

Memorandum

TO: Deferred Compensation Advisory Committee

FROM: Suzanne Hutchins
Senior Deputy City Attorney

SUBJECT: Contractual Authority under 457 Deferred Compensation Plan and T. Rowe Price Participation Agreement

DATE: November 30, 2021

The City's 457 Deferred Compensation Plan ("Plan") was amended to change the Deferred Compensation Advisory Committee's ("DCAC") and City Manager's contractual authority relating to the administration of the Plan, effective April 9, 2021. Accordingly, contractual authority relating to the administration of the Plan under San Jose Municipal Code Section 3.48.060 is set forth as follows:

- C. **The City Manager shall have the authority to enter into agreements on behalf of the City** for the administration of the Plan, for custodial agreements for funds, and **for investments selected by the Advisory Committee under the Plan where the fees under such an agreement are to be paid by the participants of the Plan or where there is no amount to be paid by the City under the agreement.**
- D. The Advisory Committee shall have the authority to make decisions on behalf of the City as to the investment policy, the choice and nature of investments to be available under the Plan, and enter into agreements on behalf of the City for investment advice under the Plan where the fees to be paid under such an agreement are to be paid by participants of the Plan or where there is no amount to be paid by the City under the agreement. The Advisory Committee shall have the authority to review and advise the City Manager on annual budgets and proposed changes to the Plan.

Since the DCAC has the authority to select the investments available under the Plan and the City Manager has the authority to enter into contracts for investments selected by the DCAC, the DCAC should request that the City Manager execute any agreements required for investments selected by the DCAC.

With respect to the T. Rowe Price investment option, as raised in outside counsel's review in the Memorandum of the Summary of Key Terms to the DCAC dated April 21, 2021, the Participation Agreement must be modified to provide that all compensation

will be paid by Plan participants and not the City. The provision at issue in the Participation Agreement in the Onboarding and Next Steps document (which refers back to the Section 8.4 of the Amended and Restated Declaration of Trust) states that “[t]he Trustee’s compensation shall be paid by the Participating Trust or by the Plan Sponsor, as agreed between the Trustee and the other party....” The City of San Jose would be the Plan Sponsor under the Agreement. Thus, the Plan precludes the City Manager from executing the Participation Agreement unless it can be modified to provide that the City would not be responsible for any fees, without any conditions or limitations.

While staff and T. Rowe Price tried to address the concerns relating to the Participation Agreement, the parties could not agree on a modification to the Agreement to ensure that the City would not be responsible for any fees. Despite the parties not reaching agreement on a suitable modification to the Participation Agreement, the DCAC still has an option if it wants to move forward with the T. Rowe Price investment. The DCAC can seek approval from the City Council for a one-time authorization to expand the City Manager’s authority to allow execution of the Participation Agreement. We confirmed that providing such authorization to the City Manager would not be an issue with respect to Plan compliance.