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REPORT TO THE HONORABLE MAYOR AND CITY COUNCIL

IMPLEMENTATION OF PROPOSITION B

INTRODUCTION

On June 5, 2012, City of San Diego (City) voters approved Proposition B, a citizens' initiative to amend the San Diego Charter (Charter), known as "Comprehensive Pension Reform for San Diego" (Proposition B or Proposition). The proponents of Proposition B qualified the initiative for the ballot by meeting all of the procedural requirements set forth in the California Constitution, California Elections Code (Elections Code), and California Government Code (Government Code), including obtaining more than 94,346 signatures of San Diego voters in support of placing the initiative on the ballot. San Diego Ordinance O-20127 (Jan. 30, 2012). This Report outlines the procedural steps necessary to implement certain key provisions of Proposition B.

This Report focuses on the establishment of a Defined Contribution Plan (DC Plan) for officers and employees initially hired or assuming office after the effective date of Proposition B (San Diego Charter sections 140, 150, 151).

This Report is intended to provide this Office's initial, preliminary analysis related to implementing Proposition B. Further analysis will likely be required as issues and questions arise. This Report does not address the provisions in Proposition B relating to reform of base compensation used to establish pension benefits (sections 70.1, 70.2); "full and fair employee contributions for the defined benefit pension plan" (section 141.2); reform of sworn police officers' defined benefit pension plan (section 141.1); elimination of pension benefits for felony convictions (section 141.3); transparency and public disclosure of pension payouts (section 141.4); or elimination of the requirement that ordinances amending the San Diego City Employees' Retirement System (SDCERS), which affect benefits of any employee under SDCERS, must be approved by a majority vote of SDCERS members (section 143.1). This Office is available to present analysis of these provisions in the future.[1]

[1] This Office previously addressed the subject of "Freezing Base Compensation under the City's Retirement Plan" in Op. City Att'y 2011-1 (Jan. 10, 2011).

QUESTIONS PRESENTED

1. What is the effective date of Proposition B?

2. What is required to implement the DC Plan?

SHORT ANSWERS

1. Proposition B is effective once the California Secretary of State chapters the approved Charter amendment. The County Registrar of Voters must certify the election results and present the certification to the San Diego City Council (Council) for approval. Upon Council approval, the City Clerk submits the Charter amendment to the Secretary of State to be filed. It is anticipated that this will occur by August 2012.

2. Proposition B mandates that all employees hired on or its effective date, except sworn police officers, participate *only* in a DC Plan or Plans, and not in the Defined Benefit Plan. Proposition B sets the maximum employer contributions to the DC Plan, but it leaves open most other factors of DC Plan design, such as the level of employer and employee contributions, vesting schedules for employer contributions, whether employee contributions will be pre or post tax, and the provision of death and disability benefits. Before the City may make any decisions on DC Plan design for represented employees, it must meet and confer with each of the City's recognized employee organizations impacted by the DC Plan provisions in Proposition B. In addition, before the City may adopt the DC Plan, it must hire an actuary to provide the analysis required by Government Code section 7507. The City should also hire outside counsel with expertise in the design of qualified retirement plans to assist in developing the DC Plan. Finally, since the requirement to meet and confer does not apply to future unrepresented employees, the City should adopt an interim DC Plan to cover unrepresented employees hired between the effective date of Proposition B and the adoption of a negotiated DC Plan.

ANALYSIS

I. AUTHORITY TO ESTABLISH PENSION BENEFITS BY CHARTER

The Charter is established under the California Constitution and California statutory law.[2] Charter cities, like this City, "can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive

[2] Section 2 of the Charter provides:

> The City of San Diego, in addition to any of the powers now held by or that may hereafter be granted to it under the Constitution or Laws of this State, shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter; provided, however, that nothing herein shall be construed to prevent or restrict the City from exercising, or consenting to, and the City is hereby authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted or prescribed by General Laws of the State.

state law."[3] The California Constitution provides: "The provisions of a charter are the law of the State and have the force and effect of legislative enactments."[4]

The California Supreme Court has held that:

> [T]he charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. . . . a charter city may not act in conflict with its charter. Any act that is violative of or not in compliance with the charter is void.[5]

The provisions of the Charter thus "supersede all municipal laws, ordinances, rules or regulations inconsistent therewith."[6]

Proposition B amends Articles VII (entitled "Finance") and IX (entitled "The Retirement of Employees") of the Charter related to retirement benefits of City employees. The California Constitution authorizes charter cities to provide for the compensation of their employees, including pensions.[7] A public employee's pension constitutes deferred compensation, meaning a pension allowance paid in retirement is earned while an employee is working.[8] Pensions are municipal affairs within the meaning of the California Constitution.[9] Proposition B, in Section 6, states, in part: "This Charter amendment addresses the subject of public employee compensation and benefits under the plenary authority granted to the Citizens of San Diego by Article XI, Section 5(b) of the California Constitution."

Proposition B is a Charter amendment proposed by citizens' initiative and approved by majority vote of the electorate.[10] "California courts have long protected the right of the citizenry under the California Constitution to directly initiate change through initiative, referendum and recall."[11]

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[3] *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979); Cal. Const. art. XI, § 5(a). San Diego Charter § 2.

[4] Cal. Const. art. XI, § 3(a).

[5] *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170-171 (1994) (citations omitted).

[6] *Stuart v. Civil Service Com.*, 174 Cal. App. 3d 201, 206 (1985). *See also* 5 McQuillan Municipal Corporations (3d ed. 2011), § 15:17; *San Diego City Firefighters, Local 145 v. Board of Administration of San Diego City Employees' Retirement System*, No. D057437, 2012 WL 1890193 (Cal. App. 4th Dist., May 25, 2012).

[7] Cal. Const. art. XI, § 5(b).

[8] *Miller v. State of California*, 18 Cal. 3d 808, 814 (1977); *See Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978).

[9] *Grimm*, 94 Cal. App. 3d at 37 (citing *City of Downey v. Board of Administration*, 47 Cal. App. 3d 621, 629 (1975)).

[10] Charter section 223 states that the Charter may be amended using the procedures described in the California Constitution. Article XI, section 3(b) of the Constitution provides that a charter amendment may be proposed by citizens' initiative or by the governing body, which is the Council. Article XI, section 3(a) of the Constitution provides that a city charter may be amended by a majority vote of the city's electors. *See also* San Diego Municipal Code (SDMC or Municipal Code) §§ 27.2801, 27.2808.

[11] *MHC Financing Limited Partnership Two v. City of Santee*, 125 Cal. App. 4th 1372, 1381 (2005) (citing *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 907-908 (1979)). "The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them." *Id.* (quoting *Rossi v. Brown*, 9 Cal. 4th 688, 695 (1995)).

