

Memorandum of Liability Coverage

Issued to the «Agency»

Effective July 1, 2014 – July 1, 2015

Administered by the California Joint Powers Insurance Authority



INTEGRITY

EXCELLENCE

INNOVATION

TEAMWORK

Effective July 1, 2014 – July 1, 2015, as a joint protection program authorized pursuant to
Article 11(a) of the California JPIA joint powers agreement

Providing Innovative Risk Management Solutions For Our Public Agency Partners



COVER PAGE

MEMORANDUM OF LIABILITY COVERAGE FOR THE CALIFORNIA JOINT POWERS INSURANCE AUTHORITY

MEMBER: «Member_Name»

MAILING ADDRESS: «Member_Address»
«City», «State» «Zip»

PROTECTION LIMITS: Primary layer: \$20,000,000

PROTECTION PERIOD: From July 1, 2014 at 12:01 a.m. Pacific Time until July 1, 2015 at 12:01 a.m. Pacific Time.

ENDORSEMENT(S):

This Memorandum, and any endorsements thereto, are a description of the terms and conditions of the Program through which certain specified and limited self-insured risks of liability are administered by the Authority and shared by its Members. *This Memorandum is not an insurance policy.* As provided in Section 990.8 of the California Government Code and appellate court cases of *Orange County Water District v. Association of California Water Agencies JPIA* (1997) and *City of South El Monte v. Southern California Joint Powers Insurance Authority* (1995), the pooling of self-insured claims or losses among the Members of the Authority shall not be considered insurance nor be subject to regulation under the Insurance Code.

California JPIA



President

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MEMORANDUM OF LIABILITY COVERAGE
for the
CALIFORNIA JOINT POWERS INSURANCE AUTHORITY

1. INTRODUCTION

This **Memorandum** is a description of the terms and conditions of the **Program** through which certain self-insured risks of liability are administered by the **Authority** and shared by its **Members** pursuant to the Joint Powers Agreement creating the **Authority** under the provisions of Section 6500 et seq. of the Government Code.

As provided in Section 990.8 of the Government Code, pooling of losses in this **Program** is *not insurance*. The sole duty of the **Authority** is to administer the **Program** adopted by the **Members**. The **Authority** can indemnify only **Claims** or losses, which are pooled under the terms of this **Memorandum** and the Joint Powers Agreement. There is no transfer of risk from the **Member** or any **Protected Party** to the **Authority** nor assumption of risk by the **Authority**.

The provisions of the **Program** are subject to and subordinated to the Joint Powers Agreement or any action taken by the Executive Committee or the Board of Directors in connection with the **Program**. This **Program** has been adopted pursuant to action taken by the Executive Committee, and is subject to any amendment, modification or extension by the Executive Committee or the Board of Directors.

The terms of this **Memorandum** shall be construed in an evenhanded fashion in accordance with the principles of California contract law. If the language of this **Memorandum** is alleged to be ambiguous or unclear, the issue of how the protection should apply shall be resolved in a manner most consistent with the relevant terms of this **Memorandum** without regard to authorship of the language and without any presumption of arbitrary interpretation or construction in favor of either the **Protected Party** or the **Authority**. Any controversy or dispute arising out of or related to an interpretation or breach of this **Memorandum** shall be settled in accordance with the appeals procedures as set forth in this **Memorandum**.

Throughout this **Memorandum**, words and phrases that appear in **bold** print are defined in 3. DEFINITIONS.

2. PROTECTION PROVIDED

A. *Payments on Behalf of Protected Parties*

Subject to all provisions of this **Memorandum**, the **Authority** will cause the **Program** to pay on behalf of the **Protected Party** all sums that the **Protected Party** shall become

legally obligated to pay as **Damages** by reason of **Tort Liability** imposed by law, or the **Tort Liability** of others assumed in a **Protected Contract**, because of:

- (i) Bodily Injury or Property Damage;
- (ii) Personal Injury;
- (iii) Public Officials Errors and Omissions;
- (iv) Broadcast/Publication Injury;
- (v) Employment Practices Injury; or
- (vi) Employee Benefit Administration Liability

caused by an **Occurrence** to which this **Memorandum** applies.

B. *Defense and Settlement*

The **Authority**, at the shared expense of its **Members**, and out of funds of the **Program** deposited or obligated to be deposited by its **Members**, shall investigate, negotiate, settle, or **Defend**, at the **Authority's** sole discretion, any **Claim** or **Suit** which has been tendered to the **Authority** and which in the sole opinion of the **Authority** is encompassed by this **Program**. The **Authority** shall control selection of defense counsel. **Defense Costs** incurred by the **Protected Party** prior to the tender of the **Claim** or **Suit**, as required by 5. CONDITIONS AND RESPONSIBILITIES, to the **Authority** are the sole obligation of the **Protected Party**. The date of the tender of the **Claim** or **Suit** shall be the date written notice of said **Claim** or **Suit** is received at the **Authority's** offices (or it's designated Claims Administrator).

The obligation of the **Authority** as described above shall cease to apply after the *Protection Limit* has been exhausted by any combination of payments hereunder for judgments, settlements, or **Defense Costs**, or if the **Authority** tenders the *Protection Limit* on behalf of any **Protected Party**. For purposes of excess insurance or reinsurance, any **Defense Costs** incurred prior to the tender of the *Protection Limit* shall be deducted from the *Protection Limit* that is tendered.

With respect to any **Claim** or **Suit** or part thereof which has been tendered to the **Authority** and over which the **Authority** assumes full or partial responsibility or charge of the settlement or **Defense**, the **Authority** shall, if applicable, cause the **Program** to pay:

- (i) All expenses incurred by the **Authority** on behalf of a **Protected Party**;
- (ii) Costs taxed against a **Protected Party** in the **Suit**; and
- (iii) Other reasonable expenses incurred by a **Protected Party** at the **Authority's** request to assist the **Authority** in the investigation or **Defense** of the **Claim** or **Suit**; but this shall not include the office expenses of the **Protected Party**, the salaries of **Employees** or officials of the **Protected Party**, nor expenses of any claims administrator engaged by the **Protected Party**.

With respect to a **Claim** or **Suit** for which the **Authority** has determined that only a portion is encompassed by this **Program**, the **Authority** shall cause the **Program** to fund

any **Defense** to the **Claim** or **Suit** against the **Member** and any settlement or final judgment of that **Claim** or **Suit**, subject to the reservation by the **Authority** of the right to recover from the **Member** any amounts paid by the **Authority** for such settlement or final judgment which are paid to claimants for **Claims** or **Suits**, or portions thereof, not encompassed by the **Program**.

With respect to a **Claim** or **Suit** for which the **Authority** has determined that no portion is encompassed by this **Program**, the **Claim** or **Suit** shall be referred, in its entirety, back to the **Protected Party**.

The payment of **Defense Costs** will reduce the *Protection Limit* under this **Program**.

C. **Protection Limit**

The *Protection Limit* shown on the Cover Page and the rules below determine the most the **Program** will pay, inclusive of **Defense Costs**, regardless of the number of:

- (i) Protected Parties;
- (ii) **Claims** made or **Suits** brought; or
- (iii) Persons or organizations that sustain injuries or **Damages**.

