



Fiduciary Training for CalPERS Board of Administration: A Focus on Open Meeting and Conflict of Interest Rules

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Today's Presenters



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FIDUCIARY TRAINING: OPEN MEETING LAW AND CONFLICT OF INTEREST CHALLENGES FOR PUBLIC RETIREMENT BOARDS & STAFF



**GOVERNANCE BY FIDUCIARIES:
LEGAL FRAMEWORK**

Board Authority and Fiduciary Responsibilities

- Board vested with “**plenary**” and “**sole and exclusive**” authority over the “administration” and “investments” of the retirement system
- Board must carry out responsibilities consistent with its fiduciary responsibilities:
 - Act in good faith as a prudent expert
 - Act in the overall best interest of retirement system’s members and beneficiaries
- Board must comply with other applicable federal and state laws
 - E.g., Cal. Const., art. XVI, sec. 17, PERL and other Cal. Gov. Code provisions & *Alameda DSA, et al v. ACERA, et al. (State of California)* (2020) 9 Cal. 5th 1031

BOARD GOVERNANCE: OPEN MEETING LAW COMPLIANCE



Bagley-Keene Open Meeting Act (Gov. Code secs. 11120, et seq.)

All Board and Committee meetings must be open and public:

- Notice and agenda to the public
 - Timing of notice depends upon nature of the meeting (i.e., regular, special, emergency)
- Meetings and decisions must be made in public
 - Unless closed session discussion permitted on particular topic
- Public attendance and participation allowed through public comment

Who Has to Comply?

- The Board
- Subsidiary bodies and committees, if composed of two or more persons and exercises authority of state body
- Advisory bodies that are:
 - Created by “formal action of the state body or of any member of the state body;” and
 - Composed of “three or more persons”
 - Multimember body supported by agency funds and which Board Members serves on in official capacity” (Gov. Code sec. 11121)

Who Does Not Have to Comply?

- Board or Committee Chairs, or other individual trustees, communicating directly with executive staff and consultants:
 - So long as no serial meetings among quorum of Board or Committee

What Is A Meeting?

- Any communication among a quorum
 - On a topic within jurisdiction of the Board (or committee)
- Discussion, debate or deliberation





What Is A Meeting?

- Receive, process and discuss information
- Not allowed
 - “Study sessions”
 - “Pre-meeting briefings” – seeking to achieve consensus among board members
 - One board/committee member providing reading material to quorum of board/committee on topic within jurisdiction of board/committee

Communications of Board/Committee Quorum That Constitute a “Meeting”

- Clarification of an issue within Board/Committee’s jurisdiction
- Agreement or compromise
- Advance the resolution of an issue
- Any aspect of deliberative process

Serial Meeting Rules Under Bagley-Keene

- “A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.” (Gov. Code sec. 11122.5, subd. (b)(1).)
- “Paragraph (1) shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.” (Gov. Code sec. 11122.5, subd. (b)(2).)

Agenda

- Notice of meeting and agendas must be provided to the public 10 days in advance of regular meetings
- Agendas must include a brief general description (less than 20 words) of each item of business
- Includes both open and closed session items
- Enough information so that public can decide whether to participate
- Board may not discuss or act on matters not included in the agenda
 - Unless 2/3 determine need for immediate action came to attention of agency after agenda was posted; unanimous if less than 2/3 of members are present. The new matter must be noticed to the public as soon as practicable and at least 48 hours before the meeting.
 - Unless majority determines there is an “emergency situation,” as defined in Gov. Code sec.11125.5 (i.e., “work stoppage or other activity that severely impairs public health or safety, or both”; or “crippling disaster that severely impairs public health or safety, or both”). Notice is to be provided to newspapers, radio and television stations who requested notice by telephone if telephone service is functioning at least one hour prior to the meeting.
- New issues may be included in next agenda

Rules for “Special” Meetings

- A “special” meeting, which does not require normal 10-day notice for “regular” meetings, may be called “at any time by the presiding officer of the state body or by a majority of the members of the state body,” to consider one of 9 listed purposes, 7 of which may apply to CalPERS:
 1. Pending litigation, as defined
 2. Proposed legislation
 3. Issuance of legal opinion
 4. Disciplinary action involving a state officer or employee
 5. Purchase, sale, exchange or lease of real property
 6. Confidential final draft audit report from the Bureau of State Audits (prior to public release)
 7. Provide for an interim executive officer of a state body upon the death, incapacity or vacancy in the office of the executive officer
- Special meetings also are permissible under Bagley-Keene only when compliance with the 10-day notice provision would “impose a substantial hardship on the state body or when immediate action is required to protect the public interest”

Special Rules for “Special” Meetings (cont.)

