ACTION MEMO

AC TRANSIT DISTRICT

Board of Directors

Executive Summary

GC Memo No. 06-002

Meeting Date: January 4, 2006

Committees:

Planning Committee  ☐  Finance Committee
External Affairs Committee  ☐  Operations Committee  ☐

Board of Directors  X  Financing Corporation  ☐

SUBJECT: CONSIDER THE ADOPTION OF RESOLUTION NO. 06-003 ADOPTING AMENDMENTS 06-A AND 06-B TO THE AC TRANSIT EMPLOYEES’ RETIREMENT PLAN

RECOMMENDED ACTION:

☐ Information Only  ☐ Briefing Item  X Recommended Motion

Adopt Resolution No. 06-003.

BOARD ACTION: Approved as Recommended  [x]  Other  [ ]
Approved with Modification(s)  [ ]

General Counsel advised that a Rule of Necessity exists in the Government Code relating to recommendations made by managers relating to benefits for their employees if there is a potential that they will benefit if the recommendation is approved. Disclosure of these facts is required prior to action being taken. To fulfill this requirement it is noted that the General Manager does not benefit from the Retirement Plan amendments being proposed. General Counsel stated that he will prepare a statement on behalf of the General Manager that can be made part of the record.

MOTION: PEEPLES/KAPLAN to adopt Resolution No. 06-003 as presented (7-0-0-0).

Ayes: Directors Peeples, Kaplan, Wallace, Jaquez, Hayashi, Vice President Bischofberger, President Harper - 7
Noes: None – 0
Abstain: None – 0
Absent: None – 0

The District Secretary was directed to include as part of the minutes the memo prepared by the General Counsel regarding the potential conflict, the memo to the Retirement Board outlining the logic for the proposal, as well as the memo outlining the financial impact. (See Exhibits A-C which are attached hereto, and made a part of these minutes).

The above order was passed on January 4, 2005.
Rose Martinez, District Secretary
By ___________________________
GM Memo No. 06-002  
Subject: Consider the Adoption of Resolution No. 06-003 Adopting Amendments 06-A and 06-B to the AC Transit Employees’ Retirement Plan  
Date: January 4, 2006  
Page 2 of 3

Fiscal Impact: The fiscal impact of the amendments will depend on when affected employees retire. The costs will be considered as part of the actuarial study done by the retirement board to determine the District's contribution rate.

Background/Discussion:

Amendment 06-A

This amendment would change the definition of "compensation" under the AC Transit Employees’ Retirement Plan (the Plan) to include "contributions made by the District on an Employee's behalf to a deferred compensation plan established by the District under Section 457(b) of the [Internal Revenue Service] Code." The amendment will clarify for the Retirement Board and the retirement staff the issue whether to include these contributions in calculating the retirement of an employee who receives such contributions.

The Retirement Board at its December meeting reviewed the proposed amendment, Exhibit A to Resolution No. 06-003. The Retirement Board did not raise any issues regarding the proposed amendment.

Amendment 06-B

This amendment would clarify that "Monthly Average Earnings" as used in the Plan includes any General Leave amount that management employees with employment agreements may elect to cash out per the employee's employment agreement. As presently drafted Monthly Average Earnings excludes vacation and sick leave payouts, with certain exceptions for ATU members. The Retirement Board recently was requested to consider the issue of General Leave and recommended that a Plan amendment would be required for the inclusion of that leave.

There are about a dozen management employees who have employment agreements with the District. Most of these contracts provide for General Leave in lieu of vacation, sick leave or management leave and, depending on the employee, either one-third or one-half of the accrued leave may be cashed out in a given calendar year. Although employment agreements have been in existence for at least the past quarter of a century, the issue of whether to include any General Leave cash out in the calculation of Monthly Average Earnings had never arisen. However, a contract employee is retiring from the District and the issue requires clarification.

Unlike Amendment 06-A the Retirement Board prior to its consideration by the District Board has not reviewed the language of the proposed amendment (Exhibit B to Resolution No. 06-003). However, because of the pending retirement, a slight
deviation of the normal process is requested. The District Board will consider the amendment prior to the Retirement Board and its approval will be contingent upon any changes suggested by the Retirement Board. If there are no changes then the amendment will take effect; otherwise it would be subject to further District Board consideration.

Drafting of the Plan Amendments

Connie Hiatt, counsel for the Retirement Board, drafted the proposed Plan amendments.

