

# California Pilotage: Analyzing Models of Harbor Pilot Regulation and Rate Setting

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## INTRODUCTION

The pilotage profession has long been recognized as holding a “unique position in the maritime world” and is undoubtedly a critical component of safe and efficient marine transportation.<sup>1</sup> Recognizing the critical nature of the service they provide, Congress authorized the states to develop a comprehensive pilotage system tailored to the specific local conditions and navigational demands of its waters.<sup>2</sup> Each of the 24 coastal states was given wide discretion in exercising this authority, and they subsequently created a patchwork of regulations and frameworks governing pilotage throughout the nation.<sup>3</sup>

## CALIFORNIA PILOTAGE BACKGROUND

While there are a variety of differences between the states, there are also substantial similarities in the organizational structures they established. The predominant pattern is that of an independent pilots association, a state appointed board of commissioners that oversees the pilots, and a state mandate that vessels meeting certain requirements employ

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<sup>1</sup> *Bisso v Inland Waterways Corp.*, 349 US 85, 99 (1955).

<sup>2</sup> Lighthouse Act of Aug. 7, 1789, ch. 9, 1 Stat 53, 54 (1789).

<sup>3</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168 (2011).

the pilots when within their jurisdictional waters.<sup>4</sup> California has a mixture of pilotage systems that varies depending on the particular port, but the San Francisco bay largely follows the traditional model.<sup>5, 6</sup>

The ports of San Francisco, San Pablo, Suisun and Monterey bays are all served by the independent San Francisco Bar Pilots Association (Pilots) and are overseen by the Board of Pilot Commissioners.<sup>7</sup> Pilotage in these ports<sup>8</sup> has been regulated by this single purpose board continuously since 1850.<sup>9</sup> In 2009 the Board of Pilot Commissioners (Board), was placed under the authority of the Business, Transportation and Housing Agency as a result of legislation that made a number of changes to the Board's structure and responsibilities.<sup>10</sup> The Board's primary purpose is to license<sup>11</sup> and regulate the pilots who guide certain

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<sup>4</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 188 (2011).

<sup>5</sup> Matthew A. Lynch, *A Comparison of Louisiana's Regulation of State-Commissioned Pilotage with that of Other Maritime States*, 29 Tul. Mar. L.J. 81 (2004).

<sup>6</sup> See Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011). (Noting that pilotage in Los Angeles, Long Beach, San Diego, Port Hueneme and Humboldt Bay (Eureka) is not organized under a state pilotage statute, but rather is the responsibility of the local port authority. In Los Angeles, the pilots are municipal employees of the port; in Long Beach, the pilots are employees or shareholders of a private company, Jacobsen Pilot Service, Inc., which holds an exclusive franchise from the port to provide pilotage services. Los Angeles and Long Beach are not considered part of the state pilotage system).

<sup>7</sup> Cal. Harb. & Nav. Code § 1100 (West 2004).

<sup>8</sup> Monterey was added by the Legislature in 2001.

<sup>9</sup> Cal. State Auditor Rep. No. 2009-043, at 7 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> See Cal. Harb. & Nav. Code § 1170 (West 2004). (Noting that licensing and appointment of pilots is within the Board's exclusive authority).

vessels into, out of, and through its jurisdictional ports and harbors.<sup>12</sup> In addition to licensing, the Board is also responsible for establishing the number of pilots needed based on current economic trends, pilot training, and incident investigation.<sup>13</sup> The Board also has a role with respect to rate determination; however, they do not have ultimate authority in this area.<sup>14</sup>

Statutes provide detailed specifications with respect to the Board's composition. The Board consists of eight members representing pilots, the shipping industry, the public, and the Business, Housing and Transportation Agency.<sup>15</sup> Specifically, two members are licensed pilots, two members are from the shipping industry (one from the dry cargo industry and one from the tanker industry) and three are public members, who may be any person, with some industry related restrictions.<sup>16</sup> The Secretary of the Business, Transportation and Housing Agency is the eighth member of the Board and sits in ex officio capacity.<sup>17</sup>

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<sup>12</sup> Cal. Harb. & Nav. Code § 1100 (West 2004).

<sup>13</sup> *Id.* at §§ 1154, 1171.5, and 1191, 1200-1201.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at § 1150.

<sup>16</sup> See Cal. Harb. & Nav. Code § 1150 (West 2004). (Outlining requirements for Board members. Public members may not have any financial interests in ownership, operation, or management of tugs, cargo, or passenger vessels, ever been a San Francisco Bar Pilot, ever been employed by a substantial user of pilot services, or consulted for or provided professional services to a company that was a substantial user of pilot services).

<sup>17</sup> See Cal. Harb. & Nav. Code § 1150 (West 2004). (Noting that the Secretary of the Business, Transportation and Housing Agency does not have a vote on the Board).

Board members are appointed by the Governor and approved by the legislature.<sup>18</sup> Appointments are staggered and appointees may not serve more than two terms of four years.<sup>19</sup> In addition to approving board appointees, approval from the legislature is also required for increases in the rates charged by Pilots.<sup>20</sup> This particular aspect of the pilotage system is one way in which California differs from many of its counterparts in other states, as rate increases must pass through two layers of approval before they are adopted. Thus while Board approval is a necessary part of adopting a rate increase, the Board may only present recommended rate increases to the legislature.<sup>21</sup> It does not have final authority for approval.

Rates for Pilot services in the San Francisco, San Pablo, Suisun and Monterey Bays are currently calculated using a formula that measures gross tonnage and draft foot of the vessel's deepest draft.<sup>22</sup> The last increase, which was adopted in 2002, raised the rates to "eight dollars and eleven cents (\$8.11) per draft foot of the vessel's deepest draft and fractions of a foot pro rata, and an additional charge of 73.01 mills<sup>23</sup> per high gross registered ton."<sup>24, 25, 26</sup> This last rate

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<sup>18</sup> Cal. Harb. & Nav. Code § 1150 (West 2004).

<sup>19</sup> *Id.*

<sup>20</sup> Cal. Harb. & Nav. Code § 1191 (West 2010).

<sup>21</sup> *Id.* at §§ 1191, 1200-1201.

<sup>22</sup> *Id.*

<sup>23</sup> Mills are defined as a monetary unit for calculations in which one mill equals one tenth of a cent ((\$0.001).

