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# MEMORANDUM

DATE: May 9, 2013

TO: Curtis Robinhold, Chief of Staff
Office of the Governor

FROM: Keith L. Kutler, Attorney-in-Charge
Tax & Finance Section

SUBJECT: Money Match

## Executive Summary

You ask whether the Legislature may alter or eliminate the Money Match benefit for inactive Tier One and Tier Two members of the Public Employees Retirement System (PERS) for the purpose of reducing the system's unfunded actuarial liability. In particular, you ask what legal issues are presented by each of two proposals, one that would prescribe a rate used to annuitize Money Match benefits for inactive members and one that would, in essence, eliminate the Money Match calculation when determining an inactive member's retirement benefits. Both concepts are defensible, with the first being marginally more defensible than the second.

ORS 238.300 prescribes how a Tier One or Tier Two PERS member's retirement benefit is calculated. As more fully explained below, the benefit consists primarily of two components, a "refund annuity" that is based upon the member's employee account, and a "life pension" that is paid for by employer contributions. To determine the amount of the benefit, in general two calculations are performed. One, the Full Formula calculation, is a percentage of the member's final average salary times the number of years of service. The second calculation involves application of actuarial equivalency factors to the amount in the employee account at the time of retirement to determine the refund annuity, and that amount is then matched with an annuity funded by employers. The member's retirement allowance is the greater of the amount resulting from this "Money Match" calculation or the amount based on the Full Formula calculation.

One of the two proposals would reduce the Money Match calculation for inactive members by reducing the applicable actuarial equivalency factors applicable to those members. The other proposal would eliminate the matching component of the calculation for inactive members, resulting in a life pension that always is based on the Full Formula calculation. Because both proposals would reduce the life pension component, both proposals would reduce employer costs.

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Adoption of either proposal is likely to be challenged on a number of grounds. The primary issue will be whether any proposal that is adopted violates a term of the PERS contract. The Supreme Court discussed the Money Match provision in its decision analyzing the 2003 PERS legislative reforms. The court, noting that the 1981 version of ORS 238.300 establishes the legislature's promissory intent regarding Money Match, concluded that the 2003 modification to the manner of employee contributions that had the effect of reducing eventual Money Match benefits for many members, some to the point that their benefits would be based on a Full Formula calculation, did not impair the PERS contract. The current proposals would have that same result. To the extent that Money Match benefits for inactive members would be reduced below the Full Formula amount, or eliminated in their entirety, those members still would receive a retirement allowance, albeit a lesser benefit in most cases, according to the Full Formula calculation. Either of the proposals may be defended on this basis.

## I. Background: How PERS benefits for inactive members are determined

An inactive member of PERS is one who is not employed in a qualified position by an employer participating in PERS, but the member has vested and is not yet retired. ORS 238.005(13). An inactive member's retirement benefits are determined in the same manner as for any other member, as described in ORS 238.300. The benefits are the sum of a refund annuity and a life pension. The refund annuity is determined based on the member's account balance. The life pension, which is paid for by contributions from employers, is an amount that, when combined with the refund annuity, results in a total that is known as the "Full Formula" benefit.[1] However, for any member who established membership before July 1, 2003, the life pension is to be not be less than "the actuarial equivalent of the annuity provided by the accumulated contributions of the member." ORS 238.300(2)(b)(A). This language is what provides what is known as the "Money Match" benefit.[2] In other words, if the member's account balance is such that the annuity based on that balance would be greater than the Full Formula benefit, the member receives the higher Money Match benefit.

Two calculations are performed to determine whether a member's highest benefit would be based on Full Formula or Money Match. The Full Formula calculation is described above. The Money Match benefit is determined by applying actuarial equivalency factors adopted in accordance with ORS 238.607 to the member's account balance to determine the refund annuity and then matching that amount with an annuity funded in equal amount by employer contributions. The actuarial equivalency factors are adopted by the board based on recommendations from its actuary. Inputs into those factors include mortality tables (life expectancy) and an annuitization rate. The annuitization rate currently used by the board is the assumed rate of return adopted by the board. The current assumed rate of return is eight percent.

[1] For members in the general service classification, the annual retirement benefit based on the Full Formula calculation is 1.67 percent of final average salary times years of service. For members in the police and fire classification, it is 2 percent of final average salary times years of service.

