



Creating a California Public Pharmaceutical Manufacturing Corporation

To: Dana Brown and Thomas Hanna, Democracy Collaborative

From: Jay Cumberland, Legal Research and Policy Specialist | Intern at the Sustainable Economies Law Center

cc: Supervising Attorneys Janelle Orsi and Cameron Rhudy

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Introduction


This memo examines California law to determine how to establish a state-owned public¹ pharmaceutical manufacturing corporation. The memo addresses: (1) the structure of public corporations that can be formed in the state of California (“the State”) as well as alternative structures, (2) the legal process for forming them, (3) the sources of financing they can access, (4) the legal and regulatory red flags standing in the way of their creation and/or success, and (5) the usefulness of classifying a public corporation as a public utility.

State takeover of an existing private pharmaceutical manufacturing corporation as a means of creating a public pharmaceutical manufacturing corporation is excluded from the scope of this memo.

The fundamental building block of this memo is the legal nature of a public corporation and, unfortunately, this legal nature is substantially undefined. Because this fundamental building block lacks significant definition, much of the law related to it also lacks significant definition. This lack of explicit definition does not halt the project of defining and creating a public pharmaceutical manufacturing corporation, but it does mean that decisions related to the project must be made amidst substantial uncertainty and that lawsuits on diverse topics could be brought challenging the structure of the corporation. Where I believe too much uncertainty and therefore too much legal liability exists, I have recommended alternative, more certain legal paths to the same end or have advised against pursuing a particular path. Where I believe lawsuits are unlikely to be brought related to a certain element, I have highlighted this.

In evaluating the options presented in this memo, it should be kept in mind both that creating a public pharmaceutical corporation is a high profile event likely to attract litigation from hostile parties and that the ultimate balancing of risk and reward is your decision, not mine. While I have made recommendations that I believe to be legally safe, those recommendations, if followed, will have you hew closely to what already exists. Venturing away from this safe harbor is innovation. Innovation may increase the likelihood and the likely success of lawsuits against the corporation. However, it may also improve the governance and effectiveness of the corporation. This is the risk and the reward that must be balanced. It may be helpful to keep in mind that the State Attorney General would defend lawsuits brought against a public pharmaceutical manufacturing

¹ “Public,” as used in this memo, generally refers to government-ownership or government-control, as opposed to a business that sells its shares to the public.



corporation, once created. In other words, innovation might delay the start of the corporation and might cost the State, the corporation, and/or the taxpayers of California money, but it will not cost those who advocate for the corporation.

Part 1: Legal Structure


The legal structure of a state-owned and/or state-controlled pharmaceutical manufacturing corporation could take a few forms. It could be a non-municipal public corporation, a public trust, or a quasi-public corporation. This memo predominantly discusses the non-municipal public corporation form. This form aligns with the normal understanding of a state-owned and/or state controlled corporation better than the quasi-public corporation form. It also affords access to state financing and state oversight that the quasi-public corporation form lacks. A public trust seems to have many of the benefits of a non-municipal public corporation. However, trust law is a complex body of law separate from corporate law, so this memo does not analyze the public trust form in depth.

A non-municipal public pharmaceutical manufacturing corporation would be a legal person formed by the State and would most likely be considered a State agency. While public corporations can be either municipal or non-municipal, a public pharmaceutical manufacturing corporation fits most readily within the non-municipal public corporation category. A non-municipal public corporation must have certain attributes that establish its special relationship to the State. It may have a range of governmental powers.

Creating a non-municipal public pharmaceutical manufacturing corporation seems to allow the creation of two distinct legal persons: an operating entity and a governing entity. Both of these entities could be non-municipal public corporations.

Creating two distinct legal entities allows the possibility of making the governing entity a non-municipal public corporation while making the operating entity a public trust. This is the structure of the University of California, which is a public trust overseen by the Board of Regents, a public corporation. A purported benefit of the public trust form is being shielded from the vagaries of politics.

Alternatively, a quasi-public corporation could be created. The purported benefit of the quasi-public corporation structure is more flexibility in governance and operations management. The law regarding non-municipal public corporations is unclear, and the law



regarding quasi-public corporations is even less clear. The term quasi-public corporation can refer to a broad range of structures with some kind of connection to the State.

I. A Public Corporation is a Legal Person Formed by the State With the Status of a State Agency

A corporation is a legal person with certain attributes. Cal. Civ. Code § 283 (repealed) once defined a corporation as “a creature of the law, having certain powers and duties of a natural person.”² This definition no longer remains, but it retains influence. The California Supreme Court has stated that “the principal attributes of a corporation” are that it is allowed by law to make contracts, incur debts, employ people and agents, have a corporate name, and have perpetual succession.³ It has the ability to act with substantial independence.

Public corporations have a special relationship to the State that distinguishes them from private corporations.


Unlike private corporations, public corporations are formed by the State Legislature or the people of California rather than by private individuals under the California Corporations Code. Cal. Civ. Code § 284 (repealed) once defined public corporations as creatures of the Legislature and private corporations as creatures of the California Corporations Code (at that time the Civil Code). Cal. Civ. Code § 284 has been repealed and has never been replaced by an all purpose definition clarifying the distinction between public and private corporations. It continues to hold some precedential value because California courts have continued to refer to this distinction even after the repeal of Cal. Civ. Code § 284

However, creation by the State Legislature is not the defining feature of public corporations. Private corporations can be formed by the State Legislature outside of the California Corporations Code. Quasi-public corporations like the State Compensation Insurance Fund, the Winegrowers of California Commission, and the California Automobile Assigned Risk Plan are private corporations created by the Legislature for the administration of State functions. Quasi-public corporations are private entities, but they are not “purely private entities.”⁴ They are not purely private because they are required to provide public services and to focus both on providing profits to shareholders and on

² *Dean v. Davis*, 51 Cal. 406, 409–11 (1876).

³ *Dean v. Davis*, 51 Cal. 406, 409–11 (1876).

⁴ See California Law Revision Commission, *Recommendation: Adjudication by Quasi-Public Entities* (Oct. 1996), <http://www.clrc.ca.gov/pub/Printed-Reports/REC-AdAdjQuasiPublic.pdf>, at 284.



fulfilling their public purpose.⁵ Despite these general features, there is no clear definition of quasi-public corporation.⁶

The two features distinguishing public corporations from both private corporations and quasi-public corporations are (1) being created by the Legislature or the people and (2) always being a state agency.⁷ Unlike quasi-public corporations, public corporations are most likely always state agencies.⁸ A state agency is part of the State's corporate body or legal person. Private corporations are not part of the State's corporate body. Quasi-public corporations are not necessarily part of the State's corporate body.

Having the status of a state agency allows a public corporation to be operated for profit by the State. In 1907 in *People ex rel. Post v. San Joaquin Valley Agricultural Association*, the California Supreme Court held that the California Constitution permits the State to engage in business for profit "only by and through its public governmental powers, and by means of agencies which constitute part of the state government."⁹

The distinguishing features of a public corporation require that it have both the independence of a legal person and the dependence of a state agency. A public corporation's relationship to the State is distinguishable from the relationship of a corporation to a holding company or parent corporation. A subsidiary is a corporation with a particular relationship to a holding / parent corporation. Similarly, a public corporation is a corporation with a particular relationship to the State's corporate body. However, a subsidiary is a legal person completely independent from its holding / parent corporation. To paint the picture: a public corporation stands in relation to the State somewhat like a child to a parent: it is a (legal) person, but not one completely independent from the State.

⁵ *Quasi Public Corporation: Everything You Need to Know*, <https://www.upcounsel.com/quasi-public-corporation>.

⁶ See Analyst in American National Government, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (July 22, 2011), https://www.everycrsreport.com/files/20110622_RL30533_b8952608c94fe4c60a9b4a9a4d434467c424ddd9.pdf (noting that "[t]he quasi government . . . is not easily defined. In general, the term is used in two ways: to refer to entities that have some legal relation or association, however tenuous, to the federal government; or to the terrain that putatively exists between the governmental and private sectors.").

⁷ See *Keller v. State Bar*, 47 Cal. 3d 1152, 1162–64 (1989), *rev'd sub nom. Keller v. State Bar of California*, 496 U.S. 1, (1990) (noting that all public corporations in California are 'clearly considered governmental entities' but declining to hold that all public corporations are necessarily state agencies). The court likely refused to hold that all public corporations are necessarily state agencies because that question was not presented to the court. I see no reason why a court would conclude that all public corporations are not necessarily state agencies.

⁸ See California Law Revision Commission, *Recommendation: Adjudication by Quasi-Public Entities* (Oct. 1996), <http://www.clrc.ca.gov/pub/Printed-Reports/REC-AdAdjQuasiPublic.pdf>, at 282.

⁹ See *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, 151 Cal. 797, 799–801 (1907) (emphasis added).



II. A Pharmaceutical Manufacturing Corporation Can and Should be a Non-Municipal Rather than a Municipal Public Corporation

Public corporations come in two types distinguished by the governmental functions they perform.¹⁰ Municipal public corporations govern a portion of the State. Non-municipal public corporations do not govern a portion of the State but do serve the general welfare of the State.

A public pharmaceutical manufacturing corporation should be a non-municipal public corporation because it is intended to serve the general welfare of the people of California by providing for their health, not to govern a portion of the State.

A pharmaceutical manufacturing corporation that provides for the health of the people of California would be held to serve the general welfare, so it could be a non-municipal public corporation.


A. A Non-Municipal Public Corporation Serves the General Welfare but Does Not Govern a Portion of the State

There is no all purpose definition of public corporation in California law,¹¹ but it is clear that public corporations exercise governmental functions¹² and that there are two types of public corporations, municipal and non-municipal, distinguished by the

¹⁰ As noted in Part 1(I), a quasi-public corporation is a private corporation, not a public corporation.

¹¹ Public corporation is defined only for the purposes of various specific statutes. See e.g. Cal. Gov't Code Section 67510 (defining public corporation for the purpose of a chapter related to the San Francisco Bay Area Transportation Terminal Authority as "any county, city and county, city, town, municipal corporation, district of any kind or class, authority, redevelopment agency or political subdivision of this state), Cal. Gov't Code Section 811.2 (for the purpose of claims against public entities, defining public entities to include "the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.").

¹² See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013) (stating that "'public corporation' is a term of art used to designate certain entities that exercise governmental functions (See Cal. Const. art. VI, § 9 [State Bar is a "public corporation"]; Bus. & Prof.Code, § 6001 [same]; *People ex rel. Post v. San Joaquin Valley Agr. Assn.* (1907) 151 Cal. 797, 799, 803–04, 91 P. 740 [district agricultural associations are "public corporations"]; Gov.Code § 6300 [defining "public corporation" to include only governmental entities]; accord *Bettencourt v. Industrial Accident Comm.*, 175 Cal. 559, 561 (1917)). Note that, per Part 1(I), quasi-public corporations are also formed by the State Legislature to administer State functions. Administering State functions is not a distinguishing characteristics of public corporations.



governmental functions they perform.¹³ Non-municipal public corporations are sometimes called quasi-municipal public corporations.

Municipal public corporations govern a portion of the State. Originally, municipal public corporations were the only public corporations, and public corporations were defined by Cal. Civ. Code § 284 (repealed) as corporations “formed or organized for the government of a portion of the state.” In 1917, the California Supreme Court cited Cal. Civ. Code § 284 to conclude that public corporations are corporations “formed for political and governmental purposes and vested with political and governmental powers.”

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Non-municipal public corporations serve the general welfare but do not govern a portion of the State. In 1929, the California Supreme Court created the concept of non-municipal public corporations by holding that Cal. Civ. Code § 284 (repealed) did not prevent the Legislature from creating public corporations for purposes other than the government of a portion of the state.¹⁵ In 2015, the California Supreme Court echoed its broad definition of public corporations from 1929. It stated that municipal and non-municipal public corporations “are organized for the purpose of carrying out the purposes of the [L]egislature in its desire to provide for the general welfare of the state.”¹⁶

¹³ See *Morrison v. Smith Bros.*, 211 Cal. 36, 39–41, 293 P. 53, 54–55 (1930) (distinguishing between municipal and non-municipal public corporations). Note that there are also quasi-public corporations, but, on your instruction, I have not included quasi-public corporations within the scope of this memo. Note also that *Morrison v. Smith Bros.* speaks of non-municipal public corporations as quasi-municipal corporations, but this term has not been picked up by subsequent courts and does not refer to quasi-public corporations.