<sup>24</sup> Cal. Harb. & Nav. Code §§ 1191, 1200-1201.

increase resulted in an average net income for San Francisco Bar Pilots that peaked in 2006 at \$491 thousand dollars per year.<sup>27, 28</sup>

Ultimately the Board plays a critical role not only in licensing and regulating pilots, but also in balancing the financial well being of the Pilots with a wide variety of direct and indirect countervailing interests including those of the state, the industry and the public. In 2009, the California State Auditor presented its audit report concerning its comprehensive review of the Board's performance and finances.<sup>29</sup> The Auditor concluded that the Board did not consistently follow state law when licensing pilots and investigating navigational accidents, or other matters involving pilots.<sup>30</sup> The Report further noted insufficient administrative procedures and a need for improvement in financial oversight.<sup>31</sup> Consequently, this memorandum will examine other models of pilotage, especially

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<sup>25</sup> A request for an increase in the pilotage rates to ten dollars and twenty six cent (\$10.26) per draft foot and 91.16 mills per high gross registered ton is currently before the legislature and pending approval.

<sup>26</sup> See also *In Re the Petition of the Pacific Merchant Shipping Association For a Change in Pilotage Rates*, in which economist Dr. Jon Haverman noted in a declaration submitted before the Board of Pilot Commissioners that rates could be reduced in 2012 by 8.25%, and by an additional 1.4 percentage points in each of the subsequent years, and pilot incomes would still be above the anticipated 2006 income levels implied by the 2002 ruling, even when adjusting for inflation.

<sup>27</sup> See *Id.* (Noting that even though pilot incomes fell during the recent recession, when averaged with increases since 2002 (date of the last rate increase) incomes grew on average by 8.4% per year).

<sup>28</sup> See Declaration of John Cindrey, Business Manager of the San Francisco Bar Pilots, March 3, 2011. (Stating average net income for 2010 was \$395,714).

<sup>29</sup> Cal. State Auditor Rep. No. 2009-043, at 1-2 (2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

with respect to rate setting, and suggest possible ways that the current organizational structure can be improved.

#### SUMMARY AND RECOMMENDATIONS

After examining various models of pilot regulation throughout the country, no single organizational structure stands out as providing superior administration of pilotage such that it should be considered an ideal template for application in California. Instead, the various systems each come with potential benefits and disadvantages across various factors central to an effective commission. Determining which model is best for California largely depends on what the state considers to be the most important to achieve a functional and effective regulatory framework for the industry. While taking parts piecemeal from other systems and constructing a hybrid form remains an option, it also carries the risk of potential unintended consequences and less certainty with respect to functionality.

Nevertheless, comparing these different oversight structures can highlight the strengths and weaknesses of various models with respect to rate setting. While no single model stands out as ideal, making some reforms to the Board could certainly be productive and result in meaningful change. Specifically, models in which the rate setting function was given to an entirely separate board seemed particularly

interesting, as on its face, this setup appears to offer a greater degree of objectivity compared to the current process.

While creating a separate rate board that deals exclusively with the industry of pilotage is one option, giving this authority to an entity that sets rates for a variety of industries (in California the appropriate entity is the Public Utilities Commission) is more appealing. It is clear that improved clarity and well defined boundaries with respect to the procedural aspects of rate setting are directly related to the resulting transparency and effectiveness in determining the subsequent rate. Ideally, the well established and more clearly defined parameters<sup>32</sup> guiding the PUC would provide these qualities in a ready-made framework that can then function as an effective counterbalance in the rate setting process. Additionally, as the PUC's process is already in place, it would avoid having to create a new rate board and the requisite procedural rules from scratch.

Whether it is a separate rate board exclusive to pilotage or an independent entity like the PUC, ultimately this works to distance pilots and industry (who often cancel out each other's votes) from the rate setting process. Furthermore, such a structure would permit the existing Board to retain its current

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<sup>32</sup> Compare Cal. Harb. & Nav. Code at §§ 1200-1203 (West 1990). (Outlining a process that is relatively open-ended and calls for constraints that can be broadly construed).

composition if it deemed Pilot and industry representation necessary for performing other Board responsibilities like hiring or training.

Ultimately, some ideas do appear as if they would be easier and more palatable to implement. For example, amending the factors that the Board must consider prior to recommending a rate to the legislature is relatively safe option and would not be exceptionally problematic to achieve. Nevertheless, while such factors can help guide and define the process, they do not provide much substantive bite and are largely window dressing. Alternatively, a complete dismantling of the Board in order to setup an entirely new system represents one of the more drastic possible reforms and is probably not feasible without substantial political will.

In general, Pilots in California (and Pilots as an industry in general) receive high marks for competence and professionalism. Following the Cosco Busan incident, the Board has been under new leadership and is still implementing changes.<sup>33</sup> The easiest course of action would probably be to maintain the status quo and allow the new board to try and implement corrections to provide the counterbalancing function it is intended to serve. The legislature still has final

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<sup>33</sup> While the Board still has a number of problems that need to be addressed, many of the individuals interviewed noted substantial improvement over the previous regime and expressed a positive outlook moving forward with Allen Garfinkle as the new Executive Director of the BOPC.



authority over rate increases, and it could choose to deny the increases until it feels that further compensation is appropriate. Nevertheless, this particular course of action would be disregarding recent Board history suggesting that it does not serve as an effective check on the Pilots.<sup>34</sup>

Model	Advantages	Disadvantages
Single Board with Rate Setting Authority	<ul style="list-style-type: none"> <li>• Could improve efficiency.</li> <li>• Institutional knowledge already in place.</li> </ul>	<ul style="list-style-type: none"> <li>• Would reduce transparency and perpetuate the lack of procedural clarity.</li> <li>• Could exacerbate consequences of any problems concerning Board objectivity.</li> <li>• Would remove the legislatures existing check on rate setting.</li> </ul>
Require Legislative Approval	<ul style="list-style-type: none"> <li>• System is already in place</li> <li>• Current system requires two layers of approval before any rate changes can be made</li> </ul>	<ul style="list-style-type: none"> <li>• Any existing problems with the Board would not be addressed.</li> <li>• Transparency and procedural clarity at the stage when the Board reviews and recommends rates needs improvement.</li> <li>• Runs the risk of further politicizing rate setting moving forward.</li> <li>• Possibility that the legislature may rely (understandably) on the Board's specialized knowledge and give too much deference to their recommendations in rate setting thus not providing an adequate check on the process.</li> </ul>
Bring Pilotage under the DCA	<ul style="list-style-type: none"> <li>• The DCA could provide greater procedural boundaries and clarify gray areas in the rate setting system.</li> <li>• Might improve objectivity and add greater legitimacy to the process.</li> </ul>	<ul style="list-style-type: none"> <li>• Would require a substantial overhaul of pilot organization and oversight.</li> <li>• Would be a departure from the committee based oversight and give final authority to the Director of the DCA.</li> </ul>
Separate Rate	<ul style="list-style-type: none"> <li>• The separate rate board</li> </ul>	<ul style="list-style-type: none"> <li>• Would have to create the</li> </ul>

<sup>34</sup> Cal. State Auditor Rep. No. 2009-043, at 1-2 (2009). Additionally, past rate increases do not appear to have generated significant pushback from the Board.

