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Item 2.E

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MAYOR & COUNCIL OFFICES
CITY OF SANTA CLARA

December 12, 2017

Mayor and Councilmembers

City of Santa Clara
Warburton Ave
Santa Clara, CA 95050

Ms. Liz Brown, Director of HR

Dear Mayor, Councilmembers, and Liz,

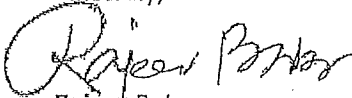
I emailed to you a letter attachment yesterday from Berliner Cohen, a law firm, with an opinion on the question asked at the March 7, 2017 City Council meeting regarding my retirement benefit.

As you know, I retired from the city service on March 30, 2017 and then continued to serve as City Manager as an annuitant until September 27, 2017. At the Council Meeting on March 7, 2017 (14 A 4), the City Council discussed and approved a supplemental retirement benefit for me for the city to pay the difference between my average annual salary (\$296K) and the IRS/CalPERS cap (\$265K), subject to getting a legal opinion that such an agreement will not violate IRS code section, 401 (a) (17).

As stated in the attached letter, Berliner Cohen has reached a conclusion that such an agreement will not violate any provisions of IRC 401 (a) (17). Therefore, I request that staff be asked to develop an agreement between the city and myself to pay the difference in retirement benefit. The actual number can be calculated by finance/HR staff based on my exact average salary and number of years served. The term of the agreement can run parallel to the CalPERS retirement term, i.e. as long as I, or my surviving spouse receive CalPERS retirement benefit.

Thank you for the opportunity to allow me to serve the City of Santa Clara.

Sincerely,



Rajeev Batra
City Manager (Retired)



POST MEETING MATERIAL

12/12/2017

XFINITY Connect Retirement Agreement Legal Opinion Printout

Rajeev Batra [REDACTED]

12/11/2017 6:50 PM

Retirement Agreement Legal Opinion

To Teresa O'Neill [REDACTED] • Patty Mahan [REDACTED]
pkolstad@santaclaraca.gov • lgillmor@santaclaraca.gov • kwatanabe@santaclaraca.gov •
Dominic Caserta [REDACTED] • Debi Davis [REDACTED]
lizbrown@santaclaraca.gov

Dear Mayor, Council Members and Liz,

This is Rajeev Batra. You may recall that I officially retired from City of Santa Clara after serving for approximately 15 years on March 30, 2017. Subsequently, I continued to work as City Manager as an annuitant till September 27, 2017 until a new City Manager was selected. Thank you for allowing me to serve.

Before my retirement in March, the City Council discussed and approved two actions in Closed session and announced publicly in Open session on March 7, 2017. (Moved by CM Mahan and approved unanimously under Item 14 A4).

The first one was to approve a 5% increase in salary to set the hourly rate as an annuitant. This did not really affect my single highest year salary for CalPERS.

The second action was to agree to pick up the difference in my retirement salary and IRS salary cap of \$265k for 2016 subject to a legal opinion that such agreement will not be in any conflict with IRS Code section 401(a)(17) which capped right salary at \$265k for CalPERS retirement.

Previously in August 2017 I submitted an opinion from a Professional CPA tax accountant confirming that such agreement could be entered into without conflicting with IRC 401(a)(17).

Subsequently I was advised by HR Director that the Council and the Acting Attorney wanted a legal opinion. Therefore, at my cost, I engaged the services of Berliner Cohen, a reputed law firm to research this matter and provide a legal opinion.

Attached for your use is Berliner Cohen's legal opinion letter based on their research, which concludes that the City can enter into a side agreement with me to pay me the difference in retirement benefit between the IRS cap (\$265k) and my single highest year salary (approximately \$296k).

Now that it has been clearly demonstrated that the City can enter into this agreement without violating any provisions of the IRS code, this is to request to get such an agreement drafted.

The amount will be approximately \$12,500 - \$13,000 per year. HR and Finance can calculate the exact amount, which could be paid on a monthly basis or, for the ease of Finance staff, on an annual basis. The term of the agreement can run parallel to the CalPERS retirement term. In other words, it will run as long as I or the surviving spouse get the CalPERS retirement benefit.

Once again, thank you for allowing me to serve the City of Santa Clara. This is to urge all of you to enter into this agreement expeditiously effective March 31, 2017.

Happy Holidays.

