RATIFICATION VOTE
CHANGES TO RETIREE HEALTH BENEFITS
FOR EMPLOYEES HIRED BEFORE JULY 1, 2005

1. What You Are Voting On

This ratification vote relates to the new Tentative Agreement making changes in retiree health benefits for employees hired before July 1, 2005. After a year of "joint study" with the City during 2010, and several months of negotiations which began in early February 2011, MEA's Negotiating Team tentatively approved this agreement on May 6, 2011, pending your ratification vote.

The City Council approved the Tentative Agreement by the required six (6) votes on May 13, 2011, with Councilmembers Carl De Maio and Lorie Zapf voting against it, claiming it represents a "big giveaway of taxpayers' dollars" when the City Attorney has advised that the retiree health benefit can lawfully be eliminated for active employees.

As an MEA member, it is your turn to cast a vote – either approving this Tentative Agreement with your "yes" vote or rejecting it by your "no" vote.

The Tentative Agreement reached by MEA's Negotiating Team is *unavoidably complicated* and does not lend itself to an accurate "short version." Please allow yourself enough quiet time to read and *re-read* this summary.

2. Four Other City Employee Unions Will Also Hold Ratification Votes

Four other City employee unions have also approved the Tentative Agreement subject to similar ratification votes by their members – the San Diego City Firefighters, AFSCME, Teamsters, and Deputy City Attorneys' Association. The City and the San Diego Police Officers' Association have not yet reached agreement and it is not presently known whether the terms of this Tentative Agreement will be offered to the POA. What we do know, however, is that the POA cannot be given a better deal because the Tentative Agreement expressly prohibits this – unless the "better deal" is also extended to MEA.

3. What You Are *Not* Doing In This Vote

Although this Tentative Agreement, if approved, establishes options under the new retiree health benefit program, this vote has *nothing* to do with your selection of one of these options. Instead, this Tentative Agreement calls for *many more months* of time and opportunity for you to receive and review information *before* having to decide which option to choose. In fact, this Tentative Agreement sets the deadline for making such a choice *early next year* to assure that you have adequate time. However, these options will never come into existence unless this Tentative Agreement is first approved by this ratification vote.

4. <u>What A Majority "No" Vote Will Mean: MEA Will Proceed To An Impasse Hearing On Mayor's "Last, Best & Final Offer"</u>

If a majority of MEA's members *reject* this Tentative Agreement by voting "NO" on the ballot being provided, the Tentative Agreement will not take effect *for MEA-represented employees*. The months-long negotiations process between the City and MEA will be over and we will move forward to an Impasse Hearing before the City Council on the Mayor's "last, best, and final offer" ("LBFO").

The Mayor's LBFO – which would be avoided by approval of the Tentative Agreement – dramatically reduces retiree health benefits for most eligible employees (hired before 7/1/05) from a defined benefit allowance of $8,880 annually, *with* an escalator, to $5,500 annually *with no* escalator and raises the age eligibility for receiving this benefit from age 55 to 60 for general members and from 50 to 55 for safety members. This means that, under the Mayor's LBFO, a retiree health benefit would not be available when you are otherwise eligible to retire with twenty (20) years of service; this $5,500 flat annual allowance would only become available when you turn age 60 (General) or 55 (Safety) even if you retire at age 55 (General) or 50 (Safety). The Mayor's LBFO does carve out a narrow exception for employees who were hired before April 1, 1986, or will be *eligible to retire* by June 30, 2012; they will retain the $8,880 annual allowance – but with *no* escalator – and the age eligibility requirement for this limited group of employees will not change.

Based on MEA's assessment of each Councilmember's likely vote at such an Impasse Hearing, MEA's leadership believes that, if this Tentative Agreement is rejected, the Mayor *will have* the required five (5) votes to impose this LBFO effective on July 1, 2011.

5. <u>What A Majority "Yes" Vote Will Mean</u>: <u>Tentative Agreement Moves Forward To Implementation</u>

If a majority of MEA's members approve the Tentative Agreement with a "YES" vote, then the next steps will be taken which will lead to implementation. There will be no "impasse hearing" and the risk of having the Mayor's LBFO imposed will be *avoided* altogether.

6. <u>Your Elected MEA Negotiating Team – Led By Ann Smith and Mike Zucchet – Strongly Recommends A "YES" VOTE</u>

Your elected Negotiating Team strongly recommends a "yes" vote because your Team has concluded that this Tentative Agreement represents a far better outcome for MEA's members than the Mayor's LBFO.