[2] There is a third calculation, known as Formula Plus Annuity or Pension Plus Annuity, available only to members with service before August 21, 1981. *See* ORS 238.300(2)(b)(B). I do not address that calculation in this memorandum.

The 2003 PERS reforms, in particular the cessation of employee contributions to the employee account established under ORS 238.200, have the effect of reducing over time the number of retirees who will receive benefits based on Money Match. That is because the growth in the employee account was stunted by the cessation of contributions after 2003 while an active member's potential Full Formula benefit continues to grow based on additional years of service and, if applicable, salary increases. *See Strunk v. PERB*, 338 Or 145, 183-93,108 P3d 1058 (2005).

Inactive members, by definition, are not accumulating additional service credit or salary increases. As a result, in many cases the Money Match calculation produces a far greater benefit for inactive members than the Full Formula benefit. Consider this example. An inactive member in general service worked for five years for a public employer in the early 1980s and wishes to retire from PERS effective July 1, 2013. During the member's five years of public employment, the member was paid amounts that resulted in a final average salary of $26,500 per year. Included within that salary were employee contributions of approximately $1,350 per year, for a total of about $6,575 in employee contributions. The member's employee account balance as of June 30, 2013, is around $104,400. This member's Full Formula benefit (assuming no final average salary adjustment for lump-sum vacation payouts or unused sick leave and no tax-remedy addition) would be $1,992 per year, or just under $166 per month. However, the Money Match calculation would result in a benefit of $19,044 per year, or $1,587 per month.[3]

This example illustrates how the availability of Money Match to inactive members contributes to the unfunded actuarial liability (UAL) of PERS. The UAL is determined by the actuary when it performs a system valuation that is based on the costs of benefits accrued compared with the total assets available to pay those accrued benefits. When the actuary valued the system as of December 31, 2011, it determined that the system's liabilities were roughly $61 billion, of which $16 billion was UAL, because the liabilities exceeded system assets by that amount.

Employer rates consist primarily of two components, normal cost and UAL. The normal cost is based on the amount of benefits being accrued by active members. That amount is determined by the board based on analyses performed by its actuary. In general, the actuary analyzes system assets and projected liabilities based on assumptions that include membership demographics, expected changes in compensation, inflation projections, and expected earnings on system assets.

When a member retires, an amount is transferred into what is known as the "benefits in force" reserve to fund the expected cost of those retirements. That amount is determined based on the retiree's life expectancy and assumptions that include expected earnings on the reserve funds as they are paid out during the member's retirement. The source of the amounts

[3] Once the amount is determined under ORS 238.300, a member may choose various options under ORS 238.305, including whether the benefits should be based solely on the life of the member or also on the life of a beneficiary who may continue to receive benefits if the member predeceases the beneficiary. A member also may choose to receive a refund, known as a lump sum payment, of the employee account and an annuity paid from employer contributions, or a "total lump sum," which is a lump sum payment equal to the total of the employee account matched by an equal amount paid from the employer account.

transferred are the employee's account (unless the employee chooses to take a lump sum refund of that account) and an amount from the employer account that is determined by PERS to be needed to fully fund the retirement, based on assumptions in effect at the time of that retirement. For retired or inactive members, no new contributions are made by employers as part of the normal cost component of employer rates. Consequently, if there is a shortfall in the amount needed to fund retirements,[4] that shortfall is an UAL, and that shortfall must be made up either through future earnings on system assets that exceed the assumed rate or by additional employer contributions. When the board sets employer rates, the UAL is amortized across the active payroll as additional employer contributions. In other words, the UAL, including the UAL attributable to inactive members, results in increased employer contributions.

## II. The Proposals

You ask about two different proposals. One proposal would reduce Money Match benefits by applying a different annuitization rate when the member is inactive at the time of retirement. The other proposal would make Money Match benefits inapplicable to inactive members.

### A. Reduction of Money Match benefits for inactive members by reducing the annuity rate

This proposal would amend ORS 238.607, the statute requiring the PERS board every two years to adopt actuarial equivalency factors, by inserting into ORS 238.607(1) the following: "The assumed annual interest rate used for tables adopted under this section shall be equal to the current rate for valuing annuity benefits as published from time to time by the Pension Benefit Guaranty Corporation." PBGC publishes a number of interest rates and I will have to defer to experts as to which rates are being referenced. I have been informed, however, that the rate at issue currently is in the neighborhood of 2.75 percent. Consequently, under this approach Money Match benefits would be reduced because the annuitization component used to determine the actuarial equivalency factors applicable to inactive members would be 2.75 percent, not the assumed rate (currently eight percent).

