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SPECIAL MEETING / BOARD STUDY SESSION

PENINSULA CORRIDOR JOINT POWERS BOARD

Due to COVID-19, this meeting will be conducted via teleconference only (no physical location) pursuant to the [Governor's Executive Orders N-25-20 and N-29-20](#).

Directors, staff and the public may participate remotely via Zoom at

<https://us06web.zoom.us/j/94068795851?pwd=Y3NZUIBQRkRNUzRZaE5xSEFIRkRNdz09>

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<http://www.caltrain.com/about/bod/video.html>

Public Comments: Members of the public are encouraged to participate remotely. Public comments may be submitted to publiccomment@caltrain.com prior to the meeting's call to order so that they can be sent to the Board as soon as possible, while those received during or after an agenda item is heard will be included into the Board's weekly correspondence and posted online at

http://www.caltrain.com/about/bod/Board_of_Directors_Meeting_Calendar.html.

Oral public comments will also be accepted during the meeting through *Zoom or via the teleconference number listed above. Public comments on individual agenda items are limited to one per person PER AGENDA ITEM. Use the Raise Hand feature to request to speak. For public participants calling in, dial *67 if you do not want your telephone number to appear on the live broadcast. Callers may dial *9 to use the Raise the Hand feature for public comment and press *6 to accept being unmuted when recognized to speak for two minutes or less. Each commenter will be automatically notified when they are unmuted to speak for two minutes or less. The Board Chair shall have the discretion to manage the Public Comment process in a manner that achieves the purpose of public communication and assures the orderly conduct of the meeting.

Friday, August 20, 2021

1:00pm – 5:00pm

1. Call to Order/Roll Call
2. Caltrain Governance Special Meeting #4 (including governance process updates; overview of self-directed governance options and evaluation approach; financial and legal analyses; Board and leadership perspectives on options; and next steps)
 - PRESENTATION & DISCUSSION – Sebastian Petty, Howard Permut, Katie Miller
 - BOARD GUIDANCE AND DIRECTION
3. Adjourn

**PENINSULA CORRIDOR JOINT POWERS BOARD
STAFF REPORT**

TO: Joint Powers Board

FROM: Michelle Bouchard
Acting Executive Director

SUBJECT: **CALTRAIN GOVERNANCE SPECIAL MEETING #4**

ACTION

It is recommended that the Peninsula Corridor Joint Powers Board (Board) receive a staff presentation providing information for the fourth Caltrain governance special meeting of 2021, including information on governance process updates; overview of self-directed governance options and evaluation approach; financial and legal analyses; Board and leadership perspectives on options; and next steps.

SIGNIFICANCE

This is the fourth of six planned special Board meetings on Caltrain governance to support development of the Board's 2021 recommendation on governance by December 2021. At the fourth meeting on August 20, Sebastian Petty, Ratna Amin, Howard Permut, and Katie Miller will present and moderate the Board's discussion. The special meeting materials include an extensive powerpoint that presents information about the self-directed governance options for analysis, as well as the results from the evaluation of the options. The JPB's general counsel, James Harrison of Olson Remcho, will present on legal analysis findings, and Rodrigo Macias of MGO, Inc. will present on financial analysis findings. It will also include information about perspectives from Board members and member agency leadership on the options. Lastly, it will include information about next steps in the 2021 governance process.

This staff report includes four attachments:

- Attachment 1: Presentation slides for the August 20, 2021 Special Meeting;
- Attachment 2: Information regarding the interviews that were conducted with Board members and partner agency leadership;
- Attachment 3: A detailed report from Olson Remcho regarding legal analysis of the self-directed governance options; and,
- Attachment 4: A detailed report from Macias Gini & O'Connell (MGO) regarding financial analysis of the self-directed governance options for pension unfunded accrued liability, other post-employment benefit unfunded accrued liability, and compensated absences liability.

BACKGROUND

In August of 2019, the Board received a Caltrain Organizational Assessment report from Howard Permut as part of the Caltrain Business Plan effort. In November 2019, the

Board held a special workshop to discuss the Caltrain organization and governance issues in greater depth. Following the workshop, at its regular December 2019 meeting, the Board agreed to form a Governance Ad Hoc Committee and hire a special counsel to research and clarify key issues in a fact-finding report. The Governance Ad Hoc Committee met regularly in the first half of 2020, and in July 2020, the special counsel presented their fact-finding report to the full Board.

In August 2020, the Board held a substantial discussion regarding the placement of Measure RR on the November 2020 ballot in San Francisco, San Mateo, and Santa Clara counties. If approved by two-thirds of the voters in all three counties, Measure RR would provide dedicated funding to Caltrain via a 1/8 cent sales tax in each county. At the August 2020 meeting, the Board approved Resolution 2020-42 to authorize placement of Measure RR on the ballot. This resolution also included provisions related to governance, including a commitment by the Board to develop and approve a governance recommendation by December 2021.

Over two-thirds of the voters in San Francisco, San Mateo, and Santa Clara counties approved Measure RR on November 3, 2020. Following its passage, the Board requested that Caltrain staff commence the 2021 governance process to support the Board in development of its governance recommendation by the end of 2021. A Governance Process Ad Hoc Committee of the Board was established to aid with the process, comprised of four Board members: Chair Davis, Director Chavez, Director Pine, and Director Walton. In addition to the Board members, JPA member agency staff also participated in the Governance Process Ad Hoc Committee meetings.

The special meeting on March 19, 2021 was the first special meeting intended to assist the full Board in the process of reaching a governance recommendation by the end of the year. At the first special meeting, the Board accepted the 2021 Governance Roadmap for the process, with the understanding that the Governance Process Ad Hoc Committee may come back with updates to refine the plan. Additionally, the Board accepted the 2021 Proposed Objectives for the Governance Outcome, with the amendment that 1) an additional objective be equitable decision making across the board for all JPB member agencies and 2) governance changes be focused on improving ridership of all income levels for Caltrain. The full minutes from the first special meeting can be found [here](#).

The second special meeting on May 14, 2021 was focused on refinement of three self-directed governance options, as well as the approach to evaluating the self-directed options, which includes both quantitative and qualitative analyses. The presentation also discussed the resources required to support the governance process. The full minutes from the second special meeting can be found [here](#).

The third special meeting on June 25, 2021 was intended to focus on the approach to regional and non-self-directed relationships; active and emerging regional discussions; strategic issues; and next steps. The meeting was adjourned early without discussion of the prepared materials on regional options.

The Governance Process Ad Hoc Committee met monthly to support the overall 2021 governance process. They met twice in advance of the Board's first special meeting, and they held two additional meetings in advance of the Board's second special meeting. One additional meeting was held in advance of the Board's third special meeting. In August of 2021, the Governance Process Ad Hoc Committee was disbanded because the committee had fulfilled its intended purpose of outlining a governance process for JPB consideration.

BUDGET IMPACT

There is no budget impact associated with receiving this report or taking any actions.

NEXT STEPS

Following the Board's third special meeting, it was determined that an additional special meeting on governance was needed in September, following the fourth special meeting on August 20, 2021. As a result, there are two more special meetings on governance scheduled in 2021:

- Special Meeting #5: TBD in September 2021
- Special Meeting #6: Friday, October 22, 2021, 1:00pm – 4:30pm.

Prepared by: Sebastian Petty, Deputy Chief, Caltrain Planning

Attachment 1: Presentation Slides for the August 20, 2021 Special Meeting



**Caltrain
Governance**

**JPB Special Meeting #4
on Governance**

August 20, 2021



**Welcome to Special
Meeting #4**



Special Meeting #4 Agenda

- **Governance Process Updates**
 - Revised process roadmap
 - Report on status of ROW repayment discussion
- **Objectives for Today**
- **Overview of Self-Directed Options Analyzed**
- **Evaluation of Self-Directed Options**
- **Financial Analysis**
- **Legal Analysis**

~ Break ~

- **Board and Leadership Perspectives on Options**
- **Summary/Synthesis and Discussion**
- **Public Comment**
- **Next Steps**



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Governance Process Updates

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Previous JPB Governance 2021 Roadmap

Phase 1

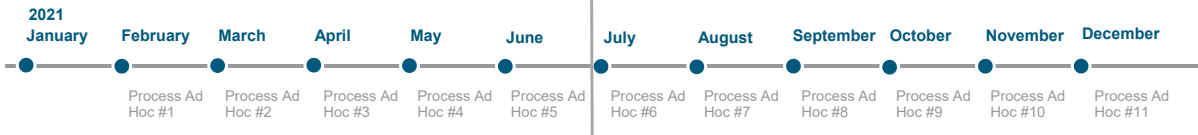
Goals:

- Exploration and education about the JPB's range of structural governance paths.
- Selection of governance options and key issues to focus on in Phase 2.

Phase 2

Goals:

- Discussion of selected option(s) and financial and legal analysis towards developing the 2021 governance recommendation.
- Adoption of governance recommendation at December 2021 JPB meeting.



Special Meeting #1

Special Meeting #2

Special Meeting #3

Special Meeting #4

Special Meeting #5

Board Adoption of 2021 Governance Recommendation

- #1 Outcomes:**
- Motion to accept 2021 gov. roadmap
 - Motion to accept 2021 gov process objectives
 - Discussion of interview themes and structural paths
- #2 Outcomes:**
- Discussion of three self-directed governance options
 - Discussion of evaluation process
- #3 Theme:** Regional (non-self directed) Options
- #4 Theme:** Summary of evaluation of governance options
- #5 Theme:** Refinement and recommendations concerning governance options

Updated Phase 2 - 2021 Roadmap

Phase 2

Goals:

- Discussion of options and financial and legal analysis towards developing the 2021 governance recommendation.
- Adoption of governance recommendation at December 2021 JPB meeting.



- Staff continue legal, financial, and qualitative analyses in preparation for Special Meeting #4 on 8/20; brief Chair Davis on materials in August before Special Meeting #4.
- Staff facilitates discussions with member agency partners on ROW repayment.

August 20: Special Meeting #4

- #4 Themes:**
- Summary of evaluation of governance options
 - Focus on questions and clarifications to support subsequent discussion of draft proposals

Late-September: New Special Meeting #5

- #5 Theme:** Discussion of draft proposals for 2021 governance recommendation

October 22: Special Meeting #6- Revisiting Regional Discussion

- #3 Theme:** Discuss regional (non-self directed) options; relationship to 2021 recommendation

November JPB: Board consideration of draft Governance Recommendation

December JPB: Board Adoption of 2021 Governance Recommendation

Ongoing work to refine draft governance recommendation and to support member agencies in ROW repayment discussions as needed.

Status Update and Discussion on ROW Repayment

- Letters have been exchanged between the partners and there is a difference of views as to the amount owed as reimbursement to SamTrans for the ROW purchase
- Caltrain ED has convened meetings with general managers from all JPA partner agencies to engage in discussion around ROW repayment. These meetings are ongoing
- Caltrain ED has also alerted MTC of potential need for their involvement as the discussion progresses.



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Objectives

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Objectives for Special Meeting #4

1. **Confirm shared understanding** of different self-directed governance options considered and evaluation approach used.
2. **Review financial and legal analyses** of self-directed governance options and address any additional questions.
3. **Consider results of qualitative interviews** with Board members and partner agency General Managers.
4. **Summarize findings** and discuss approach to September Special Meeting #5, which will be a “part two” to continue the conversation about governance options.



Overview of Self-Directed Options Analyzed

Governance Options Framework

- In order to advance the JPB's discussion of governance, self-directed options have been simplified and grouped into three basic choices.
- The options have been designed to allow for focused discussion and evaluation of the key issues that Board members and decision-makers have repeatedly raised in interviews and at prior meetings and where there are currently divergent opinions and points of view.
- Options for analysis are intended to highlight analytical differences of three points on the spectrum of potential governance change.
- **There is room for modification and adjustment within and between each of the options presented – they are starting points for analysis and discussion.**



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How do the Options Differ from the Governance Situation Today?

It is important to note that for the purposes of analysis, all the options differ from the governance situation today.

- **Dedicated Executive Director:** relative to today, each of the options includes a permanent, dedicated Caltrain Executive Director.
- **Accountability:** relative to today, each of the options includes enhanced JPB oversight and accountability over the Caltrain Executive Director.
- **Staffing:** relative to today, the “baseline” of the options includes additional staff positions that are needed to optimize the Rail Division and support implementation and operation of the electrified railroad.
- **Processes:** relative to today, Options 1 and 2 include process improvements and formalization of service arrangements between SMCTD and Caltrain.



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Three Broad “Self-Directed” Options

Less Change

More Change

Option 1

Refined Shared Services Model & ED Relationship

Maintain the San Mateo County Transit District (SMCTD) as managing agency of Caltrain with increased JPB oversight over the Caltrain Executive Director (ED) and increased Caltrain oversight of services provided to the railroad by SMCTD through shared service agreements.

Option 2

New Shared Services Model & ED Relationship

Adjust the SMCTD managing agency model to provide for greatly expanded JPB oversight and authority, including direct JPB employment of the Caltrain ED and senior leadership; expansion of services provided to the railroad directly by Caltrain; and establishment of purchased service agreements for remaining services provided to the railroad by SMCTD.

Option 3

Independent Agency

Dissolve the managing agency model and replace with a separate, independent Caltrain agency to directly manage and administer the railroad, either through reorganizing JPA or forming a special district.

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How do the Options Differ from Each Other?

The options analyzed here are intended to highlight three potential points across a spectrum of potential governance change.

The following slides highlight key differences between the options in the following areas:

- A. Caltrain Executive Director
- B. Employer of staff
- C. Reporting relationships
- D. Agreements regarding shared or purchased services

The following slides will also use org charts to visually depict the differing hierarchical structures between the three options.



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Legend for Org Charts

- **Employing entity** = entity that has staff on payroll.
- **Reporting entity** = entity that directs work and evaluates performance of staff.

As noted in the legend and in the following slides, a staff person's employment entity may be different than the entity they report to for their work.

Caltrain employee reporting exclusively up to Caltrain ED and JPB

SMCTD employee providing direct services to Caltrain and reporting exclusively up to Caltrain ED and JPB

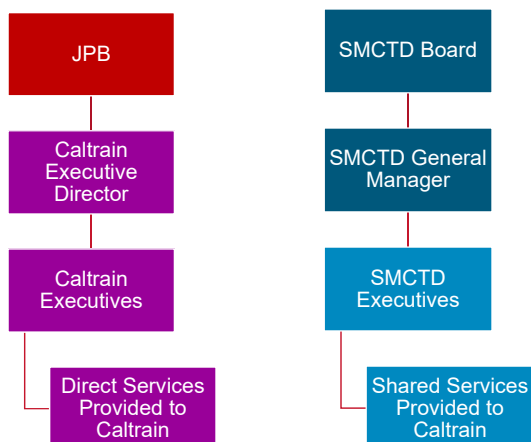
SMCTD employee reporting up to SMCTD GM but providing some services to Caltrain under a shared or purchased services agreement.

SMCTD employee reporting exclusively up to SMCTD GM and SMCTD Board.



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Option 1 for Analysis



A) Caltrain Executive Director (ED):

- Recommended by the JPB to the SMCTD Board for approval.
- JPB sets ED goals and conducts annual review.

B) Employer of Staff:

- SMCTD employs all staff.

C) Reporting Relationships:

- All staff who provide direct services to Caltrain report to Caltrain Executives, who report to Caltrain ED.
- All staff who provide shared services to Caltrain report to SMCTD executives (who report to SMCTD GM) but support Caltrain under terms of a shared services agreement.

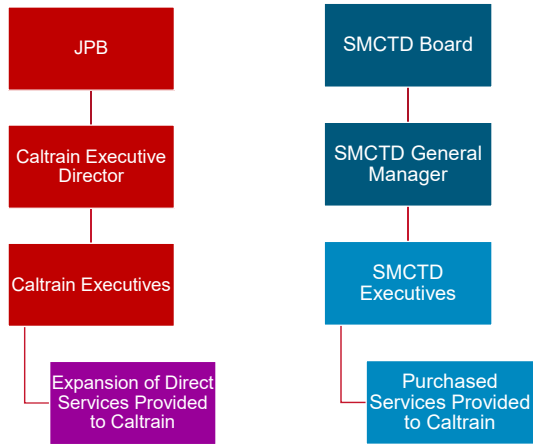
D) Service Agreements:

- For all shared services, support is provided to Caltrain ED and Caltrain Executives under the terms of a shared services agreement.



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Option 2 for Analysis



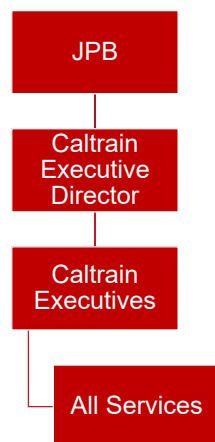
- A) Caltrain Executive Director (ED):**
- Selected by the JPB, which sets ED goals and conducts annual review.
 - Employed directly by JPB.
- B) Employer of Staff:**
- JPB directly employs Caltrain ED and Caltrain Executives only.
 - SMCTD employs all other staff.
- C) Reporting Relationships:**
- Expanded staff who provide direct services to Caltrain; they report to Caltrain executives, who report to Caltrain ED.
 - Reduced staff who provide purchased services to Caltrain; they report to SMCTD executives (who report to SMCTD GM) but support Caltrain under terms of a purchased services agreement.
- A) Service Agreements:**
- For all purchased services, support is provided to Caltrain ED and Caltrain Executives under the terms of a purchased services agreement.