¹⁴ *Bettencourt v. Industrial Accident Comm.*, 175 Cal. 559, 561 (1917). See *Div. of Labor Law Enf't v. El Camino Hosp. Dist.*, 8 Cal. App. 3d Supp. 30, 33 (App. Dep't Super Ct. 1970) (noting that “the characteristic feature of a municipal corporation, as that term is used in its strict or proper sense, is the power and right of local self-government”). See also 1 McQuillin Mun. Corp. § 2:28 (3d ed.) (noting that because “the distinction between local entities that are primarily self-governing and those that are mainly administrative is . . . a difference in degree,” the distinctions between municipal and quasi-municipal public corporations is not always clear), 1 McQuillin Mun. Corp. § 2:30 (3d ed.) (noting that courts routinely misunderstand or overlook the distinction between municipal corporations and quasi-municipal corporations). See also 1 McQuillin Mun. Corp. § 2:32 (3d ed.) (noting that both municipal and non-municipal corporations, in states without all-purpose definitions of those terms, are often held to be one thing for the purpose of one statute and another thing for the purpose of another statute).

¹⁵ *State Bar of California v. Superior Court*, 207 Cal. 323 (1929) (citing *In re Madera Irr. Dist.*, 92 Cal. 296 (1891) for the principle that “[t]he presumption which attends every act of the legislature is that it is within its power; and he who would except if from the power must point out the particular provision of the Constitution by which the exception is made . . .”). See *Div. of Labor Law Enf't v. El Camino Hosp. Dist.*, 8 Cal. App. 3d Supp. 30, 33 (App. Dep't Super Ct. 1970) (noting that “quasi-municipal corporations are public agencies created or authorized by the Legislature to aid the state in some form of public or state work, other than community government” and noting that “while all municipal corporations are public corporations, not all public corporations are municipal corporations”).

¹⁶ *Delano Farms Co. v. California Table Grape Com.*, 4 Cal. 5th 1204, 1238, cert. denied sub nom. *Delano Farms Co. v. California Table Grape Comm'n*, 139 S. Ct. 567 (2018) (citing *In re Madera Irrigation District* 92 Cal. 296



As a pharmaceutical manufacturing corporation would not govern a portion of the State, it must serve the general welfare in order to be a public corporation. That means it can be only a non-municipal public corporation.


B. A Court Would Hold That a Non-Municipal Public Pharmaceutical Corporation Serves the General Welfare

Non-municipal public corporations must be formed to help the Legislature provide for the public welfare of the State, although they can incidentally benefit private individuals. In 1929 in *State Bar of California v. Superior Court*, the plaintiff claimed the State Bar of California, a non-municipal public corporation formed to regulate the legal profession, was in fact a private corporation. The plaintiff said it was a private corporation because the practice of law is of purely private concern and does not serve the general welfare. The California Supreme Court rejected this argument. It said that attorneys were indispensable to the administration of justice and had always been regulated to ensure proper conduct with the public. It said that the practice of law is a matter of public concern and not purely private concern even though choosing to practice law is a private choice and even though the practice of law monetarily benefits only a certain subset of people.¹⁷

A public corporation manufacturing essential pharmaceuticals would serve the general welfare because of its inherent connection to public health. In *State Bar of California v. Superior Court*, the California Supreme Court found it important that the practice of law had always been regulated by the State. Similarly, the California State Board of Pharmacy extensively regulates pharmaceuticals in California. This suggests an existing connection between the general welfare and pharmaceuticals. Moreover, since manufacturing essential pharmaceuticals would protect the public health, it would serve the general welfare. The 10th Amendment to the United States Constitution grants States the police power to establish and enforce laws protecting the general welfare, safety, and health of the public. In this authorization, the health of the public is connected to the general welfare. In *Dean v. Davis*, the California Supreme Court stated that “[t]he power of

(1891) (applying this definition only to municipal corporations). See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013) (stating that “‘public corporation’ is a term of art used to designate certain entities that exercise governmental functions.”), *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (noting that “the State incorporates [public corporations so] that it may the more effectually discharge its appointed duty.”).

¹⁷ *State Bar of California v. Superior Court of Los Angeles Cty.*, 207 Cal. 323 (1929). See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321–3 (1892) (holding that a non-municipal public corporation is organized for the good of the public and to promote the prosperity and welfare of the public.”).



the Legislature to . . . promote the health of the people, and advance the public good, is unquestionable.”¹⁸

III. A Non-Municipal Public Corporation Must Have Some Degree of Sovereignty and May Have a Range of Governmental Powers

A public corporation, as a public entity, must possess some degree of the State’s sovereignty, and this requires that it have an unspecified number of the essential attributes of State sovereignty. As a public entity with some degree of the State’s sovereignty, a public corporation may exercise a number governmental powers that are incidental attributes of State sovereignty.

A. The Essential Attributes of State Sovereignty

Public corporations, as public entities, must have “some degree of sovereignty.”¹⁹ This does not mean they must be separate corporate entities sovereign in their own right.²⁰ Instead, it means the State must have extended some degree of its sovereignty to the corporation in order to make the corporation part of the State’s sovereign body.

No court has clarified how much State sovereignty a public corporation must have to possess “some degree of sovereignty,” and no court has provided a definitive list of attributes that may clothe a public corporation in some small degree of State sovereignty. To avoid the risk of litigation claiming that a public pharmaceutical manufacturing corporation is actually an illegitimate private corporation because it has too small a degree of State sovereignty, it would be best to clothe the public corporation with as many attributes of sovereignty as possible.

Courts have treated a variety of attributes as essential to public corporations and/or public entities having a degree of State sovereignty. These include:

¹⁸ See *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (noting that “[t]he power of the Legislature to . . . promote the health of the people, and advance the public good, is unquestionable.”).

¹⁹ *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013) (citing *Vallas v. City of Chula Vista*, 56 Cal. App. 3d 382, 387 (1976), disapproved on other grounds in *Peterson v. Long Beach* 24 Cal.3d 238, 245, fn.5 (1979), superseded by Evid Code, § 669 [so noting with Evid.Code, § 200]; *Lawson v. Super. Ct.*, 180 Cal. App. 4th 1372, 1396 (2010) [so noting with Gov.Code, § 811.2].) (noting that “[i]n every instance, the entities listed as public entities--from traditional bodies like counties and cities to more recent innovations like public authorities and public corporations--have one thing in commons: Each is vested with some degree of sovereignty.”).

²⁰ See *United States v. Golden Gate Bridge & Highway Dist. of Cal.*, 37 F. Supp. 505, 510 (N.D. Cal. 1941), *aff'd*, 125 F.2d 872 (9th Cir. 1942) (noting that the Golden Gate Bridge & Highway District of California, a public corporation, was a governmental agency and not a “separate and independent corporate body”).

- ❖ Being created by the Legislature or the people;²¹
- ❖ Being dissolvable only by act of the Legislature or act of the people;²²
- ❖ Being owned by the government;²³
- ❖ Being operated by the government;²⁴
- ❖ Being under the control and management of the State;²⁵
- ❖ Having governing members elected or appointed in a public manner;²⁶
- ❖ Serving a governmental purpose;²⁷
- ❖ Having property held in trust for the public and subject to State control;²⁸
- ❖ Exercising executive or administrative functions other than making rules and regulations;²⁹
- ❖ Being subject to open meeting regulations;³⁰

²¹ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013), *Gateway Cmty. Charters v. Spiess*, 9 Cal. App. 5th 499, 505 (Ct. App. 2017), *as modified on denial of reh'g* (Mar. 29, 2017) (noting that quasi-municipal corporation must be “created or authorized by the Legislature.”).

²² See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including being dissolvable only by act of the Legislature or act of the people).

²³ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013).

²⁴ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013).

²⁵ See *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, 151 Cal. 797, 799–801, 91 P. 740, 741–42 (1907) (noting that unlike private and quasi-public corporations, public corporations are under the control and management of the State).


²⁶ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including having officers elected in a public manner), *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (holding that “[w]here a corporation is composed exclusively of officers of the government having no personal interest in it or with its concerns, and only acting as the organs of the State in effecting a great public improvement, it is a public corporation.”), *Keller v. State Bar*, 47 Cal. 3d 1152, 1163 (1989), *rev'd on different grounds sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the Governor appointing six members of the State Bar Board of Governors contributed to the State Bar of California’s governmental nature) (note Cal. Bus. & Prof. Code, § 6013.5 showing that 5 attorney members are also appointed by the California Supreme Court, for a total of 11 out of 13 Board members appointed by the Executive and Judicial branches of California, respectively.).

²⁷ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013), *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that non-municipal public corporation must serve the public welfare), *Gateway Cmty. Charters v. Spiess*, 9 Cal. App. 5th 499, 505 (Ct. App. 2017), *as modified on denial of reh'g* (Mar. 29, 2017) (noting that quasi-municipal corporations must “perform[] some kind of public or state work.”).

²⁸ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including having property held in trust for the public and being subject to State control), *Keller v. State Bar*, 47 Cal. 3d 1152, 1163 (1989), *rev'd on different grounds sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the State Bar of California’s property being held for essential public and governmental purposes and exempt from taxation, per Cal. Bus. & Prof. Code, § 6008, contributed to its governmental nature).

²⁹ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 317–18, 28 P. 675 (1892) (noting that a public corporation can be organized “for the mere purpose of exercising executive and administrative functions” other than administrative rule-making and need not have legislative and judicial power).

³⁰ *Keller v. State Bar*, 47 Cal. 3d 1152, 1163 (1989), *rev'd on different grounds sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the State Bar of California being subject to open meeting regulations per Cal. Bus. & Prof. Code, § 6026.5 (repealed and substantively replaced by § 6026.7 as of Jan.

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- ❖ Having the authority to take all action necessary and proper to fulfill its designated purpose.³¹

Incorporating all of these elements into a public corporation should be enough to give it “some degree of sovereignty.” There is a presumption that all public corporations are State agencies, anyway. In 1989 in *Keller v. State Bar*, the California Supreme Court noted that “all . . . public corporations in California - water districts, school districts, reclamation districts, etc. - are clearly considered governmental entities.”³² Governmental entities are not separate corporate entities, so they have some degree of sovereignty. However, note that *Keller v. State Bar* was decided in 1989 and explicitly declined to hold that all future public corporation would necessarily be governmental agencies. The presumption that a public corporation is a State agency remains rebuttable, but I am unaware of grounds based upon which the presumption would be rebutted.

B. The Incidental Attributes of State Sovereignty

Courts have treated a variety of governmental powers as “incidents of sovereign authority.”³³ By definition, incidents of sovereign authority are non-essential, auxiliary, accompanying elements of sovereignty but not major or essential elements of sovereignty. Incidents of sovereignty include:

- ❖ The power to tax;³⁴
- ❖ The power to exercise eminent domain and condemn property;³⁵

1, 2018) contributed to its governmental nature), *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 741 (2009) (holding that water storage districts being subject to open meeting laws contributed to their status as municipal corporations).

³¹ *Keller v. State Bar*, 47 Cal. 3d 1152, 1163 (1989), *rev'd on different grounds sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that Cal. Bus. & Prof. Code, § 6001, subd. (g), which gives the State Bar of California authority to “do all . . . acts . . . necessary or expedient for the administration of its affairs and the attainment of its purpose” contributed to its governmental nature).

³² See *Keller v. State Bar*, 47 Cal. 3d 1152, 1162–64 (1989), *rev'd sub nom. Keller v. State Bar of California*, 496 U.S. 1, (1990) (stating that it is not deciding that all public corporations are governmental agencies, but finding it significant that all public corporations in California are ‘clearly considered governmental entities.’). Note that the United States Supreme Court reversed the case on different grounds. Also note that, presumably, the court refused to decide that all public corporations are state agencies because the question was not presented to it and courts generally decline to answer questions not presented to them. It would take further research to make a definitive statement, but given the research I have completed I see no reason why the California Supreme Court would not rule that all public corporations are state agencies, if presented with the question.

³³ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013); see also *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (stating that “[t]o constitute a public corporation, it is not essential that it shall exercise all the functions of government . . .”) (emphasis in original).

³⁴ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013).

³⁵ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013), *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a non-municipal public corporation *may* have the power to acquire property

- ❖ The power to purchase property;³⁶
- ❖ The power to issue bonds to acquire property;³⁷
- ❖ The power to use its own tax revenue to pay its own bond debt;³⁸
- ❖ Legislative powers;³⁹
- ❖ Judicial powers;⁴⁰
- ❖ The executive power to make rules and regulations necessary for the exercise of its particular function;⁴¹
- ❖ Sovereign immunity.⁴²

The particular set of powers conferred upon a public corporation should be tailored to the nature or needs of the public corporation created. In 1892 in *In re Madera Irrigation Dist.*, the California Supreme court held that “the powers to be exercised [by public corporations] vary with the character of the purpose for which they may be created.”⁴³ It stated that “there would be a manifest impropriety” in requiring public corporations with diverse purposes to “be conducted in the same manner.” It held that the State Legislature can create public corporations “with such powers of government as it may choose to confer upon it.” It held that “[i]t is not necessary that [a] public corporation

via eminent domain), *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 741 (2009) (holding that a water storage district having the police power to exercise eminent domain contributed to its status as a municipal corporation). *But see Gateway Cmty. Charters v. Spiess*, 9 Cal. App. 5th 499, 506–07 (Ct. App. 2017), *as modified on denial of reh'g* (Mar. 29, 2017) (calling the power to exercise eminent domain a crucial characteristic of quasi-municipal corporations).