The *Protection Limit* stated on the Cover Page is the most the **Program** will pay per **Member** for the sum of **Damages**, **Defense Costs** and expenses as included in B. *Defense and Settlement* under any or all or any combination of **Bodily Injury, Property Damage, Personal Injury, Public Officials Errors and Omissions, Broadcast/Publication Injury, Employment Practices Injury, Employee Benefit Administration Injury, or Chief Executive Separation Payment** arising out of any one **Occurrence**.

For the purpose of determining the *Protection Limit* all **Bodily Injury, Property Damage, Personal Injury, Public Officials Errors and Omissions, Broadcast/Publication Injury, Employment Practices Injury, Employee Benefit Administration Liability, or Chief Executive Separation Payment** arising out of exposure to substantially the same general condition(s) shall be considered as arising out of one **Occurrence**.

Any actual or alleged loss of use of tangible property not physically injured or destroyed shall be deemed to occur at the time of the **Occurrence** that caused such loss of use. Any other injury or damage occurring or alleged to have occurred over more than one **Protection Period** shall be deemed to have occurred during the **Protection Period** when the **Occurrence** began.

For an **Additional Contribution, Tort Liability** may be assumed in a **Protected Contract** on behalf of a **Railroad**, and the *Protection Limit* for such assumed **Tort Liability** shall be \$2,000,000 per occurrence and in the aggregate. For purposes of this coverage, the **Additional Contribution** shall be determined based upon the number of railroad crossings for which a **Member** seeks coverage.

D. *Statutory Limitations*

Notwithstanding sections 2.A. and 2.B. above, the defense and/or indemnity protections afforded by this agreement to a past or present elected or appointed official or **Employee** of a **Member** are not broader than the **Member's** own duty to defend and indemnify its official or **Employee** under California Government Code sections 825, et seq. and 995, et seq. All immunities, defenses, rights, and privileges of the **Member** under the Government Code apply to the **Program** as well, including any defense that the official or **Employee** acted outside the course and scope of employment or acted with fraud, corruption or actual malice, or any defense that the action or proceeding or type of damage sought is not the type for which the **Member** is obligated to provide defense and/or indemnity. The defense and/or indemnity protections are also subject to all the terms, conditions, and Exclusions of this **Memorandum** and do not apply if not covered by this **Memorandum**, even if an obligation to defend and/or indemnify would exist under the Government Code.

E. *Territorial Limitation*

This **Memorandum** applies only to **Claims** made in the courts of the United States or of any State.

F. *Chief Executive Separation Payment*

This **Program** will also pay a **Chief Executive Separation Payment** to an eligible **Chief Executive** who is separated from employment involuntarily, by the governing body of the **Member**. A **Chief Executive** that is forced to resign in lieu of termination will also be eligible for the **Chief Executive Separation Payment**. The **Authority** at its sole discretion shall determine eligibility for the **Chief Executive Separation Payment**.

Conditions of eligibility require the separated **Chief Executive** to place the **Authority** on notice of intent to be considered for the **Chief Executive Separation Payment** within 60 days of the date of separation. The **Chief Executive** will be required to complete and submit a **Waiver** to the **Authority**, within 60 days of the date of separation. The **Chief Executive** will further be required to submit a **Certification** to the **Authority** within 60 days following the **Waiting Period**.

The **Authority** will compute the proper payment, and payment shall commence within 30 days following the submission of the first **Certification**. For a qualifying **Chief Executive** who has applied for, but not yet received benefits from a public retirement system, the **Authority** will require the **Chief Executive** to provide written proof, from the provider, of the amount of public retirement benefit to be paid, prior to calculating and paying the **Chief Executive Separation Payment**. Payments will be made in arrears where necessary.

The **Chief Executive Separation Payment** shall not be considered "unemployment insurance," nor shall it be considered a "severance" payment, and it shall not be payable if excluded by the terms of Exclusion "AA".

The **Chief Executive Separation Payment** can only be waived by the **Chief Executive** if it is specifically noted, by name, within any separation or employment agreement entered into with the **Member**.

3. DEFINITIONS

Additional Contribution means an assessment charged to a **Member** for the cost or additional exposure associated with the **Member's** participation in an optional liability protection available through this **Memorandum**.

Administration under **Employee Benefits Administration Liability** means:

- A. Giving counsel to employees with respect to the **Employee Benefits Programs**;
- B. Interpreting the **Employee Benefits Programs**;
- C. Handling of records in connection with the **Employee Benefits Programs**; or
- D. Effecting enrollment, termination, or cancellation of employees under the **Employee Benefits Programs**, provided all such acts are authorized by the **Member**.

Aircraft means any vehicle designed to transport people or property through the air.

Airport means any locality either on land or water which is adopted for the landing and taking off of **Aircraft**, including all land, water, buildings, structures, equipment or other improvements necessary or convenient in the establishment and operation of an **Airport**.

Authority means the California Joint Powers Insurance Authority.

Automobile means a land motor vehicle, trailer, or semi-trailer.

Bodily Injury means bodily injury, sickness, or disease sustained by any person, including death resulting from any of these at any time.

Broadcast/Publication Injury means injury caused by or arising out of:

- A. Any form of defamation or other tort related to disparagement or harm to the character, reputation or feelings of any natural person or organization including but not limited to libel, slander, product disparagement, trade libel, infliction of emotional distress, outrage, or outrageous conduct;
- B. Any form of invasion of, infringement of, or interference with rights of privacy or publicity; including but not limited to false light, public disclosure of private facts, intrusion, and commercial appropriation of name or likeness;
- C. Infringement of copyright or trademark;
- D. Plagiarism or piracy or misappropriation of ideas under implied contract;
- E. Unauthorized use of names, trade names, trademarks, service marks, titles, formats, ideas, characters, character names, characterizations, performances, plots, musical compositions, slogans, program material, or any other similar material; or
- F. Denial of access to broadcast facilities based upon application of judgment or standards relating to the acceptability of material for public broadcast; committed in the course of the **Protected Party's** broadcast or publication activities.

Certification means a signed statement by a **Chief Executive** that he or she is entitled to the **Chief Executive Separation Payment** because he or she is unemployed or is employed but receiving **Compensation** that is lower than he or she was earning at the time of the **Occurrence**. The initial executed **Certification** is a form provided by the **Authority** and must be received within 60 days following the **Waiting Period**.

Chief Executive means the governing body-appointed chief administrative officer of a **Protected Party** whether called city manager, chief administrative officer, general manager or other title designating the highest appointed official of the governmental entity.

Chief Executive Separation Payment means a payment that shall be paid once a month, in arrears, for a time period not to exceed six months, following the **Waiting Period**. The payment shall equal the amount of the **Chief Executive**'s salary at the time of the separation of employment **Occurrence**, plus payment of the **Medical Benefit**, less the total amount of **Compensation** being received after the separation of employment **Occurrence** and any other payments made to the **Chief Executive**, by the member, during the payment period.