Note: There is a great amount of flexibility in both 1) the scope of staffing changes that could be included in Option 2, and 2) the timeframe and phasing for Option 2 implementation. Option 2 utilizes purchased services agreements, which would be a fee for service model rather than a cost sharing/allocation model as contemplated for the shared services agreements under Option 1.



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Option 3 for Analysis



- A) Caltrain Executive Director (ED):**
- Selected by the JPB, which sets ED goals and conducts annual review.
 - Employed directly by JPB.
- B) Employer of Staff:**
- JPB directly employs all Caltrain staff.
- C) Reporting Relationships:**
- All services report to Caltrain Executives, who report to Caltrain ED.
- D) Service Agreements:**
- No agreements needed.

Note: Option 3 would involve approximately ten currently represented staff in the Customer Service department, which would require negotiations with their bargaining unit (all other administrative staff are not currently represented). Any other large scale changes to labor representation for either Caltrain management or contractors would likely have additional cost and legal implications that would require further analysis.



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Questions?

Are there any questions about what has been outlined with the options?



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Evaluation of Self-Directed Options

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Framework for Evaluation for Self-Directed Options

- The evaluation framework for the self-directed options was presented at Special Meeting #2 to structure the process of analyzing and recommending a governance option.
- The evaluation was grouped around **three key questions** of broad importance to Caltrain, its partners, riders, and the public as a whole:
 1. To what extent does this option provide for an **effective and efficient delivery of Caltrain services**?
 2. To what extent is this governance model **fair and accountable to the public(s)** that it serves?
 3. What are the practical **resource and transition considerations** for each governance model?

Today, we will start with Question #3 and then discuss Questions #1 and #2.



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Question #3: What are the practical resource and transition considerations for each governance model?

Evaluation Criteria: how well do the governance options position Caltrain to...

- Administer the railroad in a cost-effective manner?
- Implement governance change in a way that minimizes disruption of services?



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Question #3: Analysis Approach

- **Financial analysis**

- Financial analysis was conducted by consultants and Caltrain staff and reviewed by JPA member agency CFOs. Results have been summarized by Howard Permut.
- Analysis included understanding:
 - Annual costs such as staff, overhead, and support.
 - One-time costs and impacts such as transition, pension and retirement liabilities

- **Legal analysis**

- Legal analysis was conducted by JPB General Counsel and reviewed by JPA member agency General Counsels.
- Analysis included understanding the legal details/implications for each option, such as:
 - Creation/modification of agreements, transition support, service level agreements, etc.

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Financial Analysis

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Summary of Methodology and Conclusions



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Overview of Analysis

Financial Operating Cost Analysis

- A financial analysis of the operating costs to Caltrain of the different governance options
- Results (2021\$)
 - Annual and One-time Costs by Option
 - Incremental Costs by Option

Pension, OPEB, and PTO Analysis

- An overview and analysis of the pension unfunded liability, OPEB (post retirement benefits) and PTO (compensated absences) associated with different potential outcomes



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Methodology

- **The scope of work was developed by Howard Permut.**
 - Dedicated finance department PMs were assigned and MGO was contracted to do the work.
- **A complex and iterative zero-based analytical process was used, and analysis involved a team that included Caltrain staff, MGO, and Olson Remcho.**
- **Costs are order of magnitude estimates presented to the nearest 100K.**
- **There are many external variables and factors that would impact the actual cost.**
- **Three meetings were held with Agency CFOs to review the analytical methodology and findings.**



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High-Level Conclusions

Financial Operating Cost Results

- **Annual incremental costs**
 - Option 1 = \$0
 - Option 2 = \$5.9M
 - Option 3 = \$9.2M
- **One-time cost**
 - Option 1 = \$1.5M
 - Option 2 = \$4.6M
 - Option 3 = \$48.9M - due in large part to IT system costs to support a fully independent agency

Note: These costs are in 2021 dollars and exclude capital infrastructure and rolling stock costs, TASI costs, costs to member agencies, and other annual contract operating and fueling costs.



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High-Level Conclusions

Pension, OPEB and Compensated Absences Liability Results

- Pension, OPEB and Compensated Absences Liabilities are extremely complex issues that would require extensive negotiations between SMCTD and Caltrain. There is a broad range of possible outcomes with respect to the sharing of responsibility for liabilities and the payment terms.
- These terms will be largely determined by negotiation.
- It is extremely difficult to calculate a clear number given the degree of uncertainty.
- As the governance options have a similar number of employees, they alone would not have a significant impact on these costs.
- CalPERS will play a role in approving a negotiated settlement regarding the unfunded pension liability.



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Financial Operating Costs: Annual Costs by Option



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Approach: Annual Caltrain Cost (excluding contract operations and fuel)



- **JPB Staffing Costs** = Estimated salary and benefit costs associated with Caltrain departments based on the projected number of full-time employees (FTEs)
- **3rd Party Costs** = Estimated costs to 3rd party vendors (excluding TASI).
- **JPB Payments to SMCTD** = Estimated payments from the JPB to SMCTD for services still performed by SMCTD.
- **Miscellaneous Other Costs** = Costs expected to be incurred by the JPB as a direct result of proposed organizational changes (for example rental charges, insurance, etc.)

Note:

- Outsourcing was not considered as part of this study.
- These costs exclude capital infrastructure and rolling stock costs, TASI costs, costs to member agencies, and other annual contract operations and fueling costs.
- Costs due to actions by external parties (for example, the Legislature imposing certain requirements on Caltrain if it were to become a special district) are excluded.



Results: JPB Staffing

Total Number of Employees Supporting Caltrain, by Option

Option	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Baseline	0	105	104	209
Option 1	0	105	104	209
Option 2*	8*	179*	40*	227
Option 3	236	0	0	236

*Note: there is a great amount of flexibility in both 1) the scope of staffing changes that could be included in Option 2, and 2) the timeframe and phasing for Option 2 implementation. For the purposes of analysis only, for Option 2, the number of SMCTD employees reporting to SMCTD GM but providing services to Caltrain includes staff to support the following functions: Information Technology, Civil Rights, Accounting, and Treasury.



Results: Annual Caltrain Costs

Option	JPB Staffing Costs	3 rd Party Annual Costs	JPB Payments to SMCTD	Other Annual Costs	Estimated Annual Costs
Baseline	\$21,300	\$17,900	\$24,600	-	\$63,800
Option 1	\$21,300	\$17,900	\$24,600	-	\$63,800
Option 2	\$37,900	\$17,900	\$10,700	\$3,200	\$69,700
Option 3	\$47,900	\$17,900	-	\$7,200	\$73,000

Option	Annual Increase in JPB Costs
Baseline	-
Option 1	-
Option 2	\$5,900
Option 3	\$9,200

Notes:

1. Costs are in 2021 dollars, expressed in thousands, rounded to the nearest \$100K.
2. Baseline represents a slightly larger Caltrain staff than today to reflect need for expanded capability. The Baseline includes costs related to pre-existing JPB decisions to have an independent auditor and independent counsel.
3. These costs exclude capital infrastructure and rolling stock costs, TASI costs, costs to member agencies, and other annual contract operations and fueling costs.



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Financial Operating Costs: One-Time Costs by Option



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Approach: Total One-Time Costs



- **Human Resources Costs** consist of expenditures related to the recruitment of additional personnel required for each option.
- **Information Technology Costs** consists of expenditures for each option related to the start-up costs associated with the acquisition and implementation of enterprise systems, a data center, employee IT devices, rail operating systems, and costs associated with an IT transition team.
 - Under Option 2, the vast majority of employees remain SMCTD employees, and it is assumed that the current people soft system will be utilized.
 - Under Option 3, where the JPB would become a fully independent entity, the implementation of its own information technology systems would be required. This drives the \$48.9 M expenditure.
- **Professional Services Costs** consist of legal and transition team expenses required to implement each option.

Option	One-Time Costs
Baseline	\$0
Option 1	\$1,500
Option 2	\$4,600
Option 3	\$48,900

Note: Costs are in 2021 dollars, expressed in thousands, rounded to the nearest \$100K.

Note: As options are refined, additional one-time costs may be identified.



Summary of Annual and One-Time Costs

Option	Annual Increase in JPB Costs	One Time JPB Costs
Baseline	-	\$0
Option 1	-	\$1,500
Option 2	\$5,900	\$4,600
Option 3	\$9,200	\$48,900

Note: Costs are in 2021 dollars, expressed in thousands, and rounded to the nearest \$100K.



Unfunded Pension, OPEB, and Compensated Liabilities



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Caltrain Obligation Estimates Summary

As part of the transition whereby employees are moving from SMCTD to Caltrain, the parties must negotiate three (3) complex agreements:

1. **Pension Unfunded Accrued Liability (UAL):** Difference between value of underlying investments and amount employer must pay in pension benefits already accrued (for both active and retired participants).
2. **Other Post-Employment Benefit Unfunded Accrued (OPEB) Liability:** Medical benefits paid to employees upon retirement from Caltrain.
3. **Compensated Absences:** Accrued absences (e.g., paid time off) for which employees will be paid upon leaving Caltrain.

The cost to Caltrain of each of these liabilities is a function of a negotiation between Caltrain and SMCTD as to the responsibility to pay for the liability and the terms of payment (lump sum, annual contribution). This, more than the different governance options, will determine the costs to Caltrain.

CalPERS must approve any agreement regarding the UAL. The team has reached out to CalPERS to understand their potential concerns.



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1. Caltrain Pension UAL Obligation

Key Issues

- As noted previously, the calculation of Caltrain's pension UAL is a complex process that will be driven by negotiation.
- What further complicates the situation is that under the usual rules that apply when an employee moves between employers within CalPERS (the pension plan that SMCTD employees belong to), the new employer has no obligation to pay any portion of the UAL that accrued when the employee was at their previous job.
- However, the Caltrain/SMCTD relationship has two key elements that are unique and different than this practice. First, since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model where SMCTD employees provide services to Caltrain. Thus, part of the UAL accrued by a SMCTD employee who moves to Caltrain could have been accrued while they worked for and provided services to Caltrain.
- Furthermore, in the 1996 JPA Agreement, the member agencies agreed to share in Caltrain's operating costs, including "expenses for personnel and resources of the managing agency to administer the affairs of the JPB".
- These issues would be key elements of a negotiation to determine the amount and the settlement terms (lump sum, annual payments) that would be agreed upon by Caltrain and SMCTD.
- Finally, CalPERS approval of the agreement would be required.
- As the Board gets closer to determining a governance option, additional studies are recommended to better reflect the actual employees that would transfer.



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1. Caltrain Pension UAL Obligation

Possible Negotiating Scenarios

We have developed two alternative scenarios for possible pension agreements:

- SMCTD assigns UAL liability to Caltrain at closing for employees transferring to Caltrain and retirees; thereafter Caltrain makes direct annual payments on that amount to CalPERS. This model assumed CalPERS discount rate of 7%.
- Caltrain pays lump sum payment to SMCTD at closing for its share of UAL for transferring employees and retirees and owes nothing after that. This model is based on when an agency terminates from CalPERS and pays a lump sum to CalPERS. In this case, a discount rate of 1.75% (i.e. 20-year treasury rate) might be used to eliminate any risk to SMCTD of greater unfunded liability (differential between estimated and actual rate of return). Caltrain might well argue for a higher discount rate. **In the end, the selection of the appropriate discount rate would be subject to negotiation and is the major factor in determining the ultimate cost of this scenario.**



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2. Caltrain OPEB Obligation Key Issues

- The OPEB Plan provides to qualified retirees a cash subsidy for health insurance premiums. Liability for these payments arises at the time of retirement. Hence, Caltrain will be responsible for the payment of OPEB benefits for transferring employees.
- However, as noted with the pension issue, this does not reflect the fact that since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model where SMCTD employees provide services to Caltrain. As such, certain transferring employees may have provided services to both SMCTD and Caltrain. The parties will have to agree as to how much of the OPEB Liability associated with these employees is attributable to SMCTD and settle on the terms of payment.
- Negotiation terms could vary significantly as past service does not directly impact the dollar amount of OPEB benefits received but impacts eligibility.



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2. Caltrain OPEB Obligation Possible Negotiating Scenarios

We have developed two alternative scenarios for possible OPEB agreements:

- Caltrain adopts and funds a California Employer's Retiree Benefit Trust (CERBT) which is a tax-exempt Internal Revenue Code section 115 trust administered by CalPERS.
- Caltrain adopts and funds an irrevocable trust outside of CalPERS for the purpose of pre-funding OPEB obligations.



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3. Caltrain Compensated Absences Obligation Key Issues

- The compensated absence plan provides payment for compensated absences to its employees (paid time off, or PTO). They are paid at the time of termination to employees for personal time not used. As with OPEB, the employer that an individual works for at termination is responsible for paying this benefit.
- Hence, Caltrain would be responsible for the compensated absences liabilities associated with SMCTD employees who transfer to Caltrain.
- However, also similar to OPEB, this does not consider that since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model where SMCTD employees provide all services to Caltrain. As such, certain transferring employees may have provided services to both SMCTD and Caltrain. The parties will need to agree on how much of the Compensated Absences Obligation associated with those employees is attributable to SMCTD and settle on the manner (lump sum, annual payments) by which SMCTD's liability is calculated.



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Preliminary Liabilities Analysis

This information was initially included in the Financial Analysis Memo in the August 20, 2021 Special Meeting #4 Packet, and it has now been included in this presentation at Board members' request. As described previously and below, the number of variables involved in determining liabilities are highly complex. While there is a high degree of confidence in the one-time and annual cost numbers provided in prior slides, the numbers shown below are extremely speculative. These numbers are in no way comparable to the other costs shown and should only be discussed with proper context provided.

Pension UAL Obligation:

- The Pension UAL Obligation cost estimate depends on a number of factors, which could be highly variable. Each factor must be negotiated, and thus, until those negotiations occur, a precise cost estimate cannot be provided for the Pension UAL Obligation.
 - The factors include: negotiations between SMCTD and Caltrain regarding payment terms (lump sum vs. annualized), discount rate, actual employees transferring, and CalPERS approval, among others.
- However, two different hypothetical scenarios were defined in the Financial Analysis memo for analytical purposes, to illustrate a potential range of costs. One assumed a 7% discount rate and the other assumed a 1.75% discount rate, which rendered an obligation range of \$22M to \$122M.
 - As an illustration of the extreme sensitivity of this calculation to the assumptions, if a 6% discount rate were to be utilized, the \$122M obligation would be reduced to approximately \$34M.



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Preliminary Liabilities Analysis

OPEB Obligation:

- Similarly, the OPEB obligation would be determined by the same factors that must be negotiated for the Pension UAL Obligation, except for CalPERS approval.
 - Similar to the Pension UAL Obligation, the precise cost estimate for OPEB Obligation will depend on these negotiated factors and cannot be provided at this time.
- For analytical purposes, two different hypothetical scenarios were defined in the Financial Analysis memo, to illustrate a potential range of costs. One assumed a discount rate of 6.75% and the other assumed a 1.75% discount rate, which rendered an obligation range of \$6M to \$13M.
 - As an illustration of the sensitivity of this calculation to the assumptions, if a 3% discount rate were to be utilized, the obligation would be approximately \$11M (compared to \$13M).

Compensated Absences Obligation:

- The Compensated Absences (PTO) Obligation will be determined by negotiations between SMCTD and Caltrain regarding payment terms (lump sum vs. annualized) and actual employees transferring.
 - As with the Pension UAL Obligation and OPEB Obligation, the negotiated factors will impact the calculation of the precise cost estimate for the Compensated Absences Obligation.
- One hypothetical scenario was defined in the Financial Analysis memo for analytical purposes. It assumed that Caltrain would be responsible for 100% of the PTO liability, which rendered an obligation of \$2M.
 - As an illustration of the sensitivity of the assumptions, if Caltrain were to be responsible for 50% of the PTO liability, the obligation would be approximately \$1M.



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Questions?

Are there any questions about what has been outlined with the financial analysis?



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Legal Analysis

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Overview of Analysis

Identify Legal Steps Necessary to Implement Governance Options

- Conduct detailed legal and factual review of self-directed governance options.
- Identify legal steps to be taken to implement options, any legal impediments to such actions, and any ancillary issues.
- Estimate time and legal costs associated with each option.



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Legal Analysis Assumptions

Analysis Based on Following Assumptions:

- JPB recommends governance option to member agencies by 12/31/21.
- Member agencies select a governance option.
- JPB assists member agencies in negotiating/drafting term sheet (MOU) that contains key decisions regarding implementation of the option.
- Estimated time and costs for implementation of each option assumes starting point at execution of MOU.
- Cost estimates do not include legal costs of member agencies.



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High Level Conclusions

All three options are legally feasible:

- **Option 1** would require fewer legal resources to implement and could be accomplished more quickly than the other options.
- **Option 2** would be more expensive and take more time to implement than Option 1 because it would require establishing Caltrain as an employer (for 8 senior staff) and negotiating agreements between the JPB and SMCTD for direct and purchased services.
- **Option 3** would likely consume the greatest amount of legal services and time because of the need to establish Caltrain as the employer for all employees.
 - This would be especially true if a special district were to be created, because of the need for State legislation to establish a new special district with Caltrain as the employer for all employees.