California courts have held that adoptions of and amendments to city charters are matters of statewide concern, and the charter amendment process is therefore controlled by state law.[12] California Elections Code sections 9255 to 9269 set forth the procedures for amendments to city charters. Section 9255(b)(2) states that an amendment to a charter proposed by a petition signed by 15 percent of the registered voters of a city *must* be submitted to the voters as long as the additional procedural requirements set forth in the Elections Code are met. When a citizen initiative petition to amend the Charter, like Proposition B, qualifies for the ballot, there is no legal basis for the Council to modify the proposed language.[13]

Because San Diego voters have approved Proposition B, the Council must now implement it. The Council has no discretion to alter any of its terms.

II. EFFECTIVE DATE OF PROPOSITION B

Most of the deadlines for implementing the specific provisions of Proposition B are defined in relation to the effective date of the Charter amendment. For instance, Charter section 140, added by Proposition B, states that all officers and employees, except sworn police officers, who are initially hired or assume office on or after the effective date of the Charter amendment may participate only in the defined contribution plans authorized by Charter section 150 (added by Proposition B). Similarly, Charter section 70.2, added by Proposition B, sets "emergency limitations on base compensation" that must be applied to the City's initial bargaining position in negotiations from the effective date of the Charter amendment until June 30, 2018. In addition, Charter section 143.1 is amended by Proposition B to eliminate, as of the effective date of the amendment, the active member and retiree voting requirements for changes to the Defined Benefit Plan.[14]

Certain provisions of Proposition B specify effective dates independent of the effective date of the Proposition. The provisions in Charter section 70.1, added by Proposition B, which relate to pensionable compensation, apply to years beginning on or after January 1, 2013 "to the extent allowed by law, including the legal effect of existing Memorandums of Understanding as of the effective date of this section."[15] Charter section 141.3, added by Proposition B, requires the Council to enact an ordinance, on or before July 1, 2013, eliminating the pensions of employees and officers convicted of employment-related felonies.

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[12] *District Election Etc. Committee v. O'Connor*, 78 Cal. App. 3d 261, 274 (1978).

[13] *See Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 149 (1993).

[14] Charter section 143.1, as amended by Proposition B, eliminates the voting requirements for changes to the Retirement Plan as of the effective date of the amendment.

[15] Section 6 of Proposition B states, with respect to the effective date of the Charter amendments:

> This Charter amendment shall become effective in the manner allowed by law. . . . As specified herein, the implementation of various provisions may be delayed in their implementation pursuant to provisions of any Memorandum of Understanding in effect on the effective date of this Charter amendment. Nothing herein is intended to remove legally established rights held by any officer or employee held by virtue of their employment status before the effective date of this Charter Amendment.

The effective date of a charter amendment is controlled by the California Constitution and state elections law,[16] which provide that charter amendments are effective when they are accepted and filed by the Secretary of State.[17]

Government Code section 34460 sets forth the requirements for the certification and authentication process of votes. After the election, the County Registrar of Voters certifies the election results, and forwards the certification to the City Clerk, who is the City's elections official. The City Clerk then certifies the results to the Council at the next Council meeting at which the matter can be docketed.[18] The Council must adopt a resolution that includes reference to the Charter amendment measure and the votes cast for and against it.[19] The City Clerk must then submit to the Secretary of State the adopted charter amendment and other documents related to the election,[20] who then must accept and file the charter amendment.[21] The Secretary of State will provide the City Clerk with a chapter number for the amended sections. Once the Secretary of State accepts and files the charter amendment, "the courts shall take judicial notice thereof."[22] Thus, Proposition B is effective when the Secretary of State accepts and files it.

III. REQUIREMENT TO NEGOTIATE UNDER THE MEYERS-MILIAS-BROWN ACT (MMBA)

The City is a public agency employer under the MMBA,[23] the state law that provides collective bargaining rights to employees of cities, counties, and other local public agencies. The City has six recognized employee organizations.

The MMBA requires the City to provide its recognized employee organizations with notice and an opportunity to "meet and confer" on "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment."[24] The scope of bargaining, under the MMBA, does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."[25]

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[16] Cal. Elec. Code § 9268. *See also* SDMC § 27.2808 ("The Clerk shall conduct the charter amendment initiative election in a manner conforming to other initiative elections and to the requirements of the Government Code of the State of California relating to amending charters.")
[17] Cal. Const. art. XI, § 3(a); Cal. Gov't Code §§ 34459 through 34461.
[18] Cal. Gov't Code § 34460; *see* SDMC § 27.0411 (related to City Clerk's duty to "cause a canvass of the election returns to be made," and to "certify the results of such canvass to the City *Council*").
[19] Cal. Elec. Code § 9269.
[20] *Id.*
[21] Cal. Gov't Code § 34461.
[22] *Id.*
[23] Cal. Gov't Code §§3500-3511.
[24] Cal. Gov't Code §§ 3504, 3505.
[25] Cal. Gov't Code § 3504.

Meet and confer is triggered, as a general rule, when the City, as a public agency employer, desires to modify any term and condition of employment of represented City employees.[26] The City's designated representatives must meet and confer in good faith with representatives of the recognized employee organizations and consider fully the proposals made by the employee organizations on behalf of their members, before the Council, as the governing body of the City, arrives at a determination of policy or course of action.[27]

The duty to bargain under the MMBA requires the City to refrain from taking any unilateral action that would effectuate a change in a mandatory subject of bargaining until it has negotiated proposed modifications to agreement or impasse, and exhausted any required impasse procedures.[28] Any unilateral change in a mandatory subject of bargaining before reaching agreement or impasse is a violation of the duty to bargain in good faith because it is viewed as a refusal to bargain.[29]

If the City representatives reach an agreement with a recognized employee organization during the meet and confer process, the parties jointly prepare a non-binding written memorandum of understanding and present it to the Council for determination.[30] Once a negotiated agreement has been approved by the Council, the City must comply with it.[31]

If the parties do not reach agreement after meeting and conferring in good faith, the Council may implement its last, best, and final offer to an employee organization, after exhausting any required impasse procedures.[32] The Council may not, however, implement a memorandum of understanding.[33] Further, the unilateral implementation of the City's last, best, and final offer may not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, including wages.[34]

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[26] Government Code section 3505 defines "meet and confer in good faith" as follows:

> [A] public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Cal. Gov't Code § 3505.

[27] Cal. Gov't Code §3505.

[28] *Public Employment Relations Board v. Modesto City Schools Dist.* (*Modesto City Schools*), 136 Cal. App. 3d 881, 900 (1982). *See also Regents of the University of California*, PERB Dec. No. 520-H (1985).