In fact, there is no question that the terms of the Mayor's LBFO are ***far worse*** than the terms of the negotiated Tentative Agreement. Thus, the only logical reason for the Team to have pushed forward to an impasse hearing – with the probability that the Mayor's LBFO would be imposed – would be if the Team felt that "rolling the dice on legal action" was a superior course of action. Such a litigation path would mean that we must accept the bad outcome for our members – which would take effect on July 1, 2011 – while we spend the next several years

trying to get a better result through the courts. This, of course, would be a *very uncertain* path and the legal landscape has recently been made worse due to litigation initiated by the POA.

A. POA's Recent Cases Related to Retiree Health Benefits Increase The Risks of Litigation

Many of you have followed the debate over the legal character of your retiree health benefit and know how big our disagreement with the City is on this. We will not reiterate the parameters of that debate here as much has already been written about our views – both in MEA's *Viewpoint* and in the Joint Study Report published last September.

Suffice to say that, while MEA remains adamant about the legal significance of the legislative history related to this retiree health benefit since its initial establishment in 1982, the City prefers to point to recent litigation outcomes related to this benefit which involve the San Diego Police Officers Association (POA) and its members.

When the POA sued the City in federal court back in 2005-2006 – while MEA was busy defending your pension benefits in state court against former City Attorney Mike Aguirre's roll-back plans – POA's attorneys "threw in" a claim related to retiree health benefits and then failed to introduce any evidence demonstrating that this benefit is "vested" under the relevant case law due to its 30-year legislative history. However, despite this inexcusable failure in the trial court, POA's attorneys compounded their negligence by including this issue in their appeal to the Ninth Circuit – later *conceding* in their briefing that the benefit is not vested! Such a performance is absolutely outrageous under the circumstances where the record so clearly supported the opposite conclusion because of the legal status the City gave this benefit by its own legislative actions which were separate and apart from any one MOU for a specified term. In fact, POA has a legal malpractice claim presently pending against the attorneys who handled this case. [Even if this malpractice claim ultimately benefits individual police officers, it won't help YOU at all.] Although this Ninth Circuit decision is not binding on MEA-represented employees – who weren't involved in the case at all – it is cited as if it did apply to you in determining that *your* retiree health benefit is not a specially-protected vested benefit but just a run-of-the-mill "employment" benefit subject to reduction or elimination.

More recently, in a separate case filed by the POA, two police officers who were adversely affected by the frozen retiree health benefit which the City imposed on POA-represented employees and on Local 127-represented employees in 2009 (when, unlike MEA, they did not agree on a new MOU), asked the court to declare that the ordinance amending the San Diego Municipal Code, Article 4, "City Employees Retirement System," to freeze their retiree health benefit, was unlawful since no vote under Charter section 143.1 had occurred. On **April 28, 2011**, the trial court ruled in the City's favor – inexplicably concluding that the retiree health benefit was not "under the retirement system" (even though the City Council directed the City Attorney to amend the retirement system to add this benefit back in 1982) and thus no Charter section 143.1 vote was needed. The trial court went on to cite the POA's Ninth Circuit case in support of its statement that "courts have held this benefit is not vested." While this ruling is clearly wrong based on the indisputable record of legislation and prior votes on the

retiree health benefit under Charter section 143.1 – and will likely be appealed by the affected police officers – this case underscores the point about the *uncertainty* of continuing litigation for all concerned.

B. The Tentative Agreement Provides Greater Protection And Eliminates Litigation Risks And Uncertainties

For many employees, *certainty* is more valuable than continuing legal debate and protracted litigation which makes it difficult, if not impossible, to plan for retirement. If we refuse any appropriate compromise (which the Tentative Agreement represents), the City will impose its LBFO and you will be stuck with the *known bad outcome* while we litigate over the next few years in the hope of a better but *uncertain* outcome.

On balance, your Team concluded that the terms of this Tentative Agreement represent a better outcome than the alternative – which would be imposition of the Mayor's far inferior LBFO with litigation being our only hope for something better down the road. And, it cannot be denied that the overall impact of the recession which has brought many public entities (including the City of San Diego) to their knees financially, may indeed have an unwelcome affect on how the courts evaluate the facts and apply the law when deciding whether your retiree health benefits – with jaw-dropping future annual pay-outs for the City – are "vested" or not.

