

The Regents of the University of California

COMMITTEE ON GOVERNANCE

March 25, 2010

The Committee on Governance met on the above date at UCSF–Mission Bay Community Center, San Francisco.

Members present: Regents Blum, Island, Ruiz, Varner, and Wachter

In attendance: Regents Bernal, De La Peña, Gould, Kieffer, Lansing, Makarechian, Nunn Gorman, Pattiz, Reiss, Schilling, Stovitz, and Yudof, Regents-designate Cheng, DeFreece, and Hime, Faculty Representatives Powell and Simmons, Secretary and Chief of Staff Griffiths, Associate Secretary Shaw, General Counsel Robinson, Chief Investment Officer Berggren, Chief Compliance and Audit Officer Vacca, Interim Provost Pitts, Executive Vice Presidents Brostrom and Taylor, Senior Vice Presidents Dooley and Stobo, Vice Presidents Beckwith, Duckett, and Lenz, Chancellors Birgeneau, Block, Blumenthal, Desmond-Hellmann, Drake, Fox, Kang, Katehi, White, and Yang, and Recording Secretary Johns

The meeting convened at 11:35 a.m. with Regent Wachter presiding.

1. APPROVAL OF MINUTES OF PREVIOUS MEETING

Upon motion duly made and seconded, the minutes of the meeting of January 21, 2010 were approved.

2. AMENDMENTS TO VARIOUS POLICIES ON DEFENSE AND INDEMNIFICATION FOR REGENTS, EMPLOYEES, AND OTHER AFFILIATES OF THE UNIVERSITY

The General Counsel recommended that:

- A. The Regents approve the proposed amendments to the *Policy on Defense and Indemnification of Regents in Civil Proceedings* set forth in Attachment 1, and that the Regents rescind the *Policy on Directors' and Officers' Insurance: Indemnification Resolution* set forth in Attachment 2.
- B. The Regents approve the proposed amendments to the *Policy on Indemnification of Employees for Punitive Damages* set forth in Attachment 3.
- C. The Regents approve the proposed amendments to the *Policy on Indemnification of Trustees of Campus Foundations* set forth in Attachment 4.

- D. The Regents rescind the *Policy on Indemnification of Individuals Serving on the UC President's Council on the National Laboratories* set forth in Attachment 5.

[Background material was mailed to Regents in advance of the meeting, and copies are on file in the Office of the Secretary and Chief of Staff.]

General Counsel Robinson explained that this item proposed changes to policies regarding defense and/or indemnification for four classes of individuals. He focused on the policy regarding indemnification and defense of Regents and Regents' Officers. The changes to this policy accomplish three objectives: the amendments provide a more protective standard than currently provided; the amendments address gaps in the standards established under various statutes and provide coverage in areas that are currently not provided for in statute; and the amendments provide more detail concerning reimbursement for counsel separately retained by Regents and advancement of defense costs before litigation has been concluded.

Mr. Robinson proposed one amendment to the item. In Attachment 1, Section V. D., he proposed a change to language regarding the retention of separate counsel by Regents and the authority of the General Counsel or other authorized representatives, upon a showing of good cause, to question the separate retention. He proposed that the language referring to the General Counsel or "other authorized University representative" be substituted by language indicating the General Counsel, the President of the University, or the Chairman of the Board. The intent of this change is to provide a more specific indication of which individuals could challenge or raise questions about a separate retention by a Regent or a Regents' officer.

Upon motion duly made and seconded, the Committee approved the General Counsel's recommendation as amended and voted to present it to the Board.

3. **AMENDMENT OF BYLAW 20 – OFFICERS OF THE CORPORATION**

The General Counsel recommended that, following service of appropriate notice, Bylaw 20 – Officers of the Corporation be amended, as shown in Attachment 6.

This item itself constitutes the notice of proposed amendments that is required pursuant to Bylaw 30.1. In the event that this Committee approves the recommendation, final action to approve these amendments will be recommended at the next regularly scheduled Regents meeting.

[Background material was mailed to Regents in advance of the meeting, and copies are on file in the Office of the Secretary and Chief of Staff.]