[29] *Modesto City Schools*, 136 Cal. App. 3d at 900.

[30] Cal. Gov't Code § 3505.1; Council Policy 300-06, § VIII.

[31] *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 334-35 (1975).

[32] Cal. Gov't Code § 3505.7. *See also* Council Policy 300-06.

[33] Cal. Gov't Code § 3505.7.

[34] *Id.*

Proposition B relates to pension benefits for present and future employees. Pension benefits are considered deferred compensation, meaning the right to an allowance paid in retirement is earned while an employee is working.[35] Future retirement benefits of current employees are mandatory subjects of bargaining under the MMBA.[36] The City must negotiate with its recognized employee organizations the benefits of future employees, including retirement benefits, who will be represented by an employee organization.[37]

The City has no authority to modify the language of Proposition B because it qualified for the ballot as a citizens' initiative to amend the Charter and has been approved by voters, in a manner consistent with the California Constitution and state elections law. However, before it may implement Proposition B, the City must provide its impacted employee organizations with written notice and reasonable opportunity to negotiate impacts of the Proposition.

Further, certain provisions of Proposition B require the Council to make discretionary decisions, including decisions on the details involved in implementing the DC Plan for employees initially hired after the effective date of the Proposition.

In implementing the provisions of Proposition B, the City must also comply with any MOUs between the City and its recognized employee organizations approved by the Council as of the effective date of the Proposition. Proposition B, at section 6, acknowledges the need to comply with any approved MOUs and the MMBA:

> [T]he implementation of various provisions may be delayed in their implementation pursuant to provisions of any Memorandum of Understanding in effect on the effective date of this Charter amendment. Nothing herein is intended to remove legally established rights held by any officer or employee held by virtue of their employment status before the effective date of this Charter Amendment.

Presently, the City has negotiated one-year agreements with each of its six recognized employee organizations. The agreements for Fiscal Year 2013 will bind the City, once approved by the Council,[38] which has not yet occurred as of the date of this Report. All negotiated MOUs, but the one with the San Diego Police Officers Association, contain language providing that the

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[35] *See Betts*, 21 Cal. 3d at 863.

[36] *County of Sacramento*, PERB Dec. No. 2045-M (2009); *Madera Unified School District*, PERB Dec. No. 1907 (2007) (stating "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining"); *Temple City Unified School District*, PERB Dec. No. 782 (1989); *Jefferson School District*, PERB Dec. No. 133 (1980).

[37] *See, e.g., Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Temple City Unified School District*, PERB Dec. No. 782 (1980). *See also San Lorenzo Education Ass'n v. Wilson*, 32 Cal. 3d 841, 846 (1982) (the terms of agreements reached under collective bargaining statutes, such as the MMBA, bind individual bargaining unit members even though they are not formally parties to the collective bargaining agreement).

[38] *Glendale City Employees' Ass'n, Inc*., 15 Cal. 3d at 335.

MOUs must conform to applicable laws, which would include a change in controlling law, like Proposition B as it relates to retirement benefits, during the term of the MOU.[39]

The City is not required to follow the procedural requirements of the MMBA when modifying terms and conditions of employment for employees who are not represented by one of the City's six recognized employee organizations, but the City must comply with relevant Civil Service provisions for all classified employees.[40]

IV. IMPLEMENTATION OF DEFINED CONTRIBUTION PLAN

Charter section 140, added by Proposition B, restricts officers and employees (except "sworn police officers") initially hired or assuming office on or after the effective date of the section to participating in "such Defined Contribution Plans as authorized by Sections 150 and 151 of this Charter." Charter sections 150 and 151 define the parameters of the new DC Plan or Plans, limiting the City's contribution on behalf of elected officers and most employees covered to 9.2% of the officer or employee's compensation. Employer contributions for "uniformed safety officers" are limited to 11% of the officer's compensation.

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[39] Article 20 of the negotiated MOU between the City and the Deputy City Attorneys Association provides:

> If any part or provision of this Memorandum is in conflict or inconsistent with applicable provisions of federal, state or local laws or regulations, or is otherwise held to be invalid or unenforceable by an agency or court of competent jurisdiction, such part or provisions shall be suspended and superseded by such applicable laws or regulations, and the remainder of the Memorandum shall not be affected thereby.

Article 34 of the negotiated MOU between the City and the San Diego Municipal Employees' Association (MEA) provides, in part:

> Section 1.
> This Memorandum is subject to all current and future applicable federal, state and local laws, regulations and the Charter of the City of San Diego. Provided, however, no local law which is enacted in contravention of the provisions of the Meyers-Milias-Brown Act shall affect the provisions of this Memorandum.
> Section 2.
> If any part or provision of this Memorandum is in conflict or inconsistent with such applicable provisions of federal, state, or local laws or regulations, or is otherwise held to be invalid or unenforceable by any tribunal or court of competent jurisdiction, such part or provisions shall be suspended and superseded by such applicable law or regulations, and the remainder of the Memorandum shall not be affected thereby.

Article 33 of the negotiated MOU between the City and the California Teamsters Local 911 (Teamsters) has language that mirrors Article 34 of the negotiated MOU with MEA.

Article 5 of the negotiated MOU between the City and the San Diego City Firefighters, International Association of Firefighters Local 145 provides:

> This MOU is subject to all current and future applicable federal, state and local laws, regulations and the Charter of the City of San Diego.
> If any part or provision of this Memorandum is in conflict or inconsistent with applicable provisions of federal, state, or local laws or regulations, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part or provisions shall be suspended and superseded by such applicable law or regulations, and the remainder of the Memorandum shall not be affected thereby.

[40] *See* San Diego Charter, art. VIII; SDMC, ch. 2, art. 3; City of San Diego Personnel Regulations.

Charter section 150 requires that the new DC Plan meet the legal requirements for the City "to retain its Social Security Safe Harbor Status, under the Internal Revenue Code, as amended, unless the City enrolls in the Social Security System." If the City re-enters Social Security, the combined employer contributions to the DC Plan and Social Security are capped at the 9.2% and 11% of compensation limits.

Although the City is required to meet and confer before establishing the DC Plan for new employees represented by one of the City's recognized employee organizations, there is no such requirement with respect to elected officers or unrepresented employees. Thus, the Council should not delay adoption of a DC Plan for unrepresented employees initially hired after the effective date of the Charter amendments.[41] Once the City completes labor negotiations and adopts a DC Plan covering the represented employees who are excluded from the Defined Benefit Plan by Charter section 140, it may wish to move the unrepresented employees excluded from the Defined Benefit Plan into the negotiated DC Plan.