Finally, in arriving at its recommendation, the Team considered another reality as well. Even an eventual victory in court would not end the proverbial war over your retiree health benefits. The long-term impact of the City's prior failure to pre-fund this benefit – though clearly not *your fault* – will always be *your problem* because the funding burden makes future improvements in employee compensation highly unlikely even as prices rise at the pump and in the stores. In the long run, the budget relief which this Tentative Agreement brings can be seen as a positive development for you, too, because each annual budget gap has resulted in more layoffs, impossible demands on you to do more with less, and painful reductions, not improvements, in your compensation.

7. The Deal Points: If the Tentative Agreement Is Ratified

The first point to understand is that there will be a different retiree health benefit if you retire (1) before July 1, 2011; (2) on or after July 1, 2011, and before April 1, 2012; or (3) on or after April 1, 2012. As is currently the case, entering DROP is *not* the same as retiring for purposes of retiree health benefit eligibility. While in DROP as an active employee, you remain eligible for the City's Flexible Benefits Plan. Your eligibility for a retiree health benefit *only* begins when you actually retire.

If you know you will *not* be eligible to retire before April 1, 2012, you may wish to skip the next two sections and go right to the new benefit options which will become effective for those who retire on or after April 1, 2012.

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A. MEA-Represented Employees Retiring Before July 1, 2011

Employees who were hired before July 1, 2005, who retired after July 1, 2009, or who retire before July 1, 2011, will retain the current retiree health benefit of $8,880/year with the annual escalator based on a National Health Expenditures ("NHE") index **resuming for FY 2012**. Under MEA's current MOU, this escalator was suspended for the two-year period of FY 2009 through FY 2011. The maximum increase in the retiree health benefit annual allowance under this escalator is 10% annually. Since FY 2003, the annual retiree health benefit allowance has never increased more than 6% annually under this NHE escalator.

[Please note: Employees represented by Firefighters Local 145, DCAA, and Teamsters will also have the same benefit if they retire before July 1, 2011, because they all adopted MEA's MOU language for FY 2009-2011. However, employees represented by AFSCME, Local 127 will continue to have a frozen annual retiree health benefit with *no escalator* because they did not reach agreement on a suspended escalator in FY 2009 and this *frozen benefit* was imposed on them.]

B. MEA-Represented Employees Retiring On Or After July 1, 2011, And Before April 1, 2012

Employees who were hired before July 1, 2005, who retire on or after July 1, 2011, and before April 1, 2012, will also retain the current retiree health benefit of $8,880/year with the annual escalator based on a National Health Expenditures ("NHE") index **resuming for FY 2013** – up to a maximum of 10% annually. For this group of retiring employees, the annual escalator will be suspended for the three-year period from FY 2009 through FY 2012.

[Please note: Employees represented by Firefighters Local 145, DCAA, and Teamsters will also have the same benefit if they retire on or after July 1, 2011, and before April 1, 2012. For the same reason explained in subsection A above, employees represented by AFSCME, Local 127 who retire on or after July 1, 2011, and before April 1, 2012, will continue to have a frozen annual retiree health benefit with *no escalator*.]

C. Employees Who Are On The City Payroll On April 1, 2012, And Retire After That Date

Employees hired before July 1, 2005, who are on the City payroll on April 1, 2012, and retire after that date will have one of the three benefits described below. Each employee will make an irrevocable option in early **2012** after having the months ahead to learn more about these changes in retiree health benefits and how each option works.

Employees who are eligible for Option A may take Option C if they prefer. All other employees must choose between Options B and C. While Option B resembles the Mayor's LBFO, the age eligibility for this Option does not change as the Mayor proposed. However, your Negotiating Team believes that Option C is a far superior benefit for most employees than Option B – and Option C requires no employee contribution. *But remember – you are not deciding this today*!

(1) Option A: Defined Benefit – $8,880 for FY 2013 with 2% annual escalator

• **Limited Eligibility**: This Option is available *only* to those employees who will be *eligible to retire* before April 1, 2012, or who will have twenty-five (25) years of *creditable* service before April 1, 2012. An employee who meets the years of service and age requirement to be *eligible* to retire on or before April 1, 2012, need not retire to earn Option A. When determining if an employee meets the 25-year-requirement, *both* actual City service *and* purchased service, including "air time" under SDCERS, will count.

[Please note: The eligibility requirements for Option A are distinct from the *service requirements* to be eligible for a retiree health benefit which are presently in effect and are not being changed by this Tentative Agreement. An employee must have at least ten (10) years of actual City service or purchased service under SDCERS to receive a 50% retiree health benefit, and twenty (20) years for a 100% benefit. For each additional year of actual or purchased service in excess of ten but less than twenty, an additional benefit in increments of 5% is earned; for example, an employee with fifteen (15) years of actual or purchased City service will have a 75% retiree health benefit. *Reciprocal service* with another public agency does *not* count when determining eligibility for a retiree health benefit.]

• **Benefit Amount**: An annual retiree health allowance set at $8,880 for FY 2013 with a 2% annual escalator thereafter.

• **Employee Cost**: $98 per month/$45.23 per pay period (pre-tax) for general members; $103 per month/$47.54 per pay period (pre-tax) for safety members. Contributions may not be refunded regardless of an employee's change in circumstances or separation from City employment before becoming eligible to retire. Contributions are made *only during employment* and not after retiring.

• **Covers Retiree Only**: The terms and conditions related to this annual retiree health allowance will otherwise remain the same as they are for the current benefit; this allowance may only be used for the retiree during his or her lifetime and may not be used by his/her spouse or dependents before or after the retiree's death.

(2) Option B: Defined Benefit – $5,500 with *no annual escalator*

• **Benefit Amount**: An annual retiree health allowance set at $5,500 which never increases – either before or after retirement.

• **Employee Cost**: $49 per month/$22.61 per pay period (pre-tax) for general members; $52 per month/$24 per pay period (pre-tax) for safety members. Contributions may not be refunded regardless of an employee's change in circumstances or separation from City employment before becoming eligible to retire. Contributions are made *only during employment* and not after retiring.

• **Covers Retiree Only**: The terms and conditions related to this annual retiree health allowance will otherwise remain the same as they are for the current benefit; this

allowance may only be used for the retiree during his or her lifetime and may not be used by his/her spouse or dependents before or after the retiree's death.

(3) Option C: Defined Contribution by City with a projected annual payout of $8,500 during retired employee's life expectancy

• **City Funds Account:** When an employee becomes *eligible* to retire (i.e., achieves the required creditable service and age), the City will make a defined contribution to his/her retiree health account in an amount which is projected to yield **$8,500** a year for his/her lifetime. This projection will be based on his or her life expectancy at the time of retirement eligibility based on the general mortality tables for men and women and will assume that a 6% rate of return will be earned on this lump sum once made available to the employee for investment management within the retiree health trust fund (to be established). For example, the City would fund a general employee's account with approximately $100,000 when the employee first becomes eligible to retire – i.e., has twenty years of service at age 55. Once the City funds an employee's account, the City has no further responsibility to provide additional funds if the employee does not earn the projected 6% return on his/her invested funds and/or if the employee retires and exhausts the funds in his/her account before death.

• **No Obligation to Retire When Account Funded**: An employee need not retire when this lump sum payment is made; he or she may continue to work while the amount of money in this account grows without withdrawals. This delay between funding and the first withdrawals during actual retirement will permit an employee to withdraw *more than* the projected $8,500 annually. For example, if the employee continues to work for five (5) years after the City first funds his/her account at retirement *eligibility*, the projected payout during retirement increases to approximately $12,000 a year.

• **Flexibility Re Rate of Withdrawal**: Once retired, an employee may make withdrawals from this account in amounts which are greater during the pre-Medicare-eligibility years and which are thereafter reduced after Medicare-eligibility begins.

• **Withdrawals for Qualified Medical Expenses Not Limited To Retiree**: Under the IRS rules applicable to this type of account, withdrawals for qualified medical expenses (includes but is not limited to health insurance premiums) may be made for the retiree, *as well as for a retiree's spouse or other tax dependents*. Upon the retiree's death, withdrawals for qualified medical expenses may continue to be made from any remaining funds until the retiree's spouse or other tax dependents have all died; thereafter, any remaining funds revert back to the trust. [Please note: The City has informed us that the *federal* definition of "spouse" as an opposite sex rather than same sex partner will be applicable to such a tax-qualified defined contribution plan due to relevant IRS rules.]

• **No Mandatory Employee Contribution**: This defined contribution plan will be funded exclusively by the City and no employee contribution will be required.

D. Security: A 15-Year MOU with 6 Council Votes Needed to Amend After July 12, 2014

The new retiree health benefit plan will be memorialized in a 15-year MOU with an implementing ordinance. The parties to the Tentative Agreement intend a level of security and stability for employees related to the retiree health benefit and a level of certainty related to funding of the retiree health benefit. To ensure the parties' intent is satisfied, they will memorialize the terms and conditions of this Tentative Agreement in a 15-year MOU.

However, ***after July 1, 2014***, the City ***does have the power*** to propose amendments to this MOU during its 15-year term but only under strict procedural conditions, including the requirement for six (6) votes of the City Council both to propose and to impose any change. [Councilmember Carl DeMaio has decried this requirement as creating an "insurmountable barrier" to any future amendment.

If six Councilmembers vote in an open session of the Council to propose an amendment to the 15-year MOU, the City must meet and confer with MEA in good faith and otherwise comply with the state's public sector bargaining law (the Meyers-Milias-Brown Act or MMBA) and the City's own Employee-Employer Relations Policy 300-06. Any modification of the 15-year MOU would apply only to active employees and not to retirees or those who have already had the Option C defined contribution plan funded by the City.

E. Implementation Steps And Time-Line

The City and MEA have agreed that, in addition to the time needed for a proper ratification vote to take place, a transition period will be needed for (1) an MOU and implementing Ordinance to be prepared; (2) a defined contribution retiree health benefit trust to be established; and (3) proper education to occur regarding the new benefit options before an employee will be asked to make an irrevocable election.

(1) Charter Section 143.1 Vote Still To Occur: After this education process takes place and before you make a benefit election, a *second* vote will occur under Charter section 143.1. This will be in addition to this membership ratification vote and it will occur despite the City's assertion that no such vote is legally necessary.

Thus, the new benefit options set forth in this Tentative Agreement will not become finally effective until a favorable vote under Charter section 143.1 takes place later this year. If this Charter section 143.1 vote *fails* to approve the terms of the new retiree health benefit program, the negotiations between the City and MEA will be deemed completed and the City may take any new bargaining position it chooses when negotiations over this benefit begin anew – including to eliminate the benefit for active employees entirely.

(2) Here are the STEPS:

1. Tentative Agreement signed May 6, 2011;

2. May 13, 2011: Introduction of Ordinance amending SDMC to conform to our agreement re those who retire *before* July 1, 2011, and between July 1, 2011, and April 1, 2012; second reading will be docketed before the end of May;

3. Membership ratification vote on May 18, 2011;

4. 15-year MOU with implementing Ordinance to be adopted by City Council;

5. New retiree health benefit trust documents to be prepared;

6. Education re new benefit options to occur;

7. Charter section 143.1 vote [**Please note: This will be the last vote under Charter section 143.1 related to retiree health benefits; any future modification of the 15-year MOU will not require such a vote.**];

8. Irrevocable benefit elections to be made before February 1, 2012;

9. Implementation on April 1, 2012;

10. Employee contributions (where applicable) to begin for payroll period on or near April 1, 2012.

8. <u>Employees Hired After July 1, 2005</u>: <u>New Retiree Health Benefit Trust To Be Established For Employees' Contributions</u>

This Tentative Agreement calls for MEA and the City to meet and confer in order to establish a program for employees hired after July 1, 2005, to make tax-deferred contributions to a retiree health benefit trust in order to build a health savings account – designed to earn interest from investments during an employee's active years of service, from which he/she can make withdrawals, once retired, for qualified medical expenses for himself/herself, any spouse or other tax dependents. [Please note: There is litigation pending which may result in a reversal of a lower court decision enforcing this July 1, 2005, cut-off date; if so, employees hired between July 1, 2005, and February 17, 2007, would be covered by the retiree health benefit options described above.]

<u>Final Recommendation: Vote "YES" To Approve Tentative Agreement</u>

While MEA's Negotiating Team has been living and breathing these issues and details for several weeks now, we all know that you will need time to digest this information and to ask questions in order to understand more fully what it all means for you.

We remain confident that, once you do, the merits of this Tentative Agreement will be clear and you will be ready to give it your favorable vote. In solidarity, Ann M. Smith, Mike Zucchet & MEA's Negotiating Team