General Counsel Robinson recalled that the Principal Officers of the Regents are the Secretary and Chief of Staff, the Chief Investment Officer, the Chief Compliance and Audit Officer, and the General Counsel. The proposed amendment clarifies that the Principal Officers have the authority to designate as well as remove members of their

own staffs as Officers of the Corporation. This would include any members of their staffs who had been designated by the Regents under a previous version of this Bylaw, which was amended in 2006.

The Office of the General Counsel believes that the proposed amendment is consistent with the broad authority granted to Principal Officers elsewhere in the governing documents to administer the affairs of their own offices. In Mr. Robinson's view, it does not represent a substantive change, but he noted that the authority of Principal Officers in this regard had been questioned recently. The Office of the General Counsel thought it prudent to present this clarifying language at this time.

Upon motion duly made and seconded, the Committee approved the General Counsel's recommendation and voted to present it to the Board.

The meeting adjourned at 11:40 a.m.

Attest:

Secretary and Chief of Staff

Additions shown by underscoring; deletions shown by strikethrough

POLICY ON DEFENSE AND INDEMNIFICATION OF REGENTS AND OFFICERS OF THE REGENTS IN CIVIL PROCEEDINGS

I. Definitions

- A. Civil Action: A Civil Action is defined as any civil action or proceeding threatened, filed, maintained or pending in state or federal court, excluding Other Proceedings.
- B. Other Proceedings: Other proceedings include but are not limited to actions maintained or pending in state or federal court brought by or in the right of the Regents (“derivative actions”), administrative proceedings initiated by third parties and criminal proceedings threatened, filed, maintained or pending in any forum.
- C. Action: An Action is defined as a Civil Action or Other Proceeding, as the case may be.
- D. Expenses: Expenses includes without limitation attorneys' fees and any expenses of successfully establishing a right to indemnification hereunder.
- E. Defense: Defense shall be limited to Expenses actually and reasonably incurred by the Indemnitee in connection with the defense of the Action.
- F. Indemnification: Indemnification shall be limited to payment of any judgment (except for punitive damages, which are addressed in sections VI and VII below) fine, settlement, penalties or resolution of the Action.
- G. Indemnitee: Indemnitee is defined as each person described in section II below.

II. Persons Covered

The Regents of the University of California, a corporation, shall defend and indemnify as provided in this policy any present or former member of the Board of Regents or other present or former Officer of the Corporation who has been, is, or becomes a party to any Civil Action or Other Proceeding ~~action or proceeding~~ arising out of an act or omission occurring within the scope of his or /her duties as a Regent or Officer of The Regents. This policy shall also apply to the Faculty Representatives, Student and Alumni Regents-designate and be applied to individuals who are appointed pursuant to Regents policies to positions as Advisors ~~advisors~~ to the Board of Regents or to one of its committees.

III. Scope of Coverage

The defense and indemnification provided hereunder shall not be deemed exclusive of any other rights to which a party seeking indemnification may be entitled under any statute, bylaw, insurance, agreement, or otherwise,³ and shall inure to the benefit of the heirs, executors, and administrators of such party. Such defense and indemnification shall supplement indemnification and other legal protections provided by the federal Volunteer Protection Act, California Tort Claims Act and, other statutes, and other policies of the corporation and are provided for all covered actions or proceedings to the fullest extent permitted by law and public policy, regardless of any limitations of coverage contained in the indemnification provisions of relevant said statutes or policies.

IV. General Conditions for Defense and Indemnification

As a condition of receiving to seeking defense and indemnification, the Indemnitee party shall give prompt notice to the Board and the General Counsel to The Regents of the pendency of any Action~~action or proceeding~~ for which he or she may appropriately seek defense and indemnification, shall keep the Board or its designee and the General Counsel apprised of significant developments in the Action~~action or proceedings~~, and shall cooperate in good faith in the defense of the Action.

V. When a Defense is Provided

A. Civil Actions

Subject to the conditions of section IV above, an Indemnitee shall be entitled to a defense under this policy in a Civil Action if he or she was acting within the scope of his or her duties at the time of the act or omission, unless it is determined that the Indemnitee acted or failed to act because of actual fraud, corruption or actual malice. The extent of entitlement to a defense may be established by successful defense of the Civil Action or of claims, issues or matters therein, by the tribunal determining the matter, or in the event of an adverse determination, by an independent determination of the Board itself.

