

**[PROPOSED] RESOLUTION OF THE BOARD OF RETIREMENT OF
VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
REGARDING CORRECTION OF PENSIONABILITY OF BENEFITS UNDER
COUNTY OF VENTURA'S FLEXIBLE BENEFITS PROGRAM**

WHEREAS, the Ventura County Employees' Retirement Association ("VCERA") and its Board (the "Board") are governed by the County Employees Retirement Law of 1937 (Government Code sections 31450, *et seq.*) ("CERL") and the Public Employees' Pension Reform Act of 2013 (Government Code sections 7522, *et seq.*) ("PEPRA").

WHEREAS, the Board is required by CERL to determine "compensation" and "compensation earnable" for VCERA members who entered membership in VCERA before January 1, 2013, or who entered membership in another California public retirement system before January 1, 2013 and become eligible for reciprocity with VCERA ("Legacy Members").

WHEREAS, in the case of *In Re Retirement Cases* (2003) 110 Cal.App.4th 426, to which VCERA and the County of Ventura ("County") were parties, the superior court issued a ruling on July 20, 2000, stating that "insurance-related benefits," including "employer payments into flexible benefit plans" are benefits of insurance coverage, not cash, and "[a]s such, it is an in-kind advantage." The ruling further stated that cash payments to employees from a flexible benefit plan in lieu of health benefits is cash remuneration and constitutes "compensation." The court of appeal affirmed all aspects of the superior court's ruling and concluded that public retirement systems therefore "need not" include in-kind advantages in the calculation of retirement benefits. Specifically, the court in *In re Retirement Cases* stated, "We conclude that the Legislature has expressed its intent not to include employer payments into flexible benefits plans and payments of insurance carrier premiums as "compensation" under CERL Accordingly, we conclude the trial court properly found that CERL did not require these payments to be included in the calculation of retirement benefits." *In re Retirement Cases* at p. 481. The court of appeal did not address the question of whether retirement boards had the discretion to include flexible benefit payments in compensation earnable, even though the retirement boards were not required to do so.

WHEREAS, on July 30, 2020, the California Supreme Court filed a decision entitled *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, 1070 ("*Alameda*"), which stated, in pertinent part, that "there is no indication . . . that a local board," such as the VCERA Board, "has the discretion to include the monetary value of in-kind benefits," in the determination of retirement allowances. The Supreme Court also expressly "disapproved" footnote 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi*"), stating "we reject [*Guelfi*'s] open-ended concept of compensation earnable The term 'compensation,' as used in section 31461, is . . . statutorily defined: It is an employee's 'remuneration paid in cash' and expressly excludes the 'monetary value' of benefits paid in kind. (§31460) Nothing in those definitions hints either that they are intended merely to establish a minimum, rather than to serve as a comprehensive definition, or that they may be implemented at the discretion of a local retirement board." *Alameda* at p. 1070. *Alameda* further holds that retirement boards, such as the VCERA Board, have no discretion to include benefits in Legacy Members' compensation earnable or in PEPRA Members' pensionable compensation that CERL, PEPRA, or other applicable statutes do not permit to be included (the "*Alameda* Exclusions").

WHEREAS, by an “*Alameda* Implementation Resolution” adopted and approved by the Board on October 12, 2020, the Board followed the *Alameda* Court’s directive and stated that “all portions of Flex Credit that may not be provided to members in cash under a participating employer’s rules applicable during the pertinent time period” (“In-Kind Only Flex Credit”) fall within the definitions of *Alameda* Exclusions, and that the Board thus has no discretion to include In-Kind Only Flex Credit in VCERA members’ retirement benefit calculations, even though it has historically included all Flex Credit in the calculation of its Legacy Members’ “compensation earnable”. However, the Board deferred implementation of the *Alameda* Exclusions applicable to In-Kind Only Flex Credit, under paragraphs 3, 6 and 9 of the *Alameda* Implementation Resolution, to seek judicial resolution of the matter through the declaratory relief action, *Ventura County Employees’ Retirement Association v. County of Ventura, et al.* (Case No. VENCI00546574) (“*VCERA v. County of Ventura, et al.*”).

WHEREAS, an Ad Hoc Litigation Committee of Board members recommended to the Board at its February 22, 2021 meeting that it adopt a Resolution Implementing Non-Pensionability of In-Kind Only Flex Credit, and in response numerous stakeholders objected citing, among other things, pending proposed legislation, which, if adopted as then presented, would permit VCERA to continue including In-Kind Only Flex Credit in the compensation earnable of Legacy Members.

