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1/27/11

**AGREEMENT BETWEEN THE CITY OF FRESNO  
RETIREMENT BOARDS AND THE CITY OF FRESNO  
WITH RESPECT TO LITIGATION ARISING FROM  
THE PROVISIONS OF THE PENDING TAX  
COMPLIANCE ORDINANCES THAT RELATE  
TO INTERNAL REVENUE CODE SECTION 401(a)(9)  
AND THEIR APPLICATION TO EMPLOYEES WITH  
REGISTERED DOMESTIC PARTNERS OR TO  
SAME-SEX MARRIAGES**

THIS AGREEMENT is entered into this 27<sup>th</sup> day of January, 2011 by and between the CITY OF FRESNO, a municipal corporation (hereinafter CITY) and the City of Fresno Fire and Police Retirement Board, which administers the City of Fresno Fire and Police Retirement System, and the City of Fresno Employees Retirement Board, which administers the City of Fresno Employees Retirement System (hereinafter collectively, "Retirement Boards").

**WITNESSETH**

WHEREAS, the Retirement Boards stand as fiduciaries to members, retirees, and beneficiaries of the systems;

WHEREAS, among the Boards' fiduciary duties is the duty to comply with applicable laws;

WHEREAS, compliance with those provisions of the Internal Revenue Code insure that the members, retirees, and beneficiaries remain eligible for the tax-favored treatment of retirement contributions and benefits;

WHEREAS, the Internal Revenue Service has expressed its strong desire that governmental defined benefit retirement systems apply to the Service on or before January 31, 2011 for a determination that the terms of the retirement plans comply with the applicable provisions of the Internal Revenue Code;

WHEREAS, the Retirement Boards have engaged the services of Ice Miller, a nationally recognized tax law firm with extensive experience with governmental defined benefit retirement plans, to review the plans, to offer amendments to enhance Municipal Code compliance with the applicable provisions of the Internal Revenue Code, and to submit an application to the Service for a determination that the terms of the plans comply with the Internal Revenue Code;

WHEREAS, Ice Miller has prepared draft tax compliance ordinances which have been reviewed and approved by the Retirement Boards as their recommendation to the Council;

WHEREAS, the draft tax compliance ordinances have been submitted for review to the employee organizations that have not raised any issues or questions;

WHEREAS, the draft tax compliance ordinances have been submitted to the City Attorney's Office for its review and consideration;

WHEREAS, the intent of one provision in each of the draft tax ordinances is to clarify that any optional form of benefit under the plan that gives a greater than 50% continuance is not available to a retiree who has named a non-spousal beneficiary who is younger than the retiree by more than ten years;

WHEREAS, this provision is mandated by the Internal Revenue Code as supplemented by the Federal Defense of Marriage Act;

WHEREAS, the distinction in Federal law between spouses of different sexes and marital-type associations, including domestic partnerships registered under the laws of the State of California, is the subject of litigation elsewhere in the nation;

WHEREAS, the City Attorney's Office is reasonably concerned that the inclusion of the provisions described above may result in expensive and time-consuming provision involving not only the Retirement Boards but also the City;

WHEREAS, the parties to this agreement acknowledge that, pursuant to existing valuation methodology as recommended by the system's actuary, the type of payments that may be made under this agreement, will be included in determining any unfunded actuarial accrued liability of the system from whose funds the payment was made; and

WHEREAS, it is fiduciarily appropriate under the limited circumstances of enhancing the compliance of the retirement systems with the applicable provisions of the Internal Revenue Code for the Retirement Boards to indemnify the City with respect to any litigation in which the City is named as a party and in which registered domestic partners or same sex married couples are suing the City to be treated the same as married members and retirees with respect to selection of optional forms of benefit under one or both of the retirement systems.

