



## **MEMORANDUM**

**To: Members, Citizens' Financial Accountability Oversight Committee**

**From: Bob Klein, Chairman, Governing Board  
Art Torres, Vice Chair, Governing Board, and Chair, Legislative Subcommittee**

**Date: January 14, 2009**

**Re: Little Hoover Commission Report on CIRM**

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## **INTRODUCTION**

The Governing Board of the California Institute for Regenerative Medicine ("CIRM") met on August 19, 2009, to consider the recommendations contained in the Little Hoover Commission's report ("LHC report") on CIRM. The Board considered reports from the Legislative Subcommittee, Board Counsel, and CIRM management, heard comments from members of the public, and engaged in a thorough discussion of the Little Hoover Commission's report. The Board also reviewed a letter from Senator Dean Florez, the only member of the Little Hoover Commission who opposed the Commission's adoption of the report. After considering the Legislative Subcommittee's recommendations, the Little Hoover Commission's report, Senator Florez's letter, staff analysis, public comments, and Board member discussion, the Board approved motions relating to the recommendations made by the Little Hoover Commission. Below, we summarize the Little Hoover Commission's recommendations, the staff's analysis, and the positions adopted by the Board.

The Little Hoover Commission's report includes three distinct categories of recommendations:

- (1) modifications to Proposition 71 that, based on the advice of Board Counsel, would require a new ballot measure;
- (2) policy changes that the Little Hoover Commission believes CIRM could implement on its own; and
- (3) modifications to Proposition 71 that would require legislative intervention:

### **I. Modifications that Would Require a New Ballot Measure**

#### **A. Little Hoover Commission Recommendations**

- (1) reduce the size of the Board from 29 to 15 (LHC report, pp. 17-18; 31-32);
- (2) reduce Board members' terms from 8 or 6 years to 4 years, after the terms of current members expire (LHC report, pp. 18-19; 32);
- (3) concentrate appointment authority in the Governor by authorizing the Governor to appoint 11 of 15 members (2 members would be appointed by the Legislature and 2 members would be appointed by the President of the UC) (LHC report, pp. 18-19; 33);
- (4) eliminate the Chair's statutory responsibilities and transfer them to the President (LHC report, pp. 19; 32-33); and
- (5) authorize the Board to select the Chair and Vice Chair from among the 15 members (LHC report, pp. 21-22; 32-33).

## **B. Staff Analysis**

At the Legislative Subcommittee meeting on July 16, 2009, and at the Board meeting on August 19, 2009, Board Counsel James Harrison presented his analysis of the Legislature's authority to implement these changes through legislation, as opposed to a new ballot measure. (Mr. Harrison also prepared a detailed written analysis, which is appended to this memorandum as Attachment B.) Mr. Harrison explained that, under California law, an initiative may only be amended by the voters, unless the measure expressly permits legislative amendment. This limitation was designed to protect the people's power of initiative by preventing the Legislature from undoing what the people have done without the electorate's consent. Although Proposition 71 permits the Legislature to amend the law, it restricts this power to amendments that would enhance CIRM's ability to further the purposes of its grant and loan programs.

The Little Hoover Commission's recommendations are inconsistent with these limitations, Mr. Harrison explained, because they would contravene the intent of the voters and violate specific primary mandates of Proposition 71:

- The size of the Board was intended to ensure not only that CIRM has the expertise necessary to encompass the entire scientific and medical research pipeline from discovery to clinical application, but also to provide a diversity of viewpoints that enriches debates and improves outcomes. Reducing the size of the Board almost by half would interfere with the deliberate design set forth in Proposition 71.
- By providing for six and eight year terms, the voters sought to protect the Board's scientific mission and also provide stability for CIRM to pursue its ambitious mandate. Limiting Board member terms to four years would interfere with the independence and stability of the Board.
- The diffusion of appointments among four constitutional officers was also intended to maintain the "independence" of the Board. Concentrating 11 of 15 appointments in the Governor and authorizing the Board, rather than the four constitutional officers, to nominate the Chair and Vice Chair, is inconsistent with the voters' express intent to create an independent Board to oversee CIRM.
- The assignment of statutory responsibilities to the Chair reflects the voters' intent to allocate financial/legal issues and scientific issues, respectively, to individuals with expertise in those fields. (The Chair's duties, for example, are aligned with the qualifications for Chair prescribed by Proposition 71.) Transferring the Chair's statutory duties to the President would be inconsistent with the deliberate structure established by Proposition 71.

