SUPPLEMENTAL INFORMATION REGARDING ELECTRONIC STATEMENT ISSUANCE (E-STATEMENTS)

SUMMARY:
Staff explored options for defaulting participants into electronic statement issuance (E-statements) in an effort to provide a more efficient means to communicate quarterly statement information to participants. E-statements would also be consistent with the City's goals of increasing efficiencies and reducing the City's carbon footprint.

BACKGROUND:
Staff's interest in E-statements resulted from becoming aware of recent E-statement efforts launched by the Federal Thrift Savings Plan (TSP), a defined contribution plan for Federal employees with $207 billion in assets and 3.7 million participants. In December 2009, the Federal Office of Personnel Management (OPM) moved to make electronic delivery of statements the default option for Federal employee participants, noting that at that time 64% of its participants were still receiving paper statements. OPM estimated this change would save the Federal government $4 million in printing/mailing costs. However, the TSP is a unique program not established under the same regulatory framework governing other defined contribution plans, and thus its actions cannot be considered precedent-setting or permissive from a regulatory point-of-view.

Staff explored this issue with its California large-plan peers and NAGDCA members. No other entity was currently using the TSP default approach. Staff simultaneously explored the issue with Great-West, which after considerable research concluded that, as a service provider, it would not be able to institute a "default" of electronic statement delivery under current law.

REGULATORY CHALLENGES:
Great-West indicates that the Securities and Exchange Commission ("SEC"), Financial Industry Regulatory Authority ("FINRA"), Internal Revenue Service ("IRS"), Department of Labor ("DOL"), and various states' laws ("UETA") all have some bearing on this issue, as does the Electronic Signatures in Global and National Commerce Act ("E-sign"). Great-West suggested that although the plan may be exempt from some of these laws, Great-West as a service provider was not.

Generally, it appears that the SEC requires affirmative consent to electronic delivery. In an employee workplace situation and under very narrow circumstances the SEC permits an implied consent model. The SEC has issued three major releases addressing issues raised by electronic delivery of documents:

1995: http://www.sec.gov/rules/interp/33-7233.txt
1996: http://www.sec.gov/rules/concept/33-7288.txt
2000: http://www.sec.gov/rules/interp/34-42728.htm#seciia

In the 2000 release, the SEC stated:

> "We are concerned that investors would be significantly and adversely affected by implied consent through their inadvertent failure to object. We understand that in many

> circumstances investors are not inattentive to requests for consent to electronic delivery, but rather, purposely do not consent. Thus, we generally believe that it would not be appropriate for issuers or intermediaries to rely on implied consent."

It appears that certain conditions would need to be met for an implied consent model to work: (1) access to a free computer in a kiosk at work from which to access, download, and print at no charge, any document delivered electronically, and any related e-mail messages; (2) employer authorization to retrieve and read during work hours, any document relating to the participant's account, including all documents proposed to be delivered electronically, and any related e-mail messages; and (3) a password and personal identification number ("PIN") that enable the participant to access the portion of the website where his or her account records and electronically-delivered documents are stored.

This approach would not work for terminated, deceased, or other "non-employees," nor in situations where a beneficiary needs access to information, i.e. death of the participant. It would further not work if an employee does not have access to a computer, or if the employee does not have the ability to download to a personal account, or print at no charge, documents which are otherwise delivered electronically. Great-West indicates that the SEC would not allow the presumption that all employees have access to the Internet.

With respect to "E-Sign," this federal Act provides that electronic delivery will satisfy the requirements that the information be delivered in writing if the consumer has "affirmatively consented to [electronic delivery] and has not withdrawn such consent."

Great-West indicates that State law (UETA), IRS and DOL guidance also speak to electronic delivery. In particular, the IRS and DOL have issued guidance concerning the use of electronic communications in administering employee benefit plans. They follow the same analysis as with E-sign above and call for affirmative consent to electronic delivery.

The Board's consultant, Mercer Investment Consulting, indicated that the regulatory environment in this area was evolving and that it was possible future legislation might create new opportunities for expanding the use of E-statements.

CONCLUSION:

Given current regulatory obstacles, staff did not find sufficient authority upon which to base a recommendation to default participants into electronic statement issuance. However, as described in the staff report, staff and Great-West believe that a comprehensive communications campaign can significantly increase E-statement usage from the current 7% to as much as 50% or greater over the next five years.