



Board Governance Committee

Agenda Item 6a

November 18, 2019

Item Name: Board Workstream 4 Update: Code of Conduct

Program: Board Governance

Item Type: Information

Recommendation

Consider and discuss Workstream 4's updated recommendation to revise selected sections of existing Board policies pertaining to Board member behavior instead of adopting a new Board code of conduct.

Executive Summary

At its August 2019 meeting, the Board Governance Committee and the full Board approved Board Workstream 4's recommendation to develop a Board code of conduct. The Committee then reviewed and discussed a draft code, after which it asked Anne Simpson and the CalPERS Legal Office to work with the members of Workstream 4 on another draft.

The ensuing discussion led to the realization that virtually all of what was addressed in the draft code of conduct is already covered in one or more of several existing Board policies, and that it might be better to amend one or more of those documents instead of adopting an entirely new, but largely overlapping, document. This agenda item gives the Committee an opportunity to consider this (and other) issues with the draft code of conduct, and to decide how to proceed.

Background and Analysis

The draft code of conduct addresses the issues Board members said they wanted covered in such a policy. However, almost all of those issues are already covered in other Board policies. For example, sections 2.1 and 3.1 of the draft code address conflicts of interest. Attachment 1, pages 3-4. But the existing Board Governance Policy contains seven paragraphs on Board member conflicts of interest. Attachment 2, pages 6-7. Conflicts of interest are also addressed in the Board Member Statement of Incompatible Activities (Attachment 3, page 2), as well as the Political Reform Act; California Government Code section 1090; and a large body of law interpreting those statutes.

Similarly, section 4.2 of the draft code of conduct addresses civility and professionalism.¹ But the existing Board Governance Policy covers these matters in its sections on “Governing Style” (Attachment 2, page 17), “Civility and Courtesy” (page 22), and “Prevention of Harassment, Discrimination, and Retaliation” (page 22). The Board’s existing Rules and Guidelines for the Conduct of Meetings also contains an overlapping section on Board member decorum in debate. Attachment 4, page 7.

And section 5.1 of the draft code addresses the educational expectations for Board members.² But the Board already has a seven-page Board Member Education Policy that it adopted pursuant to California Government Code section 20100. Attachment 5. Sections 11146 and 12950.1 of the California Government Code also dictate certain Board education requirements. And the existing Board Governance Policy also touches on this issue in its sections on “Effective and Capable Fiduciaries,” and “Continuous Learning and Adaptation to Changing Conditions.” Attachment 2, pages 4-5, 6.

Having overlapping language addressing the same issue in multiple governing documents begs a number of questions, such as: What was the purpose for the overlap? Why did the Board phrase the issue differently in one policy versus another? Is the result different under one policy versus another? Which policy applies to the situation at hand?

Overlapping language in multiple provisions may also conflict with each other. For example, the last sentence of section 5.1 in the draft code says that “Board members are expected to attend **all** meetings of the Board and assigned committees, except when extenuating circumstances does not make it possible” (emphasis added), while the existing Governance Policy says that “every Board member will achieve at least a 75% attendance standard.” Attachment 2, page 23. And even if overlapping provisions do not seem to conflict, the differing language of each creates opportunities for disagreement and debate over whether they do or not.

With a fresh appreciation for these and other issues,³ the members of Workstream 4 thought it prudent to reconsider whether to develop a new code of conduct, and to bring these issues back to the full Committee for consideration. These members reasoned that one alternative to a new code of conduct that would not implicate these issues would be for Board members to review the existing policies that govern Board member behavior to determine what, if any, issues are not addressed in them and/or whether issues that are addressed should be addressed

¹ It states, “The CalPERS Board is committed to creating an environment where all individuals are treated with dignity and respect. Informed, critical and respectful debate is expected to ensure the most informed decisions and best outcomes are made on behalf of beneficiaries. Board Members will be professional and respectful to one another, management staff, team members, beneficiaries, and all persons and entities conducting business or providing public comment to CalPERS.”

² It states, “Board Members shall be sufficiently informed to make policy decision on behalf of CalPERS and to participate in an educated and prepared manner in committee and Board meetings. Board Members are responsible to pursue and retain appropriate knowledge and skills relevant to committee assignments and policy decisions. Board Members are expected to attend all meetings of the Board and assigned committees, except when extenuating circumstances does not make it possible.”

³ One such other issue is that a few sections of the draft code attempt to summarize whole legal doctrines that are not easily or accurately summarized in single paragraphs, and hence may inadvertently obscure the subject rather than clarify it. For example, section 4 of the draft code of conduct is titled, “Duty of Care,” and contains a single sentence purporting to state what that duty is. The sentence may be accurate in as far as it goes, but there is a large body of law, developed over centuries of jurisprudence, that addresses the duty of care in a variety of contexts.

differently. Workstream 4 also thought it could be worthwhile to add a provision to the Governance Policy requiring members (meaning both Board members and delegates) to review each of the policies annually, and to certify that they have read, understand, and agree to be bound by them.

Committee and Board members may have other ideas as well. The main point of bringing this item back to the Committee now is to give the Committee an opportunity to discuss these issues before additional time and resources are spent developing a new code of conduct, the key elements of which are already covered in existing policies.

Attachments

Attachment 1 – Draft Code of Conduct

Attachment 2 – Board Governance Policy

Attachment 3 – Board Member Statement of Incompatible Activities

Attachment 4 – Rules and Guidelines for the Conduct of Meetings

Attachment 5 – Board Education Policy

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