NOW, THEREFORE, IN LIGHT OF THE FOREGOING, IT IS HEREBY AGREED AS FOLLOWS:

1. For purposes of this agreement the following definitions shall apply:
  - a. "Litigation" means any actions or proceedings that are judicial, administrative, or otherwise in which the legality of the provision of either of the tax compliance ordinances restricting to no more than 50% the optional form of benefit to non-spousal beneficiaries ( hereinafter "tax compliance ordinance") is being contested by plaintiffs who are members of a domestic partnership registered under the laws of the State of California or comparable jurisdiction or who are members of a same-sex marriage which is lawful under the laws of the jurisdiction in which the marriage was entered.
  - b. "Indemnify" means to provide an attorney and pay for legal fees and costs generated in the defense of City in any claim, demand, action, proceeding or litigation, including expert witness fees.

c. "Hold harmless" means that City shall bear no fiscal or financial burden whatsoever resulting from any demand, claim, action, proceeding or litigation arising from, resulting from, or in connection with the tax compliance ordinance, including the satisfaction of any final judgment rendered in any litigation under this agreement.

d. "Tender a defense" means to provide written notice of any demand, claim, action, proceeding, or litigation, whether through electronic means or otherwise, to both the Retirement Administrator of the retirement systems and to the legal counsel for the Retirement Boards and obtain confirmation of receipt by them.

e. "City of Fresno" means the City of Fresno, its officers, officials, employees, or agents.

2. The Retirement Boards shall indemnify, hold harmless, and defend City and each of its officers, officials, employees, and agents from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability including but not limited to personal injury, death at any time and property damage) incurred by City, Retirement Boards or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen out of the City's adoption and enforcement of the tax compliance ordinance. The Retirement Board's obligations under the preceding sentence shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the gross negligence, or caused by the willful misconduct, of City or any of its officers, officials, employees, or agents. This section shall survive termination or expiration of this Agreement.

3. Each Retirement Board shall be responsible to comply with paragraph 2 of this agreement only with respect to litigation in which it is either a named party or in which the demand, claim, action, proceeding or litigation contests the validity of those Municipal Code provisions which it is obligated to administer.

4. The obligations of either Retirement Board under this agreement only apply if the City of Fresno tenders a defense within 20 calendar days of receipt of any demand, claim, action, proceeding, or litigation in which City is to be indemnified and held harmless by the Retirement Boards.

5. The City will work with the Retirement Boards for the selection of the attorney mutually agreed to by both parties, to represent the City of Fresno in litigation under this agreement. In the event the parties cannot agree to the selection, the City shall make the final selection. Under such circumstances, the Retirement Boards may exercise its right to require that the counsel selected by the City possess certain minimum qualifications, which may include that selected counsel have 1) at least five (5) years of civil litigation practice, which includes substantial defense experience in the subject at issue in the litigation, and 2) errors and omissions coverage.

6. Nothing contained herein shall prohibit City, in its sole discretion, from participating in the defense of any demand, claim, action, proceeding, or litigation over and above representation by outside counsel, or from participating in the defense of any demand, claim, action, proceeding, or litigation. If City elects to also defend, it shall do so in good faith.

In no event shall City's participation in the defense of any demand, claim, action, proceeding, or litigation affect the obligations imposed upon the Retirement Boards under this agreement.

7. Without limiting the City's right to recover its costs from Retirement Boards under this agreement, Retirement Boards agree to reimburse the City for its actual costs incurred, including but not limited to, City staff and attorney time expended for certifying and/or preparing the administrative record in connection with and proceedings related to the subject matter of this indemnification agreement. Retirement Boards shall pay such cost to City before receiving such administrative record. To the extent administrative record reimbursement and related costs are recovered in any litigation by the City, Retirement Boards shall be reimbursed to the extent any such recover is made as cost recovery items.

8. Any insurance maintained by the Retirement Boards shall be primary and no contribution shall be required of City, its officers, officials, employees, or agents. The fact that insurance is maintained by Retirement Boards and City shall not be deemed to release or diminish the liability of Retirement Boards, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify City shall apply to all claims, liability and lawsuits regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by Retirement Boards. Upon request of City, Retirement Boards shall immediately furnish City with a complete copy of any insurance policy maintained by the Retirement Boards, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original copy. This requirement shall survive expiration or termination of this Agreement.