³⁶ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a non-municipal public corporation may have the power to purchase property).

³⁷ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a non-municipal public corporation may have the power issue bonds to acquire property), *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 741 (2009) (holding that a water storage district having the police power to issue bonds contributed to its status as a municipal corporation).

³⁸ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a non-municipal public corporation may have the power to use tax revenue to pay bond debt).


³⁹ See *id.*, at 317-8 (holding that it is not necessary for a public corporation to “have legislative or judicial powers conferred upon it.”).

⁴⁰ See *id.*, at 317-8 (holding that it is not necessary for a public corporation to “have legislative or judicial powers conferred upon it.”)

⁴¹ See *id.*, at 317-8, *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 741 (2009) (holding that a water storage district having regulatory power contributed to its status as a municipal corporation).

⁴² See *United States v. Golden Gate Bridge & Highway Dist. of Cal.*, 37 F. Supp. 505, 510 (N.D. Cal. 1941), *aff'd*, 125 F.2d 872 (9th Cir. 1942) (noting that although the Golden Gate Bridge & Highway District of California, a public corporation, had the ability to sue and be sued, it was a governmental agency and not a “separate and independent corporate body which could not have its property taken from it by any consent of the state legislature.”). Note the connection of this incident of sovereignty with an essential element of sovereignty--having property held in trust for the public and subject to State control. If a public corporation holds property in such a way, its property need not be taken by eminent domain.

⁴³ *In re Madera Irrigation Dist.*, 92 Cal. 296, 317–18 (1892) (also noting that “the powers committed to a public corporation organized for the administration of a park, or for the government of a levee district, or for the control of the police department, need be only such as are peculiarly appropriate to such organizations”).



should be vested with all governmental powers, but the legislature may clothe it with such as, in its judgment, are proper to be exercised . . .” by that public corporation.

IV. A Public Corporation’s Governing Body Can Be a Distinct Legal Person That Is Also a Public Corporation

Almost all non-municipal public corporations in California have legally distinct governing bodies.⁴⁴ This differs from the typical structure of a private corporation. A Board of Directors governs a private corporation. Individual members of the Board can be sued, but the Board itself cannot be sued. It is not a legal person. By contrast, the governing bodies of public entities in California are often sued separately than the entities they govern. The California Institute for Regenerative Medicine’s Independent Citizen’s Oversight Committee has been sued separately from CIRM.⁴⁵ The California State Lottery Commission has been sued separated from the California State Lottery.⁴⁶ Only persons can be sued. The ability of a governing body to be sued establishes it as a legal person distinct from the entity it governs.

The legally distinct governing body of a non-municipal public corporation could take different legal forms, but would most likely be either a state agency or a non-municipal public corporation. The legal structure of the governing body will depend on the attributes and powers it is given. A governing body that is a non-municipal public corporation will be structured with the attributes and powers specified in Part 1(III)(B) above.⁴⁷

⁴⁴ The only exception, to my knowledge, is the California Table Grape Commission, which has no distinction between governing body and operating body. See Cal. Food & Agr. Code § 65551 (stating that “[t]he California Table Grape Commission shall be and is hereby declared and created a corporate body.”). See also Chris Kroger, *Nave to Receive California Fruit Association’s Award*, <https://www.thepacker.com/article/nave-receive-california-fruit-associations-award> (Feb. 5, 2018) (noting that there is a President and CEO of the California Table Grape Commission itself and that she oversees a budget of twenty million dollars).

⁴⁵ See *People’s Advocate v. Indep. Citizens’ Oversight Comm.*, No. HG05 206766, 2006 WL 1417983, at *5 (Cal. Super. Ct. May 12, 2006), *aff’d sub nom. California Family Bioethics Council, LLC v. California Inst. for Regenerative Med.*, 147 Cal. App. 4th 1319 (2007).

⁴⁶ See *Janis v. California State Lottery Com.*, 68 Cal. App. 4th 824, 827 (1998) (for a suit against the California State Lottery Commission), *Trinkle v. California State Lottery*, 71 Cal. App. 4th 1198, 1200, 84 Cal. Rptr. 2d 496, 497 (1999) (for a suit against the California State Lottery).

⁴⁷ See *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (noting that “[t]hese are the principal attributes of a corporation, and though the statute does not in terms declare it to be a corporation, it will be sufficient if the intent clearly appears.”).



V. A Non-Municipal Public Corporation Governing Entity Could Oversee a Public Trust Operating Entity

Having separate legal entities for the governing body and the operating body allows for the governing body to be a non-municipal public corporation and the operating body to be something else.

The most likely alternative structure for the operating entity is a public trust. It would be overseen by a governing public corporation. This is the structure of the University of California. The Board of Regents of the University of California is a public corporation that oversees the public trust of the University of California.⁴⁸


The purported benefit of the public trust structure is independence from political influence. The University of California was made into a public trust to make it “entirely independent of all political and sectarian influence.”⁴⁹ If that is true, this achieves Democracy Collaborative’s expressed goal of making a public pharmaceutical manufacturing corporation free from the influence of partisan politics. However, it is not clear that a public trust would accomplish this goal better than a carefully crafted governance structure for a non-municipal public corporation.

If the governing entity were a non-municipal public corporation and the operating entity were a public trust, the governing entity would seem to be able to have the power to issue revenue bonds in its own name but for the benefit and use of the operating entity.⁵⁰ The operating body would not need to be a public corporation to utilize those bonds. The ability of non-municipal public corporations to issue revenue bonds is named in Part 3(II)(C).

⁴⁸ See *University Governance and Administration*, <https://www.ucop.edu/academic-personnel-programs/programs-and-initiatives/faculty-resources-advancement/faculty-handbook-sections/university-governance-and-administration.html> (noting that the Regents is the public corporations that administers the public trust of the University of California), Cal. Const., art. IX, sec. 9 (noting that “[t]he University of California shall constitute a public trust, to be administered by the existing corporation known as ‘The Regents of the University of California.’”). Note that this is also the structure of some research universities in other states and of the Smithsonian Institution.

⁴⁹ John Aubrey Douglass, *Shared Governance at the University of California: An Historical Overview* (March 1998), https://academic-senate.berkeley.edu/sites/default/files/shared_gov_pp_jd_sharedgov_198_1.pdf.

⁵⁰ See, for example, the Independent Citizens’ Oversight Committee overseeing the California Institute for Regenerative Medicine, which appears intended to be a public corporation. It has the ability to issue bonds in its own name.



Evaluating the benefits of a public trust and the nature of a public trust governance structure is beyond the scope of this memo because trust law is a complex body of law separate from corporate law.

VI. The Quasi-Public Corporation Structure is Not Advisable in California

A quasi-public corporation may be a legal structure capable of holding a pharmaceutical manufacturing corporation, but it is not very clear what relationship a quasi-public corporation has to the State, what attributes it must possess, and what powers it can have.

It is not clear that a quasi-public corporation defines any one thing because quasi-public entities exist in “the twilight zone” between the public and private sectors where little legal definition exists.⁵¹ Not much definition exists in this twilight zone. The most that can be said is that quasi-public entity usually refers either to “entities that have some legal relation or association, however tenuous, to the . . . government” or to entities that exist in “the terrain that putatively exists between the governmental and private sectors.”⁵²


Miners' Ditch Co. v. Zellerbach defines quasi-public corporations as “corporations technically private, but yet of a *quasi* public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, specifically the right to exercise eminent domain.”⁵³ *Potvin v. Metropolitan Life Ins. Co.* says enterprises will be treated as quasi-public based on the important products or services they provide, their express or implied representations to the public concerning their products or services, their superior bargaining power, legislative recognition of their public aspect, or a combination of these factors.⁵⁴ One law review definition from 1905 says that a private corporation is a quasi-public corporation if it meets any of the following criteria: (1) Its property is devoted to public use, (2) Its franchises are of a public nature, (3) It must deal

⁵¹ See Analyst in American National Government, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (July 22, 2011), https://www.everycrsreport.com/files/20110622_RL30533_b8952608c94fe4c60a9b4a9a4d434467c424ddd9.pdf, at 6 (citing Harold Seidman, *Politics, Position and Power: the Dynamics of Federal Organization*, 2nd ed. (New York: Oxford University Press, 1975), ch. 9.)

⁵² *Id.*, at 2.

⁵³ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 577 (1869).

⁵⁴ *Potvin v. Metro. Life Ins. Co.*, 22 Cal. 4th 1060, 1070 (2000).



with all persons without arbitrary discrimination, or (4) Is has the power of eminent domain.⁵⁵

Quasi-public corporations may or may not be state agencies. For certain purposes, public agency is defined to include “every public and quasi-public corporation.”⁵⁶ At the federal level, the Tennessee Valley Authority is often called a quasi-governmental entity even though it is simply an independent federal agency outside the governance of the executive branch but remaining a full government agency.⁵⁷ For other purposes, quasi-public entities are assumed to be distinct from state agencies.⁵⁸ In many cases, whether a quasi-public entity is or is not an agency is unclear. AMTRAK’s enacting legislation says AMTRAK is “not a department, agency or instrumentality of the United States Government,” yet the Supreme Court has held that “AMTRAK act[s] as a governmental entity.”⁵⁹ Similarly, no one quite seems to know whether the Smithsonian Institution is a federal agency.⁶⁰

The purported benefits of choosing the quasi-public corporation structure instead of a public corporation structure are increased operational flexibility and efficiency. These benefits are supposed to flow from the characteristics of private corporations in a quasi-public corporation. The structure is supposed to be less bureaucratic and less political, at the potential risk of less government oversight. Presumably, creative

⁵⁵ Henry H. Ingersoll, *Public Regulation of Quasi-Public Corporations*, 14 Yale Law Journal 5 (1905), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1763&context=yjlj>.

⁵⁶ See Cal. Gov't Code § 3501.


⁵⁷ See Analyst in American National Government, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (July 22, 2011), https://www.everycrsreport.com/files/20110622_RL30533_b8952608c94fe4c60a9b4a9a4d434467c424ddd9.pdf, at 3-4.

⁵⁸ See California Law Revision Commission, *Recommendation: Adjudication by Quasi-Public Entities* (Oct. 1996), <http://www.clrc.ca.gov/pub/Printed-Reports/REC-AdAdjQuasiPublic.pdf>, at 282 (assuming Cal Gov't Code §§ 11400-11470.50 establish a distinction between state agencies and quasi-public entities to which an agency's authority is delegated),

⁵⁹ Robert Barnes, *Supreme Court says Amtrak is more like a public entity than a private firm* (March 9, 2015), https://www.washingtonpost.com/politics/courts_law/2015/03/09/dd125130-c691-11e4-aa1a-86135599fb0f_story.html?utm_term=.9f3273b10917.

https://www.washingtonpost.com/politics/courts_law/2015/03/09/dd125130-c691-11e4-aa1a-86135599fb0f_story.html?utm_term=.1b4f7382b39f

⁶⁰ See Nicole Picard, *A Treasured Institution, a Troubled Identity, and the Threat of Denotation: Whether the Smithsonian Institution is an Executive Agency Under 5 U.S.C. s. 105 and Why It Matters*, 59 Catholic University Law Review 4 (Summer 2010), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3220&context=lawreview>, Analyst in American National Government, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (July 22, 2011), https://www.everycrsreport.com/files/20110622_RL30533_b8952608c94fe4c60a9b4a9a4d434467c424ddd9.pdf (noting that the United States Government Manual, 2009-2010 lists the Smithsonian Institution as a quasi-official agency while defining quasi-official agencies as “not executive agencies under the definition of 5 U.S.C. 105).



lawyering could help maintain significant government oversight over a quasi-public corporation and help mitigate that risk.

One substantial downside of the quasi-public corporation form in California seems to be lack of access to State financing due to lack of exclusive management and control by the State. This makes the quasi-public corporation structure in California different than the quasi-public corporation structure at the federal level, where quasi-public corporations like Fannie Mae, Freddie Mac, Amtrak, and USPS have received federal subsidies for startup and continued financing. Given Democracy Collaborative's interest in the State providing startup financing to the public pharmaceutical manufacturing corporation, the quasi-public corporation form seems like a bad fit.

