

# SEEKING DIVERSITY AND INCLUSION THROUGH THE CONTRACTING PROCESS

Board of Administration  
San Jose Police & Fire Department  
Retirement Plan  
March 4, 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