WHEREAS, on June 14, 2021, the court in *VCERA v. County of Ventura, et al.*, sustained the County’s demurrer to VCERA’s cause of action requesting declaratory relief regarding In-Kind Only Flex Credit, having concluded that the issue was not able to be adjudicated unless the Board took specific action with respect to In-Kind Only Flex Credit that other parties to the litigation disputed.

WHEREAS, on July 26, 2021, the Board adopted a “Resolution Regarding Pensionability of Flex Credit Pending AB 826,” which addressed the Flex Credit provided to those VCERA Legacy Members within benefit plans administered by County, and the Board determined that while the proposed legislation that numerous stakeholders supported, Assembly Bill 826 (2021-2022) (“AB 826”), was pending, VCERA would include Flex Credit in compensation earnable at the lowest amount that is provided to all persons in an individual member’s bargaining unit or unrepresented group during the final compensation period (“AB 826 Flex Credit Resolution”).

WHEREAS, AB 826 was vetoed by Governor Newsom on September 29, 2022, and the Governor’s veto letter critiques the bill because it “expands the definitions of ‘compensation’ and ‘compensation earnable’ in [CERL] . . . to include an employee’s flexible benefit allowance,” notes sympathy to “workers who may see a reduction in their anticipated pension because of prior misinterpretations of what constitutes ‘compensation’ and ‘compensation earnable’” but concludes that AB 826 would “inappropriately incentivize noncompliance with [PEPRA]” and “attempt[s] to circumvent recent court decisions, undermine the intent of PEPRA and expose the local governments to increased costs and litigation.”

WHEREAS, at the October 24, 2022 regular meeting of the Board, both the County and representatives of various unions requested that the Board continue to delay implementation of *Alameda* with respect to Flex Credit while the County and the unions negotiated new terms for the provision of that benefit, and the Board voted to postpone consideration of the topic until its first business meeting in April 2023.

WHEREAS, the County currently provides a Flexible Credit Allowance (“FCA”) to all regular employees by bargaining unit under a structure (“Flexible Credit Allowance for All” (“FCA-A”)), that is either (i) a flat amount given to all full-time members or (ii) a tiered amount based on the number of dependents; for employees who choose to opt out of the County-provided medical coverage, an Opt-Out Fee (“OOF”) is subsequently deducted from the FCA; the maximum baseline cashable amount (“Maximum Baseline Cashable Amount”) under the FCA-A that all similarly situated members of a member’s grade or class may receive thereunder in a given plan year is the flat or “employee-only” FCA minus the lesser of the OOF or the lowest-priced healthcare plan.

WHEREAS, the County is in the process of implementing a new Flexible Benefits Program allowance structure (“Flexible Credit Allowance or Opt-Out Allowance” (“FCA/O”)) that will be implemented as soon as administratively possible, which provides a new “Medical Plan Opt-Out Option” for members who opt out, in which they do not receive an FCA nor are they charged an OOF, but rather they receive an Opt-Out Allowance (“OOA”), while other members who opt in continue to receive an FCA; the OOA is the Maximum Baseline Cashable Amount under the FCA/O that all similarly situated members of a member’s grade or class may receive thereunder in a given plan year and is not subject to variation by a member’s ad hoc election each year that is unrelated to their job duties. (Gov. Code §31461, subd. (b)(1)(A) and/or (B), excluding in-kind conversions and ad hoc payments from compensation earnable.)

WHEREAS, VCERA’s participating employer the Ventura Regional Sanitation District (“VRSD”) has a cafeteria plan, but VRSD and its employees did not pay contributions to VCERA on the full value of the cafeteria plan as of July 30, 2020 or thereafter, and instead has paid retirement contributions only on the portion of the cafeteria plan that members were permitted to receive directly in cash; accordingly, this Resolution (“Flexible Benefits Correction Resolution” or “this Resolution”) does not impact Legacy Members as to their employment by VRSD, regardless of their retirement date, and VCERA will continue to include in compensation earnable the portion of their cafeteria plan benefit that such Legacy Members were permitted to receive in cash.

WHEREAS, California law does not support retirement boards providing a “window period” during which members may retire with allowances calculated to include benefits that are not pensionable after *Alameda’s* disapproval of *Guelfi* footnote no. 6. See, e.g., *City of San Diego v. San Diego City Employees’ Retirement System* (2010) 186 Cal.App.4th 69 (“window period” during which the retirement board knowingly permitted members to purchase service credit at unlawfully low rates was illegal). California law does, however, support a retirement board’s discretionary determination that, when the totality of circumstances so warrant, it need not recoup all amounts it has overpaid to retirees directly from them, and such amounts may be returned to the retirement system through employer payments on the unfunded actuarial accrued liability (“UAAL”). See *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210; *In Re Retirement Cases, supra*, 110 Cal.App.4th 426.