9. A material failure of the City to cooperate with the defense of the litigation shall void the obligations of the Retirement Boards under this agreement.

10. This agreement shall cease to be operative as of January 31, 2016, although the obligations of this agreement shall continue as to any litigation under this agreement which commenced prior to that date.

11. If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant, or condition of this agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses.

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12. If any provision of this agreement is determined to be invalid in a final judgment by a court of competent jurisdiction, each and every other provision hereof shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this agreement at Fresno, California, the day and year first above written.

CITY OF FRESNO,  
a municipal corporation

CITY OF FRESNO FIRE AND POLICE  
RETIREMENT BOARD

By: Mark Scott  
Mark Scott, City Manager

By: Paul Cliby  
Paul Cliby, Chair

ATTEST:  
REBECCA E. KLISCH  
City Clerk

CITY OF FRESNO EMPLOYEES  
RETIREMENT BOARD

By: Cindy Bruer 2/18/11  
Deputy Date

By: Ken Nerland  
Ken Nerland, Chair

APPROVED AS TO FORM:

APPROVED AS TO FORM:

JAMES C. SANCHEZ  
City Attorney

SALTZMAN & JOHNSON  
Board Counsel, Retirement Boards

By: Tei Yukimoto  
Tei Yukimoto, Senior Deputy

By: \_\_\_\_\_  
Russell Richeda, Board Counsel

Dated: 1/19/11

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

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CITY OF FRESNO,  
a municipal corporation

CITY OF FRESNO FIRE AND POLICE  
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By: Mark Scott  
Mark Scott, City Manager

By: \_\_\_\_\_  
Paul Cliby, Chair

ATTEST:  
REBECCA E. KLISCH  
City Clerk

CITY OF FRESNO EMPLOYEES  
RETIREMENT BOARD

By: \_\_\_\_\_  
Deputy Date

By: \_\_\_\_\_  
Ken Nerland, Chair

APPROVED AS TO FORM:

APPROVED AS TO FORM:

JAMES C. SANCHEZ  
City Attorney

SALTZMAN & JOHNSON  
Board Counsel, Retirement Boards

By: Tei Yukimoto  
Tei Yukimoto, Senior Deputy

By: Russell Richeda  
Russell Richeda, Board Counsel

Dated: 11/19/11

Dated: 11/24/11

City of  
**FRESNO** REPORT TO THE CITY COUNCIL

AGENDA ITEM NO. 1 L  
COUNCIL MEETING 1/27/11

**January 13, 2011**

Presented to City Council  
Date: 1/13/11  
Disposition: Bill Nov.  
B-1, B-2, B-3,  
and 2011-2

APPROVED BY  
  
Retirement Administrator

Presented to City Council  
Date: 1/27/11  
Disposition: Ord. 2011-1, &  
2011-2

**FROM:** CITY OF FRESNO RETIREMENT BOARDS

**BY:** STANLEY L. MCDIVITT, Retirement Administrator

*RUSSELL RICHEDA, Legal Counsel for the Retirement Boards*

**SUBJECT:** INTRODUCTION AND ADOPTION OF ORDINANCES AMENDING VARIOUS RETIREMENT SECTIONS OF THE FRESNO MUNICIPAL CODE TO ENHANCE COMPLIANCE WITH THE INTERNAL REVENUE CODE AND MAINTAIN THE RETIREMENT SYSTEMS' TAX DEFERRED STATUS

**RECOMMENDATION**

To enhance compliance with the Internal Revenue Code ("IRC") and maintain the Systems' tax deferred status with the Internal Revenue Service ("IRS"), the Retirement Boards have approved the attached two ordinances which amend various Retirement sections of the Fresno Municipal Code. The Retirement Boards are recommending that the City Council introduce the two ordinances today and subsequently adopt the ordinances at the January 27, City Council meeting. The Retirement Boards' Legal Counsel Russ Richeda and staff also concur with these proposed recommendations.