Model	Advantages	Disadvantages
Board (exclusive to pilotage)	<p>could devote all its energy and resources to rate determination.</p> <ul style="list-style-type: none"> <li>• Could improve objectivity by removing both pilots and industry representatives.</li> </ul>	<p>board from scratch.</p> <ul style="list-style-type: none"> <li>• Runs the risk of creating a second board that does not provide an effective counterbalance.</li> </ul>
Separate Rate Board (PUC )	<ul style="list-style-type: none"> <li>• The commission has experience in rate setting and commissioners are full-time professionals.</li> <li>• Procedural framework is clearly defined and already in place.</li> <li>• PUC offers greater transparency and objectivity</li> <li>• Staff has experience with verifying and analyzing data.</li> </ul>	<ul style="list-style-type: none"> <li>• Commissions in other states are considered costly and contentious.<sup>35</sup></li> <li>• Possible need to add an FTE.</li> </ul>
Strengthen Statutory Guidelines	<ul style="list-style-type: none"> <li>• Comparatively easy to accomplish and would not require a substantial overhaul of the existing system.</li> <li>• Provides issues that must be discussed and can help guide the process.</li> </ul>	<ul style="list-style-type: none"> <li>• Easily worked around and might be more window dressing than anything else.</li> </ul>
Contract Out Pilotage Duties (Long Beach model)	<ul style="list-style-type: none"> <li>• The current setup is regarded as one of the more efficient and effective pilot services.</li> <li>• Competition for the contract could inject some market controls into the state mandated monopoly.</li> </ul>	<ul style="list-style-type: none"> <li>• Would require a substantial overhaul of the state pilotage system.</li> <li>• Risks the contract holder becoming entrenched as the sole provider option.</li> <li>• There might be unforeseen consequences in the Bay Area where the Pilots serve multiple ports and not just the one as in Long Beach.</li> </ul>

## MODELS OF PILOTAGE GOVERNANCE

It is often the case that form determines function, however, this relationship did not consistently come across when examining how the various models for structuring pilotage boards influenced their subsequent operation. The areas over which

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<sup>35</sup> See Office of Program Policy Analysis and Government Accountability, *Options to Modify Harbor Pilot Oversight Could Improve Regulation and Rate Setting*, Report No. 10-21, at 12 (2010). (Noting that There has been only one pilotage dispute brought before the Maryland Public Service Commission since 2004).

pilotage boards typically exercise authority are licensing (as well as determining appropriate staffing levels), pilot training, incident investigation and disciplinary authority, and rate determination.<sup>36</sup> While there is often a lot of similarity in the ways different pilotage boards address these factors, one area in which there is often considerable variation is with respect to rate determination. Unsurprisingly, this is also one of the boards' most controversial responsibilities.

In examining the different ways in which pilotage boards determine rates, it was necessary to keep in mind the state's goals for its pilotage system.<sup>37</sup> Section 1100 of the California Harbor & Navigation Code notes that the state pilotage system is intended to provide "competent, efficient and regulated" services while ensuring the "safety of persons, vessels, and property" and protecting the "tributaries" and "ecosystem" of the surrounding waters.<sup>38</sup> With respect to rate setting, the Board can work toward these goals by striving for objectivity, transparency and clarity of process. In examining other models

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<sup>36</sup> National Academy of Sciences, Committee on Advances in Navigation and Piloting Marine Board, and the Commission on Engineering and Technical Systems National Research Council, *Minding the Helm: Marine Navigation and Piloting* 118 National Academy of Sciences ed., National Academy Press 1994 (1994).

<sup>37</sup> See Cal. Harb. & Nav. Code § 1100 (West 2002). (Stating that "The Legislature finds and declares that it is the policy of the state to ensure the safety of persons, vessels, and property using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun, and the tributaries thereof, and to avoid damage to those waters and surrounding ecosystems as a result of vessel collision or damage, by providing competent, efficient, and regulated pilotage for vessels required by this division to secure pilotage services)."

<sup>38</sup> *Id.*

of pilotage, these considerations will serve as the foundation for evaluating and comparing systems.

As previously noted the Board of Pilot Commissioners does not have final say in rate setting and can only make recommendations to the legislature that certain rate schedules be adopted.<sup>39</sup> While California currently has two layers of approval for rate setting, the existing process at first layer (the Board level) could benefit from improving its transparency and procedural clarity. Statutory considerations in rate setting are relatively broad and gray areas exist in the process as a result of it having somewhat open ended parameters.<sup>40</sup> Nevertheless, California is not the only state requiring legislative approval for rate increases, and one can look to Delaware, New York and Alabama for purposes of comparison.

#### REQUIRING LEGISLATIVE APPROVAL

Changes to rates in Delaware, New York and Alabama must be agreed to by their respective legislatures in order to take effect.<sup>41</sup> As of January 1, 2012, Delaware's rate for pilotage services will be determined by length overall (in feet) multiplied by the extreme breadth (in feet) of the vessel,

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<sup>39</sup> Cal. Harb. & Nav. Code at §§ 1191, 1200-1201 (West 2004).

<sup>40</sup> Cal. Harb. & Nav. Code at §§ 1200-1203 (West 1990). Accord Interview with Mike Jacob, Vice-President, Pacific Merchant Shipping Association, Inc. (Nov. 21, 2011).

<sup>41</sup> Office of Program Policy Analysis and Government Accountability, *Options to Modify Harbor Pilot Oversight Could Improve Regulation and Rate Setting*, Report No. 10-21, at 7 (2010).

divided by 100.<sup>42</sup> This formula provides a measurement in "units" for which a rate of \$12.61 per unit is charged.<sup>43</sup> Similarly, the various ports around New York<sup>44</sup> use a unit measurement arrived at by a formula which multiplies overall length by extreme breadth by depth to uppermost continuous deck.<sup>45</sup> This is divided by 10,000 and the resulting number is used to determine the rate per unit charged.<sup>46</sup>

What is interesting about the pilotage models in Delaware and New York is that while both require legislative approval for rate setting, they have very different approaches with respect to how they structure their pilotage boards. Ultimately what this means is that neither model is necessarily instructive for the purpose of finding a correlation between a particular board structure and subsequent rate controls resulting from that structure.