In summary, Board Counsel advised the Board that these amendments are inconsistent with the voters' intent and a primary mandate of Proposition 71 – namely the composition and structure of the Board. For all of these reasons, Board Counsel concluded that the Legislature would have to place another measure on the ballot to amend these provisions, just as it did with Propositions 10 and 63, which it sought to amend through Propositions 1D and 1E, respectively, in the May 19, 2009 special election. (The voters rejected Propositions 1D and 1E by a substantial margin.)

## **C. Board Position**

**The Board opposes Little Hoover Commission recommendations 1-5 based on Board Counsel's advice that the proposed amendments to Proposition 71 would violate the California Constitution and Proposition 71 and would fail to respect, as the California Courts have recognized, the precious right of the 7 million voters who approved Proposition 71.**

## **II. Policy Changes that CIRM Could Implement**

### **A. Little Hoover Commission Recommendations**

- (6) modify the pre-application review process (LHC report, pp. 26-27; 33-34);

(7) identify all of the applicants in connection with a request for application (RFA) on a trial basis (LHC report, pp. 25; 34);

(8) poll peer reviewers to determine whether they would resign if they were required to publicly disclose their financial interests (LHC report, pp 24-25; 34);

(9) amend the minutes of Board meetings to disclose vote tallies and recusals (LHC report, pp. 25; 39);

(10) add a provision to the Board bylaws authorizing removal of members for cause (LHC report, pp. 18; 33); and

(11) adopt a succession plan for leadership and a transition plan for the eventual expiration of bond funding (LHC report, pp. 35-36).

**B. Staff Analysis**

At the August 6, 2009 meeting of the Legislative Subcommittee, CIRM President Alan Trounson reported to the Subcommittee regarding CIRM management's position on items 6 through 8. Board Counsel James Harrison made a presentation regarding items 9 and 10 and Chairman Bob Klein addressed item 11. As was true of the July 16th meeting, staff from the Little Hoover Commission attended the meeting, provided comments, and responded to questions. CIRM staff presented this same information to the Board at its August 19, 2009 meeting. The staff's analysis of these items is summarized below:

**(6) Modify pre-application review process.**

The Little Hoover Commission recommended that CIRM modify its pre-application review process to enhance CIRM's transparency but offered no suggestions as to how the process should be modified. The Independent Citizens Oversight Committee (ICOC) agreed to have a trial period for the pre-application process over three RFAs: Basic Biology I, Disease Team Research Awards, and Basic Biology II. This trial period is still in progress and the information collection is incomplete, as is the analysis and evaluation. Staff presented the results of this experiment to the Board on December 10, 2009. The Board authorized the use of the pre-application review process for the next two requests for application, but intends to establish a taskforce to take a closer look at the process and to recommend modifications, if necessary.

**Board Position: The Board believes that this proposal is premature, but will consider modifications after further review.**

**(7) Identify all of the applicants in connection with a request for application (RFA) on a trial basis.**

Citing Connecticut, the Little Hoover Commission recommended that CIRM identify, on a trial basis, all applicants for a particular request for applications to enhance CIRM's transparency. CIRM staff believes very strongly that this is inappropriate – no granting agencies of which they are aware follow this procedure, other than Connecticut. It is not considered a best practice nor is it commonly used. Confidentiality is critical to ensuring the integrity of the peer review process. The names of submitting institutions and individuals, as well as application content and peer evaluations, are kept confidential, except to those involved in the review process, to the extent permitted by law. Disclosure of scientists' failures in grant competition would have a negative impact on their careers and make them reluctant to propose highly innovative projects that often move the science forward. In addition, CIRM's plans to expand its partnerships with industry will be compromised by disclosure of unsuccessful applications that could thwart a company's ability to raise funds.

**Board Position: Because of the importance of confidentiality in the peer review process, the Board does not support this proposal.**

**(8) Poll peer reviewers to determine whether they would resign if they were required to publicly disclose their financial interests.**

Citing previous statements from CIRM that members of the Grants Working Group (GWG) would resign if they were required to publicly disclose their financial interests, the Little Hoover Commission recommended that CIRM staff conduct an anonymous poll of its peer reviewers to determine whether they would resign if required to file public financial disclosure statements.

