



California Corporate & Securities Law

CalPERS Focus List – “Oh, no one knows what goes on behind closed doors”

Posted In [CalPERS/CalSTRS](#)

5-11-2011

As I reported in this [post](#) from last November, the [California Public Employees Retirement System](#) has reworked its Focus List program. According to this [flow chart](#) published by CalPERS, the staff should have now completed its review of the top 500 U.S. based companies and selected 5–10 companies for what CalPERS calls “engagement”.

CalPERS’ revamped Focus List process raises significant concerns for those who value open government and transparency. In California, state agencies are subject to the Bagley–Keene Open Meeting Act. The Legislature has expressed the purpose of the Bagley–Keene Act as follows:

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Government Code § 11120.

The CalPERS process, however, contemplates at least two closed sessions of the CalPERS Investment Committee. It’s not clear whether the Bagley–Keene Act permits these meetings to be held as closed sessions. It is possible that CalPERS is relying on Government Code Section 1116(c)(16) which permits pension funds to hold closed sessions “when considering investment decisions”. However, investment decisions would seem limited to decisions to buy, sell or vote securities and not discussions about corporate governance negotiations.

Even if these closed sessions are lawful under the Bagley–Keene Act, the act does not require that CalPERS conduct these meetings in secret. CalPERS is therefore free to report on its Focus List “engagements” openly.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

By cloaking these negotiations and discussions in secrecy, CalPERS also runs the risk that it may run afoul of California's insider trading statute, California Corporations Code Section 25402 should it buy or sell securities of an issuer while it is "engaging" that issuer.

Country-Western music cognoscenti will recognize today's quote as a line from Kenny O'Dell's song "Behind Closed Doors" which was the title of the 1973 Academy of Country Music album of the year by Charlie Rich.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>