B. Other Proceedings

Subject to the conditions of section IV above, an Indemnitee shall be entitled to a defense under this policy in Other Proceedings, including a derivative action, an administrative proceeding or criminal proceeding, if he or she was acting within the scope of his or her duties at the time of the act or omission and if it is determined that the Indemnitee's act or omission was in good faith, without actual malice and in the apparent interests of the University. The extent of entitlement to a defense may be established by successful defense of the Other Proceeding or of claims, issues or matters therein, by the tribunal determining the matter, or in the event of an adverse determination, by an independent determination of the Board itself.

C. Defense Prior to Final Disposition

Provided that the Indemnitee has delivered a written agreement in accordance with the requirements set forth below, the University shall begin providing the Indemnitee with a defense and/or advancing all defense costs on the Indemnitee's behalf upon notice of an Action and prior to its final disposition. Any advancement of fees or costs shall be subject to a written agreement by the Indemnitee, substantially in the form attached to this Policy as Attachment A, to repay the University for such fees or costs if ultimately it is determined by the Board that the Indemnitee was not entitled to a defense. Any advancement of fees or costs to parties other than those retained by the University shall be subject further to the requirements set forth in paragraph V.D below. The University may decline or cease to provide a defense and/or advance fees or costs under this paragraph on a finding of good cause by the Board following an independent determination in accordance with section VII below. Such finding may be issued at any time before or during the defense of an Action.

D. Counsel Retained by Indemnitee

Unless otherwise requested by the Indemnitee, the University shall provide a defense for the Indemnitee through the University's Office of General Counsel and/or through other counsel retained by the University at its expense. In lieu of a defense by the University, the Indemnitee may retain separate counsel for his or her defense at University expense, subject to the following: the Indemnitee must provide advance written notice of the proposed retention to the General Counsel to The Regents; the proposed retention and its terms must be reasonable under the circumstances; all invoices or payment requests from separate counsel must be processed through the Office of General Counsel; all payment requests must be for fees and/or costs actually and reasonably incurred; and, to the extent that there is no conflict of interest, the Indemnitee and separate counsel must cooperate with the University in the defense of other parties and/or claims in the Action.

Unless and until the Committee on Governance decides otherwise, pursuant to this paragraph, the Indemnitee shall be permitted to proceed with the proposed retention of separate counsel, on the proposed terms, following delivery of notice pursuant to the preceding paragraph. The General Counsel, the President of the University or the Chairman of the Board, may, upon a showing of good cause, request that the Committee on Governance reject, modify, or take other action on any proposal by an Indemnitee to obtain separate counsel at University expense and/or on any invoice or payment request submitted by separate counsel following retention. The Committee on Governance may grant such request, or take other action, on finding good cause. Factors to be considered in determining good cause may include, but are not limited to, the following: the nature, scope and expected cost of the proposed retention, as compared to the types of claims and level of exposure presented in the Action; the nature, scope, expected costs, and other business terms of the proposed retention as compared to retentions

typically entered into by the University for similar actions under similar circumstances; opportunities for joint representation with other defendants; and the reasonableness of any invoice or payment request in light of the services delivered, results achieved and/or amounts paid by the University for similar services in the Action or in like circumstances.

No request by an Indemnitee for separate counsel shall be denied on grounds that the Indemnitee fails to meet the requirements for a defense under this policy unless there has been an adverse determination in the Action or a finding of good cause by the Board following an independent determination, in accordance with section VII below.

VI. When Indemnification is Provided

A. Civil Actions

Subject to the conditions set forth in section IV above, an Indemnitee shall be entitled to indemnification under this policy for a Civil Action if the acts or omissions of the Indemnitee satisfy the requirements for a defense under section V.A. above.

B. Other Proceedings

Subject to the conditions set forth in section IV above, an Indemnitee shall be entitled to indemnification under this policy for Other Proceedings if the acts or omissions of the Indemnitee satisfy the requirements for a defense under section V.B above, and if further, in its sole discretion, the Board makes an independent determination that indemnification would be in the best interests of the University.