To put this request in context, it is important to understand that, under California law, members of an advisory group are not required to complete financial disclosure statements. Thus, CIRM already goes beyond the requirements of state law by requiring members of the GWG to disclose their financial, professional, and personal interests to CIRM, and CIRM requires recusal in the event of a conflict. Furthermore, pursuant to the legislative enhancements approved by the Board in 2005, CIRM has agreed to make these disclosure statements available to state auditors for review. Indeed, the State Controller has reviewed CIRM's conflict policies and records and determined that CIRM's conflict policies are more rigorous than National Institutes of Health requirements and that CIRM had complied with these policies. Thus, there is no evidence that suggests a need for modification of these policies.

However, CIRM staff conducted an informal, anonymous poll of GWG members and alternates attending the next GWG meeting to find out whether they would be willing to continue serving if: (1) the financial disclosure documents that they are currently required to complete were to be made public, or (2) they were required to complete and make public the Form 700. The results of the poll demonstrate that CIRM would risk losing a substantial number of peer reviewers if it were to require its out-of-state reviewers to publicly disclose their economic interests.

**Board Position: The Board endorses the proposal and CIRM staff has undertaken an anonymous poll of GWG members.**

**(9) Amend board minutes to include vote tallies and conflicts.**

The Little Hoover Commission recommended that the Governing Board amend the minutes of its meetings to include a tally of votes and recusals on grant applications. CIRM staff is in the process of amending the minutes of Governing Board meetings back to January 1, 2008, to include this information, and we will include this information in the minutes of meetings going forward. This information will be posted on CIRM's website.

**Board Position: The Board endorses this proposal.**

**(10) Add a provision to the Board's bylaws to permit the removal of a Board member for cause.**

The Little Hoover Commission recommended that the Governing Board add a provision to the Board's bylaws providing for the removal of members of the Board for cause. Under Proposition 71, members are appointed to serve fixed terms. (Cal. Health & Safety Code, § 125290.20(c).) In upholding Proposition 71 against a constitutional challenge, the First District Court of Appeal construed this provision to permit removal of members only through a *quo warranto* action initiated by the Attorney General. (*Cal. Family Bioethics Council v. Cal. Inst. for Regenerative Med.* (2007) 147 Cal.App.4th 1319, 1354-1355.) The court's reading of Proposition 71 is consistent with California law, which provides that a member of an appointed body serves at the pleasure of the appointing authority only when the member's term is not fixed by law. (*See* Cal. Gov. Code, § 1301; *Brown v. Superior Court* (1975) 15 Cal.3d 52, 55-56.) Because the members of the Governing Board are appointed to serve terms prescribed by law, they are not subject to removal by the appointing authority. (This feature of Proposition 71 is not uncommon; indeed, numerous members of state commissions serve fixed terms, including the members of the Little Hoover Commission.)

Furthermore, Proposition 71 provides no authority for the Board to remove members. Indeed, the inclusion of a removal power in the Board's bylaws would interfere with the authority of the appointing powers to select the members whom the appointing authority believes are best suited for the position. The Governing Board, therefore, has no power to amend its bylaws to provide for the removal of members of the Board. It is important to note, however, that this limitation would not prevent the Board from requesting that the Attorney General initiate an action to remove a member for cause.

**Board Position: Because the Board does not have the power to adopt a bylaws provision providing for the removal of members, the Board does not support this proposal.**

**(11) Adopt a succession plan for leadership and a transition plan for the eventual expiration of bond funding.**

Chairman Bob Klein explained that he had announced his intention not to seek a second term 18 months before the expiration of his term in order to permit time for the Board to plan for a leadership succession and that a succession plan, including the possibility of a Board search committee which would make recommendations for candidates to the constitutional officers, was under development and would be brought to the Board for consideration. He also explained that the Board had a responsibility to engage in strategic financial planning and that a draft plan would be issued later this year. Chairman Klein explained that there were a number of options for future financing, including the possibility for additional bond authority, which would hinge on CIRM's performance.