Prior Board Actions:

The Board has amended the Retirement Plan from time to time to reflect changes negotiated with the District’s various unions, unrepresented employees, and Board Officers, and to keep the Plan up to date.

Attachments:

Draft Resolution No. 06-003 with Exhibits A and B

Approved by: Kenneth C. Scheidig, General Counsel
              Rick Fernandez, General Manager
              Hugo Wildmann, Retirement Administrator

Prepared by: Kenneth C. Scheidig, General Counsel

Date Prepared: December 27, 2005
ALAMEDA-CONTRA COSTA TRANSIT DISTRICT

RESOLUTION NO. 06-003

A RESOLUTION APPROVING AMENDMENT 06-A and 06-B TO THE ALAMEDA-
CONTRA COSTA TRANSIT DISTRICT EMPLOYEES’ RETIREMENT PLAN TO
AMEND SECTION 1.11 (COMPENSATION) AND PARAGRAPH (E) OF SECTION
1.30 (MONTHLY AVERAGE EARNINGS), RESPECTIVELY

WHEREAS, the Alameda-Contra Costa Transit District Board of Directors (the
District) is authorized by Public Utilities Code sections 25301 and 25361 to establish a
retirement system; and

WHEREAS, the District has created a retirement system known as the AC
Transit Employees’ Retirement Plan (the Plan); and

WHEREAS, the Plan may be amended by the District's Board of Directors; and

WHEREAS, two proposed amendments have been prepared; (1) to include
under the definition of Compensation contributions made by the District on an
employee’s behalf to a deferred compensation plan established by the District and (2) to
include in the computation of Monthly Average Earnings cash out of General Leave
available to specific contractual management employees; and

WHEREAS, the necessary amendments have been prepared and have
(amendment 06-A) or will be reviewed (amendment 06-B) for approval by the
Retirement Board;

NOW, THEREFORE, the Alameda-Contra Costa Transit District Board of
Directors does resolve as follows:

SECTION 1. Approves Amendment 06-A to the Plan as more specifically set
forth in Exhibit A, attached to and incorporated into this resolution by reference as if fully
set forth in it.

SECTION 2. Approves, subject to review by the Retirement Board at its January
9th meeting, Amendment 06-B to the Plan as more specifically set forth in Exhibit B,
attached to and incorporated into this resolution by reference as if fully set forth in it.

SECTION 3. This resolution shall become effective immediately upon its
passage by four affirmative votes of the Board of Directors.
RESOLUTION NO. 06-003 WAS PASSED AND ADOPTED this 4th day of January 2006.

_____________________________________, President

Attest:

___________________________________________
Rose Martinez, District Secretary

I, Rose Martinez, District Secretary for the Alameda-Contra Costa Transit District, certify that the foregoing Resolution was passed and adopted at a Regular Meeting of the Board of Directors held on the 4th day of January 2006, by the following roll call vote:

AYES: DIRECTORS:

NOES: DIRECTORS:

ABSENT: DIRECTORS:

ABSTAIN: DIRECTORS:

__________________________________________
Rose Martinez, District Secretary

Approved As To Form:

__________________________________________
Kenneth C. Scheidig, General Counsel
The AC Transit Employees’ Retirement Plan (the “Plan”) hereby is amended as set forth below, effective back to the date the Plan was established to clarify and reflect the previous interpretation of the Plan and the Plan’s operational practice. Capitalized terms have the same definitions as in the Plan.

1. The first paragraph of Section 1.11 of the Plan, entitled “Compensation,” is restated in its entirety to read as follows:

   1.11 “Compensation’ means the total salary and wages, including overtime payments and other monetary remuneration, if any, which is paid to an Employee by the District (or by ATU or ATU-International in the case of Employees described in Section 1.23(ii)) for the Plan Year, and which is required to be reported as wages on the Employee’s Form W-2. Compensation includes any ‘elective deferrals’ (within the meaning of Section 402(g)(3)of the Code) withheld from the Employee’s gross income by the District (or ATU or ATU-International in the case of Employees described in Section 1.23(ii)) for the Plan Year, and any amounts withheld for the Plan Year from the Employee’s gross income by the District (or ATU or ATU-International in the case of Employees described in Section 1.23(ii)) that are not includible in the Employee’s gross income by reason of Sections 125, 132(f)(4) or 457(b) of the Code. Compensation also includes contributions made by the District on an Employee’s behalf to a deferred compensation plan established by the District under Section 457(b) of the Code.”
IN WITNESS WHEREOF, the Plan is hereby amended as set forth above as of this ______ day of ________, 2005.