The Delaware Board of Pilot Commissioners is composed of seven members appointed by the Governor, three of which are state licensed pilots.<sup>47</sup> The statute setting forth the requirements to serve on the Board further specifies that the remaining four members are to have a minimum of two public

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<sup>42</sup> 23 Del.C. § 131 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> This also includes New Jersey and its ports. New York and New Jersey have a unique arrangement due to significant overlap historically, practically and administratively.

<sup>45</sup> McKinney's Navigation Law § 89-a

<sup>46</sup> *Id.*

<sup>47</sup> 23 Del.C. § 101 (2009).

members and one industry representative, so there is some flexibility as to what the ultimate composition will look like.<sup>48</sup> The Board structure for Delaware is thus noticeably weighted towards the Pilots, because if they vote in unison as would be expected they are already three quarters of the way to a quorum.<sup>49</sup>

Conversely, the New York model takes a different approach and completely prohibits pilots from serving on the Board of Commissioners of Pilots of the State of New York. The statute outlining the six member Board's composition sets out specific guidelines concerning how the Board will be organized.<sup>50</sup> Under section 87 of McKinney's Navigation Law, the governor, the temporary president of the senate and the speaker of the assembly each appoint one commissioner.<sup>51</sup> Two other commissioners are elected by the presidents and vice-presidents of the marine insurance companies of the city of New York.<sup>52</sup> The sixth member is appointed by the governor from among the members or the staff of the Albany port district commission.<sup>53</sup>

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<sup>48</sup> 23 Del.C. § 101 (2009).

<sup>49</sup> *Id.*

<sup>50</sup> *But see* New York Assembly Bill No. 5461 (2011). (Proposing legislation that authorizes the board of directors of the maritime association of the port of New York and New Jersey to appoint two additional members to the Board of Commissioners of Pilots and further requires such board to advise the governor and the legislature on matters pertaining to pilotage fees).

<sup>51</sup> McKinney's Navigation Law § 87 (1999).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

According to a 2009 survey, the Ports of New York and New Jersey<sup>54</sup> ranked third busiest overall as measured for cargo volume.<sup>55</sup> While specific salary numbers were not available for New York/New Jersey Harbor Pilots, the President of New York's Sandy Hook Pilots Association commented that it was in the neighborhood of \$323,000 per year.<sup>56, 57</sup>

Alabama is also of interest as not only does it have a similar rule requiring legislative approval for rate increases, the port of Mobile is also more comparable to the Bay Area in terms of shipping activity than either New York or Delaware.<sup>58, 59</sup> The Mobile Bar Pilots are overseen by the three member State Pilotage Commission which consists of one member who is an official of a local steamship company, one state licensed pilot, and one business person or professional in an occupation licensed by the State of Alabama.<sup>60</sup> Members of the State

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<sup>54</sup> The ports of New York and New Jersey here (and in other instances) are considered as a singular port region as there is substantial overlap in how the ports are administered and served.

<sup>55</sup> U.S. Army Corps of Engineers, Waterborne Commerce Statistics Center, *U.S. Port Rankings By Cargo Volume 2009* (2009), [http://aapa.files.cms-plus.com/Statistics/2009US\\_PORTRANKINGS\\_BY\\_CARGO\\_TONNAGE.pdf](http://aapa.files.cms-plus.com/Statistics/2009US_PORTRANKINGS_BY_CARGO_TONNAGE.pdf).

<sup>56</sup> Palmeri, Christopher; Yap, Rodney, *Los Angeles Port Pilots Steer for \$374,000 a Year While Long Beach Profits*. New York, New York: [Bloomberg Businessweek](#), December 1, 2011.

<sup>57</sup> Assuming a salary of \$323,000, while not drastically lower, it is still noticeably less than Pilots in San Francisco especially when considering the level of activity in NY/NJ.

<sup>58</sup> U.S. Army Corps of Engineers, Waterborne Commerce Statistics Center, *U.S. Port Rankings By Cargo Volume 2009* (2009), [http://aapa.files.cms-plus.com/Statistics/2009US\\_PORTRANKINGS\\_BY\\_CARGO\\_TONNAGE.pdf](http://aapa.files.cms-plus.com/Statistics/2009US_PORTRANKINGS_BY_CARGO_TONNAGE.pdf).

<sup>59</sup> Note that comparable shipping activity is comparing the Port of Mobile with the combined total of all major Ports in Bay Area (Oakland and Richmond account for the majority of the activity).

<sup>60</sup> Ala. Code § 33-4-1 (1975).

Pilotage Commission work without compensation, and rates for pilot services in Alabama are currently \$31.00 per draft foot plus \$0.045 per gross registered ton.<sup>61, 62</sup> In comparison, rates for pilot services in San Francisco, San Pablo, Suisun and Monterey Bays are \$8.11 per draft foot plus \$0.07301 per ton.<sup>63</sup> Thus while California state pilots charge a higher rate per ton, they also have a lower rate per draft foot of the vessel.<sup>64</sup>

Ultimately extracting some sort of pattern with respect to providing an effective counterbalance on rate setting from the other states that require legislative approval is not totally clear. It could be suggested that New York and Alabama's models might offer some form of cost control in rate setting through either barring pilots from serving on the board or having a board with a two to one ratio of business oriented members<sup>65</sup> to pilots. Furthermore, by limiting pilots' ability to serve on the Board, a check is placed on those who have the greatest interest in seeing rates increased, and this could offer greater objectivity in the rate setting. However there are other

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<sup>61</sup> Ala. Code at § 33-4-48.

<sup>62</sup> See Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 10, stating that Mobile Pilots earned an average of \$336,000. Please note qualifications in FN 69 as to the reliability of this report. Additionally, the methodology for determining income for Mobile Pilots in particular relies on a lot of assumptions.

<sup>63</sup> Cal. Harb. & Nav. Code § 1190 (West 2004).

