



# California Corporate & Securities Law

## CalPERS to Consider Changes to Name and Shame Methodology

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In 1987, the California Public Employees Retirement System (CalPERS) initiated its “Focus List” program. Under this program, CalPERS identifies companies to a preliminary list. CalPERS then contacts these companies for the purpose of “encouraging” corporate governance changes. If CalPERS is satisfied with a company’s response, then it is not named to the public Focus List. In 2009, for example, CalPERS identified 13 companies to its preliminary list and four companies were ultimately named in the Focus List. In the preceding decade (1999–2008), CalPERS engaged a total of 155 companies, 59 of which became Focus List companies and 96 which did not. Interestingly, no companies were publicly named in 2010.

In the last few months, the CalPERS staff has reevaluated its Focus List methodology. Today, the Investment Committee will consider these proposed [changes](#) to the Focus List methodology.

What seems to be completely missing from the CalPERS staff’s proposal is any consideration of the requirements of the California Administrative Procedure Act (APA). The screening process is clearly a rule of general application and thus a regulation as defined in the APA. Cal. Govt. Code § 11342.600. This is significant because the APA requires that regulations be adopted after notice and public comment. Cal. Govt. Code §§ 11346–11348. CalPERS should comply with the APA in adopting its new Focus List methodology so as to ensure transparency and accountability.

The Focus List program also bypasses the administrative adjudication provisions of the APA. The Focus List process involves the collection and analysis of facts pursuant to which CalPERS makes a decision (*i.e.*, whether to include a company on the preliminary and final lists). Thus, the process is an “adjudicative proceeding” under the APA. Cal. Govt. Code § 11405.20.

Whatever the merits of CalPERS Focus List program, there is something unsettling (possibly even extortionate) about a government agency using the threat of a public shaming to strong-arm changes that it desires.

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