Another significant potential roadblock is the legality of operating a quasi-public corporation for profit in California. In 1907, the California Supreme Court held that the California Constitution permits the State to engage in business for profit "only by and through its public governmental powers, and by means of agencies which constitute part of the state government" and prohibits the State from "manag[ing] and control[ing] *private* corporations or *quasi public* corporations," even if those corporations are serving the general welfare of the people of California.⁶¹ As noted above, quasi-public corporations may or may not be state agencies. If a quasi-public corporation was found not to be a state agency, it would likely be unable to operate for profit. Moreover, more generally, the State seems unable to manage or control a quasi-public corporation

If the innovation and flexibility purportedly achievable through the quasi-public corporation form are desired, it would likely be best to look to a state other than California to create a public pharmaceutical manufacturing corporation. There may be states where state financing of quasi-public corporations is allowed and where operating quasi-public corporations for profit is more definitively legal.


Part 2: State Ownership and Control

In order to clarify the nature of the relationship between the State and a non-municipal public corporation, this section analyzes two of the most general essential attributes of State sovereignty--(1) State ownership⁶² and (2) State control⁶³--that a public

⁶¹ See *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, 151 Cal. 797, 799–801 (1907) (emphasis added).

⁶² See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013).

⁶³ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013) (noting that being operated by the government is an essential attribute), *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, 151 Cal. 797,



corporation must have according to Part 1(III)(A) above. The legal nature of State control is well defined through established law regarding exclusive management and control of a corporation by the State. The legal nature of State ownership and the manner through which the State would acquire ownership of a public corporation are not well defined, in part because ownership is a somewhat amorphous concept itself. What can be said with sufficient clarity is that State ownership requires certain attributes of ownership, does not require other attributes of ownership, and should not be acquired through the purchase of a public corporation's stock.

I. State Control Means Exclusive Management and Control

Case law interpreting Cal. Const., art. XVI, § 3 establishes the means by which the State can exclusively manage and control a corporation.

Exclusive management and control by the State according to Cal. Const., art. XVI, § 3 is a broad category of State sovereignty that includes or accounts for the following more narrow essential attributes of sovereignty:

- ❖ Being operated by the government;
- ❖ Having governing members elected or appointed in a public manner;
- ❖ Serving a governmental purpose;
- ❖ Being under the control and management of the State; and
- ❖ Being subject to open meeting regulations.


Exclusive management and control of a corporation by the State requires (1) legislative and (2) executive controls over a corporation but allows “for some degree of autonomy . . . or innovation” in a corporation’s manner of operation.⁶⁴ Executive controls include the power of appointment, removal, supervision, and management. Legislative controls includes the power to appropriate funds and to establish spending priorities.⁶⁵ The purpose of these controls is to ensure that the State retains exclusive ability “to define the public purpose for which public funds are expended and to ensure that the funds are used for their intended purposes.”⁶⁶ To ensure funds are used for their intended purposes, there is a third requirement of exclusive management and control: (3) public and financial accountability standards. These three controls allow some degree of

799–801 (1907) (noting that unlike private and quasi-public corporations, public corporations are under the control and management of the State).

⁶⁴ *California Assn. of Retail Tobacconists v. State of California* (“CART”), 109 Cal. App. 4th 792, 816.

⁶⁵ CART, 109 Cal. App. 4th at 816.

⁶⁶ *California Family Bioethics Council, LLC v. California Inst. for Regenerative Med.* (“California Family Bioethics”), 147 Cal. App. 4th 1319, 1354–55 (2007); see CART, 109 Cal. App. 4th at 816 (noting that controls must be sufficient to ensure that state funds are used to further state purposes).



innovation in the means by which the corporation's public purpose is achieved, but no flexibility in defining the purpose.⁶⁷ Whether controls are sufficient to establish exclusive control and management requires case-specific evaluation.⁶⁸

In 2007 in *California Family Bioethics*, a California appellate court ruled that the California Institute for Regenerative Medicine (“CIRM”) is exclusively managed and controlled by the State. The court found that having elected officials from the State legislative and executive branches nominate 24 of the 29 members of the governing entity (the Independent Citizens’ Oversight Committee) created “a significant assurance of state accountability.”⁶⁹ It did not read Article XVI, § 3 to require elected officials to nominate all board members or to hold removal power. It found CIRM’s public and financial accountability mechanisms significant. CIRM complied with open meeting requirements when determining grant recipients, published an annual report, and underwent an annual independent financial audit, among other accountability mechanisms. CIRM’s enacting legislation strictly delineated the acceptable uses of bond proceeds and set strict spending priorities. Together, the executive control over appointment, the public and financial accountability standards, and the legislative controls on spending were held to demonstrate exclusive management and control.⁷⁰

The State maintains similar control over the California State Lottery.⁷¹ Executive controls consist of a governing Commission of five members appointed by the Governor with the advice and consent of the Senate and of the Governor’s ability to remove a commissioner at any time.⁷² Legislative controls consist of spending guidelines specifying that revenues shall be allocated to maximize the lottery profits allocated to public

⁶⁷ *California Family Bioethics*, 147 Cal. App. 4th at 1354–55 (noting “attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others.”)


⁶⁸ *CART*, 109 Cal. App. 4th at 816.

⁶⁹ *California Family Bioethics*, 147 Cal. App. 4th 1319, at 1354-55 (citing *CART*); see *Board of Directors v. Nye* (1908) 8 Cal.App. 527, 532–533) (noting that in *Jarvis*, 40 Cal. App. 4th 1359, 11 of 13 directors were privately chosen with no public accountability).

⁷⁰ See also *CART* (noting that “although county commissions are conferred significant independence and discretion in adopting their strategic plans and programs to promote local decisionmaking, the commissions cannot expend tobacco tax revenue on programs inconsistent with the [statutory] guidelines and the purposes of the Act. This limitation on spending provides the necessary specificity to implement the electorate's policy decision to delegate to the county commissions the responsibility of tailoring their programs to address the needs of their respective counties.”)

⁷¹ Note, however, that there is no case law applying the exclusive management and control analysis to the California State Lottery or the California State Lottery Commission. This paragraph is intended only as an additional example of controls.

⁷² Cal. Gov’t Code § 8880.16.



education,⁷³ financial accountability mechanisms like independent audits of lottery finances,⁷⁴ and public accountability mechanism like quarterly reports to the Governor, Attorney General, Controller, Treasurer, and Legislature.⁷⁵

Given that the analysis of exclusive management and control is a case-by-case analysis, I cannot say that including certain controls will definitively establish exclusive management and control. Nonetheless, including the controls exhibited by CIRM would be wise, since a California appellate court has held CIRM's controls sufficient. Including controls exhibited by the California State Lottery would also be wise. Together, these controls are:

- ❖ Appointment of at least 83% of the governing board by members of the California executive and legislative branches.⁷⁶
- ❖ Strict controls on how public money is spent specifying the appropriate use of public money and establishing spending priorities for the use of that public money⁷⁷
- ❖ Financial accountability mechanisms including:
 - Annual, independent financial audits⁷⁸
- ❖ Public accountability mechanisms including:
 - Complying with open meeting requirements.⁷⁹
 - Annual or quarterly reports issued to the Governor, Attorney General, Controller, Treasurer, and Legislature.⁸⁰

Deviating from this recommendation in order to innovate would subject a non-municipal public pharmaceutical corporation to increased chance of litigation. Slight deviations would slightly increase both the chance of litigation and the likelihood of

⁷³ Cal. Gov't Code § 8880.4 (stating that “[n]ot less than 87 percent of the total annual revenues from the sale of state lottery tickets or shares shall be returned to the public in the form of prizes and net revenues to benefit public education.”)

⁷⁴ Cal. Gov't Code § 8880.46.5.

⁷⁵ Cal. Gov't Code § 8880.22.


⁷⁶ See *California Family Bioethics*, 147 Cal. App. 4th 1319, at 1354-55 (2007) (noting that having 82.75%, or 24 out of 29, of the members of the governing body appointed by executive and legislative officials created “a significant assurance of state accountability.”).

⁷⁷ See *California Family Bioethics*, 147 Cal. App. 4th 1319, at 1354-55 (2007) (this is a feature of CIRM).

⁷⁸ See Cal. Gov't Code § 8880.46.5 (requiring independent audits of California State Lottery finances); *California Family Bioethics*, 147 Cal. App. 4th 1319, 1354-55 (2007) (requiring annual, independent financial audits of CIRM).

⁷⁹ See *California Family Bioethics*, 147 Cal. App. 4th 1319, 1354-55 (2007) (finding that CIRM's compliance with open meeting requirements bolstered public accountability).

⁸⁰ See Cal. Gov't Code § 8880.22 (West) (noting that the California State Lottery must issue quarterly reports to the Governor, Attorney General, Controller, Treasurer, and Legislature), *California Family Bioethics*, 147 Cal. App. 4th 1319, 1354-55 (2007) (noting that CIRM must issue annual reports).



litigation being successful. Significant deviations would significantly increase both the chance of litigation and the likelihood of litigation being successful.

II. State Ownership

Part 1(III)(A) above notes that the State must own a public corporation, but there is no statute clearly spelling out the attributes of State ownership. In the absence of such a statute, the nature of State ownership, the attributes of State ownership, and the method through which State ownership is acquired must be deduced from the general principles of ownership in California law and from case law regarding State ownership. This analysis shows that State ownership seems to require certain attributes of ownership but not other attributes of ownership. The required attributes derive from the two essential attributes of State sovereignty: having property held in trust for the public and being dissolvable only by act of the Legislature or the people. The analysis also shows that State ownership of a non-municipal public corporation should not be acquired through acquisition of the corporation's stock. In fact, State ownership does not seem to require anything more than creation by the State. State ownership is mostly synonymous with State control.


A. State Ownership Entails Having an Unspecified Number of Rights

Ownership is “not a single concrete entity,” but rather a “‘bundle of rights’ that may be exercised with respect to [the owned object]—principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift.” The nature of the owned object may broaden or limit the specific ownership rights exercisable toward that object. In other words, the same bundle of rights does not attach to every owned object.⁸¹ In this case, the owned object is a public corporation. It is not clear how many rights typically associated with ownership can be removed before ownership is destroyed. It seems that many can be removed. As Justice Mosk of the California Supreme Court said in a dissenting opinion from 1990, “the pruning away of some or a great many of [the complex bundle of rights, duties, powers and immunities] does not entirely destroy the title” of ownership.”⁸²

State ownership seems to require at least a few of the typical attributes of ownership. It seems to require that the State have the exclusive right to dispose of the non-municipal public corporation's property as it pleases. This is because one of the

⁸¹ See *Estate of Sigourney*, 93 Cal. App. 4th 593, 603–04 (2001).

⁸² *Moore v. Regents of University of California*, 51 Cal.3d 120, 165–166 (1990) (dis. opn. of Mosk, J.).



essential attributes of State sovereignty is having property held in trust for the public and subject to State control.⁸³ It also seems to require that the State have the exclusive right to dispose of the non-municipal public corporation itself, whether through dissolution or privatization. This is because one of the essential attributes of sovereignty is being dissolvable only by act of the Legislature or act of the people.⁸⁴

State ownership does not seem to require State liability for debts of a non-municipal public corporation. In 1976 in *California Housing Finance Agency v. Elliott*, the California Supreme Court treated the California Housing Finance Agency as an entity exclusively managed and controlled by the State and held that the State had no legal obligation to pay the Agency's bond debt in the case of a default. This is because no section of the statute creating the California Housing Finance Agency "creates any enforceable obligations against the state general fund."⁸⁵ State liability for the debts of a non-municipal public corporation may actually be unconstitutional. Cal. Const., art. XVI, § 6 prohibits the giving or lending of public funds to any corporation in order to pay that corporation's liabilities. However, State funds given to a corporation exclusively managed and controlled by the State may not constitute a gift.

State ownership does not seem to require the right to a non-municipal public corporation's profit or net revenue. Unless specified, all money collected by State agencies is State money.⁸⁶ However, it can be specified that certain money collected by State agencies is not State money. It has been specified that money collected by the Regents of the University of California is not public money.⁸⁷ The Regents of the University of California is the public corporation that administers the University of


⁸³ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including having property held in trust for the public and being subject to State control), *Keller v. State Bar*, 47 Cal. 3d 1152, 1163 (1989), *rev'd on different grounds sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the State Bar of California's property being held for essential public and governmental purposes and exempt from taxation, per Cal. Bus. & Prof. Code, § 6008, contributed to its governmental nature).

⁸⁴ See *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including being dissolvable only by act of the Legislature or act of the people).

⁸⁵ *California Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 587-88 (1976). See also Cal. Gov't Code Section 8880.61(b) (noting that no money in the State General Fund or any other State fund shall be transferred to the State Lottery Fund or used to pay any debt or obligation of the California State Lottery or California State Lottery Commission).

