



SEEKING DIVERSITY AND INCLUSION THROUGH THE CONTRACTING PROCESS

Board of Administration
San Jose Federated City
Employees' Retirement System
February 18, 2021

Jennifer Krengel
Reed **Smith** LLP



FIDUCIARY PRINCIPLES

- Primary Loyalty Rule: Duty to act in the best interests of the members and beneficiaries; not to promote personal or others' interests
- 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”

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.”
- Prop 16: 2020 Initiative to Repeal Prop 209

PROPOSITION 209

- Examples of Impermissible Programs
 - Setting specific diversity goals, quotas or timetables
 - Categorically treating firms as socially and economically disadvantaged based on diverse ownership
 - Selective dissemination of information
 - Scoring bidders based on diversity headcounts

PROPOSITION 209

- Examples of Permissible Programs
 - Inclusive outreach that does not result in preferential treatment
 - Data collection to serve a compelling governmental interest (e.g., to eliminate bias)
 - Preference based on other criteria (e.g., economic disadvantage, geography)

GUARDRAILS 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

GUARDRAILS 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?

GUARDRAILS FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

- Determine how information will/will not be used
 - 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

GUARDRAILS FOR INQUIRING ABOUT DIVERSITY AND INCLUSION

- Clearly define and document the goals and outcomes
 - Compelling interest being served, and benefit to members and beneficiaries
 - Support with research and findings, as appropriate
 - Conform with investment policies and diversity statements, as applicable