**EXECUTIVE SUMMARY**

In fulfilling their fiduciary duties, the Retirement Boards retained the professional services of Ice Miller, a specialized tax firm, to assist in reviewing the applicable Retirement System provisions of the Fresno Municipal Code from a tax compliance perspective. Ice Miller has performed an extensive review of the retirement code and has recommended various amendments to enhance compliance with Internal Revenue Code provisions. These amendments have been incorporated in the attached two ordinances.

Prior to approving the ordinances for recommendation to the City Council, the Retirement Boards conducted public hearings on the proposed amendments and provided a formal notice to all City Labor Organizations. Additionally, on December 14, 2010, the City's Labor Relations Manager also provided notice to the labor organizations and offered to meet with the labor associations regarding the impacts with a December 23 deadline to respond. As of December 23, 2010, Labor Relations received no requests from the labor associations to meet regarding the impacts.

The City Attorney's Office has reviewed and approved the ordinances as to form.

*Subject: Introduce Ordinances amending various retirement sections of the FMC to enhance compliance with the IRC and maintain the retirement systems' tax deferred status*

## **BACKGROUND**

The Internal Revenue Service has in recent years increased its focus upon governmental defined benefit plans and has encouraged such plans to apply with the Internal Revenue Service for a determination that the plan complies with the applicable provisions of the Internal Revenue Code.

In this regard, the Boards retained the services of the law firm of Ice Miller to assist in reviewing the plans from a tax compliance perspective, assist in deciding whether it is appropriate to apply for a determination letter and submit the plans into the IRS's voluntary compliance program for any corrections of minor issues.

Ice Miller has completed its review of our two Retirement Plans and the Retirement Boards have reviewed and approved Ice Miller's proposed tax compliance amendments for both Retirement Systems. Ms. Terry Mumford of Ice Miller presented the firm's overview memorandum, the proposed amendments and answered questions at the Boards' September 8, 2010 joint meeting. Ms. Mumford also discussed the firm's recommendations that each Board file with the Internal Revenue Service for a tax determination letter and submit the plan into the IRS's voluntary compliance program (VCP) prior to January 31, 2011.

While almost all of the proposed amendments clarify current practice, it is important to note the following changes:

1. One of the proposed amendments would require employees entering the City's Deferred Retirement Option Program to continue to make employee pension contributions. Currently, members cease making employee contributions when they enter the DROP program. Ice Miller has advised that the IRS would not support an employee's mid-career decision to cease employee contributions prior to retirement; therefore, they have proposed a prospective amendment where the employee would continue to make employee contributions into the employee's DROP account, as compared to the employee's contribution account.
2. Another proposed amendment would limit benefit option selection for certain non-spousal beneficiaries which include domestic partners registered with the State of California. Federal law differs from state law on registered domestic partners and in order to comply with the Internal Revenue Code, the Retirement Systems need to follow the federal law in this area. Federal law does not impact a retiree with a non-spousal beneficiary who is less than ten years younger than the retiree. Such a retiree will continue to be able to select any available benefit option in the event of the death of the retiree, consistent with existing practice. A retiree with a non-spousal beneficiary or registered domestic partner who is more than ten years younger than the retiree, however, will be limited in the benefit options available to

REPORT TO THE CITY COUNCIL - January 13, 2011

*Subject: Introduce Ordinances amending various retirement sections of the FMC to enhance compliance with the IRC and maintain the retirement systems' tax deferred status*

be selected. However, this is not a reduction in the value of the benefit as the benefit selected must be the actuarial equivalent of the member's full allowance.

Also included as an attachment to this staff report are the Ice Miller Compliance Worksheets for both Systems which cross reference the proposed amendments as guidance to the appropriate Internal Revenue Code Section.

Finally, most public pension systems in California are performing the same due diligence review and then filing for a tax determination letter with the IRS. The majority of public pension systems in California, including the CalPERS System, have not previously filed for a tax determination letter, but will likely be filing prior to the January 31, 2011, deadline.

*Attachments:*

1. *Proposed Ordinances*
2. *Ice Miller Compliance Worksheets*