Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
13	07/25/16	Open	Action	07/20/16

Subject: Amend the General Manager/CEO's Employment Agreement

ISSUE

Whether or not to amend the Sacramento Regional Transit District General Manager/CEO's Employment Agreement, to define "retirement" as "separation from service" consistent with IRC §409A and restricting his post-retirement work hours to 20% of the total number of hours of service provided to RT in the 36 months preceding his retirement.

RECOMMENDED ACTION

Adopt Resolution No. 16-07-____, Approving the Second Amendment to the Amended and Restated Employment Agreement with Michael R. Wiley as RT's General Manager/CEO.

FISCAL IMPACT

The proposed amendment will result in approximately $156,339 in savings to RT's operating budget for FY17 resulting from a reduction in the total tax penalty amounts that would be owed as required by IRC §409A.

DISCUSSION

On November 9, 2015, the Board adopted Resolution No. 15-11-0124 amending and restating the General Manager/CEO's (GM/CEO) employment agreement to reflect changes associated with Mr. Wiley's announced retirement and the transition of leadership at RT. With respect to compensation and benefits, the amended and restated agreement carried forward provisions negotiated in connection with Mr. Wiley's initial agreement in 2008, including a supplemental retirement benefit designed to allow Mr. Wiley to receive his full RT pension despite a benefit limitation imposed by the IRS.

Supplemental retirement arrangements have a different tax treatment than defined benefit pension benefits. For instance, supplemental retirement arrangements are subject to FICA taxes. Because the purpose of the supplemental retirement arrangement is intended to give Mr. Wiley the full benefit of the agreed upon pension, without regard to the IRS cap, Mr. Wiley's contract requires that RT pay Mr. Wiley's FICA tax obligation along with any other taxes that he will incur because of the nature of the supplemental retirement arrangement.

In preparation for Mr. Wiley's retirement on August 1, 2016, and because RT does not have in-house tax law expertise, RT's Chief Counsel asked an outside law firm specializing in the tax treatment of pension and retirement benefits to provide RT with legal advice on RT's full tax liability arising from the supplemental retirement benefit in Mr. Wiley's contract. RT asked Hanson Bridgett LLP to provide the advice because they drafted the original provision that was included in Mr. Wiley's 2008 contract.

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13	07/25/2016	Open	Action	07/20/2016

Subject: Amend the General Manager/CEO's Employment Agreement

In reviewing the supplemental retirement benefit, counsel advised RT of two significant tax issues.

First, RT was advised that the value of Mr. Wiley's supplemental retirement benefit should have been reported on his W-2 as income since 2008 when it was first included in his contract, because it is structured in a way that does not meet any of the provisions of the IRC that would allow it to be deemed a qualified governmental excess benefit plan. There is no way to cure this tax issue because California's PEPRA legislation prohibits such plans. Thus, RT will have to prepare amended W-2s for tax years 2008 through 2015 and will have to pay the FICA taxes, interest and penalties associated with the failure to report the value of Mr. Wiley's supplemental retirement benefit arrangement in each of those tax years.

Second, outside counsel advised that Mr. Wiley's supplemental retirement benefit, as currently described, is subject to a section 409A of the IRC tax penalty because the event triggering the right to receive the supplemental retirement benefit is ambiguous. Unless the provision is amended to remove the ambiguity before Mr. Wiley retires, the net present value of the supplemental retirement benefit will be subject to a 20% federal tax penalty and a 5% state tax penalty. RT staff has performed some preliminary calculations of the 20% and 5% tax penalties and estimate that RT's liability will be roughly $156,339. This figure is based on a net present value of Mr. Wiley's supplemental benefit.

The tax penalty liability arising out of section IRC 409A can be avoided. Specifically, RT and Mr. Wiley may amend the supplemental retirement benefit arrangement to correct the ambiguity and structure the plan to comply with the IRC. To do that, the employment agreement will have to define "retirement" as a "separation from service" and make clear that Mr. Wiley will only be eligible to receive his supplemental retirement benefit at separation from service which will happen when he retires.

Additionally, to meet the requirements of IRC section 409A the separation from service must be a "bona fide" separation from service, meaning that Mr. Wiley will provide no further services to RT. The tax code states that to be considered a bona fide separation from service, the terminated employee cannot provide services to his/her former employer in an amount that exceeds 20% of the total amount of services provided to the employer in the preceding 36 month period. Because Mr. Wiley will continue to represent RT on the California Transit Association (CTA) Board, Mr. Wiley's contract must also be amended to restrict his hours to 20% of the total number of hours of service provided to RT in the 36 months preceding his retirement.

Mr. Wiley has agreed to, and is fully supportive of, the amendments proposed above.

Therefore, RT staff recommends that the Board approve the Second Amendment to Mr. Wiley's employment contract to define "retirement" as "separation from service" and to restrict Mr. Wiley's service in retirement to no more than 20% of the level of service provided to RT in the 36 months preceding his retirement.

RESOLUTION NO. 16-07-_____

Adopted by the Board of Directors of the Sacramento Regional Transit District on this date:

July 25, 2016

APPROVING THE SECOND AMENDMENT TO THE AMENDED AND RESTATED EMPLOYMENT AGREEMENT WITH MICHAEL R. WILEY AS RT'S GENERAL MANAGER/CEO

BE IT HEREBY RESOLVED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO REGIONAL TRANSIT DISTRICT AS FOLLOWS:

THAT, the Second Amendment to the Amended and Restated Employment Agreement between Sacramento Regional Transit District and Michael R. Wiley is hereby approved.

THAT, the Chair is hereby authorized and directed to execute said Second Amendment to the Employment Agreement.

____
JAY SCHENIRER, Chair

A T T E S T:

HENRY LI, Secretary

By: ____________________________________
Cindy Brooks, Assistant Secretary