By ________________________________
The AC Transit Employees’ Retirement Plan (the “Plan”) hereby is amended as set forth below, effective January 1, 2006. Capitalized terms have the same definitions as in the Plan.

1. Paragraph (e) of Section 1.30 of the Plan, entitled “Monthly Average Earnings” is amended by adding the following sentence at the end:

   “Notwithstanding the preceding sentence, for purposes of this Section 1.30, Monthly Average Earnings shall include amounts of General Leave (as defined and/or used in management employment agreements) elected by management Employee, with an employment agreement, to be taken as additional cash compensation rather than as pay during leave or absence from work for any years used to calculate Monthly Average Earnings for Participants who retire on or after January 1, 2006.”

IN WITNESS WHEREOF, the Plan is hereby amended as set forth above as of this _____ day of __________, 2006.

By _______________________________
To: Rose Martinez, District Secretary

From: Kenneth C. Scheidig, General Counsel

Date: January 24, 2006

Re: Rule of Necessity to Proposed Retirement Plan Amendments

At the Board of Directors meeting on January 4, 2006, item 5 was "Consider adopting Resolution No. 06-003 approving proposed amendments to the Retirement Plan (GM Memo No. 06-002)." The memo addressed proposed amendments 06-A and 06-B to the AC Transit Employees' Retirement Plan.

Amendment 06-A amended the plan to clarify that "compensation," as used in the Plan, included contributions made by the District on an employee's behalf to a deferred compensation plan established by the District under §457(b) of the IRS Code. The definition of compensation in the Plan was thought to be broad enough to include these contributions, but the amendment was proposed for clarification purposes.

Amendment 06-B clarified the term "Monthly Average Earnings" in the Plan to include any cash out of General Leave a management employee with an employment agreement could make per his/her contract. The prior language did not address the issue of General Leave.

The Plan was created by the District per PUC §25301, et seq., but is administered by the Retirement Board under PUC §25361, et seq. and the California Constitution Art. 16, §17.

The General Manager is appointed by the Board of Directors and is authorized to perform a myriad of duties. See PUC §24936. Because the Plan is funded by the District, and the General Manager is responsible for the administration of the business affairs of the District, the General Manager is in a position to know the contents of the Plan. The General Manager also is charged with the responsibility of negotiating labor agreements with represented employees, subject to Board approval, and making recommendations to the Board regarding the salaries and benefits of unrepresented employees, except for the General Counsel and District Secretary.

Due to his unique position in the District, the General Manager is responsible for recommending to the Board proposed amendments to the Plan. Since the General Manager hires all employees of the District, except for the positions of General Counsel...
and District Secretary, any recommendations from another department head or manager, such as HR Manager, essentially is a recommendation from the General Manager. Thus, even though the General Manager may benefit from a proposed recommendation to the Board, he is, by necessity, the primary employee within the District who is responsible for making salary and benefit recommendations, or negotiating the same. Ultimately, it is the Board of Directors who determines whether or not to approve the recommendation.

At the January 4, 2006 Board meeting, prior to the consideration by the Board of proposed Plan amendments 06-A and 06-B, the General Counsel indicated on the record the potential conflict of interest the General Manager would have in the amendments and that by necessity he was the only employee who could make those recommendations to the Board.

With regard to Amendment 06-A, the General Manager received (and continues to receive) a deferred compensation contribution in accordance with his employment agreement with the District. However, all management employees, both represented and unrepresented, receive varying degrees of a deferred compensation contribution from the District.

IRS Code section 401(a)(17) imposes a contribution cap for benefits received from a 457 retirement plan. The General Manager is significantly over the cap and cannot benefit from the amendment. Only if the cap rises over the years and the General Manager’s salary remains static would it become possible for him to benefit from the amendment. This is considered a highly remote possibility.

With respect to Amendment 06-B (as well as with Amendment 06-A), although the General Manager receives General Leave as a contract employee, by necessity, as noted previously, he is the only one who may make such a recommendation to the Board of Directors. A limited rule of necessity, for situations such as this, has been recognized in Caminetti v. Pac. Mutual Ins. Co. (1943) 22 Cal.2d 344; Finnegan v. Schrader (2001) 91 Cal.App.4th 572; and 65 Ops.Cal.Atty.Gen. 305 (1982).