- Notice of a special meeting must be provided “in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the special meeting specified in the notice.” (Gov. Code sec. 11125.4, subd. (b).)
- “At the commencement of any special meeting, the state body must make a finding in open session that the delay necessitated by providing notice 10 days prior to a meeting as required by Section 11125 would cause a substantial hardship on the body or that immediate action is required to protect the public interest.”
 - This finding “shall set forth the specific facts that constitute the hardship to the body or the impending harm to the public interest.”
 - The finding “shall be adopted by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present.”
 - “Failure to adopt the finding terminates the meeting.”

Closed Session

Each closed session provision has specific statutory provisions regarding when it may be invoked and what may, and may not, be discussed



Closed Session

- Commonly invoked closed session provisions:
 - Personnel matters (appointment, employment, evaluation, dismissal)
 - Pending litigation (to confer with, or receive advice from, legal counsel regarding “pending litigation,” as defined in Gov. Code sec. 11126, subd. (e), when discussion in open session would prejudice the position of the state body in the litigation)
 - Real property negotiations (purchase, sale, exchange or lease to give instructions to negotiator regarding price and terms of sale)
 - For a “state body that invests retirement, pension or endowment funds,” all “investment decisions,” including “real property investment decisions.” Some limitations apply when discussing shareholder voting on corporate stock.

Questions?





**BOARD GOVERNANCE: CONFLICT
OF INTEREST RULES APPLICABLE
TO PUBLIC RETIREMENT BOARD
MEMBERS AND STAFF**



Primary Duty Rule and Avoiding Conflicts

- Duty not to acquire a material benefit from a third party
- Statutory and common law conflict of interest prohibitions

General Conflicts of Interest Principles

- Board member may not participate in matter that impacts own finances in a manner different from how it impacts retirement system membership generally
- Board member may not participate in matter if expected to impact own employment or personal finances
 - \$2,000 threshold for stocks and bonds that results in “financial interest” that will require a Board/executive staff recusal if the entity that issues the stock/bond is before the Board
 - Same for other Form 700 disclosure thresholds (as described on subsequent slides) as well

General Conflicts of Interest Principles

- Rules differ depending upon whether the retirement board action involves a “contract”
 - Stricter rules may apply to prevent retirement board from acting so long as the board includes the conflicted member, and in some cases even recusal of conflicted member will not allow board to act

Conflicts of Interest Under the Political Reform Act (PRA)

General Rule

- No public official may make, participate in making, or use his or her official position to influence the making of a governmental decision at any stage, in which the official or their immediate family has a financial interest

Rationale

- To prevent actual or apparent biases resulting from financial interests of decision makers

DO YOU HAVE A DISQUALIFYING ECONOMIC CONFLICT UNDER THE PRA?



Multi-step analysis to determine whether a financial interest is disqualifying (PRA)

1. Public official? All Board members and CalPERS staff are public officials
2. Involved in the decision? If advise, recommend, communicate, decide, then “yes”
3. Have a “financial interest”? If disclosed on Form 700, then “yes.” Even if not disclosed on Form 700, may be a financial interest.
4. Is it reasonably foreseeable that the decision will have a financial effect on the official’s financial interest?
 - If the financial interest is the subject of the decision, then “yes”
5. Is the effect on the financial interest “material”? Very specific FPPC regulations particular to each type of financial interest establish materiality.

FPPC Advice Letters re Public Retirement Board Trustee Interests

- Retirement board trustee reports stock ownership in companies in which retirement system invests on Form 700
- FPPC Advice Letter No. I-17-093
 - This constitutes a “business interest” in those companies because of stock ownership in excess of \$2,000 each
 - “Disposing of interests in those entities or creating a blind trust for investments can eliminate the potential for conflicts of interest under the Act.”
 - The Act “would prohibit the Board member from taking part in a decision relating to [four named companies] if the decision would have a reasonably foreseeable material financial effect on one or more the Board Member’s financial interests in those business entities.”