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Option 1: Key Terms

Option 1: Key Terms Affecting Legal Steps

- SMCTD remains managing agency.
- Caltrain has dedicated ED, with increased JPB oversight.
- JPB and SMCTD enter into shared services agreement for services provided by SMCTD.



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Option 1: Legal Steps

Legal Steps Required to Implement Option 1:

- Amend 1996 Joint Powers Agreement (JPA) to delete reference to General Manager of Managing Agency acting as Executive Director of JPB.
- Make any other amendments to JPA necessary to reflect parties' agreement regarding role of JPB relating to ED and management of Caltrain.
- Negotiate, draft, and execute agreement for shared services provided by SMCTD to JPB.
 - Establish cost allocation for employees.
 - Define types and levels of service.
 - Clarify roles and responsibilities.
 - Establish performance metrics.



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Option 1: Legal Steps

Legal Steps Recommended to Implement Option 1:

- Amend 1996 JPA to define:
 - Process by which JPB recommends candidates for ED, including scope of SMCTD veto power, and role in decision-making.
 - Role of JPB in performance review and compensation and termination decisions.
 - Scope of ED's management authority.



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Option 1: Legal Steps

Potential Legal Steps Ancillary to Implementation of Option 1:

- Amend 1996 JPA to:
 - Address 2008 RPOA amendment regarding SMCTD's role as managing agency.
 - Address current practice of basing the funding allocation on the all-day boarding formula.
 - Address current practice regarding operating costs of Gilroy service.
 - Make other requested changes relating to governance, such as duration of JPA and Directors' terms.



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Option 1: Legal Steps

Potential Legal Steps Ancillary to Implementation of Option 1 (continued):

- Amend and/or restate 1991 RPOA and 2008 Amendment to address:
 - Reimbursement of SMCTD, including SMCTD's property rights (e.g., tenant in common in ROW in San Mateo County and equity conversion right).
 - SMCTD's role as managing agency.



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Option 1: Legal Costs and Time Estimates

Option 1 Legal Services Time and Cost Estimate

- Time: 6-18 months
- Cost: \$750,000 - \$1,500,000



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Option 2: Key Terms

Option 2: Key Terms Affecting Legal Steps

- Continue with JPA but JPB has direct oversight over and employs Caltrain ED and executive staff (eight positions).
- Caltrain has direct authority over expanded number of SMCTD employees who provide direct services to Caltrain through a direct services agreement with SMCTD.
- SMCTD provides other services to Caltrain through a purchased services agreement.

*Note: A direct services agreement would be required to include indemnity provisions related to employment decisions made by Caltrain, duration of agreement, billing/invoicing, remedies and pension/OPEB cost sharing issues.



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Option 2: Legal Steps

Legal Steps Required to Implement Option 2:

- Amend 1996 JPA to:
 - Provide JPB authority to hire and employ Caltrain ED and seven executives, and provide ED authority to manage Caltrain subject to JPB oversight.
 - Amend managing agency provisions, including provisions naming managing agency's GM and Finance Director as Caltrain ED and controller/treasurer, respectively.
 - Revise indemnification provisions to require indemnification of members for any activities undertaken by the JPB and to reflect the JPB's obligations under direct and purchased services agreements.



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Option 2: Legal Steps

Legal Steps Required to Implement Option 2 (Continued):

- Amend and restate 1991 RPOA/2008 Amendment to:
 - Modify language regarding SMCTD as managing agency.
 - Reflect parties' agreement with respect to reimbursement of property rights (e.g., SMCTD as tenant in common to ROW in San Mateo County and equity conversion right).



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Option 2: Legal Steps

Legal Steps Required to Implement Option 2 (Continued):

- Draft direct services agreement between JPB and SMCTD:
 - Caltrain ED directs and makes all employment decisions (hire/fire, promotions, salary, etc.) for rail employees and other SMCTD employees dedicated to Caltrain.
 - Covers most services necessary to run Caltrain.
 - Addresses indemnification (e.g., allocating liability for employment decisions made by Caltrain and for acts/omissions arising from conduct of employees acting at direction of Caltrain), scope of Caltrain's authority over personnel decisions, and dispute resolution provisions.



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Option 2: Legal Steps

Legal Steps Required to Implement Option 2 (Continued):

- Draft purchased services agreement between JPB and SMCTD:
 - Involves far fewer services than in Option 1, likely including IT, Accounting, Civil Rights, HR.
 - Fee for service agreement.
- Draft agreement between JPB and SMCTD regarding unfunded accrued liability (UAL) for pensions, OBEP, and PTO for former SMCTD employees.



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Option 2: Legal Steps

Additional Steps Necessary to Implement Option 2:

- Consider recommended amendments to JPA set forth in slides for Option 1.
- Establish JPB as an employment center for eight employees (ED and senior staff):
 - Retain human resources consultant.
 - Establish benefits and employment policies.
 - Enroll staff in benefits plans.



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Option 2: Legal Costs and Time Estimates

Option 2 Legal Services Time and Cost Estimate

- Time: 12-18 months
- Cost: \$1,500,000 - \$2,500,000



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Option 3: Key Terms

Option 3: Key Terms Affecting Legal Steps

- JPA is amended to create stand-alone employment center (Option 3a), or JPA is dissolved and special district is created to operate Caltrain (Option 3b).
- Caltrain employs and has direct authority over all employees.
- If special district, special district succeeds to all powers, rights, and duties of JPA.



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Option 3a: Legal Steps

Legal Steps Required to Implement Option 3a:

- Amend 1996 JPA to:
 - Provide JPB authority to hire and employ all Caltrain employees, and provide ED authority to manage Caltrain subject to JPB oversight.
 - Amend managing agency provisions, including provisions identifying managing agency staff as JPB officers.
 - Revise indemnification provisions to require indemnification of members for any activities undertaken by the JPB.



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Option 3a: Legal Steps

Legal Steps Required to Implement Option 3a (Continued):

- Draft agreement between JPB and SMCTD regarding unfunded accrued liability (UAL) for pensions, OBEP, and PTO for former SMCTD employees.
- Amend and restate 1991 RPOA/2008 Amendment to:
 - Modify language regarding SMCTD as managing agency.
 - Reflect parties' agreement with respect to reimbursement of property rights (e.g., SMCTD as tenant in common to ROW in San Mateo County and equity conversion right).



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Option 3a: Legal Steps

Additional Steps Necessary to Implement Option 3a:

- Draft and execute service contracts required to administer agency for services that are currently jointly provided to Caltrain and SMCTD.
- Establish JPB as an employment center for all Caltrain employees (approximately 227):
 - Retain human resources consultant.
 - Establish benefits and employment policies.
 - Enroll staff in benefits plans.
 - Address labor issues with customer services agents who are represented.



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Option 3a: Legal Steps

Additional Steps Recommended to Implement Option 3a:

- Consider recommended amendments to JPA set forth in slides for Option 1.



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Option 3b: Legal Steps

Legal Steps Required to Implement Option 3b:

- Propose and enact State legislation establishing special district:
 - Provide for district to succeed to powers, duties, rights, and obligations of JPB and for dissolution of JPB.
 - Provide for transfer of real and personal property owned by JPB to district.
 - Provide for governance of district including manner of selection and terms of Board members.
 - Provide authority to expend Measure RR revenues and for funding operating and capital expenses.



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Option 3b: Legal Steps

Legal Steps Required to Implement Option 3b (Continued):

- Address informal property arrangements between JPB and SMCTD through execution of agreements.
- Review grants and contracts to effectuate assignment.
- Draft and execute any necessary services agreements.
- Secure insurance.
- Execute regulatory filings that may be required by relevant federal agencies, including STB, FRA, FTA, and RRB.



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Option 3b: Legal Steps

Legal Steps Required to Implement Option 3b (Continued):

- Establish district as an employment center:
 - Retain human resources consultant.
 - Establish benefits and employment policies.
 - Enroll staff in benefits plans.
 - Address labor issues with customer services agents who are represented.
- Draft and adopt conflict of interest code and incompatible activities statement.



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Option 3b: Procedural Steps

Procedural Steps Required to Implement Option 3b:

- Draft terms of new legislation.
- Identify member of the Legislature to carry bill.
- Engage in lobbying effort to secure passage and Governor's signature.
- Unless bill is adopted as urgency statute, it would take effect on January 1 in the year following the year in which it is signed.
- Stand up agency by hiring staff, executing contracts, and making necessary regulatory filings.



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Option 3: Legal Costs and Time Estimates

Option 3 Legal Services Time and Cost Estimate

- Time: 12-36 months
- Cost: \$2,500,000 - \$4,000,000



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Questions?

Are there any questions about what has been outlined with the legal analysis?



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Break

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**Board Member and
Leadership Perspectives on
Options**

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Questions #1 and #2: Analysis Approach and Criteria

Analysis Approach: Interviews with Board Members and General Managers

Evaluation Criteria: How well do the governance options position Caltrain to...

For Board Members

- Be accountable and responsive to the needs of current and future riders?
- Increase social, economic and racial equity on the Caltrain system?
- Ensure fairness and accountability to the tax-paying public(s) who fund (and have funded) the Caltrain system?
- Ensure fairness and accountability to the communities who are impacted by the railroad's operations and projects?

For Agency General Managers

- Provide rider-focused, safe, high-quality, regionally connected rail service?
- Plan, fund, and deliver the Service Vision and associated mega-projects?
- Have clarity and transparency of decision-making/authority/finances across the organization?
- Be flexible and resilient in response to changing conditions?



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Overview of Board Member and General Manager Interview Process

- As outlined at the May 14th Special Meeting, interviews were completed with Board Members, Agency GMs, and senior staff from VTA, SMCTD, SFCTA, SFMTA.
- Board members and General Managers spoke candidly and participated fully.
- Interviewees approached the evaluation criteria with different levels of depth and detail.
- There is challenge inherent to “evaluating” options against criteria – especially in a politicized environment.



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Board Member Interview Themes

In addition to the quantitative information presented in the next slides, a few key facts emerged from the Board Member interviews:

- There is considerable divergence of views between different Board Members and questioning of motives, including a concern about lack of support for Caltrain as an institution.
- There was a lack of understanding as to how Option 2 could operate, which is not surprising given the variety of approaches that could be used.
- There are several Board Members who are awaiting the completed analyses to inform their decision-making.



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What issues are important to Board Members to resolve in this process?

Frequency of Ratings by Subject Area

Subject Area	Average Rating	# of Board Members Giving Each Rating			
		1	2	3	4
Repayment of SMCTD	1.1	7	1	0	0
Updating JPA	1.4	6	1	1	0
Board Member terms/composition	1.5	6	1	0	1
Expenditure of Measure RR funds	1.6	5	2	0	1
Corridor Real Estate Assets	1.6	5	2	0	1
Member Agency investments beyond Measure RR	1.8	4	2	2	0
Role of Caltrain in regional governance conversations	2.0	2	4	2	0
Gilroy Extension	2.4	2	2	3	1
Grade Separations	2.6	0	4	3	1
Major Capital Projects	2.6	0	3	5	0

Ratings:

1) A foundational governance issue that must be substantively discussed and resolved as part of a December 2021 JPB governance recommendation.

2) An important topic that should be considered as part of the December 2021 JPB governance recommendation – but where full resolution of the issue could be deferred to a subsequent phase of work.

3) An important issue that should be addressed outside of the formal Caltrain governance process.

4) Not a critical issue for the JPB to directly address or lead on at this time.



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What issues are important to Board Members to resolve in this process?

	Subject Area	Findings
Most Important	Repayment of SMCTD	Agreement by Board Members that funding compensation to/from SMCTD must be included as part of governance decision.
Most Important	Updating JPA	Agreement by Board Members that they want governance issues resolved and the JPA to be updated accordingly.
Most Important	Board Member terms/composition	Agreement by Board Members that longer board terms of 2-4 years would be worthwhile. Some board members also wanted to see board composition addressed.
Important but not as critical	Expenditure of Measure RR funds	Agreement by Board Members that this needs to be addressed.
Important but not as critical	Corridor Real Estate Assets	Agreement by Board Members that this needs to be addressed as part of the governance issue especially if Options 2 or 3 are pursued.
Important but not as critical	Member Agency investments beyond Measure RR	Most Board Members thought this was important but is not directly part of the immediate governance decision.
Less Important	Role of Caltrain in regional governance conversations	Most Board Members thought this was important but is not directly part of the immediate governance decision. All felt that Caltrain should have a stronger voice and seat at the table and several saw the regional options as future considerations as part of a "governance path."
Less Important	Gilroy Extension	Most Board members did not think that addressing the Gilroy extension was critical to the governance issues.
Less Important	Grade Separations	Most Board Members thought grade separations are important but are not critical to the governance issue.
Less Important	Major Capital Projects	Most Board Members thought major stations and connecting projects are important but are not critical to the governance issue.

How well do Board Members think governance options meet evaluation criteria?

Percent of all Criteria Met by each Option

	Minimally Meets	Partially Meets	Fully Meets
Option 1	45%	21%	34%
Option 2	12%	88%	0%
Option 3	26%	21%	53%

Option 1: Refinement of the shared services/Executive Director (ED) models

Option 2: New shared services/ED models

Option 3: Independent agency



How well do Board Members think governance options meet evaluation criteria?

Number of Responses by Option by Criteria

Evaluation Criteria	Option 1			Option 2			Option 3		
	Minimally Meets	Partially Meets	Fully Meets	Minimally Meets	Partially Meets	Fully Meets	Minimally Meets	Partially Meets	Fully Meets
1. Be accountable to the needs of current and future riders	3	1	4	1	6	0	3	0	4
2. Increase social, economic, and racial equity on the Caltrain system	2	3	2	1	5	0	1	3	2
3. Ensure fairness and accountability to the tax-paying publics who fund and have funded Caltrain system	3	2	3	0	7	0	2	1	4
4. Ensure fairness and accountability to communities impacted by the railroad's operations and capital project implementation	4	2	2	2	5	0	2	1	4
5. Maximize Board member alignment with Caltrain goals	5	0	2	0	6	0	1	2	4

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How well do Board Members think governance options meet evaluation criteria?

- There is **no consensus** as to which option best meets the criteria.
- There is a **basic difference of an opinion** between SMCTD and SCC/SFC on Options 1 and 3.
- There is **general agreement** across all the agencies that Option 2 partially meets the criteria.

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General Manager Interview Themes

General Managers responded to both questions similarly to the Board members from their county.

General Managers also highlighted:

- The importance of repayment to SamTrans for its past investment.
- The importance of resolving governance issues as they significantly detract from operating and managing the railroad.
- The difficulty of any transition to Options 2 and 3 and importance of planning the transition out.
- The importance of transparency concerning finances and decision-making so that member agencies are fully aware of Caltrain activities.
- A need for clarity around Caltrain representation in key projects.



Summary/Synthesis and Discussion

Resolution on Caltrain Governance is Urgent

- The protracted governance discussion has a significant cost for the railroad – including financial resources and considerable staff, executive, and Board bandwidth. To the extent the process plays out poorly, there is a real risk of long-term reputational damage to the institution and its credibility.
- The railroad has changed significantly since the inception of the JPB and that change is continuing with electrification, a new dedicated funding source, and ambitions to deliver on a Long-Range Service Vision.
- Over the last two years, COVID has emerged as a significant new challenge that has fundamentally altered Caltrain's business environment. The future is going to be different – and it will take extreme focus and cooperation for Caltrain to respond and succeed.
- It is healthy and necessary that Caltrain go through an evaluation of its governance, and it is essential that all parties to the JPB view the railroad's ultimate governance as fair and legitimate.



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Review of Three Broad Self-Directed Options

Less Change

More Change

Option 1

Refined Shared Services Model & ED Relationship

Maintain the San Mateo County Transit District (SMCTD) as managing agency of Caltrain with increased JPB oversight over the Caltrain Executive Director (ED) and increased Caltrain oversight of services provided to the railroad by SMCTD through shared service agreements.

Option 2

New Shared Services Model & ED Relationship

Adjust the SMCTD managing agency model to provide for greatly expanded JPB oversight and authority, including direct JPB employment of the Caltrain ED and senior leadership; expansion of services provided to the railroad directly by Caltrain; and establishment of purchased service agreements for remaining services provided to the railroad by SMCTD.

Option 3

Independent Agency

Dissolve the managing agency model and replace with a separate, independent Caltrain agency to directly manage and administer the railroad, either through reorganizing JPA or forming a special district.

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Financial and Legal Analysis Summary

Option	Annual Increase in Costs	One Time Costs	Legal Time Estimate Following MOU Agreement
Option 1	-	\$1,500	6-18 months
Option 2	\$5,900	\$4,600	12-18 months
Option 3	\$9,200	\$48,900	12-36 months

Note: All costs are expressed in thousands and in \$2021.



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Synthesizing Views on Governance

- Board members, general managers and stakeholders look at governance from a variety of perspectives and through multiple different lenses.
- On the following slides, the consultant team has attempted to synthesize what was heard in interviews and what has been learned through our legal and financial work into coherent "ballot-style" arguments that present the case for each option.
- We have presented them in the order of options 1,3 and then 2 based on the rankings assigned to them in our board member interviews- where there was a sharp division among members around options 1 and 3 whereas there was general consensus that option 2 could partially satisfy a variety of important criteria.



