253 school employers and 1201 other local public agencies which directly employ the school and other local public agency participants in Plan X. Those employers have been authorized by section 20615 of the State A Government Code to pay all or a portion of the normal contributions required to be paid by a participant on the participant's behalf.

The Board adopted a resolution on September 18, 1985, effective upon receipt of a favorable ruling, whereby it will accept employee contributions paid by a school or a local agency employer which has implemented Code section 414(h)(2) pursuant to State A Government Code section 20615. The resolution states that, if an employer does choose to implement Code section 414(h)(2) the employer must (1) specify that the contributions, although designed as employee contributions, are being paid by the employer in lieu of employee contributions, (2) not give the employees the option of receiving the contributed amounts directly instead of having them paid by the employer, (3) pay the contributions, from the same source of funds as used in paying salary, and (4) satisfy administrative procedures as set forth by the Board.

You have included with your ruling request a model resolution, set forth in Appendix A of this private letter ruling, that must be adopted by all employers choosing to implement a pick up plan pursuant to the September 18, 1985, Board resolution.

Based on the foregoing facts, you request the following rulings:

1. That gross income of a member for a tax year does not include any part of the amount of the member's contribution to Plan X which is "picked up" in the tax year by an employing school or other local public agency pursuant to the Resolution adopted by the Board of Administration on September 18, 1985.

2. That member contributions "picked up" by the employing school or other local public agency pursuant to the Resolution adopted by the Board of Administration on September 18, 1985, will be credited to the member's account but will be treated as employer contributions for tax purposes; that such contributions are exempted from the definition of wages set forth in section 3401(a)(12)(A) of the Code; and that no part of the amount of the "pick up" by the employing school or other local public agency constitutes wages for federal income tax withholding purposes in the tax year in which they are contributed.
3. That amounts "picked up" by the employing school or other local public agency pursuant to the Resolution adopted by the Board of Administration on September 18, 1985 will be taxable to the recipient upon their distribution either through a retirement benefit, disability benefit, or a lump-sum payment.

4. That, for purposes of the application of section 414(h)(2) of the Code, it is immaterial whether an employer "picks up" contributions through a reduction in salary, or offset against future salary increases, or a combination of both.

Section 414(h)(2) of the Internal Revenue Code provides that contributions, otherwise designated as employee contributions, shall be treated as employer contributions if such contributions are made to a plan established by a state government or a political subdivision thereof, which is described in section 401(a) and are picked up by the employing unit.

The federal income tax treatment to be accorded contributions which are picked up by the employer within the meaning of section 414(h)(2) of the Code is specified in Revenue Ruling 77-462, 1977-2 C.B. 358. In that revenue ruling, the employer school district agreed to assume and pay the amounts employees were required by state law to contribute to a state pension plan. Revenue Ruling 77-462 concluded that the school district's picked-up contributions to the plan are excluded from the employees' income until such time as they are distributed to the employees. The revenue ruling held further that under the provisions of section 3401(a)(12)(A) of the Code, the school district's contributions to the plan are excluded from wages for purposes of the Collection of Income Tax at Source on Wages; therefore, no withholding is required from the employees' salaries with respect to such picked-up contributions.

The issue of whether contributions have been picked up by an employer within the meaning of Code section 414(h)(2) is addressed in Revenue Ruling 81-35, 1981-1 C.B. 255 and Revenue Ruling 81-36, 1981-1 C.B. 255. These revenue rulings established that the following two criteria must be met: (1) the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and (2) the employee must not be given the option of choosing to receive amounts directly instead of having them paid by the employer to the pension plan. Furthermore, it is immaterial whether an employer picks up contributions through a reduction in salary, an offset against future salary increases, or a combination of both.

The resolution adopted by the Board and the model resolution satisfy the criteria set forth in Rev. Rul. 81-35 and Rev. Rul. 81-36 by providing that adopting employers will make contributions in lieu of the employees' contributions and that the employees may not elect to receive such contributions directly.

Accordingly, we conclude that the amounts picked up by an employer on behalf of those employees who participate in Plan X shall be treated as employer contributions and will not be includible in the employees' gross income in the year in which such amounts are contributed. These amounts will be includible in the gross income of the employees or their beneficiaries only in the taxable year in which they are distributed, to the extent that the amounts represent contributions made by the employer. Because we have determined that the picked-up amounts are to be treated as employer contributions, they are excepted from wages under section 3401(a)(12)(A) of the Code. In addition, no part of the amounts that are picked up by an employer will
constitute wages for federal income tax withholding purposes in the taxable year in which they are contributed to Plan X.

For purposes of the application of section 414(h)(2) of the Code, it is immaterial whether an employer picks up contributions through a reduction in salary, an offset against future salary increases, or a combination of both.

In order to rely on this private letter ruling, a participating school or local public employer must adopt the model resolution contained in Appendix A as written and without change. If an adopting employer modifies the model resolution in any way, this ruling will be null and void with respect to the noncomplying employer.

The effective date for the commencement of any proposed pick-up as specified in the final resolution adopted by a school or local public employer cannot be any earlier than the later of the date the final resolution is signed or the date it is put into effect.

These rulings are based on the assumption that Plan X will be qualified under section 401(a) of the Code at the time of the proposed contributions and distributions.

APPENDIX A Whereas, the . . .

has the authority to implement the provisions of

section 414(h)(2) of the Internal Revenue Code

(IRC): and Whereas the Board of administration of Plan X adopted its

resolution re section 414(h)(2) IRC on September

18, 1985; and Whereas, the Internal Revenue Service has stated on

. . . , 1985, that the implementation of the

provisions of section 414(h)(2) IRC pursuant to the

Resolution of the Board of Administration would

satisfy the legal requirements of section 414(h)(2)

IRC; and Whereas, the . . .

has determined that even though the implementation

of the provisions of section 414(h)(2) IRC is not

required by law, the tax benefit offered by section

414(h)(2) IRC should be provided to its employees

who are members of Plan X; NOW, THEREFORE, BE IT RESOLVED:
I. That the...

will implement the provisions of section 414(h)(2) Internal Revenue Code by making employee contributions pursuant to State A Government Code section 20615 to Plan X on behalf of its employees who are members of Plan X. "Employee contributions" shall mean those contributions to Plan X which are deducted from the salary of employees and are credited to individual employee's accounts pursuant to State A Government Code section 20615.

II. That the contributions made by the... to Plan X although designated as employee contributions are being paid by the... in lieu of contributions by the employees who are members of Plan X.

III. That employees will not have the option of choosing to receive the contributed amounts directly instead of having them paid by the... to Plan X.

IV. That the... shall pay to plan X the contributions designated as employee contributions from the same source of funds as used in paying salary.

V. That the amount of the contributions designated as employee contributions and paid by the... to Plan X on behalf of an employee shall be the entire contribution required of the employee by the Public Employee's Retirement Law (State A Government Code sections 20000, et. seq.).

VI. That the contributions designated as employee contributions made by... to Plan X shall be treated for all purposes, other than taxation, in the same way that member contributions are treated.
by Plan X.

END OF DOCUMENT -

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