⁸⁶ See Cal. Gov't Code Section 16305.2, Cal. Gov't Code § 8880.65 (noting that "[t]he net revenues of the Lottery shall be transferred from the State Lottery Fund not less than quarterly to the California State Lottery Education Fund), Cal. Welf. & Inst. Code § 4112 (noting that "[a]ll money belonging to the state and received by state hospitals from any source, except appropriations, shall, at the end of each month, be deposited in the State Treasury, to the credit of the General Fund.").

⁸⁷ See Cal. Gov't Code Section 16305.8



California, a public trust.⁸⁸ This suggests the right to a public corporation's profits is not an essential attribute of State ownership. However, it may be more politically and/or legally difficult to shield the profits of a public corporation from the State than to shield a public trusts profits from the State.

B. State Ownership Should Not Be Acquired Through Stock Purchase

The State can acquire ownership without purchasing a non-municipal public corporation's stock and it should acquire ownership without purchasing stock.

Acquisition of ownership through stock purchase carries too high of a legal risk. As will be discussed in Part 3(II), the power of the State to purchase stock in a non-municipal public corporation, even one it exclusively manages and controls, is legally dubious. Moreover, I have been unable to discover any public corporation in which the State owns stock. This means the issue has never been litigated, and means that there would be ample ground for bringing litigation against State purchase of stock in a non-municipal public corporation. This could significantly delay the start of a non-municipal public pharmaceutical manufacturing corporation.

Because of this risk and because the acquisition of ownership does not require the purchase of stock, State ownership should be acquired through the act of creating the public corporation. In 2014, the Ninth Circuit Court of Appeals noted that the San Diego Convention Center Corporation, a nonprofit public benefit corporation, was "wholly owned by the city of San Diego."⁸⁹ Nonprofit public benefit corporations do not have stock, so the city of San Diego did not acquire whole ownership through the purchase of stock. Instead, it acquired a number of the rights associated with ownership by baking them into the San Diego Convention Center Corporation's bylaws.⁹⁰ This should be the route through which State ownership of a public corporation is acquired.

⁸⁸ See Tax Status of the Regents of the University of California, <https://www.ucop.edu/research-policy-analysis-coordination/resources-tools/about-uc/tax-status-of-the-regents-of-the-university-of-california.html> (noting that while the University of California is often called a public corporation for ease of reference, it is formally organized as a public trust), University Governance and Administration, <https://www.ucop.edu/academic-personnel-programs/programs-and-initiatives/faculty-resources-advancement/faculty-handbook-sections/university-governance-and-administration.html> (noting that the Regents is the public corporations that administers the public trust of the University of California), Cal. Const., art. IX, sec. 9 (noting that "[t]he University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California.'").

⁸⁹ See *United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1005 (9th Cir. 2014).

⁹⁰ See Third Amended and Restated Management Agreement Between the City of San Diego and San Diego Convention Center Corporation, Inc., <https://visitsandiego.com/sites/default/files/SDCCC-Management-Agreement-City.pdf>.



Part 3: Initial Financing


A significant portion of the law relating to financing public corporations comes from the California Constitution, is old and vague, and has rarely been interpreted. This makes the legality of State equity and debt financing for public corporations unclear in several respects. The best course of action for State equity financing of a non-municipal public corporation is to appropriate money for the corporation in exchange for profits. This functionally mirrors stock purchase. Private equity financing for a non-municipal corporation also seems viable so long as private investors are not given voting rights or are given highly restricted voting rights in the corporation. State debt financing of a non-municipal public corporation could take the form of loans of credit, revenue bonds, general obligation bonds, or loans. While state loans are most likely legal, the law relating to State loans to public corporations is significantly unclear and confused.

I. Equity Financing

One typical form of initial financing for corporations is equity financing via selling stock to shareholders. In return for their investment, shareholders share in the profits and losses of the corporation. The California Constitution may or may not allow the State to be a shareholder in a public corporation. Because of this legal uncertainty and because the State can acquire the right to a public corporation's profits without stock purchase, a public corporation should not solicit equity investment from the State by asking the State to purchase stock. However, the State can appropriate money for the public corporation and receive its profits in return, which is functionally the same. Also, it may be viable for the public corporation to issue non-voting stock or limited-voting stock to private shareholders in return for equity investments.

A. State Equity Financing Should Not Take the Form of Stock Purchase

While equity financing typically takes the form of stock ownership, State purchase of stock should be avoided. This is because strong arguments can be made both for and against the State's power to purchase stock in a non-municipal public corporation. The relationship between the sections of the California Constitution governing State purchase of corporate stock is unclear. To my knowledge, the State's power to do so has never been challenged nor affirmed. Because State equity financing can functionally be achieved via State appropriations for the public corporation, the public corporation should not risk litigation by soliciting stock purchase by the State.



On its face, the Cal. Const., art. XVI, § 6 seems to unequivocally prohibit the State from purchasing a public corporation’s stock. It prohibits the State Legislature from authorizing the State or any political subdivision of the State to use public funds to purchase stock in “any corporation whatever.”⁹¹


Some of Cal. Const., art. XVI, § 6’s restrictions are lifted by art. XVI, § 3, but the restriction on State purchase of stock may not be lifted. The exceptions of § 3 allow public money to “be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation . . . under the exclusive management and control of the State as a state institution.” A provision in art. XVI, § 6 states that “nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.” There is a strong argument that art. XVI, § 6 intends for all of its restrictions to be lifted in the circumstances specified in art. XVI, § 3. Article XVI, § 6 says “nothing *in this section*” shall preclude use of State funds per art. XVI, § 3. This seems to refer to everything in section 6. However, there is also a strong argument that the restriction on stock purchase is not lifted by art. XVI, § 3. Article XVI, § 6 says nothing in the section shall preclude use of State funds per art. XVI, § 3, but it says this before the prohibition on State purchase of stock is listed. This suggests the lifting of prohibitions applies to what comes before the disclaimer and not to what comes after it. Rules of statutory construction do not clearly preference one of these interpretations over the other and, to my knowledge, no court has discussed whether art. XVI, § 6’s deference to art. XVI, § 3 would allow the State to own stock in a corporation exclusively managed and controlled by the State.⁹² As of 2002, in general, “[f]ew courts [had] interpreted article XVI, section 6.”⁹³

Given this uncertainty and given that the State can achieve the effects of stock purchase without purchasing stock, there is no reason to make State equity financing of a public pharmaceutical manufacturing corporation depend on stock purchase.

⁹¹ Cal. Const., art. XVI, § 6. *See also* Cal. Const., art. XVI, § 17 (echoing Cal. Const., art. XVI, § 6 by saying the “state shall not . . . subscribe to, or be interested in the stock of any company, association, or corporation.”)

⁹² *People ex rel. Post v. San Joaquin Valley Agric. Ass’n*, 151 Cal. 797, 799–801 (1907) contains the most extensive discussion of the relationship between art. XVI, § 3 and § 6. It suggests art. XVI, § 6 does not apply to State financing of public corporations. However, it does not directly address whether art. XVI, § 3 lifts art. XVI, § 6’s prohibition on State purchase of stock, so it does not resolve the issue of interpretation. It also does not address conflict with Cal. Const., art. XVI, § 17, which says that “The State shall not in any manner . . . subscribe to, or be interested in the stock of any company, association, or corporation.” *See Santa Clarita Org. for Planning & Env’t v. Castaic Lake Water Agency*, 1 Cal. App. 5th 1084, 1113 (Ct. App. 2016), *as modified on denial of reh’g* (Aug. 16, 2016) (noting that Section 17 traces its lineage back to the 1880 version of our Constitution.).

⁹³ *Martin v. Santa Clara Unified Sch. Dist.*, 102 Cal. App. 4th 241, 253 (2002).



Instead of providing equity financing by purchasing stock, the State could provide the functional equivalent of equity financing by appropriating money for the non-municipal public corporation and receiving a specified portion of its profits. All profit of a public corporation is, by default, State money.⁹⁴ So, functional equity financing just requires that the State have the power to appropriate public money for use by a public corporation it exclusively manages and controls.

The State can appropriate public money for public corporations it exclusively manages and controls. While Cal. Const., art. XVI, § 3 is framed in the negative, the California Supreme Court has interpreted it positively to authorize public funds to be “appropriated or drawn from the State Treasury for the purpose or benefit of any corporation . . . under the exclusive management and control of the State as a state institution.”⁹⁵ Appropriations do not have to be made in exchange for a public corporation’s profits. Cal. Const., art. XVI, § 6 prohibits (1) the giving or lending of public funds to any corporation in order to pay that corporation’s liabilities and (2) the giving of public funds to corporations generally. Courts agree that the prohibition on the *giving* of public funds to corporations does not apply when funds are allocated in exchange for consideration because consideration creates a contractual relationship and annuls the gift relationship. A gift of public funds exists only where “payment of public funds [is] without an *adequate* consideration.”⁹⁶ Consideration is “simply the conferring of a benefit upon the giving party and the suffering of detriment by the receiving party.”⁹⁷ As noted in Part 1(III)(A), a public corporation must serve a governmental purpose.⁹⁸ Therefore, appropriations to public corporations cannot be gifts barred by Cal. Const, art. XVI, § 6.

B. Private Equity Financing Via Sale of Non-Voting Shares on the Private Market May Be Viable


⁹⁴ See Cal. Gov’t Code Section 16305.2, Cal. Gov’t Code § 8880.65 (noting that “[t]he net revenues of the Lottery shall be transferred from the State Lottery Fund not less than quarterly to the California State Lottery Education Fund), Cal. Welf. & Inst. Code § 4112 (noting that “[a]ll money belonging to the state and received by state hospitals from any source, except appropriations, shall, at the end of each month, be deposited in the State Treasury, to the credit of the General Fund.”).

⁹⁵ *People ex rel. Post v. San Joaquin Valley Agric. Ass’n*, 151 Cal. 797, 799–801 (1907); see *County of Sacramento v. Chambers*, 33 Cal.App. 142, 146 (1917) (noting that Cal. Const., art. XVI, § 3 was designed to prevent the appropriation of State money for non-state purposes), *People v. Honig* 48 Cal.App.4th 289, 352 (1996) (noting that Cal. Const., art. XVI, § 3 was not designed to unduly restrict the State’s ability to appropriate funds for legitimate State purposes.).

⁹⁶ *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 59, 111 Cal. Rptr. 433, 441 (Ct. App. 1973) (citing 25 Ops.Atty.Gen. 91, 93) (emphasis added).

⁹⁷ *Id.* (citing 1 Witkin, Summary of California Law, Contracts, s 66, p. 70.).

⁹⁸ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013), *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that non-municipal public corporation must serve the public welfare).



Private equity financing of a non-municipal public pharmaceutical manufacturing corporation may be more viable politically than State equity financing. Democracy Collaborative has expressed some hesitation about State appropriations as a means of financing a non-municipal public pharmaceutical manufacturing corporation because such appropriations may be politically divisive. Since there are ways to structure private equity financing of a non-municipal public pharmaceutical manufacturing corporation that do not require appropriations of State money, private equity financing may solve this concern about political viability. Private equity financing would be very similar to bond financing.

Private equity financing must be shaped so as not to interfere with the State's exclusive management and control over a non-municipal public corporation. The issuance of full voting stock would interfere with the State's exclusive management and control. It would remove the State's control over the recommended 83% of a non-municipal public corporation's governing entity's members.⁹⁹ However, this problem could be solved by issuing non-voting stock or by issuing limited voting stock entitling holders to vote on a percentage of directors not to exceed 17% of the total directors.

Private equity financing must also be shaped so as not to interfere with the State's ownership of a non-municipal public corporation. All profit of a public corporation is, by default, State money.¹⁰⁰ The State's ownership of a public corporation's profit could be removed without destroying State ownership. Therefore, private equity investors could receive some of the public corporation's profits. The amount they are entitled to receive would have to be specified by the State.

II. Debt Financing

State debt financing of a non-municipal financing might take the form of loans, loans of credit, revenue bonds, and general obligation bonds. Loans of credit to a non-municipal public corporation are legal, and loans are probably legal. Revenue bonds issued by a non-municipal public corporation are legal, and State general obligation bonds issued for use by a non-municipal public corporation also seem legal. Revenue bonds seem preferable to general obligation bonds because they are more viable politically.

⁹⁹ See *California Family Bioethics*, 147 Cal. App. 4th 1319, at 1354-55 (2007) (noting that having 82.75%, or 24 out of 29, of the members of the governing body appointed by executive and legislative officials created "a significant assurance of state accountability.").

¹⁰⁰ See Cal. Gov't Code Section 16305.2, Cal. Gov't Code § 8880.65 (noting that "[t]he net revenues of the Lottery shall be transferred from the State Lottery Fund not less than quarterly to the California State Lottery Education Fund), Cal. Welf. & Inst. Code § 4112 (noting that "[a]ll money belonging to the state and received by state hospitals from any source, except appropriations, shall, at the end of each month, be deposited in the State Treasury, to the credit of the General Fund.").



