

UNIVERSITY OF CALIFORNIA

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SANTA BARBARA • SANTA CRUZ

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April 6, 2020

CHANCELLORS

EXECUTIVE VICE PRESIDENT – UC HEALTH
EXECUTIVE VICE PRESIDENT – CHIEF FINANCIAL OFFICER
EXECUTIVE VICE PRESIDENT – CHIEF OPERATING OFFICER
VICE PRESIDENT–AGRICULTURE AND NATURAL RESOURCES
DIRECTOR–LAWRENCE BERKELEY NATIONAL LABORATORY

Delegation of Authority – to Approve Contractual Indemnification Provisions

Regents Standing Order 100.4(dd)(9) reserves authority to the Board of Regents to approve contractual indemnification provisions that require the University to assume liability (i.e. agree to defense and indemnity) for the acts or omissions of individuals beyond the University's officers, employees, agents, employees, students, invitees, and guests.

The Regents have delegated authority to me to approve such contractual indemnification provisions, provided that any such provisions limit assumption of liability to an amount not to exceed \$10 million.

The authority granted to me pursuant to the March 27, 2020, Regents item is hereby delegated to you within your respective jurisdictions. You are to consult with your respective campus risk management and UC Legal offices before approving any such provisions. This authority may not be further redelegated.

On the first business day of each month, all approvals under this delegated authority for the preceding month must be reported in the attached form to Djallon.Dinwiddie@ucop.edu.

This delegation is effective immediately and shall terminate upon the expiration or rescission of the Declaration of Emergency issued by the Governor of California with regard to the COVID-19 pandemic.

Yours very truly,

Janet Napolitano
 President

cc: Division Leaders
 Associate Vice President and Chief Risk Officer
 Universitywide Policy Office

REPORT
PURSUANT TO DELEGATION OF AUTHORITY 2633

CAMPUS: _____

MONTH _____, 2020

Date Agreement Executed	Other Party/Parties	Brief Description of Agreement ¹	Dollar Limitation on Indemnification Provision	Summarize or Provide Text of Indemnification Provision(s)	Approved By

¹ Scope of work, contemplated performance, etc.



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March 27, 2020

INTERIM ACTION ITEM - APPROVAL OF DELEGATION OF AUTHORITY FOR CONTRACTUAL INDEMNIFICATION PROVISIONS OTHERWISE RESERVED TO THE REGENTS

EXECUTIVE SUMMARY

Regents Standing Order 100.4(dd)(9) reserves authority to the Board of Regents to approve contractual indemnification provisions that require the University to assume liability (i.e. agree to defense and indemnity) for the acts or omissions of individuals other than the University's officers, employees, agents, employees, students, invitees and guests.

This limitation on the ability to enter into contracts with certain indemnification provisions may impair University locations' ability to quickly complete many types of agreements needed to perform research and secure resources in response to the current state of emergency related to the threat of COVID-19.

This item recommends that the Regents temporarily delegate to the President or her designee the authority to approve contractual indemnification provisions described in Standing Order 100.4(dd)(9), provided that any such provisions limit assumption of liability to an amount not to exceed \$10 million. The authority could be redelegated to the Chancellors, the Director of Lawrence Berkeley National Laboratory, the Executive Vice President – Chief Financial Officer, the Executive Vice President- Chief Operating Officer, Executive Vice President- UC Health, and the Executive Vice President- Agriculture and Natural Resources. No further redelegation would be authorized. The President would be required to deliver a report to the Regents each month listing all contracts executed under this authority. The delegation would terminate upon the expiration or rescission of the Declaration of Emergency issued by the Governor of California with regard to the COVID-19 pandemic.

The request is time-sensitive because of the urgent need to respond to the threats posed by COVID-19.

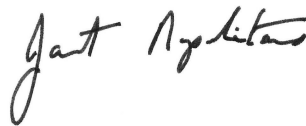
RECOMMENDATION

The President of the University recommends that:

1. The President or her designee be authorized to approve indemnification provisions currently subject to Regents approval under Standing Order 100.4(dd)(9), provided that any such provisions limit

- assumption of liability to an amount not to exceed \$10 million.
- a. The President may redelegate this authority to the Chancellors, the Director of Lawrence Berkeley National Laboratory, the Executive Vice President – Chief Financial Officer, the Executive Vice President- Chief Operating Officer, the Executive Vice President- UC Health, and the Vice President- Agriculture and Natural Resources, to be exercised in consultation with local UC Legal offices.
 - b. The Regents reserve authority to approve contractual indemnification provisions described in Standing Order 100.4(dd)(9) that do not limit liability for indemnification to \$10 million.
 - c. This delegation shall terminate upon the expiration or rescission of the Emergency Declaration issued by the Governor of the State of California with regard to the COVID-19 pandemic.
 - d. A written report will be delivered to the Regents each month listing all contracts executed under this authority.
2. The President or designee, after consultation with UC Legal, shall be authorized to approve and execute any documents necessary in connection with the above.