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Synthesis: Reasoning for Option 1 – Refining the current structure

- Option 1 builds on the success Caltrain has achieved within the current structure. Under the management of SMCTD, Caltrain has grown to be the seventh largest commuter railroad in the country and the most efficient.
- Formalization of key refinements, including the designation of a separate Caltrain ED and the development of shared services agreements, go a significant way toward providing greater accountability to the JPB and transparency around the use of resources.
- Option 1 maintains economies of scale from sharing resources between SMCTD and Caltrain and avoids the significant financial outlays associated with the other options. The railroad is still in a financially delicate position – Caltrain cannot afford to increase its operating budget by as much as \$9.2M a year just to support a governance change or to outlay nearly \$50 million dollars in one-time costs. Ultimately these are resources that could be used toward services and projects that more directly benefit riders.



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Synthesis: Reasoning for Option 1 – Refining the current structure

- Similarly, Option 1 maintains Board structure, and limits disruption – allowing the agency to use its resources and focus towards pressing issues like COVID recovery and completing electrification. Other approaches will involve protracted legal negotiations of up to three years and will be a major distraction from the railroad's core mission.
- Finally, Option 1 continues a relationship with SMCTD where the District has acted as the “backstop” for the railroad in a variety of both big and small ways. SMCTD has taken its management responsibility seriously, providing Caltrain with various kinds of hard and soft financial support and use of ROW over the years while expending tremendous executive and political bandwidth and capital on the railroad's behalf. There is concern that this sense of deep responsibility to the system as a whole (rather than just particular projects or stations) is not shared by the other partners.

“What’s the problem we are trying to solve?”



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Synthesis: Reasoning for Option 3 – Creating a new structure

- Option 3 creates fully co-equal status for member counties and the communities they represent. With Option 3, the Board can feel assured that the organization is in total alignment with its direction.
- Caltrain is a different railroad than it was 30 years ago. The financial scale of the organization has increased substantially as have the risks and impacts involved with delivering Caltrain services and increasingly large projects like electrification. Option 3 creates the direct accountability needed for the Board to fully own these challenges and responsibilities.
- Option 3 also enables Caltrain to ultimately better achieve the 2040 Service Vision and other complex and long-term regional projects by creating a focused organizational structure where the Board can direct its own agenda and can be directly involved in ensuring that decisions related to organizational priorities support its long-term vision for the railroad.



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Synthesis: Reasoning for Option 3 – Creating a new structure

- Option 3 puts Caltrain on stronger footing as a true regional agency. An independent Caltrain will be more effective in advocating for and attracting the scale of funding needed to deliver the 2040 Service Vision.
- Finally, Option 3 is the only structure that creates true clarity on staffing and accountability. While it may require more cost and effort to implement, Option 3 skips past the confusing staff reporting and complex shared services structure of other options. Other options do not fully resolve underlying governance issues and risk leaving the railroad with a governance structure that is still viewed as being overly connected to the interests of San Mateo County at the expense of San Francisco and Santa Clara Counties.

“Change and disruption are needed”



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Synthesis: Reasoning for Option 2 – Evolving the current structure

- Option 2 is the only choice that balances the need for significantly greater accountability with the reality of resource constraints, an oversubscribed mandate and a divided board. Option 2 is an efficient step forward that sets Caltrain up for the future – and could work either as a long-term solution or as a step toward further change. It achieves the fundamental accountability goals of San Francisco County and Santa Clara County policymakers at the lowest staff disruption and cost.
- While Option 2 will require an investment of time and money, the upfront costs are significantly lower than Option 3. Further, the basic structure proposed in Option 2 provides ongoing flexibility around timing, number of Caltrain employees, and sharing of staff. These can continue to be negotiated and refined by the partners to balance the desire for greater accountability with a staff sharing approach that maximizes efficiency and keeps added costs low.
- By having the JPB directly employ the Executive Director, Option 2 goes significantly further than Option 1 to create transparency, accountability, and a sense of fiduciary responsibility around purchasing shared services. This is the central issue and Option 2 resolves it whereas Option 1 does not go far enough and will clearly leave some parties unsatisfied, and the overall governance issue unsettled.



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Synthesis: Reasoning for Option 2 - Evolving the current structure

- Option 2 can also lay the groundwork for Caltrain to transition to a regional entity. It allows the JPB to direct the Caltrain ED and executives to act as fully independent players in helping to lead ongoing regional conversations but obviates the need to make a hard and costly governance transition while regional conversations are still ongoing and outcomes are unclear. Option 3 involves significant up-front costs and will require an all-consuming transition for the next several years – this could significantly complicate, if not fully deter, Caltrain’s ability to participate effectively in conversations about regional governance.

“Option 2 is an essential step to untangling Gordian knots of cost, funding, and liability – if you don’t tackle it meaningfully, you are not getting to the second step.”



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Discussion

Topics for discussion:

- Reflection on what you heard today
- Preparation for next Special Meeting in September



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Public Comment

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Next Steps

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Next Steps

This presentation has provided Board members with the requested information regarding the evaluation of the self-directed governance options.

- Continue to discuss self-directed governance options with the Board at next Governance Special Meeting #5 and regional options at Governance Special Meeting #6.
- **Upcoming Special Meetings on Governance:**
 - Special Meeting #5: TBD in September 2021
 - Special Meeting #6: Friday, October 22, 2021, 1:00pm – 4:30pm



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Attachment 2: Information Regarding the Interviews that were Conducted with Board Members and Partner Agency Leadership



Caltrain 2021 Governance Process Round 2 Interviews

Background

Howard Permut and Ratna Amin conducted interviews with the Caltrain Board Members and Member Agency General Managers regarding the “self-directed” governance options.

The purpose of interviews was to:

- 1) Gather assessments of these options and how they might perform against evaluation criteria which were selected by the Board at its May 2021 meeting.
- 2) Gather feedback on the importance of addressing issues or topics raised by Board members or key stakeholders as part of the 2021 JPB process to reach a recommendation on governance.

Key findings from the interviews are included in the August 20, 2021 Special Meeting #4 Presentation slides.

Attachment 3: A Detailed Report from Olson Remcho regarding Legal Analysis of the Self-Directed Governance Options

MEMORANDUM

TO: Peninsula Corridor Joint Powers Board

FROM: James C. Harrison, Robin B. Johansen, Thomas A. Willis, and Aaron D. Silva

DATE: August 13, 2021

RE: Legal Analysis of Governance Options

INTRODUCTION

Olson Remcho (“OR”) has been asked to identify the legal steps that the Joint Powers Board (“JPB”) and its member agencies would need to undertake to accomplish each of the three governance options currently under consideration, as those options have been defined by the JPB and its governance consultants. For each option, we provide a summary of the option, the legal steps required to achieve the option, an estimate of how long each option would take to complete, the approval requirements for each option, and an estimate of legal costs associated with the option. The cost estimates for legal services are only for the JPB and do not include the costs that could be incurred by the member agencies.

Our time estimates are based on the assumption that the JPB will agree on one of the three governance options by the end of 2021, as stipulated by JPB Resolution No. 2020-42 (e). Once that agreement is reached, we assume for purposes of this report that the member agencies would negotiate and enter into a memorandum of understanding outlining the basic structure of the agreed-upon governance option (the “MOU”). It is difficult to estimate how much time will be associated with negotiating and finalizing an MOU, including the necessary approvals by the member agencies. For that reason, our time estimates for completing the legal steps to implement each option run from the date of approval of the MOU by the member agencies.

Our estimates of the costs for legal services for each of the options include costs incurred from the date of the execution of the MOU and the completion of the legal steps necessary to implement the selected option.¹ Our cost estimates do not include legal services for the member agencies’ separate counsel nor do they include costs for the time of Caltrain staff or staff of any member agency. These other costs could be extensive, depending upon

¹ We estimate that the JPB’s legal costs associated with the negotiation and drafting of the MOU to be in the range of \$250,000-\$750,000.

how long it takes for the member agencies to reach agreement and the nature of the agreements reached.

The three proposed governance options under consideration are:

- **Option 1: Refined Shared Services Model & ED Relationship**
Maintain the San Mateo County Transit District ("SMCTD") as managing agency of Caltrain with increased JPB oversight over the Caltrain Executive Director (ED) and increased Caltrain oversight of services provided to the railroad by SMCTD through shared service agreements.
- **Option 2: New Shared Services Model & ED Relationship**
Adjust the SMCTD managing agency model to provide for greatly expanded JPB oversight and authority, including direct JPB employment of the Caltrain ED and senior leadership; expansion of services provided to the railroad directly by Caltrain; and establishment of purchased service agreements for remaining services provided to the railroad by SMCTD.
- **Option 3: Independent Agency**
Dissolve the managing agency model and replace with a separate, independent Caltrain agency to directly manage and administer the railroad, either through reorganizing the Joint Powers Agreement ("JPA") or forming a special district.

Below, we set forth the methodology we used to identify the legal steps necessary to accomplish each of the options. Our legal analysis is based on the description of the options set forth in the June 29, 2021, Caltrain memorandum entitled "Final Draft of Self-Directed Options" and direction from the JPB's governance consultants.

Subsequently, we discuss the legal steps necessary to accomplish each of the options.

As an initial matter, we believe that all three options are legally feasible. The time and costs to implement them will vary widely, however, and they depend on variables that are very hard to predict. These include the amount of time representatives from each member agency are able to devote to these issues, which will in turn determine how much time we spend in meetings and doing research and drafting. Our estimates assume that at least one member of our firm will be present at most meetings, that others will be involved in research and drafting, and that specialized counsel will be required for certain services. As noted above,

our estimates do not include the costs for legal counsel who may represent and advise the individual member agencies.

The key variable that affects time and cost is the member agencies' ability to reach agreement on critical governance issues, first in selecting a governance option and then in negotiating the MOU that establishes the terms for implementing the selected governance option. There are two threshold issues that will have a serious impact on the length and outcome of these negotiations: (1) reimbursement of SMCTD for its investment in Caltrain and (2) SMCTD's right to serve as managing agency under the 2008 amendment to the 1991 Real Property Ownership Agreement. Our time and cost analyses for Option 1 include the possibility that these two issues have not been resolved, whereas the range of cost and time estimates for Options 2 and 3 assume that the agencies have agreed on these issues, but take into account the possibility that some of these negotiations may be happening simultaneously.² It is important to keep in mind, however, that JPB Resolution No. 2020-42(d) states the JPB's desire that the governance changes include providing a majority of the JPB Board with the power to appoint the Caltrain Executive Director, *provided* that the reimbursement issue has been resolved:

That it is the desire of the JPB that the modification of "governance structure or procedures," described above, will include amendments that enable the majority of the JPB or successor governing board (or, if a larger regional rail authority is created that includes Caltrain, a majority of that agency's board), to appoint an Executive Director to operate Caltrain provided that the parties have reached an agreement to reimburse SMCTD for its investment in Caltrain.

Because of the many uncertainties inherent in this process, we can only provide broad ranges of time and cost for each option. However, we can state that we expect Option 1 to involve the least expenditure of time and money for legal services; that Option 2 will involve more time and greater legal costs than Option 1 because it will require more extensive revisions to the 1996 JPA, the negotiation of both purchased services and direct services agreements with SMCTD, and the establishment of employment mechanisms for the ED and senior staff, including retirement and benefits programs; and that Option 3 would be the most expensive

² The JPB's legal costs associated with negotiations concerning these matters would likely amount to approximately \$250,000 to \$500,000. These costs are not included in the estimate for implementation of Option 1. Our cost estimates for implementation of Options 2 and 3 include the possibility that these negotiations could occur concurrently and incorporate the estimated costs for the JPB's participation in these negotiations.

and time-consuming. The higher costs and time estimates for Option 3 are the result not only of the larger number and diversity of the workforce necessary for an independent agency, but also because if agreement is reached to create a separate entity such as a transit district, there will need to be state legislation, interaction with federal regulators, and assignment of existing contracts, such as grant agreements relating to electrification and the operating agreement with TASI, to the new entity.

METHODOLOGY

A. Approach

In determining what legal steps are required to accomplish each of the three governance options, OR undertook the following steps:

Legal Review

- Reviewed state law regarding joint power authorities (the Joint Exercise of Powers Act) to determine whether that law limited the JPB in any way from changing the JPA to accomplish the three governance options.
- Reviewed state law to determine whether there were any limits on the state Legislature's power to enact enabling legislation redesignating the JPB as a special district or reorganizing the JPA. For a point of reference, in 1988 (before the transfer of the ROW to the JPB), the Legislature passed SB 2628, which would have redesignated the JPB as a special district if the San Francisco, San Mateo, and Santa Clara boards of supervisors had been able to identify sources of funding for purchase of the right of way, stations, and equipment.
- Reviewed state and federal law regarding the prohibition on impairment of existing JPB contracts to determine whether any of the governance options would raise such concerns.
- Reviewed the current binding agreements among the member agencies to determine what provisions would have to be modified to accomplish each of the governance options. Those documents are: (1) the current Peninsula Corridor Project Joint Powers Agreement, dated October 3, 1996 (the "JPA"); (2) the Real Property Ownership Agreement, dated December 24, 1991 ("1991 RPOA"); and (3) the Amendment to Real Property Ownership Agreement, dated October 31, 2008 ("2008 Amendment"). OR believes those are the only three formal agreements among the parties that continue to remain in effect. In addition, OR

reviewed the JPB Rules of Procedures, revised June 4, 2009 (JPB Resolution No. 2009-25).³

- Reviewed the Caltrain Business Plan Organizational Assessment prepared by Howard Permut in 2019.
- Preliminarily reviewed the main contracts JPB has with third parties to determine whether those agreements, usually through assignment provisions, would limit the JPB from accomplishing any of the three governance options or require those agreements to be amended. Those include: (1) Rail Operations Agreement between TransitAmerica Services, Inc. (TASI) and the JPB, as amended; (2) Electrification Agreement between Union Pacific Railroad Company and the JPB, dated December 5, 2016; (3) Agreement between California High-Speed Rail Authority and the JPB, dated May 1, 2013; (4) Funding Agreement between California High-Speed Rail Authority and the JPB, dated December 5, 2018; (5) Full Funding Grant Agreement between the Federal Transit Administration and the JPB, dated May 22, 2017; and (6) Electrification Design-Build Contract between Balfour Beatty, Inc. and JPB, dated August 15, 2016. We have worked with the JPB staff to compile a list of other current contracts that would require review and assignment if a new entity were to be created.
- Reviewed SB 797 (the legislation enabling the JPB to place Measure RR on the ballot), the text of Measure RR, and the resolutions of the JPB, its member agencies, and the Boards of Supervisors for the Counties of Santa Clara and San Mateo, to determine if any of the governance options would affect Measure RR funding to the JPB under an amended JPA or to a successor agency, such as a special transit district.
- Reviewed the governance resolutions adopted by the JPB, its member agencies, and the Boards of Supervisors for the Counties of Santa Clara and San Mateo, that require the JPB to study governance changes as a condition of placing Measure RR on the ballot, to determine whether any of the governance options were inconsistent with that agreement.

³ The Rules of Procedure govern the conduct of the JPB's meetings and can be found: <https://www.caltrain.com/Assets/jpb+rules+of+procedure.pdf>.

- Consulted pension law experts to determine the legal requirements for moving employees from SMCTD to the JPB.
- Consulted federal transit and railroad law experts to determine the federal regulatory requirements necessary to accomplish each option. The federal agencies with which Caltrain would have to engage in order to accomplish one or more of the options include the Surface Transportation Board, the Federal Transit Administration, the Federal Railroad Administration, and the Railroad Retirement Board.
- Preliminarily consulted with bond law experts to discuss the implications of the governance options for the JPB's outstanding bonds and lines of credit.

Factual Review

- Met with the SMCTD financial team to understand the current cost sharing arrangements between the JPB and SMCTD, and examined the current cost sharing arrangements as documented through the 2021 cost allocation plan prepared by Maximus and internal cost sharing policies, such as the Indirect Cost Allocation Plan and Rate Proposal.
- Met with MGO, which has been retained to undertake a financial analysis of the three governance options.
- Conducted research relating to other recently established bodies, such as SMART and Metrolink, but have not yet been able to obtain sufficient information to determine the relevance of these bodies as potential models. Additional information from these sources may result in refinement of our analysis.

Limitations on Review (Actions That Remain)

Additional research is required to complete this review, including:

- Review by bond counsel of debt issuances (such as \$55 million in 2019 Farebox Bonds, and the proposed bond financing backed by Measure RR funding) and other financing vehicles to determine the steps necessary to reflect the governance changes, including revising the managing agency form of management under Option 2 and the reorganization proposed under Option 3.

- Review of labor laws relating to customer service employees who are currently represented.

