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MARCH 28, 2016

AGENDA ITEM 04  
ACTION ITEM

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD

*Resolution No. 2016-05: Resolution of the California Secure Choice Retirement Savings Investment Board Relating to the Approval to Execute a Memorandum of Understanding with Other States to Share Costs for Legal Services*

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***Presenter***

Christina Elliott, Acting Executive Director

***Background***

Agreement CSCRSIB02-14 (“Agreement”) between the California Secure Choice Retirement Savings Investment Board (“Board”) and K&L Gates, LLP for legal services was executed to identify and advise on legal issues regarding the market analysis, feasibility study, and program design. K&L Gates, LLP and the Board have determined it is necessary to begin engagement with the Securities and Exchange Commission (“SEC”) to seek a “no-action” letter or other appropriate confirmation that the California Secure Choice Retirement Savings Trust does not require registration under federal securities laws.

Other states, including Oregon and Illinois, among others, will begin to engage with the SEC on similar matters and have agreed to terms to partner with the Board in sharing legal costs associated with SEC engagement.

In total, the proposed memorandum of understanding would increase K&L Gates’ budget by \$105,000.

***Staff Recommendation***

Secure Choice staff recommends the Board approve Resolution No. 2016-05 of the California Secure Choice Retirement Savings Investment Board relating to the approval to execute a Memorandum of Understanding with other states to share costs for legal services.

***Attachments***

- Attachment #1: Resolution No. 2016-05
- Attachment #2: Memorandum of Understanding for Joint Secure Choice Legal Services

**RESOLUTION NO. 2016-05**

**RESOLUTION OF THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD RELATING TO THE APPROVAL TO EXECUTE A MEMORANDUM OF UNDERSTANDING WITH OTHER STATES TO SHARE COSTS FOR LEGAL SERVICES**

**WHEREAS**, the California Secure Choice Retirement Savings Investment Board (the “Board”) is established under SB 1234 (Chapter 734, 2012; codified under Government Code section 100000 et seq.) and mandated to conduct a market analysis to determine whether the necessary conditions for implementation of the California Secure Choice Retirement Savings Trust Act (the “Act”) can be met, provided that the Board shall conduct the market analysis only if sufficient funds to initiate and complete the required market analysis are made available through a nonprofit or private entity, or from federal funding;

**WHEREAS**, Government Code section 100042 provides, in part, that the Act shall become operative only if the Board determines that, based on the market analysis, the provisions of the Act will be self-sustaining, and funds are made available through a nonprofit or other private entity, federal funding, or an annual Budget Act appropriation in amounts sufficient to allow the Board to implement the Act until the California Secure Choice Retirement Savings Trust has sufficient funds to be self-sustaining;

**WHEREAS**, Government Code section 100043 provides that the Board shall not implement the California Secure Choice Retirement Savings Program (the “Program”) if the Individual Retirement Account or Individual Retirement Annuity (collectively “IRA”) arrangements offered fail to qualify for the favorable federal income tax treatment ordinarily accorded to IRAs under the Internal Revenue Code, or if it is determined that the Program is an employee benefit plan under the federal Employee Retirement Income Security Act;

**WHEREAS**, the Board deemed it necessary to contract with a law firm to provide the Board with legal services to satisfy the statutory provisions and advise on legal issues regarding the market analysis, feasibility study, and program design and thus entered into Agreement No. CSCRSIB02-14 (the “Agreement”) with K&L Gates, LLP for the necessary legal services;

**WHEREAS**, K&L Gates, LLP has advised it is necessary to engage with the U.S. Securities and Exchange Commission (the “SEC”) to determine whether the necessary conditions for implementation of the Act can be met; and

**WHEREAS**, the Board and certain other states recognize that they will have significant commonality of legal services to be provided by K&L Gates, LLP with regard to securities laws and the SEC;

**NOW, THEREFORE, BE IT RESOLVED** that the Acting Executive Director is hereby directed and authorized to prepare and take whatever steps necessary to execute a memorandum of understanding with other states and K&L Gates, LLP to share costs for legal services.

Attest: \_\_\_\_\_  
Chairperson

Date of Adoption: \_\_\_\_\_

MEMORANDUM OF UNDERSTANDING  
FOR JOINT SECURE CHOICE LEGAL SERVICES

This Memorandum of Understanding for Joint Secure Choice Legal Services (“MOU”) is hereby entered into on the \_\_\_ day of March 2016 by and between the California Secure Choice Retirement Savings Investment Board (“California”), the Office of the Illinois State Treasurer (“Illinois”), the State of Oregon, acting by and through its Retirement Savings Board and its Department of Justice (“Oregon”) (collectively the “Boards”), and K&L Gates, LLP (“K&L Gates”).