After receiving the above information, the Board of Directors unanimously voted in favor of the adoption of Resolution No. 06-003, approving the Plan amendments.

KCS/af
To: Chairman Dominguez and Members of the Retirement Board  
From: Kenneth C. Scheidig, General Counsel  
Date: December 8, 2005  
Re: Payment of General Leave for Contract Employees

It has come to our attention that the Retirement Board is determining whether a "cash-out" of General Leave by an employee covered by an executive employee agreement is included in "Monthly Average Earnings" under the retirement plan. For the reasons set forth below, it is our opinion that it does:

1. There are a limited number of employees at the executive level who are retained by the District under at-will contracts. These employees are identified in Resolution No.1180A that has been adopted by the Board of Directors. The Board has specifically approved contracts with these employees and the content of those contracts, including the pay out of General Leave.

2. Section 5 of the contracts addresses the issue of "compensation." The section identifies all items of compensation - salary and benefits. Among the benefits is General Leave, which is a set number of days credited to the employee in lieu of sick leave, vacation or management leave. An executive employee with General Leave may make an annual election to "cash out" a portion of his/her General Leave. In addition, accrued General Leave is paid to the employee upon his/her termination or retirement.

3. If a contract employee takes advantage of the General Leave cash-out provision, then that money becomes a part of their compensation for purposes of the W-2 issued by the District to the IRS and Franchise Tax Board and the employee pays taxes on this money. Thus, General Leave is treated as part of an executive employee's compensation as part of the contract and tax laws.

4. The term "compensation" in Section 1.11 of the Retirement Plan defines compensation to mean "the total salary and wages, including overtime payments and other monetary remuneration, if any, which is paid to an Employee by the District . . . for the Plan Year, and which is required to be reported as wages on the Employee's Form W-2." (emphasis added)

This office believes that it is clear that the Board of Directors considered payments under General Leave to be available to executive employees as part of their compensation, and as such meets the requirements of Section 1.11.
We are aware that Section 1.30(e) excludes from Monthly Average Earnings "cash out" of any accumulated vacation or sick leave. However, we would contend that General Leave is not vacation or sick leave. As noted above, it is provided in lieu of sick leave, vacation and management leave, the latter category not being included in Section 1.30(e). General Leave is a different category of leave that does not and should not be included within the exclusion, but should be recognized as "compensation" under Section 1.11.

This office recognizes that the Retirement Board may disagree with this interpretation. We would hope that would not be the case, but if it should, we are prepared to recommend that the Board of Directors request the preparation of a plan amendment that would clarify this point.

KCS/af

Attachment: Resolution No. 1180A

cc: Board of Directors
    Rick Fernandez
    Deborah McClain
    Connie Hiatt, Esq.
    Hugo Wildmann
January 4, 2006

Mr. Rick Fernandez
General Manager
AC Transit
1600 Franklin Street
Oakland, CA 94612

Re: General Leave for Executives

Dear Rick:

We have estimated the impact of including general leave pay for purposes of retirement benefits, based on the following assumptions for a hypothetical executive:

1. current pay of $180,000 before the general leave cashout
2. projected retirement in 2 years
3. projected service of 10 years
4. current age of 55
5. 25-year amortization of costs
6. this includes an employee who is not impacted by the IRC 401(a)(17) $220,000 compensation limit*
7. the employee cashes out $15,000 of general leave per year

* Note: The IRC 401(a)(17) limit is an IRS limit on compensation used for calculating benefits for all tax-qualified plans. If an employee was already at the compensation limit then the general leave pay could not be used in the benefit calculation.

The result is a 25-year amortization of $2,092 dollars in the first year which equates to 1.16% of current pay of $180,000. The results for 5 employees will be $10,460 per year and the results for 7 employees will be $14,644.

There are many uncertainties involved in making estimates of this kind of estimate but our calculation could be viewed as a worst case scenario in that we are assuming a cashout of general leave each year. We cannot be certain as to how much the member will cash in, when they will retire, how long each person will live after retirement or whether they will already be at the pay limit, each of which will affect the final cost.

Please let me know if you have any questions.

Sincerely,

Michael Moehle, FSA, EA, MAAA
Principal & Consulting Actuary

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