**Board's Position: The Board endorses this proposal.**

### **III. Modifications that Would Require Legislative Intervention**

#### **A. Little Hoover Commission Recommendations**

(12) eliminate the 50-employee cap (LHC report, pp. 19; 33);

(13) eliminate the 15-scientist cap on the GWG (CIRM currently has approximately 150 scientific members and alternates available to serve on peer review, so the cap has not presented a problem – for example, for the tools and technologies applications, we ran two concurrent peer review sessions) (LHC report, pp. 26-27; 33-34); and

(14) require the Citizens' Financial Accountability Oversight Committee (CFAOC), which was created by Prop. 71 and which is chaired by the State Controller, to conduct a performance audit (the CFAOC already conducts a review of CIRM's financial audit) (LHC report, p. 35).

#### **B. Staff Analysis**

CIRM President Alan Trounson reported to the Legislative Subcommittee regarding CIRM management's position on items 12 and 13 and Subcommittee Chair Art Torres reported regarding item 14. This same information was provided to the Board at its August 19, 2009 meeting.

#### **(12) Eliminate the 50-employee cap.**

The Little Hoover Commission recommended the elimination of the 50-employee cap in Proposition 71 in order to enhance CIRM's administrative flexibility. Currently, CIRM is challenged by the 50-employee cap. CIRM staff is reviewing various options for addressing this challenge, but CIRM remains committed to the six percent cap on bonds funds for administrative expenditures.

**Board Position: The Board agrees that CIRM should review the options available for addressing the challenge posed by the 50-employee cap.**

#### **(13) Eliminate the 15-scientist cap on the GWG.**

The Little Hoover Commission recommended the elimination of the 15-scientist cap on the GWG to expand CIRM's capacity to review grant applications. However, elimination of the cap of 15 scientific GWG members/alternates will not significantly affect the GWG's capacity to review more grant applications. The real limiting factor for review is time. At a review meeting the GWG can only discuss and score about 50 total applications per day for regular research grants and perhaps 15 to 20 for larger proposals such as Disease Teams or Training Grants. Increasing the number of GWG members at a review will not speed up the rate at which each application is reviewed. In fact, it may increase that review time to accommodate discussion by additional

members. Thus, regardless of the number of participating GWG members, review of additional applications will require additional meeting days and increased CIRM staff time to manage the reviews and write review summaries. CIRM staff believes (based on comments from reviewers) that larger groups would be less focused and engaged, and longer meetings would lead to reduced willingness to attend.

**Board Position: Because the 15-scientist cap on the GWG does not limit CIRM’s capacity to review applications, the Board does not support this proposal.**

**(14) Require the CFAOC to conduct a performance review of CIRM.**

The Little Hoover Commission recommended expanding the authority of the Citizens’ Financial Accountability Oversight Committee, which was created by Proposition 71 to review CIRM’s annual independent financial audit and financial practices, to include a performance audit of CIRM. Vice Chair Art Torres explained that CIRM has already been subject to performance audits, including extensive audits conducted by the Bureau of State Audits and the State Controller. He also stated that the Legislature has authority to review CIRM’s performance and added that CIRM’s strategic scientific plan requires an independent panel of scientists to conduct a review of CIRM’s performance in reaching the objectives outlined in the strategic plan. Given the existing authority of the Legislature and the State Controller to review CIRM’s performance, and the independent scientific review required by CIRM’s strategic plan, it is not necessary to expand the CFAOC’s jurisdiction.

**Board Position: Because CIRM is already subject to performance review, the Board does not support this proposal.**

**CONCLUSION**

Article IV, section 1 of the California Constitution vests the legislative power of the state in the Legislature, “but the people reserve[d] to themselves the powers of initiative and referendum.” (Cal. Const., art. IV, § 1; Cal. Const., art. II, § 8; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228-229, quoting Key & Crouch, *The Initiative and the Referendum in California* (1939) p. 435.) The power of initiative is “one of the most precious rights of our democratic process,” and it is the “solemn duty [of the courts] to jealously guard the precious initiative power.” (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, citation omitted; *Cal. Family Bioethics Council v. Cal. Inst. for Regenerative Med.* (2007) 147 Cal.App.4th 1319, 1338, citation omitted.) “[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled.” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, quoting *Associated Home Builders, supra*, 18 Cal.3d at 591.) Based on this law and Board Counsel’s advice that the proposed amendments to Prop. 71 would violate the California Constitution and Prop. 71 and would fail to respect, as the California Courts have recognized, the precious right of the 7 million voters who approved Prop. 71, the Board voted to oppose Little Hoover Commission recommendations 1 through 5. The Board also voted not to support Little Hoover Commission recommendations 7, 10, 13, and 14. The Board voted to endorse Little Hoover recommendations 8, 9, and 11 and agreed to undertake further study of recommendations 6 and 12.