WHEREAS, the Boards each have a program that is designed to make defined contribution retirement plans available to individuals and businesses in their respective states (“Secure Choice Program”);

WHEREAS, California has retained K&L Gates via a competitive procurement process to provide guidance on the application of the federal securities laws (“Securities Laws”) to its Secure Choice Program and the investments offered thereunder and to request the staff of the Securities and Exchange Commission (“SEC”) to issue a “no-action” letter or other appropriate confirmation that California’s Secure Choice Program, including its investments, internal staff, and California are not subject to the Securities Laws;

WHEREAS, Illinois and Oregon also require such legal guidance for their respective Secure Choice Programs and have decided to join California in retaining K&L Gates, because the Boards recognize that, because of the considerable overlap between the three Secure Choice Programs, there will be significant commonality of legal services to be provided by K&L Gates to the Boards, including, but not limited to, legal research, preparation of memoranda for and other communications with the SEC staff, and meetings with the Boards’ staff (“Shared Services”), therefore a joint and common handling of the Shared Services will further the individual interests of the Boards;

WHEREAS, the Boards also recognize that, due to certain differences between their respective Secure Choice Programs, the desire for each Board to obtain its own no-action letter or other relief, and the possibility that the SEC staff’s response to each Board’s request for no-action or other relief may differ, certain legal services to be provided by K&L Gates will not be Shared Services and shall be charged solely to the individual Board to which such services relate; and

WHEREAS, Illinois is entering into this MOU pursuant to the Intergovernmental Cooperation Act, 5 ILCS 220/1 *et seq.*

NOW, THEREFORE, the Boards and K&L Gates hereby agree as follows:

1. K&L Gates has agreed to charge each Board the same hourly rates for attorney time, including a 15% discount from standard rates. Therefore, to reduce costs, the Boards agree to equally split the charges for legal work and related disbursements for Shared Services. K&L Gates agrees to invoice each Board for its portion of charges for the Shared Services and each Board shall be individually (and not jointly) liable for such charges. The Boards shall share amongst themselves, upon request, copies of each Board’s K&L Gates invoice for Shared Services. The Boards agree that the initial determination of which services are Shared Services shall be made by K&L Gates, subject to the approval of the Boards, and shown in its monthly invoices to the Boards. The Boards recognize, understand and agree that in addition to this MOU, each Board may be required by its governing law to separately appoint or contract with K&L Gates to provide the Shared Services and other services related to its Secure Choice Program to the Board. The parties agree that K&L Gates shall split the cost of the Shared Services as follows:

- a. 53% of Shared Service costs invoiced to California, not to exceed a total of \$80,000;
- b. 23.5% of Shared Service costs invoiced to Oregon, not to exceed a total of \$35,000; and
- c. 23.5% of Shared Service costs invoiced to Illinois, not to exceed a total of \$35,000.

2. The Boards agree that, although there may be certain areas in which they at present or in the future have divergent positions, they have interests in common and may cooperate in their development of strategies, positions, claims and defenses in connection with the Shared Services, while not waiving any privilege attaching to joint defense communications, attorney-client communications, attorney work product or other materials.

3. The Boards agree that their common legal interests may be best protected by sharing certain memoranda of law or fact, briefing memoranda, factual summaries, factual material, documents, mental impressions, research, transcripts, digests, documents or other written materials or oral information, whether created, compiled or obtained by one Board or jointly by the Boards, which are attorney client confidences and/or attorney work product that otherwise would be protected from disclosure to third parties. The Boards also agree that any such attorney client confidences and/or attorney work product disclosed by or exchanged upon and after the effective date of this MOU between the Boards, their respective state agency staff, in-house attorneys, any consultant or expert ("Advisors") retained in connection with the Shared Services, or K&L Gates (collectively the "Materials") shall be for the purpose of a joint and common interest, and shall remain confidential and protected from disclosure to any third party by applicable attorney-client and/or attorney work product privileges, the joint defense doctrine and/or privilege, the common interest doctrine and/or privilege, the trade secret doctrine, certain privileges that attach under the First and Fifth Amendments of the United States Constitution, or any other applicable State or Federal laws privileges or protections. The Boards intend that such privileges be maintained, notwithstanding their cooperation under this MOU, and further intend that this MOU be interpreted broadly to effectuate its purposes. The Boards agree that the exchange of Materials for the benefit of, and among, the Boards and their Advisors will assist the K&L Gates in advising and providing legal advice to the Boards in relation to the Shared Services and shall be used solely for the Shared Services and for no other purpose.