<sup>64</sup> *Id.*

<sup>65</sup> One is a pilot service user and the other is an unspecified business professional, but it might be safe to infer that a business professional would have a greater overlap of interests with the pilot services user than the pilots themselves.



factors to keep in mind such as the fact that New York calls upon a much wider variety of individuals to appoint board members than California (where the Governor has sole authority to appoint) and it is possible that this might be relevant.<sup>66</sup>

One final consideration with respect to New York is the complicated pilotage relationship that it has with New Jersey and Connecticut.<sup>67, 68</sup> While rates for maritime pilotage are initially set by the New York Legislature, New Jersey law requires the Commission to adopt the New York rate after review.<sup>69</sup> Procedural clarity and efficiency do not benefit from this unique arrangement, and these circumstances make it difficult for New York to be a useful model for comparing to California.

#### MODELS WITH A SINGLE BOARD THAT HAS RATE SETTING RESPONSIBILITY

One of the more commonly observed models for pilotage oversight and rate setting is that of a single board or commission with the authority to establish rates itself. Within this particular model, some states make slight modifications when rate determinations are being considered with Oregon providing the clearest example.<sup>70</sup> Oregon is overseen by a nine

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<sup>66</sup> McKinney's Navigation Law § 87 (1999). *Cf.* Cal. Harb. & Nav. Code § 1150 (West 2004).

<sup>67</sup> C.G.S.A. § 15-14 (1990).

<sup>68</sup> See C.G.S.A. § 15-15d (1990) noting that pilotage in the Long Island Sound is concurrent with New York and accomplished through a rotation system.

<sup>69</sup> N.J.S.A. 12:8-24.1 (2004).

<sup>70</sup> O.R.S. § 776.115 (2010).

member board with equal representation from the public, pilots and industry.<sup>71</sup> Normally only five votes are needed to achieve a quorum, but law requires that the threshold be raised from five to seven when the Board is voting on a rate increase.<sup>72</sup> In a recent report regarding pilot incomes, Brent Dibner claimed that Columbia River and Columbia River Bar Pilots had salaries averaging \$215,000 which is substantially lower when compared to salaries in San Francisco.<sup>73, 74</sup> While increasing the number of quorum threshold does not do much in terms of objectivity and transparency, it certainly appears to offer some procedural safeguards with respect to rate setting.

Alternatively, Washington State requires that the rates for pilotage be fixed annually.<sup>75</sup> Pilotage in Washington is overseen by a nine member board consisting of two pilots and two industry representatives.<sup>76</sup> Washington also states that an environmental member and a member from the Department of Ecology must be appointed to the Board.<sup>77</sup> The specification that two

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<sup>71</sup> O.R.S. § 776.105 (2007).

<sup>72</sup> O.R.S. § 776.115 (2010).

<sup>73</sup> See Brent Dibner, *Review and Analysis of Harbor Pilot Net Incomes* 12 (Prepared for the Washington State Board of Pilot Commissioners 2011) (2011).

<sup>74</sup> Please note that there are some questions as to the accuracy of the information provided in the Dibner Report. Information on pilot salaries is not readily accessible, and it was suggested by the PMSA that Dibner used "flimsy, unverifiable data at selected ports to push up pilot incomes nationally -- a game of leapfrog." The reliability of the Report was further brought into question during an administrative hearing before the Department of Commerce and Consumer Affairs in Hawaii, in which it was determined to be insufficiently reliable to be allowed into evidence.

<sup>75</sup> RCWA 88.16.035 (2009).

<sup>76</sup> RCWA 88.16.010 (2008).

<sup>77</sup> *Id.*

environmentally oriented members serve on the Board is somewhat atypical, but it does appeal to California's goal as stated in section 1100 of the Harbor & Navigation code, that pilots ensure the safety of the Bay and its waters.<sup>78</sup> Nevertheless, the requirement that rates be fixed annually does not lend itself to procedural efficiency nor does it provide any additional rate setting safeguards.<sup>79</sup>

Nevertheless, the model of a single pilotage board with rate setting authority should not be applied in California. Doing so would mean that legislative approval was no longer required thereby removing one layer of protection with respect to rate increases. Furthermore, a single board with rate setting authority does not appropriately address issues of objectivity or transparency. Without changing the qualifications for who is eligible to serve on the Board or developing clearer parameters with respect to the rate setting process, any existing concerns as to legitimacy will be maintained. Moreover, the opportunity to exploit a lack of objectivity or transparency would increase with possible compounded consequences.

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<sup>78</sup> Cal. Harb. & Nav. Code § 1100 (West 2002).

<sup>79</sup> See Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 12, suggesting that 2011 Puget Sound pilot income was estimated to be \$338,071. Please note previous qualifications as to the reliability of this report.

## SEPARATE RATE BOARDS

Another commonly observed model with respect to determining pilotage rates is one in which that power is delegated to a separate board or committee. In these regulatory systems, one board usually addresses licensure, staffing, training, disciplinary matters, etc. while the other entity addresses solely rate setting. This structure can generally be further divided into states that have a separate rate setting board specifically for pilotage and those that delegate that responsibility to boards that do state rate setting for a wide variety of industries.

One example of a state with a separate rate commission dedicated to pilotage is Massachusetts.<sup>80</sup> Massachusetts is divided into four separate districts and is generally overseen by a board composed of "two commissioners of pilots for district one, and one deputy commissioner of pilots for each of the other three districts."<sup>81</sup> Rate setting was recently delegated to a separate seven member rate commission composed of individuals with various interests in piloting, shipping, the harbor and other maritime interests.<sup>82, 83</sup> Pilots in Massachusetts have

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<sup>80</sup> M.G.L.A. 103 § 31A (2011).

<sup>81</sup> *Id.* at § 2 (2011).

<sup>82</sup> *Id.* at 103 § 31A (2011).

<sup>83</sup> See generally M.G.L.A. 103 § 31A. (Specifying the specific rate board composition. "The board shall consist of the following members or their designees: the director of the Massachusetts Port Authority; the president of the Boston Marine Society; the president of the Boston Shipping Association; a commissioner of pilots designated by the trustees of the Boston Marine

traditionally received lower compensation compared to their counterparts at comparable ports; however, the new commission was only recently created and the effect it will have on pilotage rates moving forward has yet to be seen.

Similarly, Florida had a separate rate board that sets rates according to certain statutory guidelines.<sup>84</sup> Formerly, a ten person board (five of which were pilots) oversaw the pilots generally while a separate rate board determined rates.<sup>85</sup> In 2010, legislation was passed which repealed the separate rate commission and instead created a seven member rate review committee which is actually a subcommittee of the ten person board.<sup>86, 87</sup> The new rate committee is composed of two pilots, two maritime industry representatives, a certified public accountant and two members whose only qualification is that they are Florida citizens.<sup>88, 89</sup>

Conversely, examples of the latter model can be seen in states like Virginia and Maryland. In Virginia, the Virginia Board for Branch Pilots, licenses and disciplines pilots while

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Society; the chair of the Seaport Advisory Council; the executive director of the Boston Harbor Association; and the executive director of the New Bedford Harbor Development Commission)."