B. Scope and Limitations

After our investigation and review, we then preliminarily listed all legal tasks we believe are necessary to accomplish each of the governance options, as defined, and refined the list after discussions with Caltrain staff. The resulting analysis is structured as follows:

- A brief summary of the action to be taken. For example, if the JPA needs to be amended, we describe the main provisions that would require a change.
- Whether there is any legal impediment to taking the action, and if so, how it could be overcome.
- Whether the action could be taken independently or whether it could raise additional ancillary issues. For example, if the JPA is modified to achieve one of the options, should those changes be limited to accomplishing the governance change or should other provisions be amended (e.g., those provisions that have been previously identified as requiring amendment, such as restating the funding formulas or budget process to comply with current practice)? For certain actions, we have identified ancillary issues we think could arise. Where we recommend changes for best practices purposes, rather than because they are required for purposes of implementing one of the governance options, we identify them as such.
- A description of the procedural steps that would need to be taken to accomplish each action, and what member agencies or personnel would need to undertake the action. This description is limited to the legal steps necessary to implement each action and does not include administrative or other steps necessary to be taken by staff.
- An estimate of how long it would take to accomplish each action, from negotiation and drafting to approval by the required entities. Again, this time estimate focuses on the legal effort but is dependent on the time it takes for the parties to reach agreement regarding implementation of the various tasks (e.g., the negotiation, drafting, and execution of direct and shared services agreements under Option 2).

- A broad estimate of legal costs that would be incurred by the JPB for each action. Because of the number of variables involved and the lack of data available to evaluate the legal costs incurred for similar efforts, we have stated these estimates as ranges and have identified the variables that could affect the costs.

LEGAL ANALYSIS OF GOVERNANCE OPTIONS

Option 1: Refinement of Shared Service/ED Relationship

Summary of Option 1

- Maintain SMCTD as managing agency of Caltrain with increased JPB oversight over Caltrain ED and increased Caltrain oversight over rail staff and shared services agreements.
- Includes a dedicated Caltrain ED who reports to SMCTD with the JPB setting goals and evaluating the ED.
- JPB approves a recommendation for Caltrain ED; SMCTD Board approves the JPB's recommended Caltrain ED.
- Although all staff are SMCTD employees, rail staff report to Caltrain ED.
- Caltrain ED recommends the hiring and firing of all rail staff to SMCTD.
- SMCTD's General Manager decides SMCTD organizational structure but negotiates with Caltrain ED in the drafting and execution of shared services agreements.
- Caltrain ED must agree to cost allocation for shared services.

Required and Recommended Legal Steps to Implement Option 1

1. Amend 1996 Joint Powers Agreement (JPA)

Under Section 10 (C) of the JPA, the General Manager of the managing agency serves as the JPB's Executive Director. Because Option 1 contemplates that Caltrain will have a dedicated ED, the JPA will have to be amended to eliminate reference to the General Manager of the managing agency serving as Caltrain's ED and to provide for a dedicated ED. This

amendment should also address what happens if the SMCTD Board were to reject a candidate for ED recommended by the JPB.⁴

In addition to this required step, the following sections of the 1996 JPA may need to be amended depending on the agreements reached on the issues described under Procedural Steps below:

- Section 5 (F) (5), Powers of the JPB – currently provides that JPB may “advise, review and make recommendations to the managing agency” regarding the management plan. Depending on the parties’ agreement, this section would have to be amended if, for example, the JPB is provided with the authority to accept or reject the management plan or the parties agree that the JPB and the managing agency must reach agreement on the plan.
- Section 6 (B) currently designates SMCTD as the managing agency subject to removal after it has been repaid for the Additional Contribution. This is inconsistent with the 2008 Amendment to the 1991 RPOA, which provides that SMCTD may serve as managing agency as long as it chooses and should be amended to reflect that change for best practice purposes. In addition, the parties may also wish to consider amending this section to provide for JPB approval of one or more shared services agreements with the managing agency, specifying such things as the duration of the agreement, and that it would be negotiated by the ED, with JPB approval, and reflected in Caltrain’s annual budget. Although this is not required, for best practices purposes, the parties may wish to clarify the scope of the JPB’s authority over shared services.
- Section 6 (C) delegates authority to the managing agency over 12 different areas of operations. Counsel will need to assess which of these need to be amended in light of the member agencies’ agreements about the authority of the ED.
- Section 7 (C) provides that expenses incurred by the managing agency to administer the affairs of the JPB, including administration of the operating contract, shall be shared by the member agencies based on the a.m. boarding

⁴ Since Jim Hartnett’s retirement as General Manager of SMCTD and Caltrain Executive Director, Michelle Bouchard has served as Caltrain’s Acting Executive Director. Although Ms. Bouchard is a SMCTD employee, under the members’ agreement, the JPB conducts a performance evaluation for the Acting Executive Director and provides its input to the SMCTD Board.

formula. However, under the current practice, the allocation is based on an all-day boarding formula. For best practices purposes, we recommend the member agencies reconcile these different approaches and amend the JPA if necessary to reflect the parties' agreement.

- Section 7(D)(iii) provides that the managing agency shall bill the JPB for administrative expenses on a monthly basis and that the expenses will be paid monthly by the member agencies. To the degree the parties wish to change this term as part of their negotiation over shared services, it would require amendment.
- Sections 10 (D) and (E) provide that the Finance Director of the managing agency is the treasurer and controller respectively of the JPB. If the parties wish to have a different treasurer than the SMCTD's Finance Director, they would have to choose either the treasurer of one of the member agencies or one of the officers of the JPA (Chair, Vice-Chair, or Secretary) . See Gov. Code § 6505.5 [treasurer of a JPA must be treasurer of one of the member agencies, an officer of the JPA, or an employee of the JPA. Caltrain would not have any employees under Option 1.]
- Section 16 currently states that the JPB shall indemnify member agencies for liabilities arising from the performance "of any activities of the JPB *not delegated to the Managing Agency* or the activities of the JPB undertaken pursuant to this Agreement." The parties may consider amending this provision to clarify their rights and responsibilities in light of the additional authority afforded to the ED and JPB under this option, including the ED's authority to make recommendations regarding hiring and firing of rail staff and the execution of one or more shared services agreements.

Ancillary Issues

JPA: The JPB may wish to consider amending the following unrelated provisions of the

- Duration of JPA – Currently remains in force on year-to-year basis until two or more parties withdraw (Section 3).

- Length of Board members' service (Section 4)—Board members currently have no fixed terms but serve at the pleasure of their appointing authority. Staggered terms for Board members could also be considered.
- As agreed to by the parties, resolution of other outstanding issues that have been identified, such as revision of boarding formula; responsibility for net operating costs of Gilroy Service to be consistent with current practice; incorporation of Measure RR funding issues and uses; etc.

2. Amend 1991 RPOA and 2008 Amendment

Depending on the agreements reached with respect to the role of the ED and the managing agency, the following sections of the 1991 RPOA may need to be amended:

- Sections 6.1 and 6.3 currently allow the JPB to delegate management responsibilities for certain operational and nonoperational assets to another Member Agency besides SMCTD. Depending on the parties' agreement, this section should be amended either to reflect the 2008 Amendment giving SMCTD the right to serve as managing agency for as long as it chooses or to incorporate any subsequent agreement regarding the managing agency issue.

Depending on any agreement reached with respect to repayment of SMCTD's investment in Caltrain, the 1991 RPOA and 2008 Amendment regarding SMCTD's property rights may need to be thoroughly revised and restated. The estimated costs associated with revising these agreements is set forth in footnote 2.

3. Draft and Execute One or More Shared Services Agreements between JPB and SMCTD

- Under Option 1, SMCTD and Caltrain would negotiate one or more agreements for the managing agency services provided by SMCTD. Terms to be negotiated would include cost allocation, type and level of service, duration of agreement, remedies, billing/invoice procedures, performance metrics, and indemnification provisions. This would formalize the cost allocation model currently employed by SMCTD to charge Caltrain for shared services provided to the agency. (This is distinct from the fee for service model contemplated under Option 2, pursuant to which Caltrain would purchase limited services from SMCTD.) The agreement or agreements would likely include a set of services such as the ones currently shared with Caltrain including:

- Human resources
- Civil rights
- Payroll
- Facilities
- Information technology
- Treasury and accounting
- Financial planning and analysis
- Budget preparation
- Contracts and procurement
- Communications
- Safety and security
- Customer service
- Marketing
- Environmental planning
- Grants
- Real estate

Procedural Steps

- Member agencies negotiate terms of revised JPA and other agreements as necessary (e.g., 2008 Amendment, 1991 RPOA). Specifically, member agencies will need to reach agreement on the following:
 - a. Definition and scope of “oversight” of Executive Director:
 1. Process for appointment of ED (e.g., scope of SMCTD’s power to review and approve or reject JPB’s recommended candidate, including the procedure if SMCTD rejects the JPB’s choice).
 2. Role of JPB, if any, in termination decision.
 3. Any changes to current method of performance evaluation, such as semi-annual reviews, etc.
 4. JPB involvement in salary and benefits setting.

5. Scope of ED's management and contracting authority and JPB approval requirements.
 6. Scope of ED's authority to recommend hiring and firing of Rail Division staff, including whether decision to hire and fire must originate with ED.
- b. Definition and scope of "increased JPB oversight" of shared services, including:
1. The scope of additional review and approval requirements from the Caltrain ED or the JPB, including the allocation of costs of employees who provide services to multiple agencies, including Caltrain.
 2. The scope of the ED's authority to negotiate changes in shared services, both with and without JPB approval.
 3. Whether to make any changes to current practice regarding SMCTD GM's provision of information to the JPB, such as semi-annual reporting to the JPB regarding current and projected costs for provision of shared services.
- Counsel drafts amendments to JPA and agreement or agreements for shared services.
 - Amended JPA must be approved through resolutions of the boards of member agencies: CCSF (Board of Supervisors); Santa Clara Valley Transportation Authority, and San Mateo County Transit District. Caltrain counsel will need to confer with counsel for CCSF to determine whether SFMTA must also approve the amended agreements and who will sign on behalf of CCSF.
 - Shared services agreements between Caltrain and SMCTD must be approved by JPB and either the SMCTD Board or General Manager, depending on the General Manager's contracting authority.
 - Determine whether the JPB has ever designated which agency or officer has charge of JPB property and is to file the bond required by Government Code section 6505.1 and either confirm that choice or make a new designation.

- After approval by member agencies, file notice of the amended JPA with the Secretary of State within 30 days after the effective date of the amendment. The notice must contain: (1) the name of each public agency that is a party to the agreement, (2) the date that the amended agreement became effective, and (3) a statement of the purpose of the amended agreement or the power to be exercised. Cal. Gov't Code § 6503.5.
- File copies of the full text of the original JPA and the amended agreement with the State Controller. Cal. Gov't Code § 6503.6(a).
- It *may* be necessary to file copies of the amended agreement with the local agency formation commission in each member county within 30 days, depending on whether the operation of Caltrain constitutes a "municipal service" within the meaning of the Government Code. Cal. Gov't Code § 6503.6. Further research is required to determine the necessity of this step.
- If RPOA is amended, JPB records Memorandum of Agreement describing changes to RPOA in counties of Santa Clara, San Mateo, and San Francisco. (1991 RPOA, § 14.)

Time Estimate for Option 1: 6-18 Months from Member Agencies' Approval of MOU to Proceed with Option 1

- The time estimate for Option 1 varies from 6 to 18 months, depending largely on whether the member agencies determine it is necessary to resolve issues involving SMCTD's reimbursement and the extent of its role as managing agency as part of reaching agreement on this option. Whether or not the parties reach agreement on the reimbursement issue, they will need to agree on how the change to a dedicated ED and some form of increased JPB oversight over shared services affect SMCTD's role as managing agency.

Estimate of JPB Legal Costs for Option 1: \$750,000-\$1,500,000

- The cost estimate for legal services varies from \$750,000 to \$1.5 million, depending on the time required to negotiate and draft changes to the JPA and negotiated and draft new shared services agreements. For example, if the parties agree that the current levels and costs of shared services are satisfactory, then drafting those agreements will take less time than if they need to be

extensively negotiated. Because there are no existing shared services agreements, however, the drafting process is an important component of legal costs.

Option 2:
JPB Hires and Directs ED and Senior Staff

Summary of Option 2

- JPB hires, employs, and directs Caltrain Executive Director (ED) and seven senior staff positions (executive team), including: Chief of Staff; Finance; Communications; Planning; Capital Delivery; Operations and Maintenance; and Rail Commercial & Business Development.
- JPB negotiates agreements with SMCTD for direct services and purchased services as follows:
 - Direct services: Non-executive rail employees and employees in other divisions who are dedicated to Caltrain will remain SMCTD employees but report directly to Caltrain ED or senior staff, and Caltrain ED makes employment decisions (hiring, termination, evaluation, salary, etc.) through a direct services agreement between Caltrain and SMCTD.
 - Purchased Services: Caltrain purchases services from SMCTD that are not performed by staff through the direct services agreement. Under Option 2, fewer services would be provided under the purchased services agreement since most of the support for Caltrain would come through the direct services agreement. SMCTD ED would have employment decision-making authority for employees providing these purchased services.
 - Agreement between SMCTD and Caltrain required on pension/Other Post-Employment Benefits (“OPEB”) cost sharing.
- Agreements would need to be reached regarding sharing of IT systems and other overhead expenses. Additional procedures/requirements would need to be established related to, for example, Civil Rights and FTA requirements.
- Establish Caltrain as an employment center, similar to Option 3, but for only eight employees, including creating benefit and retirement programs through CalPERS.

Required Legal Steps to Implement Option 2

1. Amend 1996 Joint Powers Agreement

Amend the existing JPA as follows:

- Provide JPB hiring and employment decision-making authority over ED and executive team.
- Establish how JPB would exercise that authority, e.g., through a subcommittee to search/evaluate/set salary for ED, subject to Board approval.
- Provide ED with authority similar to managing agency, to oversee Caltrain's day-to-day operations, subject to Board oversight.
- Provide ED with hiring and employment decision-making authority over seven member executive team.
- Provide that ED and executive team will be supported by SMCTD employees both through a direct services agreement (for non-executive rail employees and other employees dedicated to Caltrain) and purchased service agreements.
- Amend managing agency provision, delete provisions that managing agency's general manager and finance director shall be the ED and treasurer/controller, respectively, of the JPB.
- Provide for the controller and treasurer positions to be held by Caltrain executive team members.
- Note that JPA does not need to be amended to permit JPB to employ staff – JPB currently has that authority. See JPA section 5 (JPB "hereby is authorized, in its own name, to do all acts deemed necessary or convenient for the exercise of said power including, but not limited to, any or all of the following: . . . to employ agents and employees . . .").
- Revise the indemnification provision of the JPA (Section 16). Section 16 currently states that the JPB shall indemnify member agencies arising from the performance "of any activities of the JPB *not delegated to the Managing Agency* or the activities of the JPB undertaken pursuant to this Agreement." The parties

will need to amend this provision by deleting reference to the managing agency and ensuring it is consistent with the indemnity provisions separately negotiated between Caltrain and SMCTD in the direct service and purchased service agreements.

Ancillary Issues

The JPB may wish to consider amending the unrelated provisions of the JPA described under Ancillary Issues in Option 1 above – but those amendments are not strictly required to implement Option 2.

2. Amend 1991 and 2008 RPOA

- Amend or delete Section III of 2008 RPOA that designates SMCTD managing agency “unless or until it no longer chooses to do so” or otherwise supersede section III through changes to the JPA.
- Note that JPB Resolution No. 2020-42 states the JPB’s desire that the governance changes include providing a majority of the JPB Board with the power to appoint the Caltrain Executive Director, *provided* that the reimbursement issue has been resolved. Therefore, it is possible that the 2008 Amendment and the 1991 RPOA will be amended as part of these negotiations. Depending on any agreement reached with respect to repayment of SMCTD’s investment in Caltrain, the 1991 RPOA and 2008 Amendment regarding SMCTD’s property rights may need to be thoroughly revised or restated. Option 2 assumes these agreements will be amended or restated as part of the process, and those costs are included in the estimate (*see* Footnote 2).

3. Draft and Execute Direct Services Agreement

- Draft and execute Direct Services Agreement between JPB and SMCTD for rail staff and other staff dedicated to JPB:
 - Non-executive rail employees and employees in other divisions who are dedicated to Caltrain will remain SMCTD employees but report directly to Caltrain ED or senior staff, and Caltrain makes employment decisions (hiring, termination, evaluation, salary, etc.) through a direct services agreement between Caltrain and SMCTD. It is contemplated that most of the services necessary to support Caltrain would be provided by

employees dedicated to Caltrain through the direct services agreement (Contracts, Real Estate, Communications, Grants, Budgeting, Marketing, etc.)

- JPB and SMCTD would need to negotiate indemnity provisions related to employment decisions made by Caltrain and acts/omissions by employees covered by the direct services agreement.
 - Because the JPB ED would be making all employment decisions, the direct services agreement would not involve the level of ongoing cooperation and consultation between the ED and SMCTD GM necessary in the shared services model contemplated under Option 1.
 - However, because the employees providing services would remain SMCTD employees, the agreement would have to address indemnity issues that could arise under such an arrangement. For example, the agreement would have to address indemnification issues related to Caltrain's employment decisions, and for any liability arising out of the acts or omissions of employees acting within the scope of their employment at the direction of Caltrain executives.
 - The agreement would also need to address how to resolve any disputes where SMCTD does not implement an employment decision requested by the Caltrain ED.
- Other terms to be negotiated would include duration of agreement, billing/invoicing, remedies and pension/OPEB cost sharing issues (see below).