This proposal, as stated here, would apply to all members. Accordingly, the proposal must be refined if it is to apply solely to inactive members. Moreover, the proposal must be further refined to apply only when the annuitization rate is used to fund a benefit based on a Money Match calculation. Absent this second refinement, it is my understanding that the proposal could have the (presumably unintended) consequence of increasing employer costs to fund retirements based on a Full Formula calculation.

A proposal of this type could, of course, adopt a different annuitization rate. An actuarial analysis is required to estimate the amount of the benefit reduction based on whatever change to

[4] Such shortfalls may result from events such as the market downturn of 2008, from retirees in aggregate living longer than what is expected under the actuarial equivalency factors, or from Money Match benefits that are paid to members that require funding from the employer account that exceeds contributions by employers made during those members' years of active service. The 2003 reforms addressed to some extent the UAL resulting from Money Match benefits.

the annuitization rate may be adopted, or the extent to which the resulting calculations under ORS 238.300 would result in inactive members still receiving higher benefits based on Money Match compared to Full Formula under any different annuitization rate that may be adopted.

### B. Elimination of Money Match for inactive members

This proposal would amend ORS 238.300 to make ORS 238.300(2)(b)(A) inapplicable to an inactive member. The result of such an amendment is that the life pension component of the inactive member's retirement benefits would not have to be at least equal to the actuarial equivalent of the refund annuity (i.e., the component based on the member's employee account). As a result, the life pension would be based on ORS 238.300(2)(a), which means it would be based on the Full Formula amount, thereby capping the amount of retirement benefits payable from the employer account. The result of that cap is a potentially substantial reduction in benefits and associated liabilities for affected members, which would permit a reduction in employer contribution rates to PERS.

### C. Additional considerations

Depending on which proposal may go forward, there are one or two additional issues to be addressed. Availability of total lump sum contributions for inactive members should be eliminated under the proposal to eliminate Money Match. Under either proposal, consideration should be given to how long a member must be inactive before the change would apply to that member, and also to whether a member who has been inactive for a substantial period of time may reestablish active membership before retirement and, if so, for how long.

As mentioned above in footnote 3, retirees may choose to receive a lump sum distribution of the employee account along with a life pension that is funded by employer contributions, or a total lump sum, which is a refund of the employee account along with payment of an equal amount funded by employer contributions. If Money Match benefits for inactive members are eliminated, the total lump sum option also must be eliminated. If it is not eliminated, then an inactive member who otherwise would qualify for a Money Match benefit could take a total lump sum when the value of the total lump sum would exceed the value of an annuitized benefit when the life pension is based on Full Formula.[5] Under the example given in the Background section, a total lump sum distribution would be $208,800, of which one half is funded by employer contributions. Meanwhile, even if the employer had to fund the life pension based on the Full Formula calculation, the member would have to live more than 52 years after retirement before the employer had to pay out $104,400 (although the employer also would have to fund cost of living adjustments). If the total lump sum option for inactive members is eliminated, the member could choose to take a refund of the $104,400 in the employee account (or an annuity based on that amount), but the life pension would be based on the Full Formula calculation, resulting in savings for employers compared with a life pension based on Money Match.

[5] The reason for this is that a total lump sum paid to a member who qualifies for retirement benefits based on Money Match is, at the moment of retirement, the actuarial equivalent of an annuity that is based on Money Match. Of course, a member who takes a total lump sum accepts the risk of investing the funds and is ineligible for cost of living adjustments.

The other consideration is how long a member must be inactive before Money Match benefits become inapplicable. It is not unusual for members to have a short lag time between the last day of work and the effective date of retirement. This can happen for any number of reasons, including inadvertent planning errors by the retiree. If these proposals are aimed primarily at costs caused by members who have been inactive for substantial periods before retirement, consideration should be given to how long members must be inactive before they are subject to the proposed change. Whether that period should be one, six, twelve months or something else is an issue for policy makers. In addition, consideration should be given to whether there should be any limits on whether inactive members may reestablish membership before retirement and thereby resume their eligibility for retirement benefits based on a Money Match calculation. These policy choices should have no bearing on the defensibility of either proposal, but they will have a bearing on who may be affected if either proposal is adopted.

