



Board of Administration

Agenda Item 9f

June 16, 2021

Item Name: Fiduciary Counsel Pool

Program: Board Governance

Item Type: Action

Recommendation

Approve the selection of the following external fiduciary counsel (subject to successful contract negotiation) for participation in the new external fiduciary counsel pool:

- Hanson Bridgett;
- Nossaman LLP; and
- Pillsbury Winthrop Shaw Pittman LLP.

Executive Summary

At the Board's request, the Legal Office solicited proposals from law firms specializing in fiduciary duty advice and counsel for possible participation in a new external fiduciary counsel pool. After reviewing and considering the proposals received, the Legal Office met with the Board President and Board Vice President on April 1, 2021, to review and evaluate the ten responses and to develop the recommendation outlined above.

Background

Reasons for Retaining External Fiduciary Counsel

When CalPERS needs specific expertise to fulfill its responsibilities, it is permitted – and sometimes required – to consult with experts in the field. Just as the Investment Committee and the Investment Office rely on outside consultants and experts, the Board and management occasionally seek expert advice from external fiduciary counsel.

Fiduciary legal representation is a specialized area of the law that can be difficult to replicate internally. Because firms that concentrate in this area represent multiple public pension plans, they can provide a broader and more diverse perspective. In addition, they provide an independent opinion on fiduciary matters that can be particularly helpful on controversial issues.

All public pension systems with which management has spoken employ external fiduciary counsel. Accordingly, the retention of external fiduciary counsel appears to be the industry norm and a best practice.

CalPERS' History of Retaining Fiduciary Counsel

The Board has reserved the power to select CalPERS' external fiduciary counsel since at least 1990. Historically, fiduciary counsel has advised the Board and management on a variety of issues involving fiduciary liability and responsibility. These issues have focused on the Board's and management's fiduciary duty to CalPERS members and issues involving the application of California Constitution article XVI, section 17 (as amended by Proposition 162) and other trust law principles to various situations. CalPERS' external fiduciary counsel responds to requests for legal opinions and advice from the Board and management, directed through CalPERS' General Counsel. CalPERS pays outside fiduciary counsel for actual work performed, in arrears.

Historically, CalPERS has retained either one or two firms as fiduciary counsel. In the last few selection cycles, the Board has selected just one firm to serve in this role. On occasion and when circumstances have required more specialized advice (such as investment-related fiduciary advice), CalPERS has retained other firms on an ad hoc basis. The Board selected CalPERS' current fiduciary counsel in March 2017.

At its November 18, 2020 meeting, the Board considered several options for retaining external fiduciary counsel and chose "Option 3," which was to issue a new solicitation and select multiple firms to participate in a pool of fiduciary counsel to whom the Board and management could turn depending on the situation at hand.

Analysis

Pursuant to the Board's direction in November 2020, CalPERS released a solicitation in December 2020. Ten firms responded with proposals.

On April 1, 2021, two Board members (Board President Jones and Vice President Taylor) met with the Legal Office management team to review and evaluate the proposals. The most significant factors considered were the firm's breadth of experience and expertise (including California-specific experience and expertise) in advising public pension plans on fiduciary issues; the credentials, experience, and expertise of the firms' proposed lead attorneys; and the reasonableness of the firms' proposed rates given their expertise.

As a result of that review and evaluation, the Board President, Vice President and the Legal Office team recommend that the full Board approve including three firms in the new external fiduciary counsel pool, subject to successful contract negotiation:

- Hanson Bridgett
- Nossaman LLP
- Pillsbury Winthrop Shaw Pittman LLP

We recommend Hanson Bridgett because it has considerable experience advising public DB and DC retirement plans on all aspects of state and federal benefits law, including fiduciary, tax and other benefits laws. Its clients include CalHR's Savings Plus Program and the UC System. It also advises health plans. All its team's members are based in California. A summary of its proposal is included in Attachment 1.

We recommend Nossaman because it regularly advises California public pension plans on a wide variety of general fiduciary issues, including constitutional, vested rights, actuarial, due

process, and PERL and CERL law. The firm currently serves as CalPERS' fiduciary counsel and advises over a dozen CERL system plans. Its team's attorneys are all based in California. A summary of its proposal is included in Attachment 1.

We recommend Pillsbury because of its experience advising public pension plans on fiduciary, governance and risk mitigation issues. The firm also has a large corporate department that advises many clients, including CalPERS, on investment related issues and transactions. Some of its team's members are based in California. A summary of its proposal is included in Attachment 1.

The combination of these three firms should provide the experience needed to address any fiduciary issues that may arise.

The seven firms that are not recommended are all excellent firms but were not deemed the right fit for CalPERS for a variety of reasons. See Attachment 2 for a list of these firms.

Once the new pool is established, the General Counsel, in consultation with the Board President and Vice President, will be able to select between the constituent firms when external fiduciary advice is needed. Having these firms in a pool and under contract will allow for their immediate retention should the need arise.

Budget and Fiscal Impacts

The costs for these services will vary based upon the fees proposed by the firms and the services actually performed.

Benefits and Risks

The general benefit of engaging external fiduciary counsel includes obtaining legal advice from firms that specialize in this area of the law. More specifically, the benefits of selecting multiple firms to participate in a pool of external fiduciary counsel better positions the organization as fiduciary advice needs arise, more immediate access to firms with specific expertise on a particular fiduciary issue and immediate availability of counsel in the event one or more of the firms in the pool has a conflict of interest on a specific issue.

Generally, the risk of not engaging external fiduciary counsel is that the Board and management may not have the benefit of highly specialized fiduciary expertise. With respect to forming a pool for external fiduciary counsel, the specific potential risks include that costs may be greater than the cost of using a single firm for fiduciary counsel, and some potential inefficiency from lack of any single firm being aware of the full range of CalPERS' recent fiduciary issues.

Attachments

Attachment 1 – Summary of Proposals from Proposed Firms

Attachment 2 – List of Other Firms

Patricia McBeath
Deputy General Counsel

Matthew G. Jacobs
General Counsel

Marcie Frost
Chief Executive Officer