Effect of Economic Conflict

- General rule: Public official may not make, participate in, or in any way attempt to use their official position to influence governmental decisions involving the conflicted interest.
- Special requirements fo Board Member and Senior Staff (87200 filers) at Board Meetings: Disqualified
 - Publicly declare the specific interest
 - Refrain from participating as board member and leave the room unless as a public participant on matters relating solely to the official's personal interests
 - Board may make decision without participation of disqualified officials (but also need to consider Gov. Code sec. 1090)

Effect of Violation of PRA Depends on Offense/Circumstances

- Criminal conviction of misdemeanor precludes public office for four years
- Fines up to \$5,000 per occurrence
- Potential for civil enforcement action
- Decision may be voided



Questions?



Conflicts of Interest in Contracting: General Rules

- Public officers and employees shall not be financially interested in any contract made by them or by any body/board of which they are members (Gov. Code Sec. 1090)
- Board members presumed to be involved in all contracts under Board's jurisdiction
 - Even disqualification or recusal of the interested member will not allow the board or board member to make the contract unless an exception applies
- Interested employees may not participate
- The reach of the statute has been broadened to prohibit any individual from aiding or abetting a violation of Section 1090 by any public official or employee

Contracting Factual Analysis

- Public officer or employee?
- Is there a contract? Broadly defined
- Involved in making a contract?
 - Developing, negotiating, modifying and soliciting bids
- Financial Interest?
 - Direct or indirect, positive or negative.
- Does an Exception Apply?
 - Non-Interest
 - Remote Interest
- Rule of Necessity? Only for essential services
- Violation to aid or abet another's violation



Contracting Exceptions

- Non-Interests: List of statutory exceptions, including:
 - “Governmental salary” exception (1091.5(a)(9)):
 - No change in compensation to public employee; and
 - Contract is not with, nor “directly affects,” employee’s own department
 - See *Lexin v. Superior Court*
 - “Public services generally provided by the board” (1091.5(a)(3))
 - See *Lexin v. Superior Court*
 - Reimbursement by official’s agency for actual and necessary expenses incurred in the performance of public duties (1091.5(a)(2))

Lexin v. Superior Court (2010)

“Governmental Salary” Exception

- The California Supreme Court concluded:
 - A contract that may result in future changes to a Board or staff member’s government compensation is not exempted from Section 1090 by the “governmental salary” exception
 - A contract that is between Retirement System and City/County/District, that does not affect (1) any Board or staff member’s government compensation or (2) directly affect any Board member’s employing department, is exempted from Section 1090 by this non-interest exception

Lexin v. Superior Court (2010)

“Governmental Salary” Exception (cont.)

- The California Supreme Court also concluded:
 - A contract that is with, or directly affects, a Board member’s employing City/County/District department (where said Board member’s government compensation will not be impacted), requires that Board member to disclose and recuse (because it’s a “remote” interest under Section 1091(b)(13), rather than a non-interest)

Lexin v. Superior Court (2010) “Public Services Generally Provided” Exception

- The Supreme Court concluded that this non-interest exception may be invoked:
 - The contractual benefit provided to the public official is one of the benefits that the public agency provides generally;
 - There is no opportunity for the exercise of individualized discretion that would allow preferential treatment to be provided to the public official; and
 - The public official and the agency’s “constituents” have access to benefits “on the same terms and conditions,” without respect to the public official’s status
- Example: PEMHCA benefits provided to CalPERS members.

“Remote” Interest Exception to Section 1090 (Sec. 1091(b)(15))

- Permits settlement of litigation between public body or board of which the officer is a member, and officer is a party if all of the following apply:
 - The body or board is represented by legal counsel in the litigation
 - Court finds that the agreement serves the public interest
 - The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board
 - Disclosure is made of the interest and is noted in board’s official records

Violation of Contracting Law

- Ordinarily a Board member cannot escape liability for a contracting law violation by recusal
- Financially interested Board member must resign from the Board (and/or irrevocably renounce interest) unless an exception applies to permit the Board to act
- Staff members with financial interest must be screened from Board action (and/or irrevocably renounce interest); only “involvement” must clearly state action is in individual, not official, capacity (see FPPC Advice Letter No. A-17-087)
- Violation of contract law is felony that can result in imprisonment of the public official, permanent disqualification from public office, and fines
 - Disgorgement of all benefits received under illegal contract may be required

Questions?