## III. Legal issues

Adoption of any proposal that would reduce or eliminate benefits for inactive members compared to the benefits available to them under current law likely would be challenged. This section considers likely challenges to each. The issues discussed herein should not be considered exclusive, however, as potential challengers may develop others.

### A. Contracts Clause

The Oregon Supreme Court in *Strunk* discussed whether Money Match is part of the PERS contract in its consideration of the provision in the 2003 legislation that redirected employee contributions for Tier One and Tier Two members from the employee account established under ORS 238.200 to the Individual Account Program (IAP) account pursuant to ORS 238A.330. The challengers argued that this redirection would diminish Money Match benefits, resulting in either reduced benefits under a Money Match calculation or, for many members, retirement benefits based on the Full Formula calculation. *See Strunk*, 338 Or at 180-81.

The court's discussion of this issue begins with a statement that appears to open the door to elimination of Money Match benefits.

> "More importantly, the wording of ORS 238.300 (2001) is unambiguously promissory. Through that statute, the legislature continuously and unequivocally has communicated to PERS members that, if they retire from service at normal retirement age, they will receive a pension component of their final service retirement allowance that, (1) when combined with the actuarial equivalent of their accumulated contributions to the fund, will consist of the Full Formula amount based upon years of service, final average salary, and class of service that equals or exceeds any pension component calculated under the other two formulas; or (2) in the event that the Full Formula calculation falls short, a pension component calculated under the Money Match or the Pension Plus Annuity. In short, the state's obligation as set out in ORS 238.300 (2001) is to

> provide a final service retirement allowance made up of an annuity component and a pension component at the minimum level described above."

*Strunk*, 338 Or at 186. The "minimum level," at least in recent years, is generally understood to be the amount resulting from the Full Formula calculation. However, the court suggests that, at one time, the legislature may have believed that the Full Formula calculation likely would yield the highest pension amount.

> "Instead, that statutory evolution demonstrates that the legislature promised that members would receive service retirement allowances calculated under whichever formula yields the highest pension amount for that member and that the Full Formula calculation ordinarily should equal or exceed calculations under the Money Match or, if applicable, the Pension Plus Annuity."

Strunk, 338 Or at 189. If so, then an argument could be made that the statutory evolution demonstrates a legislative intent that a Full Formula benefit be the floor amount, subject only to an anomaly resulting in one of the other calculations yielding a higher benefit.

The court reviewed the history of the Money Match benefit, including that it had been repealed in 1967 and then reenacted in 1969. *See* 338 Or at 190. Elimination of Money Match, despite that it was later reenacted, supports an argument that the Money Match calculation is not part of the PERS contract. But at the time of the repeal, the statutes did not provide a minimum guaranteed benefit for members. Such a minimum became a part of the statutes at the time of that repeal, when the legislature replaced Money Match with Formula Plus Annuity. That provided members, for the first time, with a guaranteed minimum pension component. In 1981, the legislature enacted the Full Formula benefit, which the Supreme Court characterizes as, "for the first time, provid[ing] members with a formula under which the risk of earnings loss fell—and continues to fall—squarely on employers." *Strunk* 338 Or at 191-92. The court concluded that this fundamentally changed the legislature's approach to PERS benefits because it "shifted the downside risk of investment return away from members." 338 Or at 192.

> "Because we presume that the legislature intended those material changes to change the meaning of the statute materially as well, we conclude that the 1981 amendments effected a reenactment of the entire section and provide the version of the statute to which we will look in ascertaining the legislature's promissory intent."

Strunk, 338 Or at 191. Consequently, any arguments about whether Money Match is part of the PERS contract must begin with the 1981 version of the statute and the court's construction of it.

Ultimately, the court concluded "that the 1981 Legislative Assembly promised each eligible member that, at retirement, the member would be entitled to receive a service retirement allowance calculated under the formula that yielded the highest pension amount. The legislature did not alter or eliminate that promise when it enacted the 2003 PERS legislation." *Strunk*, 338 Or at 192. But the issue before the court was not whether availability of Money Match is part of

the statutory contract. The issue was whether there was a contractual right that employee contributions be directed to the account established under ORS 238.200. On this point, the court held that there is no immutable right for employees to contribute to that account.

