



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

Hanson Bridgett, Judith Boyette and Liz Mason proposed as Co-Leads
San Francisco, California

Proposed Rate of Principal Attorneys: \$610/hour

Ms. Boyette is a partner and would be the relationship manager for CalPERS' matters. She has advised employee benefit plans and employers on all aspects of benefits, including tax, regulatory, fiduciary responsibility, financing, and organizational integrity issues for more than 25 years. She has unique experience as both a lawyer and an administrator with hands-on experience running large, complex employee benefit programs. She was previously directly responsible for managing the University of California's pension system, three large defined contribution plans, and the third largest health plan in California.

Ms. Mason is a partner and would serve as Co-Lead and a back-up for Ms. Boyette to ensure immediate access to a partner. Ms. Mason has focused her practice on employee benefits law for more than 15 years. She represents retirement systems, employee benefit plan sponsors and fiduciaries in all aspects of compliance with state and federal benefits law, including fiduciary, tax and other benefits law.

The firm represents more than 40 public entities for employee benefits issues. A number of these are large, like the UC Retirement System and California's Savings Plus Program (both of which have been clients of the firm for 17 years). In addition, the firm represents private sector retirement plans and sponsors subject to the Employee Retirement Income Security Act of 1974 (ERISA) and the firm believes that experience enhances their advice to their public pension clients.

The proposed hourly fees for the first year are \$610 for Ms. Boyette, Ms. Mason, and other partners (with a proposed increase of between 3.9% and 4.2% increase each subsequent year). The firm also proposes an alternative billing structure that would set rates depending upon the years of experience at various levels.

The firm has formal diversity programs and is willing to provide three half day (4 hours each) trainings each year at no cost to CalPERS and is willing to provide up to 25 additional hours of specialized training to CalPERS at a 20% discount off the rates proposed. All proposed members of the Hanson Bridgett team are located and licensed to practice in California.

Nossaman, LLP, Ashley K. Dunning
San Francisco, California

Proposed Rate of Principal Attorney: \$603/hour

Ms. Dunning is a partner and Co-Chair of the Public Pension and Investments Group at Nossaman, LLP and is located in its San Francisco office. She has provided independent fiduciary counsel service to various County Employees' Retirement Law (CERL) systems (currently 13 out of 20 systems) and to other California public pension systems since the 1990s. Ms. Dunning has served as CalPERS' external fiduciary counsel since 2017.

Ms. Dunning and the firm are known in California and nationally as respected advisors and experts on governance of public pension systems and applicable trust laws. The firm also provides fiduciary and/or governance counsel to public retirement systems nationwide. Ms. Dunning previously served several years as the Chair of the Fiduciary and Governance Section of the National Association of Public Pension Attorneys (NAPPA) and has served on NAPPA's executive Board.

Ms. Dunning is very familiar with the California Constitutional provisions that apply to public pension systems, including vested contractual protection of benefits, independence provided by Article XVI, section 17, and due process, as well as the Public Employees' Retirement Law, the Public Employees' Pension Reform Act of 2013, and other general provisions of the California Government Code that apply to public retirement systems and their boards.

The proposed hourly fees for the first year are \$603 for Ms. Dunning and other partners (with a proposed increase of between 3% and 3.1% each subsequent year for the partner rates).

The firm has formal diversity programs and is willing to provide two hours of training each year at no cost to CalPERS. All proposed members of the Nossaman team are located and licensed to practice in California.

Pillsbury Winthrop Shaw Pittman, LLP Christy Richardson
San Francisco, California

Proposed Rate of Principal Attorney: \$780/hour

Ms. Richardson is a partner and leads the firm's California practice where she focuses her practice on employee benefits. She has extensive experience advising plan fiduciaries on their obligations, including establishing governance procedures, mitigating risks, providing fiduciary training and participating in fiduciary committee meetings. She also frequently negotiates fiduciary arrangements and handles the negotiations and implementation of investment vehicles.

The firm's attorneys have extensive experience serving as fiduciary counsel to boards of public pension funds and advising public agencies on their fiduciary duties. They have advised several committees of large defined-benefit plans and defined-contribution plans sponsored by public agencies, including a public agency with plans holding more than \$100 billion in assets. In addition, the firm regularly advises numerous Fortune 500 companies on the ERISA laws governing their employee-benefit plans, including ERISA's fiduciary requirements, prohibited transaction rules, and related laws. While ERISA does not apply to governmental entities, the firm believes their ERISA expertise is critical to advising governmental entities and to having broad-based knowledge of "best practices" when it comes to fiduciary-related strategies and issues.

The firm also routinely reviews and negotiates investment-related documents and advises on the fiduciary issues and implications raised by such transactions. The firm believes that at the forefront of any review of investment transactions are the client's fiduciary obligations. The firm also believes its vast experience in representing public pension plans and related fiduciaries in all types of investment transactions makes them highly attuned to the issues affecting public pension plans.

The proposed hourly fees for the first year are \$780 for partners (with a proposed increase of between 4.5% and 4.9% in each subsequent year). The firm has formal diversity programs and is willing to provide trainings to CalPERS as they have done in the past. Most of the members of the team proposed (including the principal attorney) are located and licensed to practice in California.

Seven other firms also responded with proposals to CalPERS' Solicitation seeking external fiduciary counsel. These firms, in alphabetic order, included:

- Baker Hostetler LLP
- Duane Morris LLP
- Groom Law Group
- Morgan, Lewis & Bockius LLP
- Olson Remcho LLP
- Reed Smith LLP
- Reinhart Boerner Van Deuren s.c.