Receipt or Solicitation of Campaign Contributions: Conflicts of Interest Under PRA §84308

- Application: Applies to Retirement Board members receiving campaign contributions for election to a different office, in connection with proceedings before the Retirement Board on licenses, permits and other entitlements for use, including investment contracts
- But see: Chivaro Advice Letter, No. A-05-014, which recites FPPC's positions that sec. 84308 does not apply to constitutional officers

Receipt or Solicitation of Campaign Contributions: Conflicts of Interest Under PRA §84308

- General Rules:

- Board member may not receive or solicit campaign contributions >\$250 from financially interested persons while the proceedings are pending, and for 3 months thereafter
- All such contributions, and contributions made or received during the preceding 12 months must be disclosed and Board member is disqualified from any participation in the proceeding

- Effect of Conflict:

- Disclosure by the Board member made on the record at the beginning of any public hearing on and disqualification from any participation in the proceeding
- If the Board member returns the contributions within 30 days from the time that they should have known about the contribution and the proceeding, then the Board member may participate in the proceeding

Conflicts of Interest: Retirement Board Investments

- General Rules:

- No board member or employee shall have a personal interest or gain in making an investment
- Cross-selling ban: prohibits sales of investment products by all California public retirement system board members and staff to any California public retirement system (Gov. Code sec. 7513.95)

Common Law Conflicts of Interest

- *In re Torres*, Cal. Ops. Att’y Gen. No. 07-807 (2009)
 - AG invoked the common law conflict of interest doctrine as the basis for advising a redevelopment agency board member to recuse herself with respect to a proposed loan as to which she had no disqualifying personal financial interest under Section 1090 or the PRA, but that would be made to her adult non-dependent son who resided with her in the same apartment
- **Lesson:** May have common law conflict of interest even if no statutory conflict of interest. Note also: FPPC does not advise on common law conflict of interest.

Conflicts of Interest After Leaving Office

- General Rule: Public officials may not make, participate in making, or use their official positions to influence the making of a government decision directly relating to any person with whom they are negotiating or have an arrangement concerning future employment. (Gov. Code sec. 87407.)
 - Certain elected officials and employees are covered by other prohibitions after leaving office (see next slide)

Post-employment restrictions applicable to Board members and senior staff under Political Reform Act

- **4-year ban**: Covered officials are prohibited from making any appearance before or communication with his/her former agency, if:
 - The official has permanently left that particular office or employment.
 - The appearance or communication is within 48 months of the official leaving.
 - The official is compensated or promised compensation.
 - The appearance or communication is made on behalf of any person as an agent, attorney, or representative except to represent own personal interest.
 - The appearance or communication is made for the purpose of influencing legislative or administrative action or discretionary action involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. (Gov. Code sec. 87408)

Post-employment restrictions applicable to Board members and senior staff under Political Reform Act

- **2-year ban**: Covered officials prohibited from aiding, advising, consulting with, or assisting a business entity to obtain a contract or contract amendment with his or her former agency if:
 - The official has permanently left that particular office or employment.
 - The appearance or communication is within 24 months of the official leaving.
 - The official is compensated or promised compensation. (Gov. Code sec. 87409)
- **10-year ban**: Covered officials prohibited from serving as a placement agent in connection with investment before **either** CalPERS or CalSTRS if:
 - The official has permanently left particular office or employment.
 - The services are within 120 months of the official leaving.
 - The official is compensated or promised compensation. (Gov. Code sec. 87410)

Conflicts of Interest After Leaving Office

- Two-year waiting period on post-governmental activities by former California public retirement system board members and executive officers (Gov. Code sec. 7508.5.)
 - Forbidden to influence, *on behalf of another person or entity* and *for compensation*, any legislative, administrative or contract decision by their former public retirement system during that period



Questions?



Thank You



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