> "Nothing in the text of ORS 238.200(1)(a) (2001), which required PERS members to contribute six percent of their salaries to the fund, supports petitioners' argument that the legislature intended that contribution to be immutable. As noted earlier, the 1981 Legislative Assembly lowered the member contribution rate from a high of seven percent to a uniform six percent. And, at the same time, the legislature grandfathered those members previously paying a contribution rate of less than six percent, even though it meant that those members' account balances, and therefore the service retirement allowances that the members ultimately would receive, would be smaller under the Money Match. In other words, the text of ORS 238.200(1)(a) (2001) and its statutory context do not establish clearly and unambiguously that the legislature intended to promise members that they could contribute six percent of their salaries to their regular accounts throughout their PERS membership so as to maximize their pension component calculation under the Money Match.
>
> Applying the foregoing conclusions to petitioners' claims that the redirection of PERS members' future contributions to the IAP, as set out in the 2003 PERS legislation, either breaches or impairs a contractual obligation of the PERS contract, the answer is clear: Nothing about the creation of the IAP alters the legislature's promise that, at retirement, each member will receive a service retirement allowance calculated under the formula yielding the highest pension amount, and nothing about the IAP legislation constitutes a breach of that promise. To the contrary, under the 2003 PERS legislation, each member in the system at the time of the effective date of that legislation will, at retirement, receive a service retirement allowance consisting of an annuity component based on the member's contributions and earnings and a pension component calculated under the formula that yields the highest pension amount."

*Strunk*, 338 Or at 192-93. Three points emerge from this conclusion and holding. First, employees have no immutable right to contribute to a particular account. Second, at least some statutory changes that have the effect of reducing or eliminating benefits based on the Money Match calculation are permissible and do not breach or substantially impair the PERS contract. Note, however, that the statutory change at issue in *Strunk*, and those that occurred previously, affected contributions by employees. Third, at the time of retirement, Tier One and Tier Two members are entitled to retirement benefits calculated under the provision in ORS 238.300 that yields the highest benefit.

These three points provide direction as to the issues that must be overcome for either of the proposals affecting Money Match for inactive members to survive judicial scrutiny. Neither of the proposals affects contributions that will result in diminution of Money Match benefits. Rather, both proposals affect the Money Match calculation itself. One does so by changing the annuitization rate, the other by eliminating the requirement that the pension component that is

funded by employers match the refund annuity when the result would be a life pension greater than the life pension necessary to fund a Full Formula benefit. Consequently, both proposals will present an issue of first impression for the court, which is whether the life pension component of an inactive member's retirement benefits may be based either on an annuitization amount that is different from, and less than, the amount applied when an active member retires, or whether Money Match may be eliminated in its entirety as to inactive members. There is language in *Strunk*, quoted above, that appears to open the door to elimination of the requirement that the pension component match the refund annuity. However, the court's holding appears to tilt in favor of an approach that does not eliminate Money Match in its entirety. The effect of that proposal would be the same as the effect of the change in contributions at issue in *Strunk*; affected members would see a diminution in benefits based on the Money Match calculation while others would receive benefits under the Full Formula calculation.

Elimination of the requirement that the pension component that is funded by employers match the refund annuity when the result would be an amount that exceeds the Full Formula benefit is simpler to explain and the potential savings is likely easier to calculate than the other approach. However, the other approach has the virtue that the Money Match calculation remains available, at least if the annuitization rate is not so low as to make the Money Match calculation always less than the Full Formula calculation. If the annuitization rate is set at that level, then the two approaches are equivalent as a practical matter and likely to be viewed identically by the court.