Approved:

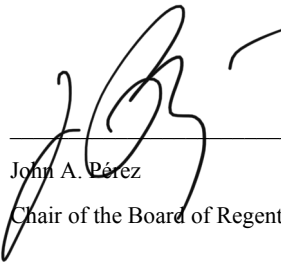


3/27/20

Janet Napolitano


Date

President of the University



John A. Pérez

Chair of the Board of Regents



Date

Hadi Makarechian

Date

Chair of the Finance

and Capital Strategies Committee

BACKGROUND

Standing Order 100.4(dd)(9) reserves to the Regents approval authority for the following contractual indemnification provisions:

Agreements by which the University assumes liability for conduct of persons other than University officers, agents, employees, students, invitees, and guests. In circumstances where it is deemed necessary by the

President, in consultation with the General Counsel, to indemnify non-University persons who have agreed at the University's request to serve as advisors on operational matters for conduct within the scope of their role as advisors, the President is authorized to provide for defense and indemnification. This restriction does not apply to agreements under which the University assumes responsibility for the condition of property in its custody.

Similarly, Regents Bylaw 22.2(c) reserves to the Regents:

Approving agreements to indemnify third-parties, subject to exceptions and parameters specified by Committee Charter or Regents Policy.

Under normal operations, the University may negotiate to attempt to limit third party contractual indemnification provisions to be “only in proportion to negligent or willful acts or omissions of University officers or employees” (or substantially similar language). However, the other contracting party may resist the proportionality language, which is a commercially reasonable response as many companies do not limit their indemnification obligations to that degree. Where third party indemnification cannot be proportionally limited, Regental approval of the indemnification provision is requested.

Currently, University locations are engaging in urgent contracting related to the threat of COVID-19, and are facing difficulties in negotiating with other parties to limit indemnification provisions to be consistent with Standing Order 100.4(dd)(9). For example:

- Contracts to secure housing for students in residence to self-isolate or in response to public health orders requiring closure of dormitories/dense university apartments: Under current circumstances, housing providers are likely to expect UC to defend and indemnify any claims by anyone associated with COVID-19.
- Contracts to secure medical supplies for medical centers that are needed immediately without time to negotiate purchase order terms: UC may need to accept increased risks on the purchasing side in order to avoid the more significant risk of lacking the supplies necessary to meet the standard of care for treatment of patients. The additional risk is offset by benefit of the increased efficiency and effectiveness of clinical care.
- Contracts for construction of temporary medical facilities for medical centers and/or temporary housing facilities if dorms/dense apartments are ordered closed: Again, it is likely to be a seller's market with insurance carriers for contractors unwilling to allow their insureds to execute contracts that do not expressly put COVID-19 risk on the medical provider or housing provider.
- Contracts for technology necessary to stand up and support online learning: It may be a practical necessity to accept terms that are unacceptable under normal conditions if specific instructional needs cannot be supported without new purchases of specific products, and if instruction would be suspended while UC attempted to negotiate limited indemnification provisions.

Risk Assessment

COVID-19 has been declared to be an international pandemic, both the Federal and State governments have declared states of emergency, and various jurisdictions have issued “shelter in place” and “stay at home” orders. The University plays a critical role in providing healthcare to California and serving the public in other ways. As demonstrated by the examples above, entering into contracts with third party contractual indemnification provisions are needed to facilitate the University's response to the public health crisis. Requiring locations to seek Regental approval of each such provision, including the time needed to secure approval, potentially jeopardizes contracts, particularly if the University is attempting to secure scarce resources. In contrast, delegating approval authority will reduce the burden to finalize terms on desperately needed contracts.

The increased risk of a third party indemnification provision in any individual contract will depend on the work to be performed under the contract and the specific terms of the contract. However, only a small number of contracts normally result in an event for which indemnity is sought. Furthermore the President and her limited delegees will continue to review the propriety of any provision covered by this delegation.

In addition, the increased risk is not unlimited, as the proposed delegation reserves to the Regents the authority to approve third party indemnification provisions in excess of \$10 million. The President would be required to deliver a report to the Regents each month listing all contracts executed under this authority. Tracking and reporting of these contracts will provide insight into the nature and extent of the risk. The requirement for consultation with UC Legal offices will also mitigate the increase in additional risk.