4. Draft and Execute Purchased Services Agreement(s)

- Draft and execute Purchased Services Agreement(s) between JPB and SMCTD:
 - SMCTD and Caltrain would negotiate one or more agreements for Caltrain's use of services provided by SMCTD. Terms to be negotiated include cost of services, type and level of service, duration of agreement, remedies for failure to provide such services, indemnification provisions,

and pension/OPEB cost sharing. This would be a fee for service model rather than a cost sharing/allocation model as contemplated under Option 1.

- It is also contemplated that unlike in Option 1, this agreement would cover far fewer services since most services will be provided through the direct services agreement. For example, the financial model assumes only IT, Accounting, Civil Rights, Treasury, and some HR support would be provided under the purchased services agreement.
- SMCTD ED would have employment decision-making authority over employees providing purchased services to JPB.

5. CalPERS

- As discussed in detail in the report prepared by MGO, the parties will likely have to negotiate over liability for the unfunded accrued liability (UAL) for SMCTD employees. See 1996 JPA, § 7.C (requiring member agencies to share in personnel expenses). In addition, the JPB will have to enter into an agency participation agreement with CalPERS to provide pension benefits to its employees and it will have to adopt a funding plan for benefits, known as Other Post-Employment Benefits.

6. Employment Matters

- Retain human resources consultant.
- Establish compensation structure and benefits and retirement programs through CalPERS and all employment policies for executive staff.
- Enroll staff in benefit and retirement plans.
- Address all earned paid time-off for transitioning employees.
- Develop personnel management infrastructure (e.g., job titles and descriptions, performance evaluations, onboarding process, etc.).
- Contract for payroll services.

- Draft employee handbook, addressing subjects such as sexual harassment and civil rights.

7. Reassess Insurance Needs

- In light of Caltrain possibly assuming additional indemnification obligations and liability, both through amending section 16 of the JPA and the direct service and purchased service agreements, determine insurance needs.
- Determine need for and secure workers' compensation insurance for executive team.

8. Federal Regulatory Filings and Requirements

- Execute any regulatory filings that may be required with the Federal Railroad Administration, Federal Transit Administration, Surface Transportation Board, Railroad Retirement Board, or other federal agencies. Federal regulatory counsel would be engaged to advise on and assist with executing this step and to advise regarding compliance with other federal requirements.

9. Bond Review

- Review terms of outstanding bonds to determine whether removing managing agency form of management implicates any bond covenants

10. Ethics Policies

- Draft conflict of interest code.
 - Under the Political Reform Act (Cal. Gov't Code §§ 87300 et seq.), a local agency must have a conflict of interest code and designate all employees into categories for purposes of disclosing their financial interests and review of their potential conflicts of interest.
 - Confirm that the Fair Political Practices Commission would be the code reviewing body.
- Draft statement of incompatible activities in order to comply with Government Code section 1126.

Procedural Steps

- Member agencies negotiate terms of revised JPA, 1991 RPOA and 2008 Amendment.
- Counsel drafts amended agreements.
- Amended JPA must be approved through resolutions of the boards of member agencies: CCSF (Board of Supervisors)⁵; Santa Clara Valley Transportation Authority, and San Mateo County Transit District.
- File notice of the amended agreement with the Secretary of State within 30 days after the effective date of the amendment. The notice must contain: (1) the name of each public agency that is a party to the agreement, (2) the date that the amended agreement became effective, and (3) a statement of the purpose of the amended agreement or the power to be exercised. Cal. Gov't Code § 6503.5.
- File copies of the full text of the original agreement and the amended agreement with the State Controller. Cal. Gov't Code § 6503.6(a).
- It *may* be necessary to file copies of the amended agreement with the local agency formation commission in each member county within 30 days, depending on whether the operation of Caltrain constitutes a "municipal service" within the meaning of the Government Code. Cal. Gov't Code § 6503.6. Further research is required to determine the necessity of this step.
- Negotiate, draft, and enter into a public agency participation agreement between JPB and CalPERS for Caltrain employees.
- Designate an officer to serve as controller or treasurer of the JPB to be the depository and have custody of all the money of the JPA, from whatever source. The controller may be the treasurer of one of the contracting parties, a certified public accountant, or an officer or employee of the JPB. Cal. Gov't Code §§ 6505.5 and 6505.6.

⁵ As noted above, we will need to consult with counsel for CCSF to determine whether additional approvals are required.

- Designate Caltrain treasurer as the public officer who has charge of, handles, or has access to any property of the agency, as required by JPA law. JPA law also requires such officers to file an official bond in an amount fixed by the contracting parties. Cal. Gov't Code § 6505.1. The 1996 JPA does not have such provisions. Further research is required to determine how best to implement this requirement, including how to determine the amount of the bond.
- JPB and SMCTD negotiate terms of direct services and purchased services agreements, counsel drafts agreement; JPB and SMCTD Board or ED (depending upon level of authority) approve agreements.
- JPB and SMCTD negotiate terms of agreement for allocation of unfunded accrued liability (UAL) for the past CalPERS service of current SMCTD employees who become employees of Caltrain (the executive team).

Time Estimate for Option 2: 12-18 Months from Member Agencies' Approval of MOU to Proceed with Option 2

- The estimated time to implement Option 2 depends largely on how long it will take for (1) the member agencies to negotiate changes to the 1996 JPA and RPOA agreements, and (2) Caltrain and SMCTD to negotiate both direct services and purchased services agreements and a cost allocation agreement for unfunded pension/OPEB liabilities. Finally, the JPA must establish an employment infrastructure, including negotiating a public agency participation agreement with CalPERS. Thus, in setting up Caltrain as an employment center – albeit for eight employees – Option 2 is more similar to Option 3 than Option 1 in terms of timing and complexity. And at least one aspect of Option 2 – negotiating the purchased services and shared services agreement with SMCTD – could make Option 2 as complex as Option 3a. For these reasons, we estimate that the time from decision to proceed to full implementation is at least 12 months and up to 18 months.

Cost Estimate for Option 2: \$1.5-2.5 million

- The legal costs associated with Option 2 are likely to be in the range of \$1.5-2.5 million. This amount does not include the costs associated with negotiating and drafting the MOU to which the parties would agree before implementing Option 2.

- This cost estimate is speculative. This range assumes that counsel will be involved in the negotiations related to the amendment of the 1996 JPA and will have primary drafting responsibilities for the amended JPA, the direct and shared services agreements with SMCTD, and amendments to the 1991 RPOA and 2008 Amendment. Costs will increase if negotiations continue over a protracted period of time or if ancillary issues arise in the course of amending the 1991 RPOA and 2008 Amendment. Costs may also increase depending upon the complexity of negotiations between Caltrain and SMCTD related to the direct and purchased services agreements and unfunded pension/OPEB liabilities.

Risk Factors to Consider

Litigation:

- As discussed in more detail under Option 3, amending the 1996 JPA is not without risk of litigation brought by outside entities, as there is at least one instance of an amendment to a JPA giving rise to a lawsuit brought by third parties. We believe, however, that risk is modest with respect to Option 2 given the relatively limited nature of the amendments.

Option 3:

Formation of Independent Agency

Summary of Option 3

- Existing joint powers agreement (1996 JPA) is either amended or dissolved and the current Joint Powers Board (JPB) is either transformed into, or replaced with, a newly independent agency that will directly manage and administer Caltrain.
- New agency may take the form of either of the following:
 - a. Modified or reformed Joint Powers Authority that vests full authority to own and operate Caltrain in an independent Transit Authority (Option 3a); or
 - b. Newly created Transit District (Option 3b).
- If new entity, succeeds to all of the powers, duties, and rights of the JPB, including all real property ownership rights under a newly amended Real Property Ownership Agreement (RPOA).
- Agency becomes the employing entity for all Caltrain employees (not including operators and engineers employed by TASI).

Required Legal Steps to Implement Option 3

1. **Create New, Independent Agency by One of Two Means:**
 - a. Amend the existing JPA to either transform the JPB into, or replace the JPB with, a newly formed independent Transit Authority.

Summary of Proposed Amendments

JPA would be amended to:

- Transform the existing JPB into a newly independent Transit Authority with full authority over the management and operation of Caltrain. This could include a span of possible options — ranging from leaving the current board intact to retaining some

portion of the existing board to providing for the appointment of an entirely new governing board.

- If creating a new entity (i.e., new JPA), provide that the Transit Authority succeeds to all of the powers, duties, rights, assets, obligations, liabilities, and indebtedness of the JPB.
- Define the scope of power of the Transit Authority, including the authority to serve as the employing agency of all Caltrain employees.
- Remove SMCTD as the managing agency of Caltrain and instead vest that responsibility with the Transit Authority.
- Provide for the Transit Authority's administrative, operational, and capital improvement costs, such as through ongoing contributions from member agencies.
- Provide that the Transit Authority succeeds to the JPB's authority to expend Measure RR funds.

b. Form New Transit District.

Requires Legislation

- Transit districts are necessarily created by statute. Therefore, in order to create a transit district as a successor to the JPB, it will be necessary for the Legislature to pass legislation creating such an entity.

Historical Precedent

- There is historical precedent for legislation proposing to transform the JPB into a transit district. In 1988, the Legislature enacted SB 2628 (Ch. 1434, Stats. 1988), which redesignated the original Peninsula Corridor Study JPB as the Peninsula Rail Transit District. However, the operation of the act was made contingent on the governing bodies of the three member agencies to the JPA determining to their satisfaction the sources of financing by which the rail transit system was to be acquired

and operated. The contingency was never triggered by the member agencies.⁶

Elements to Consider as Part of Legislation

- Provisions for the district to succeed to all of the powers, duties, rights, assets, obligations, liabilities, and indebtedness of the existing JPA.
- Provisions for the transfer of all real and personal property owned by the existing JPA to the district.
- Provisions regarding funding the district’s administrative, operational, and capital improvement costs.
- Provisions ensuring that authority to expend Measure RR funds is transferred from the JPB to the district.
- Provisions for a board of directors, including their terms, manner of selection, compensation, and scope of authority. The manner of selection could follow one of two models:
 - Appointed Board
 - Some transit districts have an appointed board, with a specified appointing authority for each seat on the board. Appointing authorities could include the governing body of a relevant local agency (such as a county board of supervisors or city council) or some other designated selection entity (such as an association of cities or mayors).

⁶ The 1988 legislation is still in effect, albeit not operative, and in theory could be triggered by satisfying the financing agreement contingency, thereby activating the statutory creation of a transit district. However, the 1988 statute lacks many elements that would be desirable in a comprehensive framework for a new district. As the prior report on Caltrain governance concluded: “Fundamentally, this legislation was intended to serve as a placeholder to cover the contingency of the JPB deciding to opt for a special district governance structure. . . . As a placeholder, the PRTD legislation is limited in scope when compared with the customary delineation of powers and duties common to the enabling legislation of other transit agencies in California.” Caltrain Business Plan, Organizational Assessment, July 2019, at p. 80.

- Each seat on the board could be designated for a member with a specific profile, such as being an elected official from a certain jurisdiction or having expertise in the field of transportation.
 - Elected Board
 - A small number of transit districts (approximately four) have an elected board whereby each seat on the board is held by a member who has been elected by the residents within the geographic scope of the transit district, either through at-large elections or district elections.
 - Provisions for other officers of the district, which may include a manager or executive director, secretary, chief engineer, legal counsel, controller, treasurer, auditor, and inspector general.
 - Provisions enabling the district to enter into contracts and procure insurance.
 - Provisions enabling the district to acquire, hold, and dispose of real and personal property.
 - Provisions regarding the transfer of existing employees from their existing employing agency to the district, including the establishment of benefits and the transfer of any collective bargaining rights.
 - Provisions regarding the district's retirement system.
- 2. Amend 1991 RPOA/2008 Amendment**
- In the event the JPA is amended or replaced with a new JPA, recast the 1991 RPOA/2008 Amendment to vest title to the ROW in the newly created agency and make other conforming changes consistent with the new agency's role as the managing agency of Caltrain.⁷

⁷ If the Legislature were to create a special district, the need to amend or restate the 1991 RPOA would turn on the contents of the bill and how it addresses existing property rights.

3. Formalize Existing Real Property Arrangements between the JPB and SMCTD

- In the event of the creation of a new JPA or transit district, existing informal property-sharing arrangements between the JPB and SMCTD would need to be converted into formal agreements with the new agency.⁸

4. Contract and Grant Review

- In the event of the creation of a new JPA or transit district, review contracts and grant awards (e.g., the Full Funding Grant Agreement for electrification project) to determine whether assignment is required, whether assignment is authorized, and draft assignment where required/authorized.

5. Bond Review

- In the event of the creation of a new JPA or transit district, review terms of outstanding bonds to determine whether assignment is required and draft assignment if required.⁹

6. Services Contracts

- Draft and execute any new services contracts required to administer the agency, for external services currently provided by contractors jointly to SMCTD and JPB (e.g., insurance brokers).

⁸ While this legal step is a necessity only for the creation of a new JPA under Option 3a or a new transit district under Option 3b, because the JPB would be dissolved and a new entity would be created, the JPB and SMCTD should consider, in connection with all other options discussed herein, formalizing arrangements concerning the agencies' use of real property in order to provide clear lines of responsibility and authority.

⁹ The Legislature has previously pledged that it would not change the composition of a joint powers authority formed "by and among two or more cities, counties, or cities and counties" that has issued bonds without the consent of the member agencies, in the form of a vote of either the relevant legislative bodies of the member agencies or a vote of the people. Cal. Gov't Code § 6519. To the extent this provision applies to the JPB, for purposes of this analysis we assume the Legislature would be empowered to change the composition of the JPB by statute without a vote of the member agencies or a vote of the people, notwithstanding Section 6519. Further consultation with bond counsel would be required to evaluate the impact of such a change on bond holders, including the risk of litigation.

7. Secure Insurance (if new JPA or Transit District)

- Determine need for and secure general liability insurance.
- Determine need for and secure workers' compensation insurance.

8. Federal Regulatory Filings (if new JPA or Transit District) and Requirements

- Execute any regulatory filings that may be required with the relevant federal agencies, to include:
 - Surface Transportation Board — If ownership of the rail corridor assets currently held by the JPB are transferred to a new entity, it will be necessary to secure authorization from the STB for the new entity to acquire and hold those assets.
 - Federal Railroad Administration — If a new entity succeeds the JPB, the new entity will need to notify the FRA that it is the new operator of Caltrain for purposes of compliance with applicable safety regulations.
 - Federal Transit Administration — If a new entity succeeds the JPB, filings will be required with the FTA for the disposition of property, either in the form of simple assignment and flow down agreements or a more formal disposition process. In addition, any new entity will have to be established as a new grantee for purposes of FTA funding grants.
 - Railroad Retirement Board — Filings will be required with the RRB to determine whether the newly configured agency operating Caltrain is an employer for purposes of railroad retirement and railroad unemployment insurance coverage.
- Federal regulatory counsel will be engaged to advise on and assist with executing this step and to advise regarding compliance with other federal requirements.

9. CalPERS

- As discussed in detail in the report prepared by MGO, in the event of an amendment to the JPA or the creation of a new JPA, the parties will likely have

to negotiate over liability for the unfunded accrued liability (UAL) for SMCTD employees.¹⁰ See 1996 JPA, § 7.C (requiring member agencies to share in personnel expenses). In addition, the agency will have to enter into an agency participation agreement with CalPERS to provide pension benefits to its employees and it will have to adopt a funding plan for benefits, known as Other Post-Employment Benefits.

10. Employment Matters

- Retain human resources consultant and employment counsel.¹¹
- Confirm that Caltrain is not required to join the federal Railroad Retirement System (contingent on whether operations continue to be performed by a third-party contractor).
- Establish compensation structure and benefits and retirement programs through CalPERS and all employment policies for agency staff.
- Enroll staff in benefit and retirement plans.
- Address paid time-off for transitioning employees.
- Develop personnel management infrastructure (e.g., job titles and descriptions, performance evaluations, onboarding process, etc.).
- Contract for payroll services.
- Draft employee handbook, including addressing subjects such as sexual harassment and civil rights.

¹⁰ If a new special district is created, the need for such an agreement would turn upon how and whether the legislation creating the district addresses this issue.

¹¹ The various steps that would be required for a new agency to become the employer of all Caltrain employees would collectively constitute a significant undertaking, and the extent and depth of the numerous employment/personnel issues that will arise are beyond the scope of this outline to fully capture. The engagement of multiple specialists in this area will be a critical element of successful implementation.

- Notify bargaining unit of represented employees of organizational change and negotiate with the bargaining unit for any represented employees. Although there are only a handful of customer service agents who would be affected, labor laws require notification and negotiating with the bargaining unit under these circumstances regarding a new contract, which could be a significant effort. Labor counsel would be retained to assist in implementing these steps.
- Additional procedures/requirements would need to be established related to, for example, Civil Rights and FTA requirements.

11. Ethics Policies

- Draft conflict of interest code.
 - Under the Political Reform Act (Cal. Gov't Code §§ 87300 et seq.), a local agency must have a conflict of interest code and designate all employees into categories for purposes of disclosing their financial interests and review of their potential conflicts of interest.
- Draft statement of incompatible activities in order to comply with Government Code section 1126.