Either proposal is likely to survive, or not, based on the court's analysis of the whether the change impermissibly modifies the promise embodied in the version of ORS 238.300 enacted in 1981. However, other issues are likely to be raised. If the proposal that is adopted also includes elimination of the total lump sum option for inactive members, a challenger could argue that the total lump sum option is a term of the statutory contract. The total lump sum option was added in Oregon Laws 2001, chapter 945, section 8, which was intended to reduce system liabilities. In general, a total lump sum distribution to a member whose highest benefit calculation is under the Money Match would reduce system liabilities because, at the time of retirement, a total lump sum payout is actuarially equivalent to an annuity, and the system would not be liable for future cost of living adjustments. Because the total lump sum benefit is actuarially equivalent to an annuity, it is unlikely the legislature envisioned this new option as increasing a benefit, and elimination of it would not have the effect of decreasing benefits, at least based on actuarial value. Consequently, whether elimination of the total lump sum for inactive members will survive judicial review likely depends on the outcome of the fundamental contract issue. If the court holds that the life pension may be reduced so that it does not have to match the annuity based on the member account, then a concurrent elimination of the total lump sum option for inactive members is likely to prevail. If the fundamental issue fails, this and the issues discussed below are rendered moot.

Another issue that likely will be raised is whether it is permissible to treat inactive members different from active members at the time of retirement. Such an argument may be based on Article I, Section 20, of the Oregon Constitution or the Equal Protection Clause of the United States Constitution. Under either constitutional provision, the legislation is likely to

survive if the government can demonstrate a rational basis for the distinction. The savings to the system in light of the current distress on the system and on public employers likely provides that rational basis. And a rational basis for making the change applicable only to members who are inactive at the time of retirement is that applying the change to active members likely would result in mass retirements by active members who are eligible to retire and whose benefits under current law would be based on the Money Match calculation. Such a mass exodus could be disruptive for employers and create enormous administrative burdens for PERS.

The proposal that would reduce the annuitization rate presents a couple of issues not presented by the other proposal. One is that, as currently formulated, the annuitization rate would be the rate adopted by a federal agency. That formulation may violate the non-delegation doctrine. *See Qwest Corp. v. Public Utilities Commission*, 205 Or App. 370, 135 P3d 321 (2006) (discussing doctrine). This problem can be avoided by altering the proposal so that the board has to adopt the annuitization rate, whether based on rates developed by a federal agency or in some other manner that the legislature may choose. The second issue is that this approach would, for the first time, require PERS to use a rate other than the assumed rate for a particular purpose. PERS, like any retirement plan, adopts an assumed rate and employs it for many purposes, including valuing the system, estimating future liabilities and determining employer costs. Opponents of the proposal may argue that using a rate other than the assumed rate for this single purpose may violate sound actuarial practice, based on the theory that the assumed rate, whatever it is, should be used for all purposes, including valuation of the system and determination of benefits. My expectation is that legislative authority would prevail over even an immutable view, if that is what it is, regarding actuarial practice.

Finally, we cannot rule out the possibility that, even if one of the proposals is enacted and survives judicial scrutiny based upon a challenge to the legislation itself, a challenge may later be made by one or more individual member upon retirement. Presumably such a challenge, if based solely on issues raised upon challenge to the legislation, would fail. However, a member could argue that he or she was unaware of the legislation, that no notices of the change were made by PERS, and this resulted in harm to the member who, it would be alleged, otherwise would have retired at some earlier date. This argument may evoke the most sympathy if such legislation is enacted quickly after introduction and with an emergency clause.

**CONCLUSION**

Either proposal is defensible and both present substantial challenges. Either proposal will present significant administrative challenges and costs for PERS. Moreover, the potential savings from the proposal to change the annuitization rate for inactive members likely are more difficult to calculate than the potential savings from the proposal to eliminate Money Match for inactive members, and the system savings under either proposal are sensitive to the number and types of retirements that could occur prior to the effective date of the legislation.[6] A proposal that will result in at least some inactive members receiving benefits based on Money Match,

[6] This assumes they have time to do so. If the changes are enacted quickly and the Act includes an emergency clause, some may not have time to retire before the effective date. Members affected in this way may challenge the timing of the enactment.

albeit at a reduced amount than under current law, may be marginally more defensible than a proposal that eliminates Money Match for inactive members. Still, neither approach can be supported with the precise rationale discussed in *Strunk*, because that discussion involved changes to employee contributions that affected eventual Money Match benefits while these proposals would affect the Money Match benefit either indirectly by changing the annuitization rate or directly, by eliminating Money Match for inactive members. Under any proposal, consideration should be given to how long a member must be inactive before the different approach will apply to that member, and whether and for how long a member may become active just before retiring in order to be eligible for Money Match benefits. In addition, under a proposal to eliminate Money Match for inactive members, consideration should be given to eliminating the total lump sum option for those members.