



**Alameda County Employees' Retirement Association
BOARD OF RETIREMENT**

SPECIAL NOTICE and AGENDA

ACERA MISSION:

To provide ACERA members and employers with flexible, cost-effective, participant-oriented benefits through prudent investment management and superior member services.

**Wednesday, September 4, 2019
9:30 a.m.**

LOCATION	BOARD OF RETIREMENT - MEMBERS	
ACERA C.G. "BUD" QUIST BOARD ROOM 475 14TH STREET, 10TH FLOOR OAKLAND, CALIFORNIA 94612-1900 MAIN LINE: 510.628.3000 FAX: 510.268.9574	HENRY LEVY	TREASURER
	CHAIR	
	ELIZABETH ROGERS	ELECTED GENERAL
	FIRST VICE-CHAIR	
	JAIME GODFREY	APPOINTED
	SECOND VICE-CHAIR	
	DALE AMARAL	ELECTED SAFETY
	OPHELIA BASGAL	APPOINTED
	KEITH CARSON	APPOINTED
	TARRELL GAMBLE	APPOINTED
	LIZ KOPPENHAVER	ELECTED RETIRED
	GEORGE WOOD	ELECTED GENERAL
NANCY REILLY	ALTERNATE RETIRED¹	
DARRYL L.WALKER	ALTERNATE SAFETY²	

¹ Alternate Retired Member (Votes in the absence of the Elected Retired Member, or, if the Elected Retired Member is present, then votes if both Elected General members, or the Elected Safety Member and an Elected General member, are absent).

² Alternate Safety Member (Votes in the absence of (1) the Elected Safety, (2) either of the two Elected General Members, or (3) both the Retired and Alternate Retired members).

Note regarding accommodations: The Board of Retirement will provide reasonable accommodations for persons with special needs of accessibility who plan to attend Board meetings. Please contact ACERA at (510) 628-3000 to arrange for accommodation.

Note regarding public comments: Public comments are limited to four (4) minutes per person in total.

The order of agendized items is subject to change without notice. Board and Committee agendas and minutes are available online at www.acera.org.

- 1. NOTICE OF SPECIAL MEETING:**
- 2. CALL TO ORDER:**
- 3. ROLL CALL:**
- 4. PUBLIC COMMENT ON ITEMS AGENDIZED FOR THIS SPECIAL MEETING:**
 - A.** Presentation regarding legal standards and best practices for managing Proposition 209 restrictions on using specified criteria in awarding contracts (*Information Item*).
- 5. ADJOURNMENT:**

SEEKING DIVERSITY AND INCLUSION THROUGH THE CONTRACTING PROCESS

Board of Retirement
Alameda County Employees
Retirement Association

July 18, 2019

Harvey L. Leiderman
Jennifer Kregel
Reed **Smith** LLP



BACKGROUND

- Then: In 2016, the ACERA Board decided not to include a diversity reporting component in an RFP for investment consultant because of legal risks under CA law re: use of the data
- Now: The Board is seeking guidance on whether the legal parameters have changed re: the collection and use of diversity-related information when hiring vendors and service providers, particularly investment managers

AGENDA

1. Legal context
2. New trend? California law requiring women on corporate boards
3. Peer systems
4. Ground rules for inquiring into diversity and inclusion in the contracting process

1. THE LAW: FIDUCIARY PRINCIPLES

- Primary Loyalty Rule: Duty to act in the best interests of the members and beneficiaries; not to promote personal or others' interests
 - May not promote political, social or private causes unless can establish a nexus to core fiduciary responsibilities
 - Must assure a “level playing field” for bidders, to attract most competitive pricing and talents

1. THE LAW: FIDUCIARY PRINCIPLES

- Exclusive Benefit Rule: Duty to use plan assets solely for the purpose of paying promised benefits and reasonable administrative expenses
- Prudence Standard: Duty to act “under the circumstances then prevailing” as would a prudent person “in a like capacity and familiar with these matters...in the conduct of an enterprise of like character and with like aims”

1. THE LAW: PROPOSITION 209

- Art. I Sec. 31 of the CA Constitution (1996) – to eliminate certain affirmative action programs
- Prohibits public entities from discriminating against, *or granting preferential treatment to* “any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, and public contracting.”

1. THE LAW: PROPOSITION 209

➤ Impermissible Programs

- Requiring a specified percentage of MBE or WBE subcontractors
- Automatically treating women and minority-owned firms as socially and economically disadvantaged
- Providing information to advantage minority firms
- Setting specific diversity goals, quotas or timetables
- Scoring bidders based on their women and minority headcounts

1. THE LAW: PROPOSITION 209

➤ Permissible Programs

- Aspirational – may promote diversity in ways that do not result in preferential treatment
- Outreach to recruit underrepresented minorities and women as employees
- Data collection to serve a compelling governmental interest (e.g., to support outreach, eliminate bias)
- Preference based on other criteria (economically disadvantaged, geographic preferences...)

