File# 210443

Williams, Gregory E

From: Robert Klausner <bob@robertdklausner.com>
Sent: Tuesday, September 21, 2021 12:05 PM
To: Johnston, William D.; Williams, Gregory E
Subject: Comments on investments

William

This is in response to the Board's request for a written summary of our efforts to reach agreement on two limited partnerships. We have endeavored for several months to reach agreement with Pretium and CI regarding a side-letter to modify the terms of the limited partnership agreement (LPA) they require. The following are the issues:

Standard of Care – Florida law requires the Board to act pursuant to the prudent investor standard as that term is generally employed in the Employee Retirement Income Security Act of 1974. Specifically, Section 112.661 provides:

112.661 Investment policies.—Investment of the assets of any local retirement system or plan must be consistent with a written investment policy adopted by the board. Such policies shall be structured to maximize the financial return to the retirement system or plan consistent with the risks incumbent in each investment and shall be structured to establish and maintain an appropriate diversification of the retirement system or plan's assets.

(1) SCOPE.—The investment policy shall apply to funds under the control of the board.

(2) INVESTMENT OBJECTIVES.—The investment policy shall describe the investment objectives of the board.

(3) PERFORMANCE MEASUREMENT.—The investment policy shall specify performance measures as are appropriate for the nature and size of the assets within the board's custody.

(4) INVESTMENT AND FIDUCIARY STANDARDS.—The investment policy shall describe the level of prudence and ethical standards to be followed by the board in carrying out its investment activities with respect to funds described in this section. The board in performing its investment duties shall comply with the fiduciary standards set forth in the Employee Retirement Income Security Act of 1974 at 29 U.S.C. s. 1104(a)(1)(A)-(C). In case of conflict with other provisions of law authorizing investments, the investment and fiduciary standards set forth in this section shall prevail.

As you note from the above, you are expected to perform as an ERISA fiduciary would be required to do. The two LPAs provide for a Delaware limited partnership standard. That is considerably lower than the Florida statutory standard. In order to be consistent with its fiduciary duty, the General Partner only needs to avoid gross negligence or willful misconduct. The LPA applies an ERISA level standard of care only when 25% or more of the assets under management are held by ERISA plans. We do not believe that is case.

We offered alternative language to the effect that neither party waives any of the statutory rights granted to them. This would mean "we agree to disagree" and they did not find that language acceptable. As a result, I believe the Fund is inadequately protected by that standard.

Choice of Law and Venue for Disputes – Under both LPAs Delaware law and venue control for any legal dispute. We offered Florida venue if the dispute was solely between Gainesville and the General Partner. The offer was declined. Similarly, we pointed out that Florida's Uniform Prudent Investor Act, Chapter 518, Florida Statutes, provides that any asset manager submits to the jurisdiction of Florida courts. Section 518.11 requires the Prudent Investor Rule. Section 512.112, Florida Statute provides that when investment authority is delegated to a manager, such as the GP of these investments would be, must observe the same standard as the Board and subject to Florida Law, Specifically 518.112(5) and (6) provide:

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

If the LPA was accepted, Gainesville would be waiving these statutory protections. We do not recommend acting at variance with statutory requirements as it may impact the Board's immunity from suit.

As to venue for disputes, maintaining a suit out of state would prove particularly costly for the Board and would involve the necessity of hiring additional local counsel. We believe offering the federal court in Gainesville was reasonable.

Indemnification – The LPAs require investors to indemnify and defend the GP from any suits for actions which are not in violation of the Delaware standard of care. We do not believe that the Board has the authority to indemnify and if it does, cannot offer indemnification in excess of its investment in the contract. The concern is that if we believe the manager was negligent, we would be using our own money to defend the manager from our claim. There was some flexibility from the managers on this point but we did not believe it was sufficient to balance out our other concerns.

We do not comment on the merits of investment; that is a responsibility of the consultant. In terms of contractual protections for Gainesville, we cannot recommend the safety of the Fund if you proceed with these agreements.

I will prepared to answer the Board's questions tomorrow morning. Please distribute to the trustees.

Bob

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