A. Loans

A court would likely hold that the State can loan public money to a public corporation, but there is a substantial minority chance a court would hold otherwise.


Courts routinely blur together two distinct parts of Cal. Const., art. XVI, § 6, and this leads them to incorrectly hold that § 6 prohibits State loans to corporations. Cal. Const., art. XVI, § 6 prohibits (1) the giving or lending of public funds to any corporation in order to pay that corporation's liabilities and (2) the giving of public funds to corporations generally.¹⁰¹ Despite the second prohibition on using public funds to benefit corporations applying to gifts and not to loans, courts routinely speak of Cal. Const., art. XVI, § 6 as the constitutional prohibition on gifts *and* loans.¹⁰² This is correct shorthand, given that art. XVI, § 6 begins with “[t]he Legislature shall have no power to give or to lend . . .” However, it is incorrect textual interpretation and incorrect law. The first line of Cal. Const., art. XVI, § 6 applies to gifts or loans to pay corporate liabilities. There is a semicolon after the first line. The next line states: “nor shall [the Legislature] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any . . . corporation . . .”

There are two grounds for rejecting this analysis, but they do not completely resolve the issue of whether loans are allowed in addition to loans of credit.

First, when the California Supreme Court incorrectly speaks of art. XVI, § 6 as a prohibition on gifts and loans to corporations, it applies the public purpose exception to both gifts and loans of credit. In *California Housing Finance Agency v. Elliott*, the California Supreme Court calls art. XVI, § 6 the “constitutional prohibition against the lending of public credit and the gift of public funds.” It holds that “under the public purpose

¹⁰¹ Cal. Const., art. XVI, § 6.

¹⁰² See *California Hous. Fin. Agency*, 17 Cal. 3d 575, 582 (1976) (calling Article XVI, Section 6 “the constitutional prohibition against the lending of public credit *and* the gift of public funds” and stating that “under the public purpose exception, public credit may be extended and public funds disbursed if a direct and substantial purpose is served and nonstate entities are benefitted only as incident to public purpose), *City of Los Angeles v. Post War Public Works Rev. Bd.* 26 Cal.2d 101 (1945) (calling Article XVI, Section 6 the “Constitution section prohibiting Legislature from giving or lending credit of state to municipal corporation”), *Board of Sup'rs of City and County of San Francisco v. Dolan*, 45 Cal.App.3d 237 (App. 1 Dist. 1975) (calling Article XVI, Section 6 the “prohibition . . . against giving or lending of public moneys”), *American Co. v. City of Lakeport*, 220 Cal. 548 (1934) (calling Article XVI, Section 6 the “constitutional prohibition against gift or loan.”), and *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 59 (Ct. App. 1973) (stating that appellants argued that a certain use of funds “constitute[d] a gift of public funds and/or the giving or lending of the credit . . . of the state in aid of and to a private corporation).



exception, public credit may be extended and public funds disbursed if a direct and substantial purpose is served and nonstate entities are benefitted only as incident to public purpose.”¹⁰³ The California Supreme Court accepts the plaintiffs inaccurate characterization of art. XVI, § 6 as a prohibition on the lending of public credit and the giving of public funds. It does not specifically address loans, as distinct from loans of credit. As noted in Part 1(II)(A), a non-municipal public corporation must serve the general welfare and only incidentally benefit private parties. So, any loan of credit to a legitimately formed non-municipal public corporation would fit within the public purpose exception.

Second, the California Supreme Court sometimes correctly speaks of art. XVI, § 6 as a prohibition on gifts and not on loans. In *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, the California Supreme Court correctly distinguishes between the prohibition on gifts and loans to pay corporate liabilities and the flat prohibition on gifts to corporations. This holding allows the State to lend its credit to public corporations as long as the credit is not loaned to pay corporate liabilities.¹⁰⁴


These grounds for viewing loans of State money to corporations exclusively managed and controlled by the State as constitutional do not make clear that loans, in addition to loans of credit, are constitutional, but courts seem to treat loans and loans of credit indistinguishably. Loans of credit are loans of a set amount of money for a set amount of time. If the borrower repays a certain amount of the loaned credit, that repaid amount becomes available again as credit to the borrower for the apportioned time period. Loans are a set amount of money given for a set amount of time. If the borrower repays a certain amount of the loan, that repaid amount does not become available to the borrower again. The California Supreme Court has treated loans of credit and loans under the umbrella of “credit.” It has noted that credit is simply “the transfer of property in exchange for a . . . promise of payment at a future time.” It has made clear that all loans are loans of credit, stating that “the debt due in consequence of a contract, is also called a credit.”¹⁰⁵ Similarly, both loans and loans of credit fall within the umbrella of appropriations. An appropriation is “[a]n authorization from a specific fund to a specific agency or program to make expenditures / incur obligations for a specified purpose and period of time.”¹⁰⁶ Cal. Const., art. XVI, § 3 allows money to “be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation . . . under the exclusive management and control of the State as a state institution.” Since both loans and

¹⁰³ See *California Hous. Fin. Agency*, 17 Cal. 3d 575, 582 (1976).

¹⁰⁴ *People ex rel. Post v. San Joaquin Valley Agric. Ass'n*, 151 Cal. 797, 799-801 (1907).

¹⁰⁵ *People ex rel. McCullough v. Pacheco*, 27 Cal. 175, 196 (1865).

¹⁰⁶ *Glossary of Budget Terms*, http://www.dof.ca.gov/budget/resources_for_departments/budget_analyst_guide/glossary.pdf.



loans of credit fit within the umbrellas of appropriation and of credit, they should be allowed.

B. Loans of Credit

Cal. Const., art. XVI, § 17 says the “State shall not in any manner loan its credit,” but, as discussed immediately above, the California Supreme Court in *California Housing Finance Agency v. Elliott* has held that “under the public purpose exception, public credit may be extended and public funds disbursed if a direct and substantial purpose is served and nonstate entities are benefitted only as incident to public purpose.”¹⁰⁷ Moreover, Cal. Const., art. XVI, § 3 provides an exception for loan of credit appropriations to corporations exclusively managed and controlled by the State. The California State Lottery received a 12 month term, multi-million dollar line of credit as startup financing.¹⁰⁸ Based on this information, loans of credit to a non-municipal public corporation are allowed.

C. Revenue Bonds

State agencies, including non-municipal public corporations, can issue revenue bonds. The Board of Regents of the University of California, a public corporation, issues revenue bonds for projects like constructing new dorm buildings and repays the bonds from revenue generated by student room and board payments. It has over \$10 billion in outstanding general revenue bonds.¹⁰⁹

Revenue bonds are backed by the issuing agency or public corporation, not by the full faith and credit of the State.¹¹⁰

Revenue bonds, unlike general obligation bonds, do not often require a vote of two thirds of the Legislature and a majority of the people of California. Cal. Const., art. XVI, § 1 requires that any law which will create a debt of the Legislature exceeding \$300,000 must be passed by a two-thirds vote of each house of the Legislature and a majority of the people voting in a general or primary election.


Since revenue bonds are not backed by the full faith and credit of the State, they do not create any debt of the Legislature. In *California Hous. Fin. Agency v. Elliott*, the California

¹⁰⁷ See *California Hous. Fin. Agency*, 17 Cal. 3d 575, 582 (1976).

¹⁰⁸ See Cal. Gov't Code § 8880.3 (West).

¹⁰⁹ See John Chiang, California State Treasurer, *California Bonds: 101 - A Citizen's Guide to State Revenue Bonds (2017 Edition)*, https://www.treasurer.ca.gov/publications/bonds101_revenue.pdf, at 4, 7.

¹¹⁰ John Chiang, California State Treasurer, *California Bonds: 101 - A Citizen's Guide to State Revenue Bonds (2017 Edition)*, https://www.treasurer.ca.gov/publications/bonds101_revenue.pdf, at 2.



Supreme Court held that the revenue bond debt of the California Housing Finance Agency was not the bond debt of the State because it was to be repaid from housing project revenues rather than the State's funds. Therefore, it held that revenue bonds over \$300,000 do not require special authorization per Cal. Const., art. XVI, § 1. Note that the California Supreme Court did hold that, technically, the State was still liable for the California Housing Finance Agency's revenue bond debt if it defaulted because the Legislature had set aside a reserve security fund for this purpose.¹¹¹

D. General Obligation Bonds

Because it is highly difficult to get approval to issue general obligation bonds and because the public pharmaceutical manufacturing corporation would presumably make revenue that allows it to issue revenue bonds, revenue bond financing seems preferable to general obligation bond financing. Nonetheless, general obligation bond financing for a non-municipal public corporation seems legally viable and remains an option.


Cal. Const., art. XVI, § 6 prohibits the State from giving or lending public funds to any corporation to pay that corporation's liabilities. Whether this prevents a non-municipal public corporation from issuing general obligation bonds seems to depend on whether the bonds are a liability of the non-municipal public corporation or simply a liability of the State.

General obligation bonds most likely create a debt of the State rather than a debt of a non-municipal public corporation on whose behalf the bonds are issued. Cal. Const., art. XVI, § 1 applies to any law which will create a debt of the Legislature exceeding \$300,000. In *California Hous. Fin. Agency v. Elliott*, the California Supreme Court held that the revenue bond debt of the California Housing Finance Agency was not the bond debt of the State. It held that Cal. Const., art. XVI, § 1 applies only to "legally enforceable obligations against the state's general funds or taxing power."¹¹² The full faith and credit of the State back general obligation bonds. The full faith and credit of the State entails commitment of the general fund to pay bond debt and commitment to use taxing power to ensure funds in the general fund are adequate to pay bond debt.¹¹³ Therefore, general obligation bonds do not create a liability of the non-municipal public corporation that

¹¹¹ *California Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 587 (1976) (citing *City of Oxnard v. Dale*, 45 Cal.2d 729, 733 (1955)).

¹¹² *California Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 587 (1976) (citing *California Educational Facilities Authority v. Priest*, 12 Cal.3d 593 (1974)).

¹¹³ See Cal. Gov't Code § 16724(c) (noting that each bond act issuing a general obligation bond must state "that the bonds are valid obligations of the state and a pledge of the full faith and credit of the state for the punctual payment of both principal and interest thereof.")



would bring it within the scope of Cal. Const., art. XVI, § 6. That means the State is most likely able to issue general obligation bonds on behalf of a non-municipal public corporation.

This position is supported by the use of general obligations bonds to finance the California Institute for Regenerative Medicine. The California Institute for Regenerative Medicine seems to be a non-municipal public corporation since it has been held to be a corporation exclusively managed and controlled by the State. The act authorizing the issuance of a general obligation bond must create a committee charged with issuing the bond.¹¹⁴ For the California Institute for Regenerative Medicine, this is the California Stem Cell Research and Cures Finance Committee, chaired by the State Treasurer and populated by the State Controller, State Director of Finance, and three members of the Independent Citizens' Oversight Commission.¹¹⁵ This Committee was initially given the discretion to issue \$350 million dollars of general obligation bonds per year for ten years, for a total of over \$3 billion dollars of general obligation bonds.¹¹⁶

The method by which the California Institute for Regenerative Medicine overcame the high hurdle to be able to issue large general obligation bonds is instructive, and it would be wise to follow this method if general obligation bond financing is desired for a public pharmaceutical manufacturing corporation. General obligation bonds require approval of a majority of the voters in a given election in California.¹¹⁷ Moreover, Cal. Const., art. XVI, § 1 requires that any law which will create a debt of the Legislature exceeding \$300,000 must be passed by a two-thirds vote of each house of the Legislature and a majority of the people voting in a general or primary election. This is a high procedural hurdle. However, as noted in Part 4 below, a ballot initiative passes with a vote of the majority of people voting in a given election. The ballot proposal creating the California Institute for Regenerative Medicine including a proposal to authorize general obligation bonds for 10 years. Thus, passage of the ballot proposal both created the California Institute for Regenerative Medicine and got it one half of the way toward accessing general obligation bonds. The only other hurdle was receiving a two-thirds vote of approval from each house of the California Legislature.


Part 4: Procedure for Forming a Non-Municipal Public Corporation

¹¹⁴ See Cal. Gov't Code § 16722(d).

¹¹⁵ See Cal. Health & Safety Code § 125291.40(a), 125291.35.

¹¹⁶ See Cal. Health & Safety Code § 125291.45(b).

¹¹⁷ See John Chiang, State Treasurer, *California Bonds: 101 - A Citizen's Guide to General Obligation Bonds (2016 Edition)*, <https://www.treasurer.ca.gov/publications/bonds101.pdf>.