C. Punitive Damages

Indemnification shall be made for punitive damages when it would otherwise be proper under this policy and under the following additional criterion: prior to such indemnification and in its sole discretion, the Board has made an independent determination that the Indemnitee's acts or omissions were without actual malice and in the apparent best interests of the University and that payment of the award would be in the University's best interests.

~~When such notice is provided, the Board or its designee shall provide for a defense for the party or, by mutual agreement, may permit the party to provide for his/her own defense. When expenses incurred in defending an action or proceeding are paid by the corporation in advance of the final disposition of such action or proceeding, it shall be with the understanding that the party must repay such amount unless it ultimately shall be determined that he or she is entitled to be indemnified as authorized herein.~~

~~Such indemnification shall be limited to expenses actually and reasonably incurred by such party in connection with the defense, judgment (except for punitive damages, which are addressed elsewhere in this policy), or settlement of such action or proceeding (1) to the extent that a party has been successful in the defense of any action or proceeding, or in the defense of any claim, issue, or matter therein, or (2) if authorized in the specific case, after it has been resolved, upon an independent determination as provided therein that indemnification is proper in the circumstances because the party acted or failed to act in good faith, in a manner such party believed to be in the best interest of the University, and with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances. For purposes of this resolution, "expenses" includes without limitation attorneys' fees and any expenses of establishing a right to indemnification hereunder.~~

~~Such indemnification shall be made for punitive damages when it would otherwise be proper under this policy and under the following additional criteria: Prior to such indemnification an independent determination must conclude that the present or former member of the Board acted or failed to act without malice and in the apparent best interests of the University and that payment of the award would be in the best interests of the University.~~

VII. Independent Determination

When any independent determination is required pursuant to this policy, it shall be made by the Board, by a majority vote of a quorum consisting of members not parties to such Action~~action or proceeding~~. If such quorum cannot be convened or, even if convened, if a majority of such quorum so directs, the determination shall be made by a disinterested third party appointed by such quorum or, ~~if no such quorum can be convened, the appointment of the disinterested third party shall be made by the Board itself~~ President of the State Bar of California. The independent determinations provided hereunder shall be made upon a consideration of all relevant facts and circumstances ~~including~~ included without limitation the record of any Action~~action or proceeding~~ giving rise to the request for indemnification. ~~The independent determination in connection with any request for indemnification for punitive damages additionally shall consider the availability of University funds from appropriate fund sources.~~

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL



1111 Franklin Street, 8th Floor • Oakland, California 94607-5200 • (510) 987-9800 • FAX (510) 987-9757

Charles F. Robinson
VICE PRESIDENT AND GENERAL COUNSEL

Writer's direct line: (510) 987-9938
E-mail: charles.robinson@ucop.edu

Date: _____

Re: [case name]

Dear Regent _____:

Thank you for notifying us of the above-captioned Action. As you and I discussed, the University will provide you with a defense and/or pay for attorney's fees and any related expenses incurred to defend you at the University's expense, pursuant to the University Policy on Defense and Indemnification of Regents and Officers of The Regents. In return for this commitment, you agree to repay the University for all attorney's fees and other expenses the University incurs in defending you in the Action, in the event that it is ultimately determined under the Policy that you were not entitled to a defense in the action at University expense.

Please return a signed copy of this letter to me at your earliest convenience to indicate your agreement to these terms.

Sincerely,

Charles F. Robinson
Vice President and General Counsel

Agreed:

Regent's Signature

Date

Additions shown by underscoring; deletions shown by strikethrough**~~DIRECTORS' AND OFFICERS' INSURANCE: INDEMNIFICATION RESOLUTION~~****RESOLVED THAT:**