WHEREAS, this Flexible Benefits Correction Resolution is intended to comply with the requirements of the Internal Revenue Code of 1986, and the regulations issued thereunder, as applicable.

NOW, THEREFORE BE IT RESOLVED, that the VCERA Board declares the following:

1. The foregoing Recitals are incorporated herein by reference.

2. This Flexible Benefits Correction Resolution directs that, subject to the caveats in paragraph no. 3 below, for Legacy Members who retired, or will retire, on or after July 30, 2020 (“Post-*Alameda* Legacy [Active, Deferred and Retired] Members”), VCERA will require member and employer contributions on, and pay retirement allowances based on, only the portion of any cafeteria plan benefit that such members could receive directly in cash, and limited to the maximum cashable amount permitted to be provided to everyone in the same grade or class of positions. For clarification, the determination of the Maximum Baseline Cashable Amount will be made as follows:

A) Under the Flexible Credit Allowance for All (FCA-A) structure, the Maximum Baseline Cashable Amount is the flat or “employee-only” flexible credit allowance (FCA) minus the lesser of the opt-out fee (OOF) or the lowest-priced healthcare plan.

B) Under the Flexible Credit Allowance or Opt-Out Allowance (FCA/O) structure, the Maximum Baseline Cashable Amount is the Opt-Out Allowance (OOA).

3. With respect to Post-*Alameda* Legacy Retired Members and their beneficiaries (collectively “Retirees”), VCERA will determine, as soon as administratively feasible, the member contributions paid on In-Kind Only Flex Credit (“Overpaid Contributions”) with compound interest per annum (at a rate to be determined by the Board) (“Interest”) to be refunded as the result of the correction required by this Flexible Benefits Correction Resolution, offset by any overpaid benefits such Retirees already have received as the result of the inclusion of In-Kind Only Flex Credit (“Overpaid Benefits”), plus Interest, in accordance with requirements under the Internal Revenue Code and other applicable law; provided, however, for good cause shown that the Retirees, as a whole, did not cause the delay in the Board’s implementation of this Flex Credit Correction Resolution and would be unduly burdened by recoupment of funds from them, the Board hereby exercises its lawful discretion to limit its recoupment from Retirees of any Overpaid Benefits that they have received, and will receive, plus Interest, prior to VCERA correcting their retirement allowance distribution in accordance with this Resolution, to the referenced offset against their Overpaid Contributions, plus Interest. All remaining Overpaid Benefits will be returned to VCERA through employer payments on the UAAL.

4. With respect to Post-*Alameda* Legacy Active Members (“Active Members”), VCERA will determine, as soon as administratively feasible, the Overpaid Contributions, together with Interest, to be refunded as the result of the correction required by this Flexible Benefit Correction Resolution. VCERA will communicate amounts due to the Active Members, and then provide those amounts, either through direct payments or rollovers to the Active Members, or through the County or their other VCERA participating employer if any, as soon as practicable and in accordance with applicable tax law. For clarification, member and employer contributions as to Active Members are only to be paid on the Maximum Baseline Cashable Benefit, and retirement allowance calculations as to Active Members will include only the applicable Maximum Baseline Cashable Benefit to members. For further avoidance of doubt, all Flexible Benefits-related remuneration, whether provided in cash or in-kind, will continue to be excluded from the retirement allowance calculations of PEPRAs members as required by Government Code section 7522.34, subd. (c)(1), (2), (3), (7), (11) and/or (12).

5. With respect to Post-*Alameda* Legacy Deferred Members (“Deferred Members”), VCERA will determine, as soon as administratively feasible, the Overpaid Contributions, plus Interest, to be refunded to members as the result of the correction required by this Resolution. VCERA will communicate amounts due to the Deferred Members, and then provide those amounts, either through direct payments or rollovers, or, if neither are elected by the Deferred Member(s), then with the Deferred Members’ retirement or other allowance, or with a refund of all Overpaid Contributions, plus Interest, due to the Deferred Members or their beneficiaries, as is applicable.

6. The AB 826 Flex Credit Resolution and all other Board actions relating to Flex Credit are hereby rescinded to the extent they are inconsistent with this Flexible Benefits Correction Resolution. For avoidance of doubt, the limitation in the AB 826 Flex Credit Resolution of compensation earnable to the “lowest amount that is provided to all persons in an individual member’s bargaining unit or unrepresented group during the final compensation period,” remains in effect to the extent that amount is the Maximum Baseline Cashable Benefit.

Mike Sedell, Chair of the Board