Sincerely,

Rajeev Batra

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- Letter re IRC 401(a)(17) for Rajeev Batra.pdf (706 KB)



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December 8, 2017

Rajeev Batra



Re: Research Regarding Internal Revenue Code Section 401(a)(17)
Our File No.: 25940.001

Dear Mr. Batra:

I reviewed the documentation that you provided, and law related to, your query as to maximum compensation under Internal Revenue Code ("IRC") Section 401(a)(17).

Issue Presented

The question essentially is whether, during your retirement, the City of Santa Clara (the "City") can pay you the difference between (1) the maximum amount of compensation allowed for certain types of retirement plans under IRC Section 401(a)(17), and (2) your salary as of the time of your retirement.

Factual Background

As I understand it, pursuant to your employment by the City, and previously by the City of San Jose, you joined the California Public Employees' Retirement System ("CalPERS") in 2002. Thereby, you are subject to the compensation limits as set forth in IRC Section 401(a)(17).

On March 7, 2017, while you were serving as Interim City Manager, the City Council approved two actions regarding your compensation. First, the City Council approved a 5% salary increase for you, for purposes of establishing your future hourly rate as a non-employee consultant with the City after your retirement from the City. Second, the City agreed to enter into a side agreement with you in order to pay you, annually, during your retirement, the difference between

Rajeev Batra
December 8, 2017

(1) the maximum amount allowed under IRC Section 401(a)(17) and (2) the average of your salary over the 12-month period leading up to your retirement. The City agreed to enter into this side agreement with you pending confirmation that this arrangement would not violate the maximum compensation rule of IRC Section 401(a)(17). Your average annual salary over the 12-month period ending with your retirement is approximately \$296,000. This amount exceeds the maximum amount permitted to be paid to you during your retirement under a "qualified plan" of \$265,000, as discussed below. The side agreement which the City Council approved for you is to cover the approximate \$31,000 difference between the amount permitted under your CalPERS qualified plan and your average annual compensation as of the 12-month period leading up to your retirement. In 2017, you retired as the Interim City Manager of the City but have continued to perform work for the City in the capacity of a non-employee independent consultant.

Now, you and the City are requesting an analysis regarding the impact that IRC Section 401(a)(17) may have on the City's ability to pay you compensation in excess of the cap imposed under IRC Section 401(a)(17) during your retirement, and you have requested that we provide some analysis of this issue.

Analysis

Generally, plans meeting certain requirements under IRC Section 401(a) are considered to be "qualified plans". A qualified plan must satisfy specific requirements set forth in the IRC and regulations with respect to eligibility to participate, vesting and benefit accrual, funding, distribution, and alienation of benefits. Specifically, with regard to the vesting and accrual of benefits under a plan, IRC Section 401(a)(17) specifies a maximum amount of compensation that may be taken into account. In particular, under IRC Section 401(a)(17), a qualified plan may not take into account compensation in excess of \$200,000 per year, indexed for inflation, or \$265,000 for 2016, in determining a participant's pension benefit.

What the City has proposed and agreed to do is to enter into a side agreement with you to provide you with compensation during retirement which is in excess of the IRC Section 401(a)(17) limit. This is what is sometimes referred to as a "Supplemental Executive Retirement Plan" ("SERP"). A SERP is, in essence, a form of "top-hat" plan that provides participants with retirement income in excess of what they can receive from their employers' qualified pension plan. SERPs are designed to provide benefits that could have been paid under a qualified plan but for the limitations and restrictions imposed on qualified plans by various provisions of the IRC, such as the IRC Section 401(a)(17) limitation. Resultantly, the existence of a side agreement which constitutes a SERP for you does not, in itself, violate the IRC Section 401(a)(17) limitation or invalidate an otherwise qualified plan.

Conclusion

In conclusion, based on our research, the City can, through a side agreement, pay you a retirement benefit in excess of the IRC Section 401(a)(17) limit. Specifically, the IRC Section 401(a)(17) limit for you, based on your retirement date, is \$265,000. Your average compensation for the 12-month period ending with your retirement is \$296,000. Thus, the City can pay you a

Rajeev Batra
December 8, 2017

retirement benefit on the difference of approximately \$31,000 by a side agreement without violating IRC Section 401(a)(17).

This letter is not intended to express any opinion on the side agreement, nor have we reviewed the side agreement itself. The only opinion being expressed in this letter is with regard to IRC Section 401(a)(17).

Should you have any further questions, or would like to discuss further, please do not hesitate to contact me.

Very truly yours,

BERLINER COHEN, LLP

TYLER A. SHEWEY
E-Mail

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