Following is a preliminary overview of: (1) the City's meet and confer obligations with respect to the new DC Plan and the state law requirement to obtain actuarial analysis before approval, (2) the defined contribution safe harbor requirements for a Social Security replacement plan, (3) the types of defined contribution plans the City could implement for new unrepresented employees under Charter sections 150 and 151, and (4) some of the plan design features the City may wish to consider. The City should retain an employee benefits attorney with substantial public sector plan design experience to review its options.

A. The City Must Meet and Confer With Its Recognized Employee Organizations Before It Implements the Defined Contribution Plan for Represented Employees.

As explained in Section II above, the effective date of Proposition B will be the date on which the Secretary of State accepts and files the Charter amendments. While there is no discretion to modify the language of a Charter amendment proposed by citizens' initiative and approved by San Diego voters, there are provisions set forth in Proposition B, that require the Council to make discretionary decisions. Proposition B requires the Council to determine the details of the new DC Plan, including the level of employer and employee contributions, the vesting period for employer contributions, whether the plan will replace Social Security, and the types of death and disability benefits that will be provided to participants. These discretionary decisions are subject to meet and confer. Before the DC Plan or Plans may be implemented for represented employees, the City must complete the meet and confer process with its impacted employee organizations to agreement or impasse and exhaustion of impasse procedures.

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[41] There is no immediate need to establish a new DC Plan for elected officers who initially assume office after the November election, because the existing Supplemental Pension Savings Plan (SPSP) already serves as a Social Security safe harbor plan for elected officers who opt out of the defined benefit plan. However, since the SPSP plan does not include a Social Security replacement plan for unrepresented employees, it would have to be amended to provide for this. Amendments to the SPSP plan must be approved by a majority vote of the participants. Elected officers excluded from the defined benefit plan will be required to make mandatory contributions to the SPSP plan that, when matched by the City, will satisfy the safe harbor requirements. These elected officers may also participate in the City's existing 401(k) and 457(b) deferred compensation plans.

The meet and confer requirement need not delay implementation of the DC Plan for elected officers and unrepresented employees. The City should implement a DC Plan for unrepresented employees before the effective date of the Charter amendment. Any employees hired after that date, but before a Social Security replacement plan is adopted, will automatically be covered by Social Security until they become covered by a replacement DC Plan.

B. Before Implementing the Defined Contribution Plan, the City Must Obtain an Actuarial Analysis of the Costs Associated with the Benefit Changes and Consider Those Costs in Considering the Terms of the Plan.

Before the Council establishes the DC Plan or Plans required by Proposition B, it must have an actuary determine the costs associated with the new DC Plan, including the expected actuarial impact of the DC Plan on the City's overall post-employment benefit costs. Government Code section 7507(b)(1) provides that, before a local legislative body may authorize changes in retirement or other post-employment benefits, it must have an actuary provide a statement of the actuarial impact of the changes upon future annual costs, including normal cost and any additional accrued liability. Government Code section 7507(c)(1) further requires that the future costs, as determined by the actuary, be made public at a public meeting at least two weeks before any changes in public retirement plan benefits or other post-employment benefits are adopted. Government Code section 7507(d) also requires that the person with the responsibilities of a chief executive officer of the employer providing the benefit "acknowledge in writing that he or she understands the current and future cost of the benefit as determined by the actuary."

In addition, the intent of Proposition B, as stated in section 2, is "to limit the impacts City budgetary decisions have on pension liabilities in the immediate term and the long term as a way to prevent further cuts in important neighborhood services that are mandated by the Charter." The Council must consider the voters' intent as it establishes the terms of the new DC Plan. The actuarial information is critical to determining the appropriate level and vesting schedule for employer contributions to the DC Plan.

C. Social Security Coverage

1. Historical Background

Congress amended the Social Security Act in 1950 to authorize *voluntary* participation by states and local government agencies in the Social Security System (System) for old age, disability, and death benefits. Before that time, employees of state and local governments were not allowed to participate in Social Security. In 1950, states were given the ability to enter into agreements with the Social Security Administration under section 218 of the Social Security Act[42] (called "218 agreements"), to bring all eligible employees of the state and its political subdivisions under Social Security coverage. At that time, the Social Security Act allowed state

[42] 42 U.S.C. § 418.

and local government agencies to terminate their section 218 agreements upon two years advance written notice to the Social Security Administration.[43]

Currently, every state has a Social Security Administrator and a 218 agreement with the Social Security Administration.[44] The State of California entered into its 218 agreement in 1955.[45] The agreement permits the State to enter into separate agreements with its local public agencies allowing them to participate in Social Security. The City notified the California Social Security Administrator of its intent to terminate its 218 agreement in January 1980, and formally withdrew from the Social Security program effective January 1, 1982.[46]

In 1983, Congress amended the Social Security Act to prevent state and local governments who had voluntarily joined Social Security from thereafter withdrawing from the System, making Social Security coverage mandatory for all states and local governmental agencies that were voluntary members of the System at that time.[47] Agencies that had terminated their Section 218 agreements before 1983, such as the City of San Diego, may rejoin Social Security at any time, however, an agency that chooses to do so cannot later terminate that agreement.[48]

When the City withdrew from the Social Security System in 1982, it established the SPSP plan for salaried general member employees and legislative officers.[49] The City later established the Supplemental Pension Savings Plan-Hourly (SPSP-H plan) for part-time hourly employees, in order to comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) requirement that all governmental employees not covered by Social Security be covered under an employer-sponsored retirement plan by July 1, 1991.[50] The SPSP and SPSP-H plans are both qualified governmental defined contribution plans under sections 401(a) and 414(d) of the Internal Revenue Code (Code or I.R.C.).

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[43] IRS Publication 963 (Rev. 11-2011), *Federal-State Reference Guide*, (Providing guidelines for social security and Medicare coverage and tax withholding requirements for state, local, and Indian tribal government employees and public employers), Department of the Treasury Internal Revenue Service www.irs.gov.

[44] Http://www.ssa.gov/slge/faqs.htm.

[45] *See* Cal. Gov't Code §§ 22000-22018.

[46] *See* San Diego Resolution R-255609 (Jan. 4, 1982), authorizing establishment of the SPSP plan effective January 8, 1982.

[47] Subsection (f) of Section 218, 42 U.S.C. 418(f), provides that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983."

[48] *Id.*

[49] The SPSP plan was limited to General Members, because only the General Members had participated in Social Security. At that time, the Social Security Act excluded public safety members who were covered by an employer-sponsored retirement plan. Social Security Amendments of 1954, P.L. 83-761, §101(h)(2).

[50] The Omnibus Budget Reconciliation Act of 1990 amended I.R.C. section 3121(b)(7)(F) to provide that every public employee's wages are subject to Social Security taxes, unless the employee is a member of a "public retirement system," and extended the requirement to part-time, seasonal, and temporary employees. In order to avoid mandatory Social Security coverage of its part-time and hourly employees, the Council established the SPSP-H Plan by adopting San Diego Resolution R-278180 on June 24, 1991.