Procedural Steps

- (a) If Amending JPA to Create Transit Authority:
- Member agencies negotiate terms.
 - Counsel drafts amendment to JPA.
 - Adoption of amended agreement must be approved through resolutions of the boards of member agencies: CCSF (Board of Supervisors), Santa Clara Valley Transportation Authority, and San Mateo County Transit District.
 - File notice of the amended agreement with the Secretary of State within 30 days after the effective date of the amendment. The notice must contain: (1) the name of each public agency that is a party to the agreement, (2) the date that the amended agreement became effective, and (3) a statement of the purpose

of the amended agreement or the power to be exercised. Cal. Gov't Code § 6503.5.

- File copies of the full text of the original agreement and the amended agreement with the State Controller. Cal. Gov't Code § 6503.6(a).
- It *may* be necessary to file copies of the amended agreement with the local agency formation commission in each member county within 30 days, depending on whether the operation of Caltrain constitutes a "municipal service" within the meaning of the Government Code. Cal. Gov't Code § 6503.6. Further research is required to determine the necessity of this step.
- Designate an officer to serve as controller or treasurer of the new Transit Authority to be the depositary and have custody of all the money of the agency, from whatever source. The controller may be the treasurer of one of the contracting parties, a certified public accountant, or an officer or employee of the new agency. Cal. Gov't Code §§ 6505.5 and 6505.6.
- Designate the public office or officers that have charge of, handle, or have access to any property of the agency and require such officers to file an official bond in an amount fixed by the contracting parties. Cal. Gov't Code § 6505.1. Further research is required to determine how to implement this step.
- Amend or formulate new bylaws.

(b) If Enacting Legislation to Create Transit District:

- Member agencies negotiate terms of proposed legislation, reaching agreement on the various elements described above. Counsel drafts proposed legislation with input from member agencies regarding the scope of powers of the new Transit District. Counsel circulates draft of legislation among member agencies and incorporates feedback.
- Identify possible member of the Legislature to carry the legislation and approach member's office about introducing the legislation. If legislation is pursued in 2022, a bill would need to be introduced in January or February, 2022.

- Engage in lobbying efforts to get legislation advanced in the house of origin. The bill would be heard in the committees of the house of origin sometime in March, April, or May of 2022, and would pass out of the house of origin by the end of May, 2022.
- Engage in lobbying efforts to get legislation advanced in the second house. Full passage by the Legislature would likely occur in August, 2022.
- Engage in lobbying efforts to secure the Governor's signature. The Governor would likely consider the bill during September 2022. If enacted, the bill would go into effect January 1, 2023.
- File a notice with the Secretary of State regarding the creation of the Transit District within 70 days after the date of commencement of its legal existence. Cal. Gov't Code § 53051.
- Formulate new bylaws.

For (a), to amend the RPOA:

- Member agencies negotiate terms, including reaching agreement with SMCTD regarding its rights under the RPOA, particularly SMCTD's rights with respect to property-related transactions.
- Counsel drafts amendments to RPOA.
- Adoption of new agreement must be approved through resolutions of the boards of member agencies: CCSF (Board of Supervisors)¹², Santa Clara Valley Transportation Authority, and San Mateo County Transit District.
- Amend county property recordings to reflect amendments to RPOA.

¹² As noted above, consultation with counsel for CCSF is necessary to determine whether additional approvals are required.

Time Estimate for Option 3: 12-36 Months from Member Agencies' Approval of MOU to Proceed with Option 3

- The estimated time to implement Option 3 varies significantly, depending on which version of this option is pursued.
- Under the scenario in which the member agencies agree to amend the JPA to create a Transit Authority, the estimated time to full implementation is 12 months to two years from the time an MOU is executed, as described in the Introduction.
- Under the scenario in which legislation is pursued to create a transit district, the minimum amount of time full implementation is two to three years from execution of an MOU. However, that estimate assumes that legislation is pursued and successfully enacted during 2022. If legislation is not pursued until a subsequent legislative session, the time estimate expands accordingly.

Cost Estimate for Option 3: \$2.5 million to \$4 million

- The costs for Option 3 are likely to be in the range of \$2.5 million to \$4 million.
- However, that cost estimate is highly speculative, given the enormous number and range of variables in play in connection with this option. In particular, the wide range of estimates for time of implementation makes costs difficult to project, as longer implementation times will inevitably lead to higher and ever more uncertain implementation costs.

Risk Factors to Consider

Litigation:

- Terminating and reforming the agreement is not without risk of litigation brought by outside entities, as there is at least one instance of an amendment to a JPA giving rise to a lawsuit brought by third parties.
- In 1994, the cities of Los Angeles and Long Beach amended the joint powers agreement they had formed in 1989 creating the Alameda Corridor Transportation Authority to oversee the railway corridor servicing the ports of Los Angeles and Long Beach. The purpose of the amendment was to reconfigure

the JPA's finance committee and reduce the authority of the JPA's governing board over expenditure decisions.

- A lawsuit challenging the amendment was brought by several neighboring cities, on the theory that they were third party beneficiaries to the joint powers agreement, as well as by at least one citizen asserting taxpayer standing. The plaintiffs asserted that the amendment to the joint powers agreement violated the Joint Exercise of Powers Act by unlawfully delegating to the finance committee authority over the agency expenditures, which the plaintiffs argued was required to remain with the governing board as a whole.
- Ultimately, the challenge to the amendment failed. *City of Los Angeles v. Superior Court*, 50 Cal. App. 4th 598 (1996). However, the parties to the Peninsula Corridor JPA should simply be aware that any termination/amendment of the existing agreement carries some risk of litigation.

Loss of Measure RR Revenue Expenditure Authority:

- Under the enabling legislation for Measure RR (SB 797; Ch. 653, Stats. 2017), the authority to expend Measure RR tax revenue is specifically vested in the JPB. Although Measure RR itself allows for expenditure authority to pass to a successor agency, the enabling legislation contains no such provision. If a special district were created, we recommend that the enabling legislation expressly provide for the new entity to act as a successor agency for purposes of the receipt of Measure RR revenues.
- There is a small degree of risk that a court would find that, as a matter of state law, expenditure authority does not pass to a successor agency without statutory authorization. This is relevant to the scenario in which a successor joint powers authority entity, such as a Transit Authority, is created by the member agencies pursuant to a new JPA, rather than a transit district created by statute. In that event, legislation could be required to designate the new Transit Authority as the successor to the JPB for purposes of expenditure authority over Measure RR funds.

Attachment 4: A Detailed Report from Macias Gini & O'Connell (MGO) regarding Financial Analysis of the Self-Directed Governance Options for Pension Unfunded Accrued Liability, Other Post-Employment Benefit Unfunded Accrued Liability, and Compensated Absences Liability

CALCULATION OF UNFUNDED LIABILITIES PENSION, OPEB, AND COMPENSATED ABSENCES

INTRODUCTION

Macias Gini & O'Connell (MGO) was requested by the Peninsula Corridor Joint Powers Board (JPB) to prepare an estimate of costs and obligations for the JPB based on a current baseline model and three separate options for modifying the entity's current organizational structure, in conjunction with the *Organizational Structure Options Financial Study Results* (Financial Study), which identified the annual operating and one-time costs for the JPB based on the proposed governance options. MGO, together with an Actuarial Specialist from Independent Actuaries, prepared the following memo, which discusses the estimated obligations for Caltrain based upon the three proposed governance options. The ongoing costs (or current benefit contributions for existing employees) are not included in this analysis, as they are reflected in the estimated annual operating costs within the Financial Study.

As noted in the Financial Study, the proposed governance options under consideration are:

- **Baseline:** No change in the current operational structure, all services associated with the JPB would continue to be provided by the San Mateo County Transit District (SMCTD).
- **Option 1:** Maintain SMCTD as managing agency of Caltrain with increased JPB oversight over Caltrain Executive Director (ED) and Caltrain oversight of shared services model.
- **Option 2:** Adjust SMCTD managing agency model to provide for greatly expanded JPB oversight and authority over Caltrain ED as well as Caltrain oversight of leadership and shared services.
- **Option 3:** Dissolve managing agency model and replace with separate, independent Caltrain agency to directly manage and administer Caltrain, by reorganizing JPB.

The estimated obligations for the JPB herein are as follows:

- **Pension Unfunded Accrued Liability (Pension Liability):** The difference between a plan or pool's market value of assets and the total dollars needed as of the valuation date to fund all benefits earned related to service that has already been provided (including active and retired participants).
- **Other Post-Employment Benefit Unfunded Accrued Liability (OPEB Liability):** Retiree medical benefits, which are paid in the period after employment and provided separately from a pension plan.
- **Compensated Absences Liability:** Absences (e.g., paid time off) for which employees will be paid.

In the current operational structure, SMCTD does not estimate the JPB's portion of the Pension, OPEB, or Compensated Absences Liabilities prior to making payments to CalPERS. Instead, SMCTD annually allocates a portion of those payments to the JPB for its share of the Pension, OPEB, and Compensated Absences Liabilities. For comparison purposes, we have estimated the JPB's portion of the outstanding Pension, OPEB, and Compensated Absences Liabilities utilizing the allocation percentages applied to the 2019 Pension and OPEB Liabilities per the 2019 General Ledger, which approximated 22%. The allocation percentages utilized can fluctuate from year to year as the basis of allocation is variable depending on the allocation methodology (e.g., the allocation methodology in FY 2021 is 12%). The 22% used in FY 2019 was an allocation based on Caltrain's percentage of total budgeted salaries.

- For Option 1, we allocated 22% of the estimated outstanding liabilities as there are no changes in governance structure.
- For Option 2, we allocated the Pension and OPEB Liabilities for those individuals remaining within SMCTD strictly on active participant headcount as of 2019.
- For Option 3, this methodology is not applicable as Caltrain will obtain full independence under this option.

CALCULATION OF UNFUNDED LIABILITIES PENSION, OPEB, AND COMPENSATED ABSENCES

The ranges estimated by option are based upon certain factors including the fact that the actual individuals who transfer in Options 2 and 3 have not been specifically identified at this time (i.e., only the counts have been provided). Additionally, it was assumed that salaries and benefit levels will be maintained for all individuals transferring from SMCTD to Caltrain. We recommend additional studies be performed to increase the level of accuracy of the estimates once the actual individuals who transfer in Options 2 and 3 are identified, as well as the amount of Pension and OPEB liabilities associated with previously retired members allocable to Caltrain are quantified.

INFORMATION GATHERING

In determining the potential unfunded Pension and OPEB Liabilities allocable to Caltrain under each of the three governance options currently under consideration, Independent Actuaries undertook the following information gathering steps:

- Reviewed the Public Employees' Retirement Law (PERL).
- Met with Olson Remcho, LLP (OR), which has been retained to undertake a legal analysis of the three governance options, and consulted with their pension law expert.
- Reviewed SMCTD's June 30, 2019 Actuarial Valuation Report for the pension plan, dated July 2020, supplemented by the most recent GASB 68 Accounting Report.
- Reviewed SMCTD's June 30, 2019 Actuarial Valuation Report for the OPEB plan, dated July 2020, supplemented by the most recent GASB 75 Accounting Report.
- Reviewed the 2019 and 2020 SMCTD Annual Comprehensive Financial Report (ACFR).
- Met with the SMCTD financial team to understand the current relationship between the JPB and SMCTD.
- Met with OR, MGO, and the SMCTD financial team to understand the proposed governance options.
- Reviewed AB-1912 Public employees' retirement: joint powers agreements: liability.

In determining the potential Compensated Absences Liability allocable to Caltrain under each of the three governance options currently under consideration, MGO undertook the following information gathering steps:

- Reviewed the SMCTD compensated absences policy.
- Reviewed the 2019 and 2020 SMCTD ACFR.
- Reviewed the FY 2019 labor distribution report.
- Met with the SMCTD financial team to understand the current relationship between the JPB and SMCTD.
- Met with OR and the SMCTD financial team to understand the proposed governance options.

PENSION LIABILITY

- **Background:** All qualified permanent and probationary SMCTD employees, including those assigned to work for the JPB and the San Mateo County Transportation Authority (Transportation Authority), participate in the California Public Employees' Retirement System (CalPERS), a defined benefit pension plan, which acts as a common investment and administrative agent for its participating member employers. Benefits are established by contract with CalPERS in accordance with the provisions of the Public Employees' Retirement Law. SMCTD is responsible for funding those benefits through its contributions to CalPERS, which cover both the so-called "Normal Cost" of ongoing benefit accruals as well as the amortization of existing unfunded accrued liabilities (UAL) that exist with respect to already-accrued benefits. CalPERS provides service retirement and disability benefits; annual cost of living adjustments; and death benefits to plan members,

CALCULATION OF UNFUNDED LIABILITIES PENSION, OPEB, AND COMPENSATED ABSENCES

retirees, and beneficiaries. Benefits are based on years of credited service, equal to one year of full-time employment. For participants who transfer from one employer to another, yet remain within the CalPERS system, the total benefit that a participant earns under multiple participating employers will be split in proportion to the years of service earned under each employer. As such, the employers are legally responsible for the payment of the proportioned benefit related to that participant. Under Options 2 and 3, a new employer would be created; and certain participants would transfer from SMCTD to the new employer (Caltrain). The Pension Liability within CalPERS is directly tied to the plan sponsor (i.e., the legal employer of the individual, not who the individual reports to).

Liability for UAL Subject to Negotiation: Two points should be kept in mind when discussing Caltrain's potential liability for the UAL associated with SMCTD employees who become Caltrain employees under governance Options 2 and 3. First, the amount of Caltrain's liability and the payment terms will be the result of negotiations between Caltrain and SMCTD and, as the scenarios below indicate, there is a broad range of possible outcomes. Under the usual rules that apply when an employee moves between employers within CalPERS, the new employer has no obligation to pay any portion of the UAL that accrued when the employee was at their previous job. Thus, from CalPERS' perspective, Caltrain would not be responsible for the Pension Liability associated with SMCTD employees who move to Caltrain. That doesn't consider the fact that since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model pursuant to which SMCTD employees provide all services to Caltrain. As a result, part of the UAL accrued by a SMCTD employee who moves to Caltrain would have been accrued while they worked for and provided services to Caltrain. In addition, the member agencies agreed to share in Caltrain's operating costs, including "[e]xpenses for personnel and resources of the Managing Agency to administer the affairs of the JPB . . ." See 1996 JPA, § 7. SMCTD has historically incorporated a portion of the amortized payments to CalPERS to cover the Pension Liability as part of the operating costs for which it is reimbursed by Caltrain. As a result, before employees move to Caltrain, the parties will need to agree on how much of the Pension Liability associated with those employees is attributable to Caltrain and settle on the manner (lump sum, annual payments) by which Caltrain's liability is calculated. The scenarios below show the potential ranges and methods of payment for that liability.

Second, the amounts below should not be viewed as additional costs created *because* of the proposed governance options. As noted above, through the shared services model currently in place between Caltrain and SMCTD, Caltrain makes annual payments toward SMCTD's Pension Liability for those employees who provide services to Caltrain. Because the governance options do not make significant changes to the number of employees providing Caltrain services, and instead just change where they are employed, the governance options alone should not cause a significant change in Caltrain's overall Pension Liability. Rather, significant changes would occur if the parties negotiated a change in the manner in which Caltrain pays that liability, for example, by agreeing that Caltrain would pay one lump sum amount to SMCTD when employees transfer to Caltrain instead of making annual payments.

- **Results:** As the Pension Liability within CalPERS is directly tied to the plan sponsor (i.e., the legal employer of the individual, not who the individual reports to), Caltrain may not be responsible for the unfunded accrued liability associated with past service related to Caltrain operations provided by employees of SMCTD from the viewpoint of CalPERS. However, as noted above, the parties will likely have to negotiate over the UAL for SMCTD employees who become employees of Caltrain.

CALCULATION OF UNFUNDED LIABILITIES PENSION, OPEB, AND COMPENSATED ABSENCES

While this negotiation would likely occur without input from CalPERS, CalPERS will ultimately be responsible for final approval of the apportionment of the retirement obligations.

Scenario A: The parties agree to transfer a portion of the Pension Liability from SMCTD to Caltrain within CalPERS, and as such Caltrain will be responsible for direct annual payments to CalPERS (assuming CalPERS approves the allocation). The following estimates were based strictly on active participant headcount.

- **Baseline/Option 1:** No transfer would be made. The Pension Liability would remain with SMCTD as explained within the introduction. For comparison purposes, the JPB's estimated portion of the Pension Liability is approximately \$17,700,000 based on the present value as of 7/1/22.
- **Option 2:** Approximately \$600,000 of the outstanding liability would be transferred from SMCTD to Caltrain for the five participants transferred from SMCTD to Caltrain. No transfer would be made for the remaining participants continuing under the current governance structure (as explained within the introduction); however, for comparison purposes, the JPB's estimated portion of the Pension Liability for the remaining participants is \$17,200,000. The sum of both Caltrain's transferred and the JPB's estimated portion of the Pension Liability remaining with SMCTD is approximately \$17,800,000, or approximately \$100,000 more than Baseline/Option 1 based on the present value as of 7/1/22.
- **Option 3:** Approximately \$22,000,000 of the total outstanding Pension Liability would be transferred from SMCTD to Caltrain based on the present value as of 7/1/22.