<sup>84</sup> F.S.A. § 310.151 (2010).

<sup>85</sup> *Id.* at § 310.011 (2010).

<sup>86</sup> *Id.* at § 310.151 (2010).

<sup>87</sup> See Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 9. (Finding that pilot income for Tampa and the Everglades was \$202,000 and 283,000 respectively after seeing a decrease resulting from economic recession. Please note previous qualifications as to the reliability of this report).

<sup>88</sup> F.S.A. § 310.151 (2010).

<sup>89</sup> The statutory guidelines utilized by the separate rate board have remained in effect for the new rate review committee.

the separate State Corporation Commission prescribes and enforces pilotage rates.<sup>90</sup> Similarly, in Maryland a board of nine members with various backgrounds from interested parties to public members regulates the Pilots in a general capacity while the state's Public Service Commission assumes responsible for setting the rates.<sup>91, 92</sup>

In California, the analogous rate setting entity is the Public Utilities Commission (PUC). The California PUC is a commission established by Article twelve of the state's constitution and is composed of five members appointed by the Governor.<sup>93</sup> The practice of pilotage could be reasonably interpreted as the exact type of activity within the PUC's rate determination duties. Though it would require legislative activity to make such a change, section three through five of the California constitution provide substantial reason to believe that rate setting for pilotage could be a duty performed by the PUC.<sup>94, 95, 96, 97</sup>

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<sup>90</sup> VA Code Ann. § 54.1-918 (1992).

<sup>91</sup> MD Code, Business Occupations & Professions, § 11-202 (2004).

<sup>92</sup> MD Code, Public Utilities, § 4-303 (1998).

<sup>93</sup> Cal.Const. Art. 12, § 1 (1974).

<sup>94</sup> *Id.* at §§ 3-5 (1974).

<sup>95</sup> See *id.* at § 3. (Noting that "Private corporations and persons that own, operate, control, or manage... storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature)."

<sup>96</sup> See also *id.* at § 4. (Noting that "the commission may fix rates and establish rules for the transportation of passengers and property by transportation companies...")"

<sup>97</sup> See also *id.* at § 5. (Noting that "the Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the

While delegating rate setting authority to the PUC is one possible option, counterarguments would likely highlight the fact that in such a structure, neither the pilots nor industry would be represented on the commission. However, it should be noted that there are other procedural mechanisms for their voices to be heard when rates are being determined. Rate setting by other states' public utility commissions is also perceived by some to be contentious and costly, but it is unlikely that pilotage would generate the same level of debate that the PUC encounters with rate setting for other state monopolies.<sup>98, 99</sup> Additionally it could be suggested that the Commission is already occupied with its other rate setting responsibilities and pilotage might not receive its proper attention. Nevertheless, this remains one possible option that could be an effective counterbalance.

What is consistent among this type of organizational structures is that the composition of the boards providing general oversight of the pilots does not really impact the rate setting process. Thus if it is deemed necessary to have state

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commission, to establish the manner and scope of review of commission action in a court of record...)”

<sup>98</sup> Office of Program Policy Analysis and Government Accountability, *Options to Modify Harbor Pilot Oversight Could Improve Regulation and Rate Setting*, Report No. 10-21, at 12 (2010).

<sup>99</sup> See Interview with Mike Jacob, Vice-President, Pacific Merchant Shipping Association, Inc. (Nov. 21, 2011). (Noting that such a model would likely be beneficial despite the potential for a more costly process as a result of a possible need to add an FTE. Mr. Jacob thought that giving the PUC rate setting authority would provide greater objectivity and improve the clarity and transparency in the rate setting process).

licensed pilots on the board for hiring, training and disciplinary reasons due to their unique knowledge of the industry, it is possible to have a board with substantial institutional knowledge without running the risk of them dominating the rate determination process. This does not necessarily preclude pilot representation (as noted above in Massachusetts and Florida), nor should that always be the case as they undoubtedly have an interest in covering their expenses and receiving equitable compensation.

Ultimately, a separate rate board remains one possible option that is worth exploring in greater detail, especially with respect to an established entity like the PUC. A separate rate board (if composed of uninterested parties) could significantly improve objectivity in rate setting, and there are procedural mechanisms that could ensure all voices are heard. While creating a separate rate board dealing exclusively with pilotage would require starting from scratch (though some might embrace an opportunity to start with a blank canvas) delegating authority to the PUC would allow California to take advantage of a well defined pre-existing framework. Furthermore, the more fully developed PUC processes would provide greater procedural clarity and could offer greater transparency.

Ultimately pilotage is a state mandated monopoly not subject to normal market controls. This unique quality was



acknowledged by Administrative Law Judge Michael Cohn who explained that "it is essential that the regulatory agency take a firm hand in ensuring that pilotage rates are based on reasonable, controlled costs."<sup>100</sup> Subsequently, rate setting in these situations requires that the rate setting entity consider a wide array of factors beyond operational expenses when determining an appropriate rate. Thus it is the responsibility of the board to set the most reasonable and non-confiscatory rates possible while still providing a fair return to the pilots and observing any statutory guidelines.

#### ATYPICAL OR HYBRID MODELS

The state of Alaska provides another model that is unique in the way it regulates pilots and their rates. Alaska is divided into three regions overseen by the state's Board of Marine Pilots.<sup>101</sup> In Alaska, a state board adopts pilotage rates proposed by the pilot associations and holds a hearing only if there is an objection to the proposal by a party with an interest in the rate change.<sup>102</sup> In the event of a hearing, the Board must consider certain statutory guidelines in evaluating the reasonableness of proposed pilotage rates.<sup>103</sup> What is

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<sup>100</sup> *Section 1201 Petition of the Pacific Merchant Shipping Association for Statutory Rate Adjustment Recommendation, Rate Adjustment Hearing before the Board of Pilot Commissioners, (2011) (page 2 of PMSA petition).*

<sup>101</sup> AS § 08.62.010 (1995).

<sup>102</sup> AS § 08.62.046 (1995).