The SPSP plan was closed to general members hired after June 30, 2009, and lifeguard members hired after and December 31, 2010. However, SPSP-H continues to function as a Social Security safe harbor plan for hourly employees not covered by either SPSP or the City's Defined Benefit Plan.

In addition to the SPSP and SPSP-H plans, the City maintains a qualified defined contribution plan for general member employees hired on or after July 1, 2009 (2009 401(a) Plan). The 2009 401(a) Plan is *not* designed to be a Social Security replacement plan, because the employees covered by the plan also participate in the Defined Benefit Plan, but with a lower benefit formula than the one for general members hired before July 1, 2009.[51] Even with the lower benefit formula, the defined benefit for these employees meets the safe harbor requirements for a defined benefit plan to serve as a replacement for Social Security.[52]

2. Social Security Safe Harbor Requirements for Defined Contribution Plans

If the Council intends to have unrepresented employees hired after the effective date of Charter section 140 not participate in Social Security, the new DC Plan must be designed to satisfy the Social Security safe harbor requirements for defined contribution plans. Since July 1, 1991, the wages of a state or local government employee whose employer has withdrawn from Social Security are subject to Social Security taxes unless the employee is a "member of a retirement system" maintained by the governmental employer that provides at least a minimum level of retirement benefits.[53] A defined contribution retirement plan satisfies the minimum retirement benefit requirement with respect to an employee for periods during which at least 7.5% of the employee's compensation is allocated to his or her retirement account.[54] The 7.5% requirement applies only up to the Social Security wage base,[55] which is $110,100 for 2012.[56]

This minimum benefit may be made up of employer or employee contributions or a combination of both, but cannot include any earnings on the account. Depending on the type of defined contribution plan that is chosen, the employee contributions may be mandatory or elective, pre tax or post tax. To meet the Social Security safe harbor requirement, the employees' accounts must either be credited with a "reasonable interest rate" or held in a separate trust subject to fiduciary standards and credited with actual earnings.[57]

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[51] SDMC § 24.0402.0001.

[52] The Social Security safe harbor requirements for governmental defined benefit pension plans are set forth in Rev. Proc. 91-40.

[53] I.R.C. § 3121(b)(7)(F).

[54] Treas. Reg. § 31.3121(b)(7)-2(e)(2)(iii)(A). For this purpose, the definition of compensation "must be no less inclusive than the definition of the employee's base pay"; overtime, bonuses, and certain single-sum payments may be disregarded. Treas. Reg. § 31.3121(b)(7)-2(e)(iii)(B).

[55] *See* Treas. Reg. §31.3121(b)(7)-2, example under subsection (e)(2(iii)(B),which confirms that once an employee reaches the wage base, he or she is a qualified participant in the plan for the entire year "without regard to whether the employee ceases to participate at any time after reaching the maximum contribution base."

[56] Section 1.401(l)-1(c)(34) of the Treasury Regulations defines the taxable wage base as the contribution and benefit base under section 230 of the Act. Rev. Ruling 2012-5 sets the wage base for 2012 at $110,100.

[57] Treas. Reg. § 31.3121(b)(7)-2(e)(iii)(C).

If the Council would like to have the unrepresented employees covered by Social Security, there are two ways this can be accomplished. The simplest way is to design the DC Plan so that it provides benefits that do not meet the safe harbor requirements. For example, if the City were to design the DC Plan to require employees to contribute only 3% of compensation with a 3% employer match, the employees covered by the DC Plan would be subject to mandatory Social Security coverage. The City and the employees would be subject to the employer and employee Social Security taxes, which are each 6.2% of compensation up to the "wage base."[58]

If the Council wishes to provide benefits under the DC Plan that meet or exceed the safe harbor requirements and also provide for Social Security coverage, referred to as "voluntary coverage," there must be a referendum of eligible employees (i.e., employees eligible for the new DC Plan). There are specific rules for this referendum, including that eligible employees are given not less than 90 days notice of the referendum. The referendum would be conducted by the Social Security Administrator for the State of California.[59]

All states are authorized to use the majority vote referendum process. Under this process, if a majority of all eligible members vote in favor of coverage, all current and future employees in positions covered by the DC Plan will have Social Security coverage.

In addition to the majority vote referendum procedure, certain States, including California, are authorized to divide a retirement system based on whether the employees in positions covered by the safe harbor retirement system want coverage. Under the divided vote referendum, only those employees who vote "yes" are covered by Social Security; members who vote "no" are not covered as long as they maintain continuous employment in a position within the same safe harbor public retirement system. It is important to note, however, that even under a divided vote referendum; all *future* employees covered by the new DC Plan would be covered by Social Security. The City may wish to delay having a referendum until a substantial number of employees are participating in the DC Plan so that a meaningful vote can be held. For this reason, it is not feasible to have unrepresented employees hired between the effective date of Charter section 140 and the establishment of a negotiated DC Plan, participate in a safe harbor DC Plan and also in Social Security during the interim period. If the City Council would like to explore this approach at a later time, this Office will provide more detailed information on the procedural requirements of conducting a referendum.

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[58] For 2011 and 2012, employees pay only 4.2% of their wage earnings (up to the wage base) for Social Security tax, instead of the normal 6.2% rate. Employers still pay the full 6.2% rate. This special payroll tax holiday was enacted as part of the Tax Relief Act of 2010 (Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub.L. 111-312, 124 Stat. 3296, H.R. 4853), was passed by the United States Congress on December 16, 2010 and signed into law by President Barack Obama on December 17, 2010., then extended through February 2012 by HR 3765 (Section 101 of the Temporary Payroll Tax Cut Continuation Act of 2011-HR 3765), and then further extended through the end of 2012 by HR 3630 (Section 101 of the Middle Class Tax Relief and Job Creation Act of 2012).

[59] The very preliminary information related to the referendum requirements and procedures was obtained through discussions with the State of California's Social Security Administrator.

If the City hires any unrepresented employees after the effective date of Charter section 140, but before it adopts a safe harbor DC Plan covering those employees, those employees will be subject to mandatory Social Security coverage, until they become covered by a safe harbor DC Plan, at which point their Social Security coverage will stop.

D. Plan Design Considerations for New DC Plan

1. Types of Defined Contribution Plans

a. 401(a) Plan.