4. It is the mutual understanding of the Boards that the exchange of Materials is not intended to waive or diminish in any way the confidentiality of, or privileges attaching to, such Materials. The Boards also intend and understand that any exchange of Materials will not constitute a waiver of any otherwise available privilege or protection. The Boards intend to protect from disclosure all Materials to the greatest extent permitted by law, regardless of whether the writing or document is marked "Confidential." Any unauthorized disclosure of Materials, whether inadvertent or otherwise, shall not be deemed to diminish in any way the confidential or privileged nature of such Materials or constitute a waiver of any applicable privilege.

5. The Boards shall exchange the Materials only among themselves and their Advisors and shall endeavor to designate as highly confidential those Materials that a Board believes contain confidential state, proprietary or trade secret information, or other information considered by a Board producing such Materials to be highly confidential. The Boards intend to protect from disclosure all Materials designated highly confidential to the greatest extent permitted by law, regardless of whether the writing or document is marked "Confidential."

6. If a Board believes that, in response to a request for disclosure, it is legally required to disclose Materials under its governing law or because of an order issued by a governing body with jurisdiction over the Board, the Board shall promptly notify the other Boards of the potential disclosure and provide

the other Boards not less than ten (10) business days before disclosure, to permit the other Boards to intervene or commence legal action to bar such disclosure. If neither of the other Boards seeks to intervene or bar the disclosure within the ten (10) business days, the Board subject to the request for disclosure may release the Materials in compliance with the request for disclosure without further notice and without liability to the other Boards.

7. Except as set forth in Paragraph 1, nothing in this MOU shall obligate any Board to exchange documents or information with any other Board. The Boards recognize the respective rights of each Board to undertake separate efforts, legal research and other actions. The failure of any Board to disclose any such information to any other Board shall not in any way affect its obligations under this MOU or the application of this MOU's terms. It is further agreed and understood that nothing in this MOU shall bind or oblige any Board to agree to a single course of action, to adopt joint positions, to jointly retain consultants, or to take any specific action.

8. This MOU shall not create any agency or similar relationship between the Boards. No Board shall have the authority to waive any applicable privilege or doctrine on behalf of any other Board, nor shall any waiver of an applicable privilege or doctrine by one Board be construed to apply to any other Board.

9. A Board may unilaterally withdraw at any time from this MOU. If a Board withdraws from this MOU, that Board shall immediately notify the other Boards and K&L Gates in writing, and will continue to be fully bound by the obligations of this MOU as to information exchanged prior to such withdrawal and the Board's share of costs for Shared Services until the effective date of withdrawal. No withdrawal shall be effective until it is received by the other Boards.

10. Except as expressly provided in this MOU, this MOU shall not constitute, be interpreted, construed or used as evidence of any admission of liability, law, or fact, or as a waiver of any right or defense, or an estoppel against a party or any other person. However, nothing in this paragraph is intended or should be construed to limit, bar, or otherwise impede the enforcement of any term or condition of this MOU against any party. Nothing in this MOU shall be construed to create a right or benefit in favor of any person or entity not a party to this MOU.

11. Except as expressly provided in this MOU, nothing in this MOU shall be construed to waive any rights, claims or privileges which parties shall have against each other or any other person or entity.

12. No waiver by any party of any default by any other party in the performance of any portion of this MOU shall operate as or be construed as a waiver of any future default, whether like or different in character.

13. The parties shall attempt in good faith to promptly resolve any dispute arising out of or relating to the obligations under this MOU.

**14. Notwithstanding any other provision in this MOU, the provisions in this MOU are subject to the public record laws of the respective Boards.**

15. Modifications to this MOU may be made if such modifications are in writing and are signed by all parties.

16. This MOU may be signed in any number of counterparts, and such counterparts may include signatures transmitted by facsimile.

17. The powers and duties of each Board under this MOU shall be governed by the internal laws of the state of which a Board is an agency or instrumentality.

IN WITNESS WHEREOF, the parties have caused their respective authorized representatives to sign this Memorandum of Understanding for Joint Secure Choice Legal Services. Each of the undersigned hereby represents and warrants that it is authorized to execute this MOU on behalf of the respective party to the MOU and when executed is a valid and binding obligation enforceable by and against such party in accordance with its terms.

CALIFORNIA SECURE CHOICE  
RETIREMENT SAVINGS INVESTMENT  
BOARD

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Dated: \_\_\_\_\_

STATE OF OREGON, acting by and through its  
RETIREMENT SAVINGS BOARD

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Dated: \_\_\_\_\_

OFFICE OF THE ILLINOIS STATE  
TREASURER

By: \_\_\_\_\_  
Jay H. Rowell  
Deputy Treasurer

Dated: \_\_\_\_\_

and its DEPARTMENT OF JUSTICE (pursuant to  
ORS 190.110)

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Dated: \_\_\_\_\_

K&L GATES LLP

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Dated: \_\_\_\_\_