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September 17, 2007

K. Michael Miller  
Chair, Board of Pilot Commissioners  
Pier 9, Suite 102  
San Francisco, CA 94111

Re: Board of Pilot Commissioners  
September 27, 2007 Rulemaking Hearing

Dear Commissioner Miller:

As you know, the August 23, 2007 Rulemaking hearing recessed before a vote was taken on the proposed new regulation regarding Pilot Pension Benefit Calculations.

The California Administrative Procedure Act ("APA") requires, *inter alia*, that:

- (a) An agency that **adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action** shall make the document available as required by this section.
- (b) **At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to** all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
- (1) Persons who testified at the public hearing.
  - (2) **Persons who submitted written comments at the public hearing.**
  - (3) **Persons whose comments were received by the agency during the public comment period.**
  - (4) **Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.**

Government Code Section 11347.1 (emphasis added).

PMSA has not received any notice per Section 11347.1(a) with respect to the upcoming September 27, 2007 rulemaking hearing, and therefore presumably no new documents will be added to the rulemaking file or relied upon at such hearing.

The apparent basis for the recess taken at the August 23, 2007 rulemaking hearing was to consider and address deficiencies in the rulemaking record including, without limitation, the failure to properly consider alternative fiscal impacts as required by the APA, as reflected in a form STD 399 or otherwise.<sup>1</sup> There is no realistic way to correct this deficiency without the generation of and reliance upon documents of the nature described in Section 11347.1(a). Therefore, the rulemaking record remains clearly deficient in this regard.

In light of the foregoing, PMSA respectfully submits that, pursuant to the APA, any vote taken at the September 27, 2007 hearing would necessarily be based on the same defective rulemaking record as existed at the August 23, 2007 hearing.

PMSA reserves all rights and further comment. We welcome any questions or comments on the foregoing.

Very truly yours,



Conte C. Cicala  
of  
FLYNN, DELICH & WISE

cc: Board of Pilot Commissioners  
Board of Pilot Commissioners Executive Director, Board Counsel  
SFPB (Counsel, Port Agent, Business Manager)

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<sup>1</sup> Following is an excerpt of a relevant portion of the 8/23/07 hearing transcript:

MR. LEVIN: Well, in the absence of Ms. Scuri, I don't understand how you could fill out a form, four-page form, that includes statement of economic analysis and statement of fiscal impact without having – I mean, doesn't that answer her question? Well, she's not here, obviously, to answer that. Do we need a full blown economic analysis?

COMMISSIONER WAINWRIGHT: Well, I never said that. Not a full blown economic analysis. My major concern is that if Anita Scuri, the woman that wrote the operating manual for this procedure, would like the – for our report to be tightened up somehow, then it should be tightened up, however that's done.

MR. PAETZOLD: A comment on it, because it may raise questions. Not everybody has a copy of the 399. It's certainly available. The 399, I don't have it in front of me, but in essence, that the proposed regulation would not change the practice as it has been in the past and would not in and of itself create a further economic cost beyond that already inherent in the statute. That is an issue that was taken up by PMSA saying no, and that the Board needs to do the economic analysis.

**And what Ms. Scuri is suggesting is that the Board should specifically address how – what the economic impact will be if “service” is defined one way or the other.**

So the answer is yes, there is a form; yes, there are blocks to fill out. **But that analysis, pulling dollars and cents to what the effect would be if “service” is defined one way or the other, has not been done, and Ms. Scuri recommends that it be done and that the Board consider that before deciding this regulation.**