The DC Plan for unrepresented employees could be established as a new 401(a) plan or by amending one of the City's existing 401(a) defined contribution plans, which include SPSP, SPSP-H, and the 2009 401(a) Plan. Employees could make their mandatory employee contributions on a pre-tax basis, if the City adopts a pick-up arrangement, as it has done for employee contributions made to the Defined Benefit Plan.[60]

Any voluntary contributions to a 401(a) plan must be made on a post-tax basis. Therefore, it may be more advantageous for employees to make only mandatory employee contributions to the 401(a) plan, and to make their voluntary contributions to the City's existing 401(k) plan, which is the only structure that allows employees to make discretionary contributions on a pre-tax basis. (See section "b," below.)

There is no individual contribution limit for employee contributions to a 401(a) defined contribution plan; however, there is an annual limit on the total amount of employee and employer contributions that may be made on behalf of an employee to all qualified plans sponsored by the same employer.[61] For 2012, the limit is the lesser of: (1) $50,000,[62] or (2) 100 percent of the employee's compensation.

As discussed below, a 401(a) plan, such as SPSP or SPSP-H, offers more flexibility to employees to adequately save for their retirement than a 401(k) or a 457(b) plan, because a 401(a) plan is not subject to the much lower annual limits that apply to both 401(k) and 457(b) plans.

The SPSP plan cannot be amended without approval by a majority vote of the participants. The SPSP-H plan does not have a vote requirement. This makes SPSP-H the easier plan to amend to cover unrepresented employees initially hired after the effective date of Charter section 140, at least during the interim period before a more comprehensive DC Plan can be negotiated and adopted.

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[60] Under I.R.C. section 414(h)(2), a governmental employer may make contributions for an employee on a tax-deferred basis. Although the contribution is designated as an employee contribution under the plan, and is deducted from the employee's paycheck, it is deemed to be an employer contribution for tax purposes only. The contribution is not reported as taxable income on the employee's W-2 form for federal or state income tax purposes, but it is subject to the Medicare tax. Revenue Ruling 2006-43 sets forth the requirements for a valid employer pick-up. The pick-up election related to the City's defined benefit is at Municipal Code section 24.0108. (This is different from the "offset," which is the amount the City agrees to pay on the employee's behalf.)

[61] I.R.C. § 415(c). "Catch-up" contributions are excluded for this annual combined limit.

[62] This is the annual limit for 2012. It is indexed to cost of living and may (or may not) increase in 2013.

b. 401(k) Plan.

The new DC Plan could be added to the City's existing 401(k) plan or established as a new 401(k) plan.[63] This would allow all employee contributions to be made on a pre-tax basis. However, an employee's contributions to a 401(k) plan are limited to $17,000 per year,[64] which makes this type of plan less well suited to be an employee's primary retirement plan. Employees age 50 or over (by the end of the applicable calendar year) may make additional "catch-up" contributions up to $5,500 per year.[65] The 401(k) plan would also be subject to the annual contribution limit for all contributions on the employee's behalf to all of the City's defined contribution plans (the lesser of $50,000 or 100 percent of the employee's compensation).

As discussed in section "a" above, the SPSP-H plan could be amended to provide a Social Security replacement for unrepresented employees until a negotiated plan is adopted. Employee contributions to the SPSP-H plan could be limited to mandatory employee contributions, which could be pre-tax, along with the City's matching contributions on those amounts. The unrepresented employees could make their voluntary contributions to the City's existing 401(k) plan, which would not be matched. This would allow these employees to make all of their contributions, voluntary and mandatory, on a pre-tax basis.

c. 457(b) Plan.

The new DC Plan could be added to the City's existing 457(b) plan, which is a governmental deferred compensation plan. This would allow the employee contributions to be made on a pre-tax basis. However, as with a 401(k) plan, the employee's annual contributions would be limited to $17,000.[66] The total annual contribution limit for all defined contribution plans (the lesser of $50,000 or 100 percent of the employee's compensation) does not apply to a 457(b) plan. But, the special limits prescribed for 457(b) plans, including the special 457(b) rule permitting additional contributions by employees approaching normal retirement age (i.e., over age 50), do apply.[67]

2. Investment of Contributions

The new DC Plan may be administered by a third party record-keeper (e.g., VALIC or Wells Fargo), through Risk Management, with employees self-directing the investment of their own accounts under the plan. Alternatively, if the plan is a qualified plan under Code section 401(a) (including a 401(k) arrangement), the plan assets may be pooled and co-invested with the assets of the Retirement System's Group Trust, which is an option the City may wish to explore with the Retirement System. This structure could result in lower investment fees due to

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[63] Government entities generally cannot establish or maintain a 401(k) plan unless it is adopted before May 6, 1986. I.R.C. § 401(k)(4)(B)(ii). However, because the City established its 401(k) plan before that date, it may amend that plan or even create a new 401(k) plan. Either way, the plan will be deemed to have been created before May 7, 1986 (i.e., "grandfathered"). Treas. Reg. § 1.401(k)-1(e)(4)(iv).

[64] This is the annual limit for 2012. It is indexed to cost of living and may (or may not) increase in 2013.

[65] This is the annual limit for 2012. It is indexed to cost of living and may (or may not) increase in 2013.

[66] This is the annual limit for 2012. It is indexed to cost of living and may (or may not) increase in 2013.

[67] I.R.C. § 457(b)(3).

the larger size of the overall investment pool. In addition, a single investment pool may result in a better rate of return for employees because of greater diversification and active professional investment management.[68]

3. Death and Disability Retirement Benefits

Under Charter section 151, added by Proposition B, the City is required to provide death and disability benefits for uniformed public safety officers covered by the new DC Plan who are killed or injured in the line of duty. These benefits need not be limited to service-connected deaths and disabilities. Charter section 150 defines "uniformed public safety officers" as employees meeting the Retirement System's definition of a Safety Member, which is set forth in Municipal Code section 24.0103, as follows:

> *"Safety Member"* means any Member who is: (1) a sworn officer of the City Police Department hired after July 1, 1946, (2) a uniformed member of the City Fire Department hired after July 1, 1946, (3) a full-time City lifeguard, or (4) effective July 1, 2003, a Police Department recruit employed by the City and participating in the City's Police Academy. Except as provided above, police cadets, persons sworn for limited purposes only, and all other employees of the Police Department, Fire Department and lifeguard service are not Safety Members.

Thus, the City must provide both death and disability benefits to full-time lifeguards and uniformed members of the City Fire Department who are covered by the new DC Plan and excluded from the Defined Benefit Plan. Sworn police officers are not affected by this provision, as they continue to be eligible for the Defined Benefit Plan, and the death and disability benefits provided under that plan.

With respect to non-safety employees covered by the new DC Plan, Charter section 151 provides that the City may, but is not required to, "provide for disability benefits to support an employee who has become physically or mentally disabled by reason of bodily injury or illness related to the discharge of their duties." Charter section 151 is silent on whether the City may provide non-safety employees covered by the DC Plan with death benefits or non-service-connected disability benefits.