<sup>103</sup> *Id.*

unusual, however, is that ship owners have the option to negotiate rates with individual pilot associations.<sup>104, 105</sup>

The organizational structure of Alaska is worth examining especially because it has been noted by pilot service users for its efficiency and effectiveness.<sup>106</sup> The option for users to negotiate alternative agreements with the pilot associations seems appealing; however, any comparison with Alaska should take into account the area's unique conditions. Pilots in Alaska are often widely distributed across the state's vast coastline, need to guide ships longer distances, and often only operate seasonally. As a result of the unique nature of Alaskan pilotage, direct comparisons with California are not as instructive.

Hawaii shares the Alaska tradition of having an atypical organizational structure for pilotage; however, it achieves this end through a very different mechanism. Pilotage in Hawaii is not overseen through a Board or Commission as in other states, but rather is regulated by the Department of Commerce and Consumer Affairs (DCCA).<sup>107, 108</sup> In Hawaii, the Director of the

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<sup>104</sup> AS § 08.62.046 (1995).

<sup>105</sup> Alaska had previously experimented with competitive pilotage in which ships were allowed to compete for services between various pilot associations. This was primarily relevant for the cruise ship industry and was widely regarded as an anomaly. This system effectively ended in 2002 when the pilots of one group all joined another.

<sup>106</sup> Telephone interview with Scott Jones, President, General Steamship, Inc. (Oct. 17, 2011).

<sup>107</sup> HRS § 462A-3 (1978).

DCCA has final authority in administering the duties that are usually the responsibility of a board, including rate setting.<sup>109</sup> While the Department of Consumer Affairs is California's (DCA) counterpart to Hawaii's DCCA, pilotage in the state was historically organized under the Harbors and Navigation Code and thus did not fall under Department of Consumer Affairs' jurisdiction.<sup>110</sup> Departments like the DCA and DCCA provide oversight for a wide variety of industries, occupations and professions throughout the states and offer professional guidelines on issues ranging from the profound to the mundane. As the statutes concerning the pilotage industry (both in California and elsewhere) are often found in other sections, some procedural aspects of pilot oversight might remain less developed than could be the case if they were under the DCA. As the DCCA is concerned with the regulation of a wide variety of industries, the structure in Hawaii provides a model with well developed procedural guidelines and an improved appearance of objectivity. Installing a similar framework in California might clarify existing gray areas and improve the transparency of pilot oversight.

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<sup>108</sup> See Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 9, suggesting that Hawaii pilot income was \$213,000. Please note previous qualifications as to the reliability of this report.

<sup>109</sup> HRS § 462A-3 (1978).

<sup>110</sup> Cal. Harb. & Nav. Code § 1100 (West 2004).

## SOUTHERN CALIFORNIA PILOTAGE

As noted in FN 6, pilotage in Southern California is not organized under a state pilotage statute, but rather is the responsibility of the local port authority.<sup>111</sup> In Los Angeles, the pilots are municipal employees of the port and are overseen by the Harbor Commission which is made up of five individuals appointed by the mayor and confirmed by the city council.<sup>112</sup> Los Angeles hires pilots as municipal employees and determines how many pilots it will employ.<sup>113</sup> It also determines the pilots' pay and benefits.<sup>114</sup> Furthermore, a substantial portion of their "net income is salaried and unaffected by ship demand" which is a big difference from independent pilot associations found elsewhere whose pay is directly related to ship traffic.<sup>115</sup> As municipal employees, it should be mentioned that Los Angeles assumes responsibility for funding their pilots' pension.<sup>116</sup> The cost of using these services is part of the port's tariffs.<sup>117, 118</sup>

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<sup>111</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011).

<sup>112</sup> Port of Los Angeles, Homepage and Harbor Commission page, (2011), at <http://www.portoflosangeles.org> (last visited 12/12/11).

<sup>113</sup> Office of Program Policy Analysis and Government Accountability, *Options to Modify Harbor Pilot Oversight Could Improve Regulation and Rate Setting*, Report No. 10-21, at 8 (2010).

<sup>114</sup> Palmeri, Christopher; Yap, Rodney, *Los Angeles Port Pilots Steer for \$374,000 a Year While Long Beach Profits*. New York, New York: [Bloomberg Businessweek](#), December 1, 2011.

<sup>115</sup> Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 9-10.

<sup>116</sup> *Id.*

<sup>117</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011).

Similarly, the Port of Long Beach is also not part of the state's pilotage system.<sup>119</sup> Instead, Long Beach contracts with a private firm to provide piloting services, with shipping companies paying for these services as part of the port tariffs set by the city.<sup>120, 121</sup> The pilots are employees or shareholders of a private company, Jacobsen Pilot Service, Inc., which holds an exclusive franchise from the port to provide pilotage services.<sup>122</sup> This contractor determines the number of pilots needed to meet the demand for the services.<sup>123</sup> The Harbor Commission for Long Beach is a five member board appointed by the mayor and provides oversight for the harbor and its pilots.<sup>124</sup>

Rates for pilot services in Los Angeles and Long Beach have traditionally been lower compared to their Bay Area counterparts, especially when considering that there is

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<sup>118</sup> Pilots in Los Angeles belong to the local longshoreman's union, which negotiates on their behalf.

<sup>119</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011).

<sup>120</sup> See Telephone interview with Scott Jones, President, General Steamship, Inc. (Oct. 17, 2011), (anecdote that users of pilot services laud Long Beach and Jacobsen Pilot Services Inc. for professional, efficient and cost effective services.

<sup>121</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> [Polb.com](http://www.polb.com), Port of Long Beach: The Green Port, <http://www.polb.com/commission/default.asp> (last visited 11/08/11).

significantly more activity in Southern California.<sup>125</sup> It should be noted that because Los Angeles and Long Beach are not considered part of the state pilotage system, their pilots are not required to have state licenses.<sup>126</sup> Instead, they must hold federal licenses which are issued and administered by the U.S. Coast Guard.<sup>127</sup> The Federal pilotage system is comparatively less comprehensive than the state system and licensing requirements are not as rigorous.<sup>128, 129</sup>

While it is possible that a similar arrangement could work in Northern California, there are also a significant number of obstacles that should not be overlooked. First, if the various ports throughout the Bay Area were to take responsibility for local oversight and regulation, this could result in a lot of duplicative services and redundant resources.<sup>130</sup> Additionally, pilotage requires intimate local knowledge and an existing

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<sup>125</sup> See Dibner, *Review and Analysis of Harbor Pilot Net Incomes* at 9, suggesting that Los Angeles pilot income was \$327,000. Please note previous qualifications as to the reliability of this report; Accord Palmeri, Christopher; Yap, Rodney, *Los Angeles Port Pilots Steer for \$374,000 a Year While Long Beach Profits*. New York, New York: [Bloomberg Businessweek](#), December 1, 2011. *But cf.* LA Daily News, *LA City Employees Salary Database*, <http://lang.dailynews.com/socal/citypayroll/> (last visited 12/15/11) (suggesting pilot salaries range from \$197,943.44 - \$242,667.36).