The Board’s positions are summarized in the attached chart.

**ATTACHMENT**

<b>Little Hoover Commission Recommendations</b>	<b>Board Position</b>
<p><b>Recommendation 1-5:</b>            (1) Reduce the size of the Board from 29 to 15 (LHC report, pp. 17-18; 31-32);            (2) reduce Board members' terms from 8 or 6 years to 4 years, after the terms of current members expire (LHC report, pp. 18-19; 32);            (3) concentrate appointment authority in the Governor by authorizing the Governor to appoint 11 of 15 members (2 members would be appointed by the Legislature and 2 members would be appointed by the President of UC) (LHC report, pp. 18-19; 33);            (4) eliminate the Chair's statutory responsibilities and transfer them to the President (LHC report, pp. 19; 32-33); and            (5) authorize the Board to select the Chair and Vice Chair from among the 15 members (LHC report, pp. 21-22; 32-33).</p>	<p>The Board opposes Little Hoover Commission recommendations 1-5 based on Board Counsel's advice that the proposed amendments to Prop. 71 would violate the California Constitution and Prop. 71 and would fail to respect, as the California Courts have recognized, the precious right of the 7 million voters who approved Prop. 71.</p>
<p><b>Recommendation 6:</b>            Modify the pre-application review process (LHC report, pp. 26-27; 33-34).</p>	<p>The Board believes that this proposal is premature, but will consider modifications after further review.</p>
<p><b>Recommendation 7:</b>            Identify all of the applicants in connection with a request for application (RFA) on a trial basis (LHC report, pp. 25; 34).</p>	<p>Because of the importance of confidentiality in the peer review process, the Board does not support this proposal.</p>
<p><b>Recommendation 8:</b>            Poll peer reviewers to determine whether they would resign if they were required to publicly disclose their financial interests (LHC report, pp. 24-25; 34).</p>	<p>The Board endorses the proposal and CIRM staff has undertaken an anonymous poll of GWG members.</p>
<p><b>Recommendation 9:</b>            Amend the minutes of Board meetings to disclose vote tallies and recusals (LHC report, pp. 25; 39).</p>	<p>The Board endorses this proposal.</p>
<p><b>Recommendation 10:</b>            Add a provision to the Board bylaws authorizing removal of members for cause (LHC report, pp. 18; 33).</p>	<p>Because the Board does not have the power to adopt a bylaws provision providing for the removal of members, the Board does not support this proposal.</p>
<p><b>Recommendation 11:</b>            Adopt a succession plan for leadership and a transition plan for the eventual expiration of bond funding (LHC report, pp. 35-36).</p>	<p>The Board endorses this proposal.</p>
<p><b>Recommendation 12:</b></p>	<p>The Board agrees that CIRM should review the options available for</p>

<b>Little Hoover Commission Recommendations</b>	<b>Board Position</b>
Eliminate the 50-employee cap (LHC report, pp. 19; 33).	addressing the challenge posed by the 50-employee cap.
<p><b>Recommendation 13:</b> Eliminate the 15-scientist cap on the GWG (CIRM currently has approximately 150 scientific members and alternates available to serve on peer review, so the cap has not presented a problem – for example, for the tools and technologies applications, we ran two concurrent peer review sessions) (LHC report, pp. 26-27; 33-34).</p>	Because the 15-scientist cap on the GWG does not limit CIRM’s capacity to review applications, the Board does not support this proposal.
<p><b>Recommendation 14:</b> Require the Citizens’ Financial Accountability Oversight Committee (CFAOC), which was created by Prop. 71 and which is chaired by the State Controller, to conduct a performance audit (the CFAOC already conducts a review of CIRM’s financial audit) (LHC report, p. 35).</p>	Because CIRM is already subject to performance review, the Board does not support this proposal.

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