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[68] Employees directing their own investments tend to earn lower investment returns than defined benefit plans for a number of reasons. Defined contribution plan members are part-time investors, whereas defined benefit plan assets are managed by investment professionals. In addition, institutional investors have investment options that are generally not available to defined compensation plan members, including real estate and private equity. *See Public Plan DB/DC Choices*, Periscope (January 2009), Milliman, http://publications.milliman.com/periodicals/peri/pdfs/PERi-01-01-09.pdf; *A Comparative Analysis of Defined Benefit and Defined Contribution Retirement Plans*, pp. 11-13, Arizona State Retirement System, September 22, 2006, http://www.nasra.org/resources/dbdcissues.htm.

The only benefit under a DC Plan is the accumulated vested balance in an employee's account, including earnings, at the time of the employee's retirement, termination, or death.[69] Unlike in a defined benefit plan, risk cannot be shared among employees in a defined contribution plan. Thus, the new DC Plan cannot *directly* provide any death or disability benefit beyond the employee's account balance.[70] The City may, however, provide death and disability benefits *separately* for employees in the DC Plan through supplemental contributions or funding or through the purchase of insurance.

One example of how this can be done is in the State of Florida, which since 2000 has allowed employees to choose among three retirement plans: a defined benefit plan, a defined contribution plan, and a hybrid plan. The state offers a separate disability retirement benefit for employees participating in the defined contribution plan. If an employee in the defined contribution plan is determined to be permanently and industrially disabled, the employee may surrender his or her defined contribution account in exchange for a monthly disability allowance for life. The benefit is funded through separate employer contributions.[71]

The State of Alaska, which offers a mandatory defined contribution plan for all new employees, took a different approach. Alaska separately funds an occupational death and disability benefit for its employees. If an employee becomes permanently disabled or dies because of a work related injury, the employer pays the employee (or the employee's surviving spouse or dependent) a percentage of the employee's salary until the employee reaches (or would have reached) normal retirement age. The employer also makes the required employee and employer contributions to the employee's defined contribution account until normal retirement age. When the employee reaches (or would have reached) normal retirement age, the disability allowance stops, but the employee or survivor then receives the defined contribution account balance.[72]

Should the Council choose to amend the SPSP-H plan to provide an interim DC Plan for unrepresented employees, it must separately provide for and fund service-connected death and disability benefits for any unrepresented safety member employees who are hired during the interim period, in order to comply with Charter section 151.

4. Employer Contributions and Related Vesting Issues

One consideration in designing a DC Plan for employees excluded from the Defined Benefit Plan is whether or not the employer matching contributions will be guaranteed at a particular level or left to the discretion of the City, to be determined through meet and confer and set forth in the annual Salary Ordinance. For example, the City may wish to leave the level of matching contributions to the discretion of the Council, but specify a range. For example, the contributions would never be less than the amount necessary to satisfy the Social Security safe harbor requirement, unless the City decides to have these employees covered by Social Security.

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[69] I.R.C. § 414(i).
[70] I.R.C. § 414(i).
[71] Additional information regarding these plans is available on the Florida Retirement System's webpage at http://www.sbafla.com/fsb/RetirementPlans/tabid/377/Default.aspx.
[72] Additional information regarding Alaska's defined contribution plan is available at http://doa.alaska.gov/drb/dcrp/index.html.

The top of the range could be the employer contribution limits set forth in Charter section 150 (9.2% of compensation for general members, 11% of compensation for safety members).

Another policy consideration is the rate at which employer contributions will vest under the new DC Plan. Under the current SPSP-H plan, employer matching contributions vest immediately, in order to satisfy the safe harbor requirements for part-time, seasonal and temporary employees – the only participants in SPSP-H at this time. The regulations issued under I.R.C. section 3121(b)(7) provide, as to part-time, seasonal and temporary employees only, that an employee is a qualified participant in a safe harbor defined contribution retirement system on a given day only if all contributions counted towards the safe harbor threshold are 100 percent non-forfeitable on that day.[73] For purposes of these regulations: (1) a part-time employee is one who works twenty hours or less per week,[74] (2) a seasonal employee is one who normally works full-time less than five months per year,[75] and (3) a temporary employee is one who performs services under a contractual arrangement with the employer of two years or less duration.[76]

Immediate vesting of employer contributions is not required for employees who are not part-time, seasonal, and temporary. The regulations provide that such an employee is a qualified participant in a defined contribution retirement system on a given day "if he or she has satisfied all conditions (other than vesting) for receiving an allocation to his or her account."[77] Thus, the City could choose to have the matching contributions vest over a period of years, as they do under the existing SPSP plan,[78] or have them vest all at once (e.g., on the employee's third or fifth anniversary), which is generally referred to as "cliffvesting."

Under the current Defined Benefit Plan, an employee who leaves City employment without qualifying for a pension (i.e., with less than ten years of service) only receives his or her employee contributions plus interest credited on those amounts, unless the employee establishes reciprocity with another public employer in California.[79] If the employer contributions for the new DC Plan are set at or near the maximum allowable under Charter section 150, and the City provides for immediate vesting of all employer contributions, the DC Plan could be more costly than the current Defined Benefit Plan. These are issues that need to be addressed by the actuary hired to provide the analysis of the DC Plan under Government Code section 7507(b)(1).

5. Long-Term versus Short-Term Considerations

Substantial time is required to evaluate the various plan design options and negotiate the terms of the new DC Plan with the five affected employee organizations. The City must immediately establish a plan for unrepresented employees hired on or after the effective date of the Proposition B Charter amendments (or have them covered by Social Security). However, the

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[73] Treas. Reg. § 31.3121(b)(7)-2(d)(2)(i).
[74] Treas. Reg. § 31.3121(b)(7)-2(iii)(A).
[75] Treas. Reg. § 31.3121(b)(7)-2(iii)(B).
[76] Treas. Reg. § 31.3121(b)(7)-2(iii)(C). Elected officials who are paid in excess of $100 a year are not considered part-time, seasonal or temporary employees for these purposes.
[77] Treas. Reg. § 31.3121(b)(7)-2(d)(1)(ii).
[78] Under the SPSP plan, at section 8.02, employer matching contributions vest at the rate of 20%, reaching 100 percent vesting after five years of City employment.
[79] SDMC §§ 24.0206, 24.0306.

City may ultimately wish to have all employees hired after the effective date of Charter section 140 (other than police officers) participate in one DC Plan, rather than maintaining separate plans for represented and unrepresented employees.