~~The Regents of the University of California, a corporation, shall indemnify any member of the Board of Regents and any officer or employee of the Corporation or of the University who has been, is, or becomes a party to any threatened, pending, or completed civil action or administrative proceeding brought by or in the right of the Corporation or its instrumentalities, against expenses actually and reasonably incurred by such individual in connection with the defense or settlement of such action or proceeding if such individual acted or omitted to act in good faith, in a manner such individual believed to be in the best interest of the University, and with such care, including reasonable inquiry, as an ordinarily prudent person in like position would use under similar circumstances. For purposes of this resolution "expenses" includes without limitation attorneys' fees and any expenses of establishing a right to indemnification hereunder.~~

~~Such indemnification shall be made (1) to the extent that any individual has been successful in the defense of any action or proceeding, or in the defense of any claim, issue, or matter therein, or (2) if authorized in the specific case, after it has been resolved, upon a determination that indemnification is proper in the circumstances because the individual has met the applicable standard of conduct as set forth in the first paragraph of this resolution. The determination as to entitlement to indemnification shall be made by the Board by a majority vote of a quorum consisting of members not parties to such action or proceeding; if such a quorum cannot be convened or, even if convened, if a majority of such quorum so directs, the determination shall be made by a disinterested third party appointed by such quorum or, if no such quorum can be convened, the appointment of the disinterested third party shall be made by the President of the State Bar of California. The determination as to entitlement to indemnification shall be made upon a consideration of all relevant facts and circumstances including the record of any action or proceeding giving rise to the request for indemnification.~~

~~As a condition to seeking indemnification, the individual shall give prompt notice to the Board of the pendency of any action or proceeding for which he or she may seek indemnification and shall keep the Board or its designee apprised of significant developments in the action or proceeding.~~

~~Expenses incurred in defending an action or proceeding may be paid in advance of the final disposition of such action or proceeding as authorized by the Board in the specific case upon receipt of any undertaking by or on behalf of the individual to repay such amount unless it shall ultimately be determined that he or she is entitled to be indemnified as authorized herein.~~

~~The indemnification provided hereby shall not be deemed exclusive of any other rights to which an individual seeking indemnification may be entitled under any statute, bylaw, insurance, agreement, or otherwise; and shall continue as to a person who has ceased to be associated with the University; and shall inure to the benefit of the heirs, executors and administrators of such person.~~

Additions shown by underscoring; deletions shown by strikethrough

POLICY ON DEFENSE AND INDEMNIFICATION OF EMPLOYEES AND FORMER EMPLOYEES FOR PUNITIVE DAMAGES

For all matters except those specified below, the defense and indemnification of employees and former employees shall be governed by the provisions of the California Tort Claims Act and administered in accordance with the delegations to the President and the General Counsel pursuant to the Bylaws, Standing Orders and Regents Policy.

In the event of an award of punitive damages against an employee or former employee of the University related to an act or omission of the employee or former employee, ~~the~~ the Regents shall make an independent determination ~~of whether the employee or former employee acted or failed to act~~ employee's act or omission was: (1) within the course and scope of University employment; (2) in good faith, without actual malice and in the apparent best interests of the University; and (3) whether payment of the award would be in the best interests of the University. If ~~the~~ the Regents determine that the employee or former ~~employee acted or failed to act~~ employee's act or omission was within the course and scope of University employment, in good faith, without actual malice and in the apparent best interests of the University, and that payment of the award is in the best interests of the University, ~~the~~ the Regents shall indemnify the employee or former employee as to such punitive damages. ~~The Regents' undertaking as to indemnification in any such case shall be limited to the amount determined in the particular case by The Regents in light of relevant circumstances including availability of funds from appropriate fund sources.~~ The amount to be indemnified shall be determined by the Regents and in their sole discretion.

Additions shown by underscoring; deletions shown by strikethrough

DEFENSE AND INDEMNIFICATION OF TRUSTEES OF CAMPUS FOUNDATIONS

~~That The Regents indemnify and~~ University of California shall defend and indemnify present and former members of the Boards of Trustees of the Campus Foundations (“Foundation Trustees”) for any action or proceeding (“Proceeding”) arising out of an act or omission occurring within ~~as to all claims and liability that may arise or occur in~~ the course and scope of ~~the performance~~ of their duties in connection with ~~the~~ investment and reinvestment of assets held for the benefit of the University, including split-interest trusts and similar arrangements, ~~to the same extent as afforded individual Regents;~~ provided that actions giving rise to the ~~claims or liability~~ Proceeding are in connection with the Campus Foundation investments which are invested in accordance with University policies and guidelines respecting the investments of Campus Foundations, that the actions giving rise to the Proceeding are undertaken in a manner consistent with the requirements of applicable provisions of The California Nonprofit Corporations Code, and further provided that the defense and indemnification ~~and defense~~ shall be secondary to any entitlements ~~the trustees~~ Foundation Trustees may have to ~~indemnification and defense and indemnification~~ from insurance carried by any insurance policies under which the Campus Foundations are insured.