2. NEW TREND? SB 826 (2018) WOMEN ON CORPORATE BOARDS

- Requires by 2020 all publicly-held corporations with principal executive offices in CA to have at least one female director on its board
- If no open seats by 2020, must expand board size by one and fill with a woman
- Beginning in 2022, more women required depending on board size

2. NEW TREND? SB 826 (2018) WOMEN ON CORPORATE BOARDS

- Bill contained findings re: lack of women on corporate boards and likelihood that gender disparity will exist for forty + years if action not taken
- Bill summarized research finding that adding women to corporate boards increases board effectiveness and the company performance
- Bill may suggest the pendulum is swinging away from Prop 209 prohibitions
- Can we establish that a diverse workforce produces better economic outcomes?

3. PEER SYSTEMS

➤ CalSTRS

- Robust diversity and inclusion programs, without specific mandates
- Emerging Managers Program: Focus on size, employee ownership, and track record
- Investment Belief 7: Responsible corporate governance, including ESG factors, can benefit long-term investors like CalSTRS
- State laws applicable only to CalPERS and CalSTRS promote management diversity

3. PEER SYSTEMS

➤ CalPERS

- Emerging and Transition Managers Program: Defines emerging managers as newly formed or relatively small firms
- 2019 Survey of external managers includes questions regarding diversity of their workforce and key competency positions, ownership interest, levels of participation in investment decision making, sexual harassment, and pay equity
- Intent to develop a reasonable set of diversity and inclusion-related questions for external managers

3. PEER SYSTEMS

CalPERS, cont.

Diversity Questionnaire sent to law firms responding to RFPs – asks for headcount based on race, ethnicity, gender, sexual orientation...and diversity statement identifying strategies for increasing diversity, hiring and mentoring programs targeted to persons of diverse backgrounds, participation in diversity surveys, firm's diversity manager and that person's role in the firm

3. PEER SYSTEMS

➤ Los Angeles County ERA

- Investment Policy Statement on Diversity and Inclusion
- Diversity and Inclusion Questionnaire

Mandatory section: Diversity information, including policy, oversight, incentives and risk management strategies, and portfolio strategies

Optional demographic information

3. PEER SYSTEMS

➤ Los Angeles City ERS

Diversity and Inclusion Questionnaire

Demographic information

Additional diversity-related questions (e.g., whether the firm has racial/ethnic or gender-based compensation disparities)

3. PEER SYSTEMS

Most CERL systems have no policies or practices promoting or documenting diversity and inclusion among vendors, consultants, managers

3. PEER SYSTEMS

- Pennsylvania SERS – Uses ILPA Team Diversity Template in its due diligence with prospective managers
- Philadelphia Board of Pensions and Retirement – Includes D&I questions in RFP process, tracks data going forward
- Jacksonville P&F Pension Fund – Uses “emerging managers” as proxy for seeking D&I data; also asks consultant to do outreach
- Indiana Public Pension System – Law that required sunsetted; now seek voluntary disclosure

3. PEER SYSTEMS

- Illinois systems – State law requires detailed disclosures before contract let, including bidder's contracts with others. Consultants specifically required
- New York State Common Retirement Fund – Emerging managers program reflected in state law; special emphasis on identifying women and minority funds
- New York City Retirement System – Similar to New York State Common Retirement Fund

3. PEER SYSTEMS

➤ ILPA Team Diversity Template

- Sept. 2018 addition to Due Diligence Questionnaire
- Disclosure of GP's gender and ethnic diversity of teams, by seniority and role. Includes hiring practices, promotions, family leave, mentoring and harassment/discrimination claims
- “ILPA believes that diversity and inclusion is a strength that all stakeholders...should embrace and promote in meaningful ways...[This] represents an opportunity for LPs and GPs to have conversations about these important issues, in the spirit of a stronger and ever-improving workplace for everyone. We look forward to advancing these ideals which serve as the foundation for a healthy, prosperous industry.” – ILPA Release 9.24.18

4. GROUND RULES FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

- Determine what data may be sought
 - Policies on workplace diversity and inclusion
 - Policies regarding discrimination and harassment
 - Oversight and policy compliance
 - Firm's track record, claims history, settlements
 - Firm's diversity and inclusion strategies
 - Portfolio holdings' strategies
 - Mandatory v. voluntary questions

4. GROUND RULES FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

➤ Determine when data may be sought

- Before the RFP process commences?
- During the RFP process, before the scoring?
- In confidence, or in public session?
- During the RFP process, integral to the scoring?
- After the RFP process, the vote, and the contract entered into?
- Periodically thereafter?

4. GROUND RULES FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

- Determine how information will/will not be used
 - Establish aspirational goals
 - Diversity-related information may not be used to select a vendor or service provider, or an investment manager
- Adopt a prudent process
 - Any use of diversity reporting should occur outside of the RFP decision-making process

4. GROUND RULES FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

- Clearly define, document goals and outcomes
 - Identify the compelling interest being served
 - Identify the benefit to members and beneficiaries
 - Support with research and findings, as appropriate (e.g., findings, declarations and research supporting SB 826)
 - Conform with investment policies and diversity statements

DISCUSSION