To address the immediate need of providing a DC Plan for unrepresented employees hired between the effective date of Charter section 140 and the date on which the City is able to adopt a negotiated DC Plan, the Council may consider amending the SPSP-H plan for this purpose. During the interim period, the unrepresented employees would participate in SPSP-H and direct their own investments. Once labor negotiations are completed, the City would have discretion to move the unrepresented employees hired during the interim period into the DC Plan established by the City pursuant to labor negotiations, provided the SPSP-H plan amendments are drafted to give the City this discretion. The unrepresented employees hired during the interim period would not forfeit their account balances in the SPSP-H plan by moving prospectively to the negotiated DC Plan, provided the SPSP-H plan amendments so provide. The City should contract with outside counsel experienced in plan design to advise on how this can best be accomplished.

E. Hiring Freeze

As explained above, Proposition B added language to the Charter, providing that "all Officers and employees, with the exception of sworn police officers, who are initially hired or assume office on or after the effective date of [Section 140] shall participate only in such Defined Contribution Plans, as authorized by Sections 150 and 151 of this Charter." The City must implement a DC Plan for future employees as soon as possible. The City must negotiate the terms of the DC Plan with the five recognized employee organizations that will represent the future employees who are excluded from the Defined Benefit Plan.[80] The City must approach these negotiations in a good faith effort to reach agreement and, if necessary, exhaust all necessary impasse procedures, before it implements a DC Plan for represented employees.

To ensure compliance with the Charter, this Office advises that the City must implement a hiring freeze, from the effective date of Proposition B, until the DC Plan is implemented. The pending Fiscal Year 2013 MOUs with the five employee organizations impacted by the DC Plan all have provisions stating that the MOUs are subject to all current and future applicable federal,

[80] Proposition B does not require that sworn police officers participate only in defined contribution plans. Most of the City's sworn police officers are represented by the San Diego Police Officers Association. Proposition B, at section 140, authorizes the Council to provide sworn police officers hired after the effective date of Proposition B with either the Defined Benefit Plan or the DC Plan; however, it is not a mandate that sworn police officers participate only in the DC Plan. Proposition B, at section 141.1, modifies the factors used to calculate the Defined Benefit Plan for sworn police officers hired after the effective date of the Proposition.

state and local laws, regulations, and the Charter.[81] Proposition B is a superseding law, within the meaning of the MOUs. To ensure compliance with the Charter while alleviating the uncertainty created by hiring new employees if a DC Plan is not in effect, a hiring freeze is required.[82]

The meet and confer requirement does not apply to unrepresented employees. Therefore, the City should implement expeditiously the DC Plan for unrepresented employees to ensure it is in place by the effective date of Proposition B, and before the City hires any unrepresented employees after that date. The City should not hire any unrepresented employees after the effective date of the Proposition until a DC Plan is in place or a decision has been made that they will participate in Social Security.

V. IMPLEMENTATION TIMELINE

June 2012	Provide notice to the City's affected employee organizations and an opportunity to negotiate impacts prior to implementation.
Mid-July to early- to mid-August 2012	Estimated effective date of Charter amendment, when the Secretary of State accepts and files it. DC Plan must be in place for officers and employees hired on or after the effective date of the Charter amendment. (Charter §§ 140, 150.) Also, sworn police officers hired after the effective date of the Charter amendment have a modified formula for their Defined Benefit pension. (Charter § 141.1.)
Effective Date of Charter Amendment through June 30, 2018	City's initial position in bargaining is established. Also actuarial analysis is required to be completed and publically disclosed prior to approval of any MOU. (Charter § 70.2.)
Effective Date of Charter Amendment, and by September 1, 2012 for new employees hired after that date	Charter section 143.1 voting requirement under Charter section 143.1 for employees and retirees upon change to benefits is eliminated. (Charter § 143.1.)

[81] *See* footnote 39.

[82] It is a management right under the City's MOUs with its recognized employee organizations and under Council Policy 300-06, the City's negotiated employee-employer relations policy, to determine the personnel by which government operations are conducted. Therefore, implementing a hiring freeze is generally a management right. However, any impacts to workload or safety of existing employees, as a result of a hiring freeze, will be subject to negotiations. *International Ass'n of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board*, 51 Cal. 4th 259, 276 (2011); *see also Fire Fighters Union, Local 1186, Int'l Ass'n of Fire Fighters, AFL-CIO v. City of Vallejo*, 12 Cal. 3d 608, 622 (1974). The California Public Employment Relations Board (PERB) has stated that if an employer's decision regarding management of its services and utilization of its staffhas an impact on the amount of work to be performed by represented employees, the decision may be subject to bargaining. *Desert Sands Unified School District*, PERB Dec. No. 2092 (2010); *Davis Joint Unified School District*, PERB Dec. No. 393 (1984).

By January 1, 2013, to the extent allowed by law, including the legal effect of existing MOUs	Earnings Code documents adopted as part of the annual Salary Ordinance must exclude any pay components from pensionable compensation that may be excluded under "any judicially approved legal settlement." (Charter § 70.1.)
By January 30, 2013, and each subsequent year	City must post online a listing of the total amount paid by SDCERS to each individual City retiree for the preceding calendar year. (Charter § 141.4.)
On or before July 1, 2013	Council, by ordinance, must eliminate Defined Benefit Pension for any individual City officer or employee convicted of a felony related to their employment duties. (Charter § 141.3.)

RECOMMENDATIONS

To ensure compliance with Proposition B and other applicable laws, this Office makes the following recommendations to the City:

1. Provide the City's recognized employee organizations with notice and opportunity to negotiate any impacts of Proposition B. The City must meet and confer to agreement or impasse and exhaust any applicable impasse procedures prior to making any discretionary decisions under Proposition B that involve mandatory subjects of bargaining, including deciding the specific terms of the DC Plan for represented employees. The Council should immediately provide direction to City negotiators relating to implementation of Proposition B.

2. Implement an interim DC Plan for unrepresented employees before the effective date of Proposition B, which will be when the Secretary of State accepts and files the Charter amendment. This date is anticipated to be sometime between mid-July and early- to mid-August. The City is not required to meet and confer before implementing the DC Plan for unrepresented employees and must have it in place before any unrepresented employees are hired after the effective date of Proposition B, unless a decision has been made that these employees will be covered by Social Security.

3. Hire a plan design and tax expert and an actuary to assist in developing an interim DC Plan for unrepresented employees, as well as the negotiated DC Plan or Plans for represented employees, and to advise the City in implementing Proposition B.

4. Implement a hiring freeze for unrepresented employees from the effective date of Proposition B, at least until an interim DC Plan is in place or a decision has been made to have these employees covered by Social Security. Implement a hiring freeze for represented employees until the meet and confer process is completed and the negotiated DC Plan or Plans are in place.

JAN I. GOLDSMITH, CITY ATTORNEY

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