A public corporation must be created by the Legislature or the people and must be dissolvable only by the Legislature or the people.¹¹⁸

Both the Legislature and the people have the power to create a public corporation. The Legislature and the people can enact any legislation not prohibited by the California Constitution.¹¹⁹ Nothing in the California Constitution prohibits the Legislature or the people from creating a public corporation. The authority of the Legislature and the people to create non-municipal corporations was affirmed by the California Supreme Court in *State Bar of California v. Superior Court*. There, it held that the Legislature could pass statutes creating non-municipal public corporations, or corporations “for purposes other than the government of a portion of the state.”¹²⁰

A corporation does not have to be designated as a public corporation in its enacting legislation to be treated as one. If it has the attributes of a public corporation, it will most likely be treated as a public corporation.¹²¹

Creation by an act of the State Legislature may be best when the public purpose of the prospective public corporation is uncontroversial. The California State Hospitals were created this way.

Creation by ballot initiative may be best when the goal is to create a non-municipal public corporation in the California Constitution, when the public purpose of the non-municipal public corporation might be challenged, or when the corporation wants to access general obligation bonds. The California Institute for Regenerative Medicine and the California State Lottery were formed this way.


If a non-municipal public corporation is to be created within the California Constitution, it must be created via a constitutional amendment. A constitutional

¹¹⁸ See *Hagman v. Meher Mount Corp.*, 215 Cal. App. 4th 82, 87–88 (2013) (noting it must be created by the Legislature or people); *In re Madera Irrigation Dist.*, 92 Cal. 296, 321-3 (1892) (holding that a corporation is a non-municipal public corporation when it possesses certain attributes, including being dissolvable only by act of the Legislature or act of the people).

¹¹⁹ Gelfand, *State and Local Government Debt Financing* § 1:2 (State Borrowing) (2d ed.) (West). (citing *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund*, 986 So. 2d 1, 19, (La. 2007), on reh'g, (Jan. 7, 2008).

¹²⁰ *State Bar of California v. Superior Court*, 207 Cal. 323 (1929) (noting that the Legislature has the authority to create public corporations for purposes other than the government of a portion of the State). This old California Supreme Court case was cited approvingly by the California Supreme Court in 1990 in *Keller v. State Bar*, 47 Cal. 3d 1152 (1989), *rev'd sub nom. Keller v. State Bar of California*, 496 U.S. 1 (1990).

¹²¹ See *Dean v. Davis*, 51 Cal. 406, 409–11 (1876) (noting that “[t]hese are the principal attributes of a corporation, and though the statute does not in terms declare it to be a corporation, it will be sufficient if the intent clearly appears.”).



amendment can be drafted by the Legislature and proposed to the people or proposed by the people. In either case, a vote of 50% of the people voting in a given election passes the constitutional amendment.¹²² The California Institute of Regenerative Medicine¹²³ and the California State Bar¹²⁴ are non-municipal public corporations created in the California Constitution via ballot proposals voted upon by the people. Creating a public corporation in the Constitution makes it dissolvable only by ballot initiative or constitutional amendment, and therefore makes the corporation more durable and less subject to changes in the political winds.

Creating a non-municipal public corporation via ballot proposal is beneficial because although the Legislature's determination of public purpose is given great deference, the people's determination of public purpose via ballot proposal heightens deference.¹²⁵ In other words, the ballot proposal process can be used to launder a public corporation. The California State Lottery was created in this manner.¹²⁶ Since a public pharmaceutical manufacturing corporation would most certainly serve the general welfare of the people of California, as noted in Part 1(II)(B), it should not be necessary to launder the purpose of the corporation through the ballot proposal process.

Part 5: Legal and Regulatory Red Flags

Forming a public pharmaceutical manufacturing corporation in California should not require substantial changes in the legal and regulatory landscape. There are not, to my knowledge, any legal and regulatory red flags standing in the way of forming it. Although there are no legal and regulatory red flags, there is one legal and regulatory concern to be aware of when creating a public pharmaceutical manufacturing corporation.

I. Competitive Bidding Requirements


¹²² See Cal. Const., art. XVIII (noting that revisions and amendments to the Constitution can be made by constitutional amendment or by ballot initiative).

¹²³ Proposition 71, known as the California Stem Cell Research and Cures Act, established the California Institute of Regenerative Medicine within the California Constitution. See Cal. Const., art. XXXV.

¹²⁴ See Cal. Const., art. VI, sec. 9 (added Nov. 8, 1966, by Prop. 1-a. Res.Ch. 139, 1966 1st Ex. Sess.) (stating "the State Bar of California is a public corporation.").

¹²⁵ See *Scott v. State Board of Equalization*, 50 Cal App 4th 1597 (1996).

¹²⁶ See *California State Lottery Act, Proposition 37 (1984)*, www.ballotpedia.org, [https://ballotpedia.org/California_State_Lottery_Act,_Proposition_37_\(1984\)](https://ballotpedia.org/California_State_Lottery_Act,_Proposition_37_(1984)). (noting that Proposition 37 amended the California Constitution to authorize the establishment of a statewide lottery in California and enacted a statute, in the Cal. Gov't Code and not the Cal. Const., establishing a California State Lottery Commission to oversee the California State Lottery).



The California Public Contract Code mandates competitive bidding by the State and by public entities in the State, subject to a few exceptions. This means that the lowest bid will generally win a public contract. This may be problematic for the public pharmaceutical manufacturing corporation if it wants to gain initial market share by selling to State hospitals and public schools but is unable to outbid other sellers. However, express exceptions to competitive bidding requirements exist, and an express exception to the competitive bidding process for State hospitals and public schools purchasing items from the State pharmaceutical manufacturing corporation could be written.¹²⁷

II. Considered But Dismissed Obstacles

Other red flags were considered but dismissed as not relevant.


One dismissed red flag was interaction of the public pharmaceutical manufacturing corporation and the Food and Drug Administration. In the public banking context in California, the principal legal and regulatory red flag came from the inability of a public bank serving cannabis businesses to acquire an FDIC account. That red flag is not relevant in this context. If the public pharmaceutical manufacturing corporation were to begin manufacturing pharmaceuticals that the FDA was unable to approve because they involved cannabis or some other substance legal in California but not legal at the federal level, issues may arise. Other than that scenario, oversight of a public pharmaceutical manufacturing corporation by the FDA does not raise any red flags, to my knowledge.

One dismissed red flag was the need to exempt health data related to the public pharmaceutical manufacturer's customers (should it engage in direct sales) from the public records act. This red flag was dismissed because health data exemptions to the public records act in California already exist. It may be necessary to create a specific exemption for health data held by the public pharmaceutical manufacturing corporation in its enacting legislation, but that is not a high hurdle.

One dismissed red flag was the national prudent investor standard, which California has adopted.¹²⁸ The standard requires that State fiduciaries must manage the State's financial resources so as to take into account the need to preserve capital, ensure adequate liquidity, and obtain a sufficient rate of return. This was dismissed as not relevant because it applies to investment by the State and does not seem to apply to any

¹²⁷ Jennifer Dauer and Clare Gibson, *Public Works Contracts in a Tough Economy: Tips and Techniques for City Attorneys* (July 12, 2011), <https://www.cacities.org/getattachment/ce501b8d-ff7e-4fcf-a093-96accb7b0857/LOCC-Webinar-Public-Bidding-Process-Paper.aspx>.

¹²⁸ See Cal. Gov't Code Section 53600.3 et seq.



financing the State would provide to a public pharmaceutical manufacturing corporation. That said, the loan of credit the State issued to the California State Lottery had a large interest rate attached to it, so there may be a need to fight to ensure the requisite rate of return on financing a public pharmaceutical corporation does not hamstring its ability to operate differently than a private pharmaceutical manufacturing corporation.

Part 6: The Usefulness of Public Utility Classification

While the Legislature and the people of California have the power to classify public pharmaceutical manufacturing corporations as public utilities, this seems to serve little purpose.

I. The State Legislature Could Classify Public Pharmaceutical Manufacturing Corporations as Public Utilities


Pharmaceutical manufacturers are not currently classified as public utilities in California. Cal. Public Utilities Code, § 216(a) defines public utility to include “every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.” No additional classes of corporations beyond energy, communications, rail, passenger, and water corporations are named.¹²⁹

The State Legislature has explicit power to classify new types of *private* corporations as public utilities. Cal. Const., art. XII, § 3 notes that the California Public Utilities Commission has jurisdiction over certain private corporations and that “[t]he Legislature may prescribe that additional classes of private corporations or other persons are public utilities.”¹³⁰ This does not give the Legislature unfettered ability to classify any type of private corporation as a public utility. The Legislature can make private corporations into public utilities only if those private corporations dedicate themselves to public use.¹³¹

¹²⁹ See *Utilities and Industries*, <http://www.cpuc.ca.gov/UtilitiesIndustries/>.

¹³⁰ Sec. 3 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.

¹³¹ See *Independent Energy Producers Ass'n, Inc. v. State Bd. of Equalization*, 125 Cal.App.4th 425 (App. 4 Dist. 2004) (noting that although not expressly stated, the Constitution requires a dedication to public use to transform private businesses into public utilities), *Allen v. Railroad Commission of Cal.* 179 Cal. 68 (1918), certiorari denied 249 U.S. 601 (noting that dedication to public use is required to prevent violation of the due process clause of the 14th Amendment to the United States Constitution).



The State Legislature has implicit power to classify new types of public corporations as public utilities. A positive statement of State power is not intended to limit the State’s power in any other manner. Therefore, the Constitution authorizing the Legislature to classify new classes of *private* corporations as public utilities will not be construed to prevent the Legislature from classifying new classes of *public* corporations as public utilities.¹³² In any case, the California Constitution gives the Legislature “plenary power . . . to confer additional authority and jurisdiction upon the [California Public Utilities Commission].”¹³³ Moreover, public corporations are dedicated to public use and therefore not excluded from being public utilities.

The State Legislature has previously brought local public corporations into the jurisdiction of the California Public Utilities Commission. For example, the CPUC regulates utilities owned by municipal corporations.¹³⁴

II. Classifying Public Pharmaceutical Manufacturing Corporations as Public Utilities Would Serve Little Purpose

While the State Legislature could classify a class of non-municipal public corporations as a public utility, this would seem to serve little purpose with respect to a singular public pharmaceutical manufacturing corporation at the State level. The California Public Utilities Commission regulates municipally-owned public utilities. There are many of these, so establishing uniform regulations serves a purpose of ensuring consistency. This would not apply to a public pharmaceutical manufacturing corporation which would be the only one of its type in California. Its regulations would be better situated within the Act creating it. Presumably, the enacting legislation creating the state-level public pharmaceutical manufacturing corporation could bring it under the authority of the California Public Utilities Commission, if this were desired to govern rates set by the corporation. However, as Part 1(III)(B) notes, the corporation could also have the executive power to make its own rules and regulations necessary for the fulfillment of its purpose. This rulemaking would be subject to open meeting requirements

¹³² See *State Bar of California v. Superior Court*, 207 Cal. 323 (1929) (citing *In re Madera Irr. Dist.*, 92 Cal. 296 (1891) for the principle that “[t]he presumption which attends every act of the legislature is that it is within its power; and he who would except if from the power must point out the particular provision of the Constitution by which the exception is made . . .”).

¹³³ Cal. Const., art. XII, Section 5.

¹³⁴ See Cal. Pub. Util. Code Sections 10001-10303.



Appendix :: Relevant Public Corporations and Quasi-Public Entities

California Institute for Regenerative Medicine


Creation: The California Institute for Regenerative Medicine (CIRM) was created in 2004 after 59% of California voters approved [California Proposition 71](#).

Initial financing: \$3 billion in General Obligation bonds to be spent over a period of 10 years.

Income: Cal. Const., art. XXXV, sec. 4 states that funds authorized for, or made available to, the institute shall be continuously appropriated without regard to fiscal year, be available and used only for the purposes provided in this article, and shall not be subject to appropriation or transfer by the Legislature or the Governor for any other purpose. Cal. Const., art. XXXV, sec. 6 states that CIRM may utilize state-issued, tax-exempt bonds to fund its operations.

Spending: How can it spend its money? How can it dispose of its assets? How can it invest its assets, and does prudent investor rule apply?

Governing body: Independent Citizen's Oversight Committee. Five members are appointed by the chancellors of University of California at San Francisco, Davis, San Diego, Los Angeles, and Irvine. Twelve members are appointed by the Governor, the Lieutenant Governor, the Treasurer, and the Controller, who each appoint a member from each of the following three categories: (a) A California university, excluding the ones mentioned above, (b) a California nonprofit academic and research institution that is not part of the University of California, (c) a California life science commercial entity that is not actively engaged in researching or developing therapies with pluripotent or progenitor stem cells. Two members from Alzheimer's and spinal cord injury disease advocacy groups are appointed by the Governor. Two members from type II diabetes, multiple sclerosis, or amyotrophic lateral sclerosis disease advocacy groups are appointed by the Lieutenant Governor. Two members from type I diabetes and heart disease advocacy groups are appointed by the State Treasurer. Two members from cancer and Parkinson's disease advocacy groups are appointed by the State Controller. One member from a mental health disease advocacy group is appointed by the Speaker of the



Assembly. One member from an HIV/AIDS advocacy group is appointed by the President Pro Tempore of the Senate. The overall Independent Citizen's Oversight Committee elects a chairperson and a vice chairperson.

Activities: Cal. Const., art. XXXV, sec. 2: "(a) To make grants and loans for stem cell research, for research facilities, and for other vital research opportunities to realize therapies, protocols, and/or medical procedures that will result in, as speedily as possible, the cure for, and/or substantial mitigation of, major diseases, injuries, and orphan diseases. (b) To support all stages of the process of developing cures, from laboratory research through successful clinical trials. (c) To establish the appropriate regulatory standards and oversight bodies for research and facilities development."

Other: Cal. Const., art. XXXV, sec. 7 says the institute and its employees are exempt from civil service.


State Compensation Insurance Fund

Creation: Created by the Boynton Act of 1913, now written into statute in the Insurance Code. Cal. Insurance Code Section 11773 says the fund is organized as a public enterprise fund. Some history

Initial finance: An appropriation of \$100,000 to cover 25 employees, according to this history. It had income immediately, so didn't need more than that.

Income: Cal Insurance Code Section 11775 says the he fund shall, after a reasonable time during which it may establish a business, be fairly competitive with other insurers, and it is the intent of the Legislature that the fund shall ultimately become neither more nor less than self-supporting.

Spending: 11774 - The assets of the fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of the salaries and other expenses charged against it in accordance with the provisions of this chapter. 11776 - It seems to function a bit like a cooperative and is able to pay dividends to employers when there are surpluses; in fact, the history page said it had paid \$34 million in dividends by 1939. 11788 - State Treasurer shall be custodian of all securities belonging to the State Compensation Insurance Fund. 11797 - ability to invest assets. 11800.1 - moneys deposited with the State Treasurer are not state moneys within the intent of Section 16305.2 of the Government Code. (see that section definition and management of "state money"). 11885(a) - The Director of Finance is hereby authorized to act as agent for the state and,




in that capacity, to sell a portion of, or otherwise obtain value for, the State Compensation Insurance Fund's assets and liabilities. That authorized sale or other disposition shall be transacted with an entity that the director, in consultation with the State Treasurer, determines will provide the best combination of each of the following: [...]

Governing body: 11770. (b) (1) The Board of Directors of the State Compensation Insurance Fund is composed of 11 members, nine of whom shall be appointed by the Governor. The Governor shall appoint the chairperson. One of the members appointed by the Governor shall be from organized labor. The members appointed by the Governor, other than the labor member, shall have substantial experience in positions involving workers' compensation, legal, investment, financial, corporate governance and management, accounting, or auditing responsibilities with entities of sufficient size as to make their qualifications relevant to an enterprise of the financial and operational size of the State Compensation Insurance Fund. At all times the board shall have a member with auditing background for the purposes of fulfilling the responsibility of the chair of the audit committee. [...] (2) The Speaker of the Assembly shall appoint one member who shall represent organized labor, and the Senate Committee on Rules shall appoint one member who shall have been a policyholder of the State Compensation Insurance Fund, or an officer or employee of a policyholder, for one year immediately preceding the appointment, and must continue in this status during the period of his or her membership. (3) The Director of Industrial Relations shall be an ex officio, nonvoting member of the board, and shall not be counted as members of the board for quorum purposes or any other purpose.

Openness/ transparency: 11785 - Both the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code) and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) shall apply to the fund. 11785 - Also must submit reports to legislature, see 9795 of Gov. Code. I believe most of the above only happened after 2008 after concerns about integrity arose in prior years.


Accountability/integrity: 11785(a) - rules about salary setting. 11785(b) - Section 87406 of the Government Code, the Milton Marks Post-Government Employment Restrictions Act of 1990, shall apply to the fund. Members of the board, a person who held a position designated in subdivision (a), and any other person designated by the fund shall be deemed to be designated employees for the purpose of that act (prohibits state elected officers and specified state agency officers and employees from being paid to represent another person before their former state agency for one year after leaving that agency.) 11785.5 - prohibitions on past employees lobbying the fund.



Immunity/liability: 11771 - The State shall not be liable beyond the assets of the State Compensation Insurance Fund for any obligations in connection therewith. See Gov Code Part 3 on claims against public entities. 11793 - the Fund's expenditures are exempt from the section on claims against public entities. In 1972, something might have happened to expand the Fund's liability where it might have been previously immune. I saw reference in the history. They raised insurance rates as a result.

Activities: 11778 - The fund shall be subject to the powers and authority of the [state Insurance Commissioner] to the same extent as any other insurer transacting workers' compensation insurance, except where specifically exempted by reference. 11780.5 - It can't market to employers in other states, but it can insure CA employers with employees in other states. 11781 - The board of directors may perform all acts necessary or convenient in the exercise of any power, authority or jurisdiction over the fund, either in the administration thereof or in connection with the insurance business to be carried on by it under the provisions of this chapter, **as fully and completely as the governing body of a private insurance carrier**. 11783 - The State Compensation Insurance Fund may: (a) Sue and be sued in all actions arising out of any act or omission in connection with its business or affairs, (b) Enter into any contracts or obligations relating to the State Compensation Insurance Fund which are authorized or permitted by law, (c) Invest and reinvest the moneys belonging to the fund as provided by this chapter, (d) Conduct all business and affairs and perform all acts relating to the fund whether or not specifically designated in this chapter, (e) Commission an independent study, with the assistance of an investment banking firm, to determine the feasibility of the State Compensation Insurance Fund issuing bonds or securities. The study may include, among other things, the purpose for issuing bonds and any potential adverse consequences that may arise from that issuance.

Other: 11771.5 - Any advertising of the State Compensation Insurance Fund shall include the following disclaimer: "The State Compensation Insurance Fund is not a branch of the State of California." From the history : 1945 Assembly Bill 1391, signed by Gov. Earl Warren, creates a board of directors for State Fund, separates the Fund from the Industrial Accident Commission and makes it a division within the Department of Industrial Relations. A little political history: Looks like there were attempts to reduce its power. In 1955 Assembly Bill 3458 dies. The bill attempted to prohibit State Fund from actively soliciting business, and would have permitted private insurers to write policies for public agencies. How state policy impacted business viability: Between 1915 and 1995, CA law set minimum insurance rates. When that was repealed, the Fund had a much less competitive edge, since other insurers slashed their prices. But by 2003, a bunch of private insurers who had slashed prices failed due to insolvency, so the Fund stepped in to



save the day and provide insurance. In 1996, Gov Wilson looked into privatizing the fund, but dropped it under criticism

California Housing Finance Agency


Creation: HSC 50900 - The agency constitutes a public instrumentality and a political subdivision of the state, and the exercise by the agency of the powers conferred by this division shall be deemed and held to be the performance of an essential public function.

Initial finance: 51350(a) - The agency may, from time to time, issue its bonds in the principal amount that the agency determines necessary to provide sufficient funds for financing housing developments and other residential structures

Income: 50956 It shall be the policy of the agency to conduct its operations so as to be fiscally self-sufficient and so as not to require appropriations from the General Fund for payment of its administrative costs or to service bonds of the agency.

Spending: - 50913 For its activities under this division, the executive director shall prepare a preliminary budget on or before December 1 of each year for the ensuing fiscal year to be reviewed by the Secretary of Business, Consumer Services, and Housing, the Director of Finance, and the Joint Legislative Budget Committee. Treasury holds its funds - 51000 - The California Housing Finance Fund is hereby created in the State Treasury. [...] Notwithstanding Section 13340 of the Government Code, all money in the fund is hereby continuously appropriated to the agency for carrying out the purposes of this part, and, notwithstanding Chapter 2 (commencing with Section 12850) of Part 2.5 of Division 3 of Title 2 of the Government Code, or the provisions of Sections 11032 and 11033 of the Government Code, and except as provided in this part, expenditure of the fund shall not be subject to the supervision or approval of any other officer or division of state government. 51000.4 - if the agency dissolves, all its assets go to the State's general fund

Governing body: 50901 - The agency shall be administered by a board of directors consisting of 13 voting members, including a chairperson selected by the Governor from among his or her appointees. The Treasurer; the Secretary of Business, Consumer Services, and Housing; the Director of Housing and Community Development; and the Secretary of Veterans Affairs, or their designees, shall be members, in addition to seven members appointed by the Governor, one member appointed by the Speaker of the Assembly, and one member appointed by the Senate Committee on Rules. The Director of Finance, the Director of Planning and Research, and the executive director of the agency shall serve as nonvoting ex officio members of the board. 50902(a) - Appointed members




of the board shall be able persons broadly reflective of the economic, cultural, and social diversity of the state, including ethnic minorities and women. However, it is not intended that formulas or specific ratios be applied in order to achieve that diversity. There's more about qualifications - See 50902(b)-(f). Anyone appointed by the governor must be confirmed by the Senate (50903)

Openness/ transparency: 50916 - All meetings of the board and of all committees of the board including those committees whose membership constitutes less than a quorum of the board shall be open and public and all persons shall be permitted to attend and address the board or its committees, except when the meetings are held as executive sessions as authorized by Section 11126 of the Government Code. 51005 - annual report to legislature and other agencies. 51050(e) - If the agency acts by rule or regulation, the rule or regulation shall be adopted, amended, repealed, and published in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. But apparently not everything requires rules - 51058.5 - Notwithstanding any other provision of law, the agency is not required to promulgate rules and regulations in order to establish or operate a mortgage refinance program.

Accountability/integrity: 50909 has guidance on determining salaries

Immunity/liability: The State is ultimately liable for its debts. 51006 - requires advance notice to many government branches if it runs into financial trouble and can't pay debts. 50911 - says it can hire its own attorney. (a) Notwithstanding **Sections 11042 and 11043 of the Government Code**, the executive director may employ as general counsel for the agency an attorney at law licensed in this state (and 11042 of the gov code says no state agency can hire its own lawyer without permission from AG.) 50911(b) - Except as provided in Section 11040 of the Government Code, the Attorney General shall represent and appear for the people of the state and the agency in all court proceedings involving any question under this division or any order or act of the agency. However, the agency may also employ private counsel to assist in any court proceeding. 50959 - This division is intended to benefit purchasers and residents of housing developments who are persons and families of low or moderate income and shall be liberally construed to allow such persons to initiate civil actions and to enforce rights, duties and benefits under this division and regulations adopted pursuant to this division;

Activities: Primary purpose is housing finance for low income - 50950. It's powers are listed in 51050



Tax: 50954 - the agency shall not be required to pay any tax or assessment on any property owned by the agency under the provisions of this division or upon the income therefrom.

Other: 51051 - The agency shall be a state representative for purposes of receiving and allocating financial aid and contributions from agencies of the federal government

California State Lottery

Creation: It began on November 6, 1984, after California voters passed Proposition 37, the California State Lottery Act of 1984, to authorize the creation of a lottery.

Initial finance: Multi-million dollar line of credit from the State, useable for 12 months and had to be repaid within 12 months.

Income: Cal. Gov't Code 880.3 - No appropriations, loans, or other transfer of State funds shall be made to the California State Lottery Commission except for a temporary line of credit for initial start-up costs as provided in this Act. Cal Gov't Code 8880.61 - The State Lottery Fund in the State Treasury receives all revenues and is continuously appropriated for use by the California State Lottery.

Spending: Cal Gov't Code 8880.4 - 87% of revenue has to return to the State to fund public education and to give prizes. Prize revenue must be at least 50% of ticket sale revenue. Unclaimed prize money goes to public education. A maximum of 13% of revenue can go toward operational expenses. Cal Gov't Code 8880.5 - The California State Lottery Education Fund is created within the State Treasury and continuously appropriated for public education.

Governing body: 8880.23 - Governor appoints with the advice and consent of the Senate. Can remove unilaterally. 8880.15 - Commission created in State Gov't. It has five members

Openness/ transparency: 8880.21 - Bagley-Keene Open Meeting Act applies.

Accountability/integrity: 8880.22 - quarterly reports. 8880.46.5 - 8880.46.6 - public and financial accountability

Immunity/liability: 8880.61 - the State is not liable for its debts, excepted as provided in the chapter establishing the lottery.



Activities: Lottery games only, nothing else. Strictly defined, and there have been lawsuits.

Other: 8880.61 - Money in the State Lottery Fund can be loaned to the State General Fund, but must be loaned for interest and the loan must not interfere with the ability of the California State Lottery to operate.