<sup>126</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 189 (2011).

<sup>127</sup> Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 196-199 (2011).

<sup>128</sup> *Id.*

<sup>129</sup> See *Id.* (Noting that Federal Pilotage regulation gives the U.S. Coast disciplinary authority over pilots acting under a Federal license).

<sup>130</sup> This concern might be addressed if it is possible for the pilots to become employees at the state level rather than the municipal level.

contract holder would clearly have an advantage over other bidders. This could lead to a single company becoming entrenched as the sole service provider. This is particularly relevant considering that Jacobsen Pilot Service, Inc. has provided uninterrupted service for the Port of Long Beach since 1922.<sup>131</sup>

While Los Angeles and Long Beach are worth examining because of their substantial activity and comparatively lower rates, it is not immediately clear that the different systems would offer significant improvements with respect to objectivity, transparency and procedural clarity. The two systems are so individually tailored to their specific ports that any projections as to how they would impact objectivity, transparency and process if applied in the Bay Area are not particularly meaningful beyond the readily apparent superficial changes.

#### MUNICIPAL REPRESENTATION

One remaining option is to look beyond the pilotage industry to boards in various other industries. One possible model is a BART style board in which directors are appointed from each of the represented districts. This could give a greater voice to municipalities such as Oakland and Richmond who

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<sup>131</sup> Memorandum from Director of Real Estate Karl Adamowicz to the Port of Long Beach Finance and Support Services Committee (August 3, 2009) (available at [http://longbeach.granicus.com/MetaViewer.php?view\\_id=38&clip\\_id=3405&meta\\_id=268839](http://longbeach.granicus.com/MetaViewer.php?view_id=38&clip_id=3405&meta_id=268839)).

are stakeholders by virtue of their port activity. Ideally, this would inject some market forces into the rate setting process as the various municipalities would be competing for ships and have an incentive to keep costs reasonable.

Nevertheless, this could be problematic for a variety of reasons including the fact that most of the Ports in the Bay Area attract different industries and are not necessarily competing with each other for trade. Furthermore, shipping activity is not equally divided among the various ports (with Oakland and Richmond much busier than the others), and some might be dissatisfied with having a diluted vote compared to their industry share. Even so, a board with this type of organizational structure offers some unique possibilities and is worth mentioning.

NON-STRUCTURAL CONTROLS: STRENGTHENING STATUTORY GUIDELINES FOR  
RATE SETTING

A common feature in many states' rate setting processes is providing specific guidelines and factors that must be considered by the board. California already has its own guiding principles that must be taken into account, but there is certainly room for strengthening the existing statutes and providing more exacting guidelines.<sup>132</sup> California Harbor & Navigation Code § 1203 mandates that the Board consider seven

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<sup>132</sup> Cal.Harb. & Nav.Code § 1203 (1990).



factors when recommending a rate increase to the legislature.<sup>133</sup> One factor, observed in states such as Alaska and Texas, and which is notably missing from Section 1203 is consideration of time spent aboard the vessel and actually performing pilot duties.<sup>134, 135</sup> If time spent performing pilot duties were made to be a consideration, then there is greater reason to believe that allocation of pay would be as consistent as possible with work performed. This could provide a check on potential overstaffing, as the most efficient staffing level would result in the highest pay per pilot. Maximizing the efficiency of staffing levels offers the possibility of reducing overhead while maintaining high salaries for the remaining pilots.

Additionally further tightening of the guidelines comparing comparable ports and other economic indices might be helpful. Specific reference to ports of similar size/activity might also provide greater guidance. Ultimately, strengthening

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<sup>133</sup> See generally § 1203. (Stating factors to be considered including: (a) The costs to the pilots, individually or jointly, of providing pilot service as required. (b) A net return to the pilot sufficient to attract and hold persons capable of performing this service with safety to the public and protection to the property of persons using the service; and the relationship of that income to any changes in cost-of-living indices. (c) Pilotage rates charged for comparable services rendered in other ports and harbors in the United States. (d) The methods of determining pilotage rates in other ports and harbors in the United States. (e) Economic factors affecting the local shipping industry, including prospective increases or decreases in income and labor costs. (f) Additional factors affecting income to pilots such as the volume of shipping traffic using pilotage, numbers of pilots available to perform services, income paid for comparable services, and other factors of related nature. (g) Changes in, or additions to, navigational and safety equipment necessary to insure protection of persons, ships, and waterways).

<sup>134</sup> AS § 08.62.046 (1995).

<sup>135</sup> V.T.C.A., Transportation Code §§ 66.011, 67.011, 68.011, 69.011, 70.011.

the factors that must be considered in the rate setting process offers one relatively modest effort to provide greater control in rate determination without requiring that overly intrusive steps be taken to restructure the Board. Furthermore, although the statutory guidelines are often just window dressing requiring only a pretense of consideration, they do have the secondary benefit of guiding the discussion and improving how the process unfolds. However, it is probable that these changes alone would not be a sufficient counterbalance and would provide constraints no more effective than those that currently exist.

#### CONCLUSION

Pilotage is a unique industry essential to ensuring efficient and effective maritime travel. The pilots possess unique skills and training vital to ensuring the safety of industry, the state and environment. In order to enable the pilots to carry out their duties as effectively as possible, it is essential to have a regulatory framework that is objective, transparent and well defined. As pilots are in a unique position as a state mandated monopoly, those overseeing the pilots must function as an equitable counterbalance and take all interests into account. Specifically, special consideration must be given in matters of rate setting, as normal market forces are not available.

In an industry premised on tailoring its service to the local region, comparing other models across the nation with California is a relatively counterintuitive process. However, by looking to the underlying elements of objectivity, transparency and procedural clarity, useful ideas can be revealed as these are essential to successful oversight. Improving these foundational elements will go a long way toward producing a fair and equitable rate setting process that protects all interested parties. And looking beyond rate setting when determining what changes, if any, should be made to the Board, strengthening these underlying principles will help achieve the state's primary interest of providing competent, efficient and regulated pilotage.