As a condition of receiving defense and indemnification, Foundation Trustees shall give prompt notice to the University of the pendency of any action or proceeding as defined above, shall keep the University or its designee apprised of significant developments in the action or proceeding and shall cooperate in good faith in the defense. The President shall issue any necessary guidelines to implement ~~the~~ this policy.

Additions shown by underscoring; deletions shown by strikethrough

~~INDEMNIFICATION OF INDIVIDUALS SERVING ON THE UC PRESIDENT'S COUNCIL ON THE NATIONAL LABORATORIES~~

The Regents indemnify and defend individual members of the UC President's Council on the National Laboratories, including its associated panels, as to claims and liabilities that may arise or occur in the course and scope of their service as members of the Council or its associated panels, except for claims resulting from fraud, corruption, or actual malice. The President is authorized to issue any necessary guidelines to implement this policy.

Additions shown by underscoring; deletions by strikethrough

BYLAW 20.

OFFICERS OF THE CORPORATION

20.1 Designation-Identity and Qualifications

The Officers of the Corporation shall be the President of the Board (~~who shall be the Governor of the State~~); the Chairman; the Vice Chairman; and the following, who shall ~~collectively~~ collectively be known as the Principal Officers of The Regents: the Secretary and Chief of Staff, the Chief Investment Officer and Vice President for Investments (who also serves as an Officer of the University), the General Counsel and Vice President for Legal Affairs (who also serves as an Officer of the University), and the Senior Vice President – Chief Compliance and Audit Officer (who also serves as an Officer of the University); ~~and such deputies, associates and assistants of the foregoing Principal Officers as they may from time to time designate in their respective areas of responsibility as Officers of the Corporation.~~ The Officers of the Corporation shall also include such deputies, associates and assistants of the Principal Officers as are designated Officers of the Corporation by the Principal Officers in their respective areas of responsibility pursuant to Bylaw 20.2. The President shall be the Governor of the State. The President, Chairman, and Vice Chairman shall be members of the Board, but membership on the Board shall not be a necessary qualification for other Officers. Any Officer, other than the President, Chairman, and Vice Chairman, may hold as many offices as the Board shall determine.

20.2 Election or Designation, and Removal

The Governor of the State shall be designated as President by virtue of serving as Governor of the State. The Board shall elect the Chairman, Vice Chairman, and Principal Officers ~~except the President, who shall be the Governor of the State.~~ The Chairman and Vice Chairman shall be elected at the May meeting of the Board and shall hold office for one year commencing on July 1 and until their successors are elected. In the event of an interim vacancy in the office of Chairman, the Vice Chairman shall hold office until a successor is elected. The Chairman of the Board shall not be elected for more than two consecutive years/terms plus an immediately preceding unexpired term, if any. The Vice Chairman of the Board shall not be elected for more than two terms plus an immediately preceding unexpired term, if any. ~~All other~~ The Principal Officers shall be elected at such times as vacancies may occur and shall hold office at the pleasure of the Board. The election and removal of the Chairman, Vice Chairman, and Principal Officers of the Corporation shall be by the affirmative vote of a majority of the members of the Board, except that the election of a Chairman Pro Tempore shall be by the vote of a majority of the members of the Board present and voting at any regular or special meeting of the Board at which such election takes place.

Each Principal Officer shall have the authority to designate or remove as an Officer of the Corporation any deputy, associate and/or assistant in his or her area of responsibility,

including any deputy, associate and/or assistant previously designated or appointed an Officer of the Corporation by the Board or a Principal Officer under previous Bylaw provisions.