Scenario B: The parties agree to Caltrain remitting a lump-sum payment to SMCTD for their portion of the Pension Liability, assuming a termination discount rate of 1.75% as identified in SMCTD's June 30, 2019 valuation. SMCTD would retain the entire Pension Liability and continue to be responsible for direct annual payments to CalPERS. The discount rate and payment terms would be subject to negotiation between the parties. The change in discount rate is non-linear in respect to the change in the estimated Pension Liability. For reference, the Pension Liability calculated at a discount rate of 6% is approximately 57% higher than the Pension Liability calculated at 7%; and conversely, the Pension Liability calculated at a discount rate of 1.75% is about 27% higher than the Pension Liability calculated at 2.75%. We recommend that further additional studies be performed to increase the level of precision of the estimates once potential discount rates are identified. For participants who remain with SMCTD, no lump-sum payment will be made. Note that the Pension Liability estimated on a termination basis is calculated differently from the plan's ongoing funding liability. For this hypothetical termination liability calculation, both compensation and service are frozen as of the valuation date; and no future pay increases or service accruals are assumed. The discount rate assumption used for termination valuations is a weighted average of the 10-year and 30-year U.S. Treasury yields where the weights are based on matching asset and liability durations as of the termination date. The discount rates used in the table are based on 20-year Treasury bonds, rounded to the nearest quarter percentage point equating to 1.75%.

- **Baseline/Option 1:** Annual payments would continue to be made from the JPB to SMCTD under the current governance structure. For comparison purposes, utilizing the 1.75% terminated agency discount rate, the JPB's estimated portion of the Pension Liability would be approximately \$100,000,000.
- **Option 2:** A lump-sum payment of an estimated \$3,100,000 would be payable from Caltrain to SMCTD for the five participants transferred from SMCTD to Caltrain. Annual

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payments would continue to be made from JPB to SMCTD for the remaining participants continuing under the current governance structure (as explained within the introduction); however, for comparison purposes, the estimated portion of the Pension Liability (utilizing the 1.75% discount rate) for the remaining participants is approximately \$97,300,000. The sum of both the lump-sum payment payable to SMCTD and the JPB's estimated portion of the Pension Liability remaining with SMCTD is approximately \$100,400,000, or approximately \$400,000 more than Baseline/Option 1.

- **Option 3:** A lump-sum payment of approximately \$122,000,000 would be payable from Caltrain to SMCTD.

- **Methodology:** Refer to Appendix A.

OPEB LIABILITY

- **Background:** In August 1993, the SMCTD's Board of Directors adopted the San Mateo County Transit District Retiree Healthcare Plan (Plan). The Plan provides lifetime post-retirement CalPERS medical care insurance benefits to qualified retirees — those who have attained at least 50 years of age, have at least five years of service, and who retire under CalPERS within 120 days of separation from SMCTD employment — and their eligible dependents and surviving spouses. Benefit allowance provisions are established, and may be amended, through agreements and memorandums of understanding (MOUs) between SMCTD, its management employees, and unions representing SMCTD employees. In April 2008, SMCTD's Board of Directors adopted an Other Post Employment Benefit (OPEB) funding plan; and in April 2009, as authorized by that plan, adopted the California Employers' Retiree Benefit Trust (CERBT), a tax-exempt Internal Revenue Code section 115 trust administered by CalPERS. SMCTD's net OPEB Liability includes all employees assigned to work for the JPB and the Transportation Authority. SMCTD provides qualified retirees with a cash subsidy in the form of fixed dollar SMCTD contributions directly to CalPERS for monthly medical insurance premiums. The amount of the subsidy is indexed each year. Retirees can select from various health plans offered through CalPERS from a variety of providers. If a qualified retiree waives coverage, the retiree will not receive SMCTD's contribution.

Liability for OPEB Subject to Negotiation: OPEB works differently from pension benefits in that the benefit is not guaranteed if an employee separates from service prior to his or her retirement. If an employee separates service any time after becoming vested (generally, after reaching five years of service), the pension benefit that he or she has earned at that point can never be forfeited. In contrast, if an employee separates from SMCTD at age 49 with 20 years of service, SMCTD has no obligation for any OPEBs on behalf of that retiree. It's only the last CalPERS employer that an individual works for immediately preceding retirement that is responsible for paying that person's OPEBs. As such, from CalPERS' perspective, SMCTD would not be responsible for the OPEB Liability associated with SMCTD employees who transfer to Caltrain. That doesn't consider the fact that since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model pursuant to which SMCTD employees provide all services to Caltrain. As a result, before employees move to Caltrain, the parties will need to agree on how much of the OPEB Liability associated with those employees is attributable to SMCTD and settle on the manner (lump sum, annual payments) by which SMCTD's liability is calculated.

- **Results:** Since OPEB benefits are not "vested" (i.e., nonforfeitable) as are pension benefits, neither SMCTD nor Caltrain will recognize an accrued liability for any transferred participants as of the transfer date. Caltrain will be responsible for the ultimate payment of OPEB benefits through

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CalPERS. While no accrued liability is recognizable as of the date of transfer, SMCTD's reduction in estimated OPEB Liabilities outstanding as noted in the June 30, 2019, Actuarial Valuation Report would be as follows:

Scenario A: Caltrain adopts a California Employers' Retiree Benefit Trust (CERBT) as administered by CalPERS. The estimated liability associated with those SMCTD employees who become employees of Caltrain based strictly upon active participant headcount for the purposes of financial and actuarial valuation reporting is as follows:

- **Baseline/Option 1:** While the entirety of the OPEB Liability is recognized on SMCTD's financial statements and within their OPEB valuation, for comparison purposes, we have estimated the amount of the OPEB Liability for Baseline/Option 1 to be approximately \$5,100,000 based on the present value as of 7/1/22.
- **Option 2:** Approximately \$200,000 of the OPEB Liability would be recognized within Caltrain's financial statements and within their OPEB valuation for the five participants transferring from SMCTD to Caltrain. While the entirety of the OPEB Liability for the remaining participants continuing with the JPB will be recognized on SMCTD's financial statements and within their OPEB valuation, for comparison purposes, the estimated portion of the OPEB Liability for the remaining participants is approximately \$5,000,000. The sum of Caltrain's recognized and the JPB's allocated portion of the OPEB Liability is approximately \$5,200,000 based on the present value as of 7/1/22.
- **Option 3:** Approximately \$6,200,000 of the OPEB Liability would be recognized within Caltrain's financial statements and within their OPEB valuation based on the present value as of 7/1/22.

Scenario B – Caltrain adopts an irrevocable trust outside of CalPERS, and the trust's assets are invested in lower risk investments resulting in a 1.75% discount rate. This rate would be subject to negotiation. For reference, the OPEB Liability calculated at a discount rate of 5.75% is approximately 17% higher than the OPEB Liability calculated at 6.75%; and, conversely, the OPEB Liability calculated at a discount rate of 1.75% is approximately 15% higher than the OPEB Liability calculated at a discount rate of 2.75%. The estimated liability associated with those SMCTD employees who become employees of Caltrain, based strictly upon active participant headcount, for the purposes of financial and actuarial valuation reporting is as follows:

- **Baseline/Option 1:** While the entirety of the OPEB Liability is recognized on SMCTD's financial statements and within their OPEB valuation, for comparison purposes, we have estimated the amount of the OPEB liability based upon the 1.75% discounted rate for Baseline/Option 1 to be approximately \$10,700,000.
- **Option 2:** Approximately \$300,000 of the OPEB Liability would be recognized within Caltrain's financial statements and within their OPEB valuation for the five participants transferring from SMCTD to Caltrain. While the entirety of the OPEB Liability for the remaining participants continuing with the JPB will be recognized on SMCTD's financial statements and within their OPEB valuation, for comparison purposes, the estimated portion of the OPEB Liability based upon the 1.75% discounted rate for the remaining participants is approximately \$10,400,000. The sum of Caltrain's recognized and the JPB's allocated portion of the OPEB Liability is approximately \$10,700,000.
- **Option 3:** Approximately \$12,700,000 of the OPEB Liability would be recognized within Caltrain's financial statements and within their OPEB valuation, assuming that Caltrain elects not to pre-fund these benefits.

CALCULATION OF UNFUNDED LIABILITIES PENSION, OPEB, AND COMPENSATED ABSENCES

- **Methodology:** Refer to Appendix B.

COMPENSATED ABSENCES LIABILITY

- **Background:** Employees accrue compensated absence time by reason of tenure at annual rates ranging from 169 to 344.5 hours per year. Employees are allowed to accumulate from 800 hours up to 1,440 hours of compensated absence time, depending upon the number of years of service. Under the current governance structure, annual costs associated with compensated absences for those SMCTD employees providing services to Caltrain are allocated to the JPB.
- **Liability for Compensated Absences Subject to Negotiation:** Similar to OPEB, it's only the employer that an individual works for immediately preceding termination that is responsible for paying that person's compensated absences. As such, SMCTD would not be responsible for the Compensated Absences Liabilities associated with SMCTD employees who transfer to Caltrain, assuming the transferred individuals retain their benefits subsequent to transfer. That doesn't consider the fact that since Caltrain's inception, Caltrain and SMCTD have operated under a shared services model pursuant to which SMCTD employees provide all services to Caltrain. As a result, before employees move to Caltrain, the parties will need to agree on how much of the Compensated Absences Liability associated with those employees is attributable to SMCTD and settle on the manner (lump sum, annual payments) by which SMCTD's liability is calculated.
- **Results:** If the parties agreed to allocate the liability for the outstanding compensated absences for SMCTD employees who become employees of Caltrain based strictly on the number of full-time employees, then we would expect the amount allocable to Caltrain and ultimately payable by Caltrain to SMCTD (assuming Caltrain is responsible for 100% of the transferring employees' compensated absences) at the employee's termination to be as follows:
 - **Baseline/Option 1:** While the entirety of the Compensated Absences Liability is recognized on SMCTD's financial statements, for comparison purposes, we have estimated the liability associated with the SMCTD employees providing services to Caltrain for Baseline/Option 1 through the JPB to be approximately \$2,046,000.
 - **Option 2:** Approximately \$55,000 of the outstanding liability would be transferable to Caltrain for the 5 employees transferring from SMCTD to Caltrain. While the entirety of the liability for the remaining employees continuing with the JPB would be recognized on SMCTD's financial statements, for comparison purposes, we have estimated the amount of the liability for the remaining employees to be \$1,991,000. The sum of both Caltrain's transferred and the JPB's estimated portion of the Compensated Absences Liability remaining with SMCTD is approximately \$2,046,000.
 - **Option 3:** Approximately \$2,112,000 of the outstanding liability would be transferable to Caltrain from SMCTD.
- **Methodology:** For the purposes of this estimation, it is assumed that the transferred individuals will retain their benefits and as such all of the outstanding Compensated Absences Liability will transfer to Caltrain from SMCTD. As the individuals to be transferred are unknown, the Compensated Absences Liabilities were estimated by determining the average compensated absences balance per full-time employee (FTE) based on the FY 2019 SMCTD ACFR and the FY 2019 labor distribution report and projecting the estimated liabilities by option based on the calculated average and number of FTEs by option.

In addition, we have made the following assumptions:

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Baseline/Option 1

Of the 209 FTE count identified in the Financial Study, it is assumed that:

- 186 positions will continue to provide services to Caltrain through SMCTD
- 23 vacant positions will be filled through SMCTD

Option 2

Of the 227 FTE count identified in the Financial Study, it is assumed that:

- 5 positions available at Caltrain will be filled by participants transferring from SMCTD
- 181 positions will continue to provide services to Caltrain through SMCTD
- The remaining 41 vacant positions will be filled through SMCTD

Option 3

Of the 227 FTE count identified in the Financial Study, it is assumed that:

- 105 positions will be filled by participants transferring from SMCTD rail (Rail)
- 92 positions will be filled by participants transferring from other SMCTD operations
- 30 positions will be filled by new participants directly hired by Caltrain

CALPERS IS A “DEFINED BENEFIT” RETIREMENT PLAN, MEANING THAT THE BENEFIT THAT A PARTICIPANT IS ENTITLED TO AT RETIREMENT IS DEFINED BY THE PLAN. FOR MOST SMCTD PARTICIPANTS, THAT FORMULA (IF RETIRING AT AGE 60) IS: 2% X FINAL PAY X YEARS OF SERVICE.

APPENDIX A – PENSION LIABILITY METHODOLOGY

CalPERS is a “defined benefit” retirement plan, meaning that the benefit that a participant is entitled to at retirement is defined by the plan. For most SMCTD participants, that formula (if retiring at age 60) is: 2% x final pay x years of service.

For example, a participant retiring at age 60 with 20 years of service and a salary of \$6,000 per month will receive a benefit of $2\% \times \$6,000 \times 20 = \$2,400/\text{month}$, payable for life. The present value of that future expected payment stream is called the Present Value of Future Benefits (PVFB), since it reflects the entire benefit that the participant is expected to receive in retirement.

Building off the prior example, let’s say this participant is currently age 50 with 10 years of service, earning \$5,000 per month. Their accrued benefit, if they were to terminate employment today, is $2\% \times \$5,000 \times 10 = \$1,000/\text{month}$, payable for life beginning at age 60. It’s only if they continue to work for SMCTD that they’ll earn the full \$2,400/month. The present value of the \$1,000 per month earned to date is called the Present Value of Accrued Benefits (PVAB).

That said, employers use yet a third measure of liability to determine cash funding requirements and financial accounting obligations associated with the pension plan: the Accrued Liability. This liability measure is essentially based on the participant’s current years of service, but taking future salary increases into account. In our example, the Accrued Liability would essentially be the present value of $2\% \times \$6,000 \times 10 = \$1,200/\text{month}$ (this is a gross simplification, but close enough for discussion purposes).

For inactive participants (i.e., current retirees and terminated vested participants entitled to future payments), the PVFB, PVAB, and Accrued Liability are all equal. However, for active participants, the PVFB is greater than the PVAB, with the Accrued Liability falling somewhere in between.

As such, the estimates were based on the results shown in SMCTD’s June 30, 2019 Actuarial Valuation Report, dated July 2020, supplemented by the most recent GASB 68 Accounting Report. As described in detail below, we have used the liabilities, participant demographics, and actuarial assumptions presented in that report as the basis for the estimates presented here.

As of June 30, 2019, there were 725 active SMCTD employees participating in CalPERS. Dividing the projected June 30, 2022 Pension Liability by this headcount provides an average Pension Liability per active participant as of the anticipated transfer date.

For each of Options 2 and 3, we have multiplied this average Pension Liability by the number of SMCTD employees expected to be transferred, to arrive at the estimated allocation of Pension Liability between SMCTD and Caltrain based simply on active headcount. Under both options, we have assumed that the average pay, age, and years of service for the transferring group are the same as the averages for SMCTD employees as a whole; and that the transfer date will be July 1, 2022.

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For purposes of this analysis, we have relied on results presented in SMCTD's 2019 actuarial valuation report. As such, we have implicitly relied on the data, assumptions, and plan provisions summarized in that report. In addition, we have made the following assumptions:

Baseline/Option 1

Of the 209 FTE count identified in the Financial Study, it is assumed that:

- 186 positions will continue to provide services to Caltrain through SMCTD
- 23 vacant positions will be filled through SMCTD

Option 2

Of the 227 FTE count identified in the Financial Study, it is assumed that:

- 5 positions available at Caltrain will be filled by participants transferring from SMCTD
- 181 positions will continue to provide services to Caltrain through SMCTD
- The remaining 41 vacant positions will be filled through SMCTD

Option 3

Of the 236 FTE count identified in the Financial Study, it is assumed that:

- 105 positions will be filled by participants transferring from SMCTD rail
- 92 positions will be filled by participants transferring from other SMCTD operations
- 39 positions will be filled by new participants directly hired by Caltrain

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APPENDIX B – OPEB LIABILITY METHODOLOGY

- Our calculations are based on the results shown in SMCTD’s June 30, 2019 Actuarial Valuation Report for the Retiree Healthcare Plan, dated July 1, 2020. As described in detail below, we have used the liabilities, participant demographics, and actuarial assumptions presented in that report as the basis for the estimates presented here.

As of June 30, 2019, there were 734 active SMCTD employees. Dividing the Accrued Liability associated with active participants by this headcount provides an average Accrued Liability per active participant.

For each of Options 2 and 3, we have multiplied this average Accrued Liability by the number of Rail employees expected to transfer, to arrive at the estimated reduction in Accrued Liability (also equal to the reduction in OPEB Liability). Once the makeup of the transferring group is more closely known, we can potentially refine that baseline liability by considering the expected average age and average years of service for the transferring group to the average age and average years of service of the total population. Under both options, we have assumed that the average pay, age, and years of service for the transferring group are the same as the averages for SMCTD employees; and that the transfer date will be July 1, 2022.

For purposes of this analysis, we have relied on results presented in SMCTD’s 2019 actuarial valuation report. As such, we have implicitly relied on the data, assumptions, and plan provisions summarized in that report. In addition, we have made the following assumptions:

Option 2

Of the 227 FTE count identified in the Financial Study, it is assumed that:

- Positions available at Caltrain will be filled by participants transferring from SMCTD.
- The remaining 225 positions would continue to be employed by SMCTD.

Option 3

Of the 227 FTE count identified in the Financial Study, it is assumed that:

- 105 positions will be filled by participants transferring from SMCTD Rail
- 92 positions will be filled by participants transferring from other SMCTD operations
- 39 positions will be filled by new participants directly hired by Caltrain