Claim means a notice, demand, or **Suit** against a **Protected Party** to recover **Damages**. **Claim** does not include an administrative claim filed with the Equal Opportunity Employment Commission, the California Department of Fair Employment and Housing, or other similar state or federal administrative agency.

Compensation for purposes of computation of the **Chief Executive Separation Payment** means:

- A. Wages or salary earned as an employee of a new employer, subsequent to separation,
- B. Payments from a defined benefit retirement plan commencing subsequent to separation for which benefits were earned while employed by the **Member**,
- C. Unemployment insurance, and
- D. Income earned from self-employment or from work or activities as an independent contractor, consultant, or in a similar capacity subsequent to separation.

Compensation does not include Social Security, Medicare or disability benefits.

Dam means a structure described by California Water Code sections 6002 through 6004.

Damages means compensation in money recovered by a party for loss or detriment it has suffered through the acts of a Protected Party. **Damages** does not include defense of **Claims** or any punitive, exemplary or multiplied damages or non-monetary relief or redress or injunctive relief.

Defense Costs means all fees and expenses incurred in connection with the adjustment, investigation, defense, and appeal of a **Claim** covered hereunder, including attorney fees, court costs, premiums for appeal bonds, and interest on judgments accruing after the entry of judgment, and also shall include the costs of any claims administrator or defense counsel assigned by the **Authority** to respond to any **Claim** on behalf of the **Authority**. **Defense Costs** shall not include the office expenses of the **Protected Party**, nor the

salaries of employees or officials of the **Protected Party**, nor expenses of any claims administrator engaged by the **Protected Party**. **Defense Costs** also do not include any fee or expense relating to coverage issues between the **Authority** and any **Protected Party**.

Discrimination means injury caused by or arising out of:

- A. Unlawful discrimination because of race, sex, color, age, religion, or national origin, or membership in any similar legally protected class; or
- B. Violation of the discrimination prohibitions of the Americans with Disabilities Act of 1990, any rules or regulations promulgated thereunder and amendments thereto or similar provisions of any federal, state, or local statutory law or common law.

Employee includes any person falling within the definition of “employee” under section 810.2 of the Government Code. That section provides: “**Employee** includes an officer...employee, or servant, whether or not compensated, but does not include an independent contractor.” **Employee** also includes any volunteer designated by the **Member** to perform specific functions in the course and scope of authorized activities under the direction and control of the **Member**.

Employee Benefit Administration Liability means liability for injury or damage caused by or arising out of any negligent act, error or omission of the **Protected Party** in the **Administration** of the **Member’s Employee Benefits Programs**.

Employee Benefits Program means group life insurance or self-insurance, group medical, dental or vision-care insurance or self-insurance, pension plans, retirement plans, deferred compensation plans, workers’ compensation, unemployment insurance, social benefits, disability benefits, and other similar employee benefits.

Employment Practices Injury means injury arising out of the following offenses:

- A. Wrongful dismissal, discharge, or termination of employment;
- B. Breach of any oral or written employment contract or quasi-employment contract;
- C. Employment-related coercion or misrepresentation;
- D. Violation of employment discrimination laws;
- E. Workplace sexual or other harassment;
- F. Wrongful failure to employ or promote;
- G. Wrongful discipline, negligent evaluation, or wrongful demotion;
- H. Wrongful deprivation of a career opportunity; or
- I. Employment-related:
 - (i) Invasion of privacy,
 - (ii) Defamation, or
 - (iii) Wrongful infliction of emotional distress.

Fungi means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents, or byproducts produced or released by fungi.

Hostile Fire means a fire that becomes uncontrollable and breaks out from where it is intended to be.

Levee means a permanent embankment intentionally constructed for the purpose of preventing overflow of a watercourse or body of water.

Medical Benefit means the cost of all benefits to which a **Chief Executive** is entitled under the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA).

Member means the entity, including all of its departments and constituent agencies, that is a signatory to the Joint Powers Agreement creating the **Authority** as may be amended from time to time, which has adopted a resolution to participate in the **Program**, and whose name appears on the Cover Page of this **Memorandum**. **Member** includes any other agency for which the **Member's** governing board or council acts as the governing board, and also includes any commissions, agencies, districts, authorities, redevelopment agencies, boards, or similar entities coming under the **Member's** direction and control. **Member** shall include any other agency authorized by the **Authority's** Executive Committee or Board of Directors.

Memorandum means this Memorandum of Liability Coverage authorized by the Joint Powers Agreement of the **Authority** specifying the terms and conditions of the **Program** through which certain specified and limited self-insured risks of liability are administered by the **Authority** and shared by its **Members**.

Nuclear Material means "source material," "special nuclear material," or "by-product material" as those terms are given meaning in the Atomic Energy Act of 1954 or any law amendatory thereto.

Occurrence means:

- A. With respect to **Bodily Injury** or **Property Damage**, an accident, including continuous or repeated exposure to conditions, that first occurs during the **Protection Period** and that results in **Bodily Injury** or **Property Damage** neither expected nor intended from the standpoint of the **Protected Party**;
- B. With respect to **Public Officials Errors and Omissions**, actual or alleged conduct described in the definition of **Public Officials Errors and Omissions** during the **Protection Period**;
- C. With respect to **Employee Benefits Administration Liability**, actual or alleged conduct described in the definition of **Employee Benefits Administration Liability** during the **Protection Period**;
- D. With respect to **Personal Injury**, **Broadcast/Publication Injury**, and **Employment Practices Liability**, an offense described in the definitions of those terms; or
- E. With respect to **Chief Executive Separation Payment**, injury arising out of:
 - (i) Dismissal, discharge, resignation in lieu of termination or termination of the employment of a **Chief Executive**; or
 - (ii) Failure to renew an employment contract which results in termination of the employment of a **Chief Executive**

for which liability on the part of a **Protected Party** can be settled through the acceptance by the **Chief Executive** of a **Chief Executive Separation Payment** in exchange for a **Waiver** and **Certification**.

All claims based on or arising out of **Harassment** or similar conduct (including molestation or sexual abuse) by an **Employee**, or more than one **Employee** acting in concert, will be considered arising out of one **Occurrence** and shall be deemed to have been committed at the time of the first of such acts or alleged acts, regardless of the number of:

- (i) Protected Parties;
- (ii) **Claims** made or **Suits** brought; or
- (iii) persons or organizations that sustain injuries or **Damages**.

If a series of wrongful acts committed by one **Employee**, or more than one **Employee** acting in concert, takes place over more than one **Protection Period**, the wrongful acts will be deemed to have been committed during the first **Protection Period** and only the **Protection Limit** for that **Protection Period** shall apply.

Personal Injury means injury, other than **Bodily Injury**, **Property Damage** or **Public Officials Errors and Omissions**, resulting from one or more of the following offenses:

- A. False arrest, detention, or imprisonment;
- B. The use of force for the purpose of protecting persons or property;
- C. Malicious prosecution or abuse of process;
- D. Wrongful entry by any employee of the **Member** into a room, dwelling, or other similar premises that a person occupies;
- E. Wrongful eviction by any employee of the **Member** of a person from a room, dwelling, or other similar premises that such person occupies;
- F. The publication or utterance of a libel or slander, including statements that disparage a person's or organization's goods, products, or services;
- G. A publication or utterance that violates a person's right of privacy;
- H. Interference with an existing or prospective economic advantage, contract, or agreement;
- I. **Discrimination**;
- J. Violation of civil rights; or
- K. Infliction of emotional distress.

Pollutants/Hazardous Materials includes without limitation:

- A. Any flammable or explosive substances, radioactive materials, asbestos, polychlorinated biphenyls, chemicals, substances known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, toxic substances, or related materials which are regulated by or under any federal, state, or local environmental law;

- B. Any material identified as hazardous in Sections 66261.10 through 66261.126 of Title 22 of the California Code of Regulations, as amended from time to time (collectively);
- C. Any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. The term “waste” includes materials to be recycled, reconditioned, or reclaimed; or
- D. **Fungi** and bacteria of any kind, unless caused by an otherwise covered **Occurrence**.

Program means the California Joint Powers Insurance Authority Liability Protection Program described by this **Memorandum** and the Agreement of the **Members** creating the **Authority**. The **Program** is a fund created by the **Members** for the purpose of pooling self-insured losses.

Property Damage means:

- A. Physical injury to or destruction of tangible property which occurs during the **Protection Period**, including the loss of use thereof at any time resulting there from; or
- B. Loss of use of tangible property that has not been physically injured or destroyed provided such loss of use is caused by an **Occurrence** during the **Protection Period**.

Protected Contract means a written agreement that satisfies all of the following:

- A. The agreement pertains to the **Member’s** operations and by the contract terms the **Member** assumes the **Tort Liability** of another to pay damages because of **Bodily Injury** or **Property Damage** to a third person or organization;
- B. The agreement is entered into prior to the **Bodily Injury** or **Property Damage** for which a **Claim** is made; and
- C. The agreement, including its value, is reported by the **Member** and approved by the **Authority** through issuance of an evidence of coverage letter prior to the **Bodily Injury** or **Property Damage** and the value is added to the **Member’s** annual payroll for use in any retrospective deposit or annual contribution computation.

A **Protected Contract** may cover an architect, engineer, or surveyor for his or her role as a Public Official, except for the application of paragraphs B.(i) and B.(ii) below. **Protected Contracts** may apply to contract public works directors, building officials, planning directors, city managers, **Chief Executives**, city attorneys, city prosecutors, redevelopment directors, or other contracted Public Officials for occurrences arising out of their official duties, but this coverage applies only to the named contract Public Official and does not extend to other individuals within the contractor’s firm.

A **Protected Contract** does not include any part of any contract or agreement:

- A. That indemnifies any person or organization for injury or damages caused by or arising out of the ownership, operation, maintenance or use of any **Aircraft**, **Airport** or **Watercraft**;

- B. That indemnifies an architect, engineer, or surveyor. This exclusion does not apply in the instance where an individual is under an exclusive contract as a contract Public Official solely for the benefit of the **Member** (i.e., no work is performed by the person for any other person or entity), for injury or damage arising out of:
 - (i) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
 - (ii) Giving or failing to give directions or instructions, if that is the primary cause of the injury or damage;
- C. Under which the **Protected Party**, if an architect, engineer, or surveyor, assumes liability for injury or damage arising out of the **Protected Party's** rendering or failing to render professional services, including those listed in B. above and supervisory, inspection, or engineering services; or
- D. That indemnifies any person or organization for damages by fire, explosion, or water damage to premises rented or loaned to the **Member**.

Limited Protected Contract means a written agreement, contract or permit in which:

- A. The **Member** assumes the **Tort Liability** of another to pay damages because of **Bodily Injury** or **Property Damage** to a third party in one of the following:
 - (i) Easements or License Agreements;
 - (ii) Leases of Real or Personal Property;
 - (iii) Encroachment Permits;
 - (iv) Special Events Sponsored by the **Member**; or
 - (v) Use of Facilities, Equipment, real or personal property by the **Member**;
- B. The **Member** assumes the **Tort Liability** of another to pay damages because of **Bodily Injury** or **Property Damage** to a third party for an activity not named in paragraph A. directly above, and upon its review of the agreement, **Authority** staff has determined at its sole discretion that any risks assumed in the agreement do not significantly increase the **Member's** risk exposure, and an Evidence of Coverage letter has been issued by the **Authority**; or
- C. The **Member** is obligated to provide evidence of coverage for a third party to participate in a funding program administered by another government or evidence of coverage required by bond indentures entered into by the **Member** if **Authority** staff has determined in its sole discretion that any risks assumed in the agreement do not significantly increase the **Member's** risk exposure, and an Evidence of Coverage letter has been issued by the **Authority**;

and which is entered into prior to the **Bodily Injury** or **Property Damage** for which a **Claim** is made.

A **Limited Protected Contract** does not include any part of any contract or agreement that indemnifies any person or organization for injury or damages caused by the sole negligence of such person or organization, or that cannot be included in a **Protected Contract**.

A **Limited Protected Contract** also does not include any part of a contract or agreement that indemnifies the owner or operator of a **Railroad**.

Protected Party means:

- A. The **Member** named on the Cover Page;
- B. Persons who are, or were, elected or appointed officials or **Employees** of the **Member**, whether or not compensated, while acting within the scope of their duties or employment as such, including while acting on outside committees, commissions, or boards at the direction of the **Member**, except that the protection so provided does not apply to **Bodily Injury** to another official or employee of the **Member** in the course of and arising out of his or her duties to or employment by the same **Member**;
- C. Any nonprofit California corporation or unincorporated association under written contract, approved by the **Member's** governing board or council, to perform specified functions under the **Member's** direction and control. The corporation or unincorporated association is a **Protected Party** only for **Occurrences** arising out of the functions described in the contract. For the purposes of this section, direction and control means the authority of the **Member** to be involved in decision making and to overturn decisions;
- D. Any person or entity identified as an additional **Protected Party** in a letter certifying such additional **Protected Party** status issued by the **Authority**, for **Bodily Injury** or **Property Damage** during the time period identified in the letter; if a particular activity is identified in the letter, the person or entity is a **Protected Party** only for **Occurrences** arising out of the described activity. Additional **Protected Party** status will apply only where required by the terms of a written agreement;
- E. Any person while using an **Automobile** owned, hired, or leased by a **Member**, and any person or organization legally responsible for the use thereof, provided the use is with the express permission of the **Member**, and only for **Bodily Injury** and **Property Damage**. This protection does not apply to:
 - (i) Any person or organization, or any agent or employee thereof, other than the member, engaged in selling, repairing, servicing, delivering, testing, road testing, parking or storing, **Automobiles**, with respect to any **Occurrence** arising out of any such occupation or activity;
 - (ii) With respect to any hired automobile, to the owner or a lessee thereof, other than the **Member**, or to any agent or employee of such owner or lessee; or
 - (iii) Any person or organization, or to any agent or employee thereof, engaged in a business of operating buses or other **Automobiles** for the transport of members of the public unless that business is owned by the **Member** and operated by its employees.

(This **Memorandum** does not provide Underinsured or Uninsured Motorist coverage.); or

F. The **Authority**, its officers and employees while acting in the course and scope of their duties or employment.

No person or entity is a **Protected Party** with respect to the conduct of any current or past partnership, joint venture or joint powers authority (including any separate entity created pursuant to a joint powers agreement). However, for any person who is an official or **Employee** of a **Member**, who participates in the activities of a partnership, joint venture, or joint powers authority and is acting for or on behalf of the **Member** at the time of the **Occurrence**, protection is afforded by this **Memorandum**. Such coverage shall be in excess of, and shall not contribute with, any collectible insurance, self-insurance or other coverage provided to the other joint powers authority, agency or entity.

Protection Period means the time period shown on the Cover Page of this **Memorandum**.

Public Officials Errors and Omissions means any act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any **Protected Party** in the discharge of that individual's duties for the **Member**; or any matter claimed against any **Protected Party** solely by reason of the individual being or having been an employee of the **Member**. **Public Officials Errors and Omissions** does not include **Bodily Injury**, **Property Damage**, **Personal Injury**, **Broadcast/Publication Injury**, or **Employment Practices Injury**.

Radioactive Contamination Injury means **Bodily Injury** or **Property Damage** caused by or arising from ionizing radiations or contamination by radioactive material.

Railroad means a commercial railway as described by the California Public Utilities Code, Section 229. **Railroad** includes street railroad as described by the California Public Utilities Code, Section 231. **Railroad** does not include amusement railroad rides that do not cross public streets.

Suit means a civil proceeding in which a **Protected Party** is named as a defendant or cross defendant, or an arbitration proceeding or alternative-dispute resolution proceeding to which a **Protected Party** submits with the **Authority's** written consent.

Termination for Cause means dismissal, discharge, termination of employment, or failure to renew a contract for the reasons stated in 29 USC §1111 of the Employee Retirement Income Security Act of 1974. This includes ending the employment of a **Chief Executive** because the **Chief Executive** has been convicted of robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of a state or federal law regulating a controlled substance (felony drug conviction), murder, rape, kidnapping, perjury, assault with intent to kill, or any felony involving abuse or misuse of the **Chief Executive's** position to obtain illegal personal gain.

Tort Liability means civil liability that would be imposed by law in the absence of any agreement or contract.

Waiting Period means a period of time after the termination of employment **Occurrence** equal to the greater of (1) six months or (2) the number of months of salary received by the **Chief Executive** as a severance payment from the **Member**, regardless of whether the severance payment is made in lump sum or in multiple payments.

Waiver means a full and complete relinquishment by a **Chief Executive** of any and all rights to sue a **Protected Party** for any **Benefit**, compensation, injury, or damages, known or unknown, past, present or future, arising out of the employment of, termination of the employment of, or failure to employ the **Chief Executive**. The **Waiver** is a form provided by the **Authority** and must be signed and returned to the **Authority** within 60 days following the termination of employment. **Waiver** does not mean any waiver and release agreement signed by the **Chief Executive** directly with the member, during the separation process.

Watercraft means a vessel, more than 25 feet in length, designed to transport persons or property in, on, or through water.

4. EXCLUSIONS

This **Memorandum**, including any obligation to defend or to pay **Defense Costs**, does not apply to:

- A. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by or arising out of the ownership, maintenance, use or operation of any **Watercraft, Aircraft, or Airport** or any air show events sponsored or controlled by the **Protected Party** or conducted on property owned by the **Protected Party**. Protection does apply to use of an **Aircraft or Watercraft**, if the **Aircraft or Watercraft** is not owned in whole or in part by the **Member** and the **Member** exercises no part in the servicing or maintenance of the **Aircraft or Watercraft**. However, this limited protection does not apply to:
 - (i) Loss, loss of use of, or damage to the **Aircraft or Watercraft**;
 - (ii) Use of any **Aircraft or Watercraft** for hire or reward; or
 - (iii) Public Officials Errors and Omissions coverage.
- B. Any **Claim, Suit**, obligation or alleged obligation for which a **Protected Party** or any insurance company as his/her/its insurer may be held liable under any workers' compensation, unemployment compensation or disability benefits law, or under any similar law.
- C. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense for **Bodily Injury** to:
 - (i) An employee of the **Protected Party** arising out of and in the course of employment by the **Protected Party**; or
 - (ii) The spouse, child, parent, brother, or sister of that employee as a consequence of paragraph (i) above.

This Exclusion C. applies whether the **Protected Party** may be liable as an employer or in any other capacity, and to any obligation to share damages with or repay someone else who must pay damages because of the injury. However, this exclusion does not apply to liability assumed in a **Protected Contract** or **Limited Protected Contract**.

- D. Injury to or destruction of:
- (i) Property owned by the **Protected Party**;
 - (ii) Property rented to or leased to the **Protected Party** where it has assumed liability under any contract for damage to or destruction of such property unless the **Protected Party** would have been liable in the absence of such assumption of liability; or
 - (iii) Property in the care, custody, or control of any **Protected Party**.
- E. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by, arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation, by whatever name called, whether such liability accrues directly against the **Protected Party** or by virtue of any agreement entered into by or on behalf of the **Protected Party**. This Exclusion E. shall not apply to liability, loss, cost or expense arising from **property damage** caused by earth movement, subsidence of land, flooding not caused by the failure of a **Dam** or **Levee**, or sewer backup, even though a legal theory upon which a claimant seeks recovery is the principle of inverse condemnation. This Exclusion E shall not apply when the claim or suit alleges damages arising out of temporary physical measures taken by the **Member** for public safety reasons in an effort to prevent or reduce a loss.
- F. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, escape, or any other forms of exposure to or the presence of **Pollutants/Hazardous Materials** including any **Claim, Suit**, liability, alleged liability, loss, cost or expense directly or indirectly caused by or arising out of any:
- (i) Request, demand, or order that any **Protected Party** or others test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of **Pollutants/Hazardous Materials**;
 - (ii) **Claim** or **Suit** by or on behalf of a governmental authority or any other entity or person for costs of or damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, or neutralizing, or in any way responding to, or assessing the effects of **Pollutants/Hazardous Materials**; or
 - (iii) Actions or steps taken to mitigate damages or to relocate persons, property or business as a result of **Pollutants/Hazardous Materials**.

EXCEPTION TO EXCLUSION, PROTECTION FOR CERTAIN ACCIDENTAL POLLUTION INJURIES. However this Exclusion F. does not apply to **Bodily Injury** or **Property Damage** arising out of or caused by any actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **Pollutants/Hazardous Materials** if all of the following:

- (i) It was directly caused by **Hostile Fire**, explosion, lightning, windstorm, vandalism or malicious mischief or collision, overturning or upset of a motor vehicle or railroad vehicle;

- (ii) It was accidental and was neither expected nor intended by the **Protected Party**;
- (iii) It was instantaneous and was demonstrable as having commenced at a specific time and date during the term of this **Memorandum**;
- (iv) Its commencement became known to the **Protected Party** within seven days;
- (v) Its commencement was reported in writing to the **Authority** within twenty days of becoming known to the **Protected Party**; and
- (vi) Reasonable efforts were expended by the **Protected Party** to correct or terminate the discharge, dispersal, seepage, migration, release, or escape of **Pollutants/Hazardous Materials**.

Nothing contained in this EXCEPTION TO EXCLUSION, PROTECTION FOR CERTAIN ACCIDENTAL POLLUTION INJURIES shall operate to provide any protection or obligation to defend or pay **Defense Costs** with respect to:

- (i) Any site or location used by others on the **Protected Party's** behalf for the handling, storage, disposal, dumping, processing, or treatment of waste material. This exclusion applies whether or not the action by others was known to the **Protected Party**;
 - (ii) Any clean-up costs mandated by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and any similar laws or statutes;
 - (iii) Clean up, removal, containment, treatment, detoxification or neutralization of **Pollutants/Hazardous Materials** situated on premises the **Protected Party** currently owns, rents or occupies; or
 - (iv) Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense based upon or arising out of **Personal Injury** or **Public Officials Errors and Omissions**.
- G. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense directly or indirectly based on or arising out of the hazardous properties of **Nuclear Material**. However, this exclusion does not apply to **Radioactive Contamination Injury**.
- H. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense directly or indirectly caused by any complete or partial failure, interruption or surge in the supply of water, electrical power, gas or fuel, unless such failure, interruption or surge results from sudden and accidental physical destruction of tangible property which is caused by the **Protected Party**.
- I. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense arising out of the partial or complete structural failure of a **Dam** or **Levee**.
- J. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by, or arising out of, or in connection with the operation of any hospital, clinic (including a mobile clinic), or established health-care facility owned or operated by the **Protected Party**, but protection does apply to liability arising out of the rendering of emergency medical aid by paramedics, emergency medical technicians, or other **Protected Parties** who are not acting in the course of their employment by a

hospital, clinic, or established health-care facility. Protection also applies for liability arising out of the operation of any hospital, clinic (including a mobile clinic) or established health care facility, owned and operated by the **Protected Party** for animal care and control purposes.

- K. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by or arising out of or in connection with the ownership, maintenance, use, or operation by the **Protected Party** of any **Railroad**.
- L. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by, based upon or arising out of the Employee Retirement Income Security Act of 1974, Public Law 93-406, or any amendment or addition thereto, or any statute or common law rule which imposes fiduciary duties and responsibilities with respect to employee benefits or retirement plans; however this exclusion does not apply to liability protected under **Employee Benefit Administration Liability**.
- M. Any **Claim, Suit**, liability, or alleged liability for punitive or exemplary damages or fines or other damages imposed primarily for the sake of example and by way of punishing the **Protected Party**, including liability of a **Member** to defend or pay damages where the governing body thereof has elected to provide a defense or pay damages for a **Claim**, action or judgment for punitive or exemplary damages.
- N. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by the intentional conduct of a **Protected Party** with willful and conscious disregard of the rights or safety of other or with malice. However, where the **Protected Party** did not authorize, ratify, participate in, consent to or have knowledge of such conduct by its past or present **Employee**, elected or appointed official or volunteer and the claim against the **Protected Party** is based solely on its vicarious liability arising from its relationship with such **Employee**, elected or appointed official or volunteer, this exclusion does not apply to that **Protected Party**.
- O. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by or arising out of any violation of state or federal antitrust or restraint-of-trade laws.
- P. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense arising out of:
 - (i) the adoption or administrative application of any ordinance, resolution or regulation;
 - (ii) the approval or disapproval of any land-use entitlement including but not limited to general plan amendments, zoning amendments, conditional-use permits, tract maps, development agreements, owner-participation agreements, or disposition-and-development agreements;
 - (iii) the approval or disapproval of any rent control ordinance, outdoor advertising ordinance, or adult bookstore ordinance; or
 - (iv) the approval or disapproval of the operation of a medical marijuana dispensary, any ordinances governing that activity and any and all enforcement efforts.

This exclusion shall not apply to the physical enforcement of an ordinance, resolution or regulation, such as **Tort Liability** arising from the act of delivering a fine, citation, warning, notice or inspection.

Q. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense including **Tort Liability**:

- (i) Arising out of or as a consequence of an actual or alleged breach of any contract or agreement;
- (ii) For any amount actually or allegedly due under the terms of any contract or agreement; or
- (iii) Arising out of or as a consequence of the failure, refusal, or inability of a **Protected Party** or anyone acting on behalf of a **Protected Party** to enter into or renew any contract or agreement.

However, this exclusion shall not apply to **Tort Liability** imposed by law for **Damages** caused by, arising out of, or as a consequence of failure or delay by a **Protected Party** or anyone acting on behalf of a **Protected Party** to fully perform any duties or obligations under any contract or agreement.

As used in this exclusion, the term “contract or agreement” shall include but not be limited to a **Protected Contract** or **Limited Protected Contract**.

- R. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense for declaratory, injunctive, equitable or other relief, writs of mandate or prohibition or other prerogative writs, or other relief not seeking **Damages**. This includes any expense or cost incurred by a **Protected Party** arising from the cost of reasonable accommodation of any disabled person, including any **Employee**.
- S. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense for **Personal Injury** or **Broadcast/Publication Injury** directly or indirectly caused by or arising out of any:
 - (i) Oral or written publication of material, if done by or at the direction of the **Protected Party** with knowledge of its falsity;
 - (ii) Oral or written publication of material whose first publication took place before the beginning of the **Protection Period**; or
 - (iii) Act, omission, or offense committed by a **Protected Party** with actual malice.
- T. Any liability for which the **Protected Party** is obligated to pay damages by reason of liability assumed in a contract or agreement. This Exclusion does not apply to liability for **Bodily Injury** or **Property Damage**:
 - (i) Assumed in a contract or agreement that is a **Protected Contract** or **Limited Protected Contract**; or
 - (ii) That the **Protected Party** would have independent of a written contract or agreement.
- U. Any **Claim** or **Suit** by a **Member** against a **Protected Party**, except that this section shall not apply to a **Claim** or **Suit** brought against the **Authority**.

- V. Any **Claim** or **Suit** by a **Member** against another **Member**.
- W. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense based upon or arising out of:
- (i) Loss of, loss of use of, injury to, destruction of, diminution of value of, disappearance of, or costs of recovery of any money or securities, or any financial loss or default;
 - (ii) Refunds of taxes, fees, or assessments;
 - (iii) The issuance, management of proceeds or repayment of bonds, notes or other debt instruments by any **Member** or any agent acting on behalf of such **Member**; or
 - (iv) The purchase, transfer, or sale of any securities by any **Member** or agent acting on behalf of such **Member**.
- X. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense for **Public Officials Errors and Omissions Liability** based upon or arising out of:
- (i) Liability of any **Protected Party** arising out of estimates of probable costs or cost estimates being exceeded or for faulty preparation of bid specifications or plans including liability for mechanic's lien claims, stop notice claims, change order claims, site differential claims, or similar claims for the value of services or materials provided; this exclusion extends to such claims, however denominated, including claims of breach of oral or written contract, third party beneficiary claims, quantum meruit claims, and/or open account claims;
 - (ii) Any **Protected Party** obtaining remuneration or financial gain to which the **Protected Party** is or was not legally entitled;
 - (iii) Liability assumed by a **Protected Party** in a contract or agreement, but this exclusion does not apply to liability for **Damages** that the **Protected Party** would have independent of the contract or agreement; or
 - (iv) Willful violation of penal code or ordinance committed by or with the knowledge or consent of any **Protected Party**.
- Y. Under **Employment Practices Injury**, any **Claim, Suit**, liability, alleged liability, loss, cost, or expense that:
- (i) Constitutes benefits due or to become due or the equivalent value of such benefits, including but not limited to perquisites, fringe benefits, payments in connection with an employee benefits plan, service, disability or industrial disability retirement benefits or any other payment other than salary or wages to or for the benefit of an **Employee** arising out of the employment relationship;
 - (ii) Is representative of back salary either unpaid in whole or part or paid at an improper rate to an **Employee** by the **Member**;

- (iii) Is based upon, arises from, or is in consequence of the employment reinstatement of the claimant by the **Member** or the continued employment of the claimant;
- (iv) Is based upon, arises from, or is a consequence of an **Occurrence** that began prior to this **Memorandum's Protection Period**;
- (v) Constitutes front pay, future damages or other future economic relief or the equivalent thereof, if the **Member** is ordered to reinstate the **Employee** pursuant to a judgment or other final adjudication, but fails to do so;
- (vi) Is in the form of paid administrative leave; or
- (vii) Is based upon, arises from or is in consequence of an actual or alleged violation of the responsibilities, obligations or duties imposed by the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act, rules or regulations promulgated there under and amendments thereto or similar provisions of any federal, state, or local statutory law or common law.

However, with respect to the exclusions listed in items (i) through (vii) immediately above, no fact pertaining to or knowledge possessed by any **Protected Party** shall be imputed to any other **Protected Party** to determine if protection is available under this **Memorandum**.

Z. Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense for **Employee Benefit Administration Liability** based upon or arising out of:

- (i) Any dishonest, fraudulent, criminal or malicious act, libel, slander, discrimination, or humiliation;
- (ii) Failure of performance of contract by an insurer;
- (iii) Failure of any investment plan to perform as represented by a **Protected Party**;
- (iv) Advice given by a **Protected Party** to an **Employee** to participate or not participate in subscription plans; or
- (v) The inability of any **Employee Benefits Program** to meet its obligations due to insolvency or inadequacy of funding.

AA. Any demand under the **Chief Executive Separation Payment** coverage where the following exists:

- (i) **Termination for Cause**;
- (ii) Lack of notice of intent to be considered for payment and receipt of a duly executed **Waiver** within 60 days of separation;
- (iii) Lack of a duly executed **Certification** within 60 days following the **Waiting Period**; or
- (iv) Made by a separated interim or acting **Chief Executive**

BB. Any Claim, Suit, liability, alleged liability, loss, cost or expense falling within the Protection Provided terms of the "Memorandum of Cyber Liability Coverage" issued by the Authority, parts I.B "Privacy Regulatory Claims Coverage" or I.C "Security Breach Response Coverage."

5. CONDITIONS AND RESPONSIBILITIES

A. *Inspection and Audit*

The **Authority** shall be permitted but not obligated to inspect the **Protected Party's** property and operations at any time. Neither the **Authority's** right to make inspections nor the making thereof nor any report hereon shall constitute an undertaking, on behalf of or for the benefit of the **Protected Party** or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulations. The **Authority** may examine and audit the **Protected Party's** books and records at any time during the **Protection Period** and extensions thereof and within three years after the final termination of this **Program**, as far as they relate to the subject matter of this **Memorandum**.

B. *Severability of Interest*

The term **Protected Party** is used severally and not collectively, and the protection afforded applies to each **Protected Party** against whom a **Claim** is made as if a separate **Memorandum** were issued to it, but the inclusion herein of more than one **Protected Party** shall not operate to increase the per **Member Protection Limit**.

C. *Protected Party's Duties in the Event of Occurrence, Claim or Suit*

- (i) In the event of any **Occurrence**, written notice containing particulars sufficient to identify the **Protected Party** and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the **Protected Party** to the **Authority's** Claims Administrator as soon as practicable.
- (ii) If a **Claim** is made against a **Protected Party**, the **Protected Party** shall immediately forward to the **Authority's** Claims Administrator every demand, notice, summons or other process received by the **Protected Party** or the **Protected Party's** representative.
- (iii) The **Authority's** Claims Administrator will review the **Claim**, undertake whatever investigation is indicated, and take appropriate action, depending on the circumstances. A **Claim** may be returned to claimant as "insufficient," if it does not contain minimum and essential information about the incident or the identity of the claimant. A **Claim** may also be returned as "late," if the prescribed time for filing has been exceeded. The Claims Administrator may request that the **Member** reject the **Claim**, or take no action until further notice, or such actions may be taken by the Claims Administrator if claims handling authority has been delegated to the **Authority** by the **Member**.

- (iv) The **Protected Party** shall cooperate with the **Authority** and, upon the **Authority's** request, assist in making settlements, in the conduct of **Suits**, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **Protected Party** because of injury or damage with respect to which protection, including any **Defense** obligation, is afforded under this **Memorandum**; and the **Protected Party** shall not, except at the **Protected Party's** own cost, voluntarily make any payment, assume any obligation or incur any expense. No **Claim** shall be settled without the prior written consent of the **Authority**, and the **Authority** shall not be required to contribute to any settlement to which it has not consented.

D. Other Protection

If collectible insurance or any other coverage or protection with any insurer, any permissibly self-insured general employer, joint powers insurance authority or any other source is available to the **Protected Party** covering a loss also protected hereunder (whether on a primary, excess or contingent basis), the protection hereunder (including any **Defense** obligation) shall be in excess of, and shall not contribute with, such insurance or other coverage or protection, provided that this clause does not apply with respect to any insurance purchased by a **Protected Party** specifically to be in excess of this **Memorandum**. Under no circumstances shall the protection afforded by this **Program** be considered primary, pro rata, concurrent or co-existent with such insurance, coverage, or other protection, unless agreed to by the **Member** through a written agreement approved by the **Authority** through the issuance of an evidence of coverage letter prior to a loss.

Protection Provided under this Memorandum of a Claim, Suit, liability, alleged liability, loss, cost or expense also falling within the coverage terms of the "Memorandum of Cyber Liability Coverage" issued by the Authority, parts I.A "Privacy Liability (including employee liability)", I.D "Security Liability", and/or I.E "Multimedia Liability", shall be on an excess and non-contributory basis except that if coverage exists under this Memorandum, it shall apply to the Retention amount in the Memorandum of Cyber Liability Coverage.

E. Termination or Amendment

This **Memorandum** may be terminated or amended at any time in accordance with the Joint Powers Agreement and Bylaws of the **Authority**. The Executive Committee may adopt exclusions of coverage, copayments or deductibles for actions or omissions of a **Member** that are deemed to be a risk to the program. Such exclusions, copayments or deductibles may be imposed immediately upon adoption by the Executive Committee or as a consequence of a **Member's** failure to adhere to an approved Performance Improvement Plan.

F. Changes

Notice to any agent or knowledge possessed by any agent of the **Authority** or by any other person shall not effect a waiver of or a change in any part of this **Memorandum**,

nor shall the terms of this **Memorandum** be waived or changed, except by a written addendum issued by the **Authority** to form a part of this **Memorandum**.

G. Subrogation

The **Authority** shall reserve the right to subrogate for any payments made hereunder and to assume the **Protected Party's** recovery rights. The **Protected Party** shall do nothing after loss to prejudice such rights and shall do everything necessary to secure such rights. The **Protected Party** may waive subrogation rights, but only through written agreement executed before the **Occurrence** giving rise to the loss. The **Authority** shall have standing to seek subrogation recovery in its own name or in the name of the **Protected Party**, and the **Protected Party** shall cooperate with and assist the **Authority** in pursuing such recovery, including assigning its right to recover subrogated amounts, and if necessary executing a written agreement to effect such assignment. Any amount so recovered shall be apportioned as follows:

- (i) The **Authority** shall be reimbursed to the extent of all payment under this **Memorandum**. Any remaining balance shall be applied to reimburse the **Protected Party**;
- (ii) The expenses of such recovery proceedings shall be apportioned in the ratio of respective recoveries. If there is no recovery in proceedings conducted solely by the **Authority**, the **Authority** shall bear the expenses thereof.

H. Assignment

Assignment of interest under this **Memorandum** shall not bind the **Authority** until its consent is endorsed hereon; if, however, the **Member** shall be adjudged bankrupt or insolvent, such protection and **Defense** obligations as are afforded by this **Memorandum** shall apply (a) to **Member's** legal representative, as the **Member**, but only while acting within the scope of said representative's duties as such, and (b) with respect to the property of the **Member**, to the person having proper temporary custody thereof, as a **Protected Party**, but only until the appointment and qualification of a legal representative.

I. Joint Powers Agreement

The provisions of this **Memorandum** are subject to and subordinate to the terms and provisions of the Agreement creating the **Authority**, and in the event of any conflict between the terms and provisions of said Agreement and this **Memorandum**, the terms and provisions of the Agreement shall control.

J. Appeal of Disputes

No party is entitled to appeal or arbitrate claims under this **Memorandum** other than the **Member**. Specifically, **Employees** are not intended to be third party beneficiaries of this agreement and shall have no right to bring an action against the **Authority** for a declaration of rights to protection under this **Memorandum**. The sole remedy of any **Employee** shall be the **Employee's** right to defense or indemnity against the employing **Member** under the provisions of the California Government Code.

Any disputes concerning coverage, protection, **Defense** obligations, or procedures of the **Program**, as interpreted by the **Authority's** staff, shall be appealed to the **Authority's** Executive Committee in accordance with the following procedures.

- (i) A written notice that a **Claim** is not covered by the **Memorandum** will normally be provided to the **Member** by the Claims Administrator. A **Member** may request any determination of a lack of coverage made by the Claims Administrator to be reviewed by the Chief Executive Officer. Such a request shall be in writing and must be made within 90 days of the date of the written notice from the Claims Administrator.
- (ii) Upon request, the Chief Executive Officer shall review a determination of a lack of coverage made by the Claims Administrator or **Authority** staff and shall send to the **Member** a written determination of coverage.
- (iii) If a **Member** disagrees with the coverage determination by the Chief Executive Officer, the **Member** may appeal the decision to the Appeals Committee. The Appeals Committee consists of the Executive Committee and the chairs of the Managers and Finance Officers Committees. Appeals must be in writing within 90 days of the date of the Chief Executive Officer's written decision. The appeal request must state why the **Member** disagrees with the denial, and the **Member** should present any information that may have a bearing on the ultimate determination of coverage.
- (iv) The appeal request shall be presented by **Authority** staff to the Appeals Committee, on a regularly scheduled Executive Committee meeting day, allowing time for sufficient review and agenda deadlines. Staff shall notify the **Member** in advance of the meeting at which its appeal will be presented.
- (v) If the **Member** would like to personally address the Appeals Committee, the **Member** or the **Member's** representative may attend the meeting and speak to the issue.
- (vi) The Appeals Committee may refer the appeal to the Coverage Committee and consider the recommendation of the Coverage Committee during its deliberation on the appeal. The Appeals Committee's decision is final. **Authority** staff will notify the **Member** of the Appeals Committee's decision in writing.
- (vii) Following a final determination regarding a **Claim**, consideration of the decision may be reopened at the request of the **Member** if circumstances change as follows: (1) a new and distinct **Claim** arising out of the prior **Occurrence** is presented to the **Member**, or (2) new and distinct causes of action are added to the **Claim**. If the new **Claim** or causes of action are reasonably thought by the **Member** to be covered, the Appeals Committee will reconsider the issue, in accordance with the procedure in this paragraph J., upon request. Any request for such reconsideration must be in writing within 90 days of the notice to the **Member** of the new **Claim** or cause of action.

If a **Member** disputes a coverage issue relating to the application or scope of an exclusion, then, during the course of the administrative and arbitration proceedings provided herein, only upon the request of the **Member**, the **Authority** shall defend the **Claim** against the **Member** and have the right to control any settlement of that **Claim**, subject to the right of the **Authority** to recover from the **Member** any amounts paid out by the **Authority** for such defense or settlement which are finally determined by the Appeals Committee, or as a result of the Binding Arbitration Process, not to be owed by the **Authority** under the **Program**. If the **Member** does not elect to request such a defense, **Defense Costs** incurred during the coverage appeal shall be at the sole cost and expense of the **Member**.

K. *Arbitration*

If the **Member** has followed the coverage Appeals Procedure outlined in 5.J. ***Appeal of Disputes*** and disagrees with the final determination of the Appeals Committee, the **Member** may request consideration of the coverage issue through the **Authority's** Binding Arbitration Process.

The Arbitration process shall be as follows:

- (i) Following a decision by the Appeals Committee, the appealing **Member** shall notify the Chief Executive Officer in writing, within 30 days of the Appeals Committee's final decision, that it wishes to participate in Binding Arbitration and shall submit a non-refundable \$1,000 arbitration appeal fee. The written notice shall specify the grounds for the arbitration.
- (ii) Following payment of the arbitration appeals fee, the name of each **Member**, other than the appealing **Member** and the **Members** represented on the Appeals Committee, shall be placed in an unmarked envelope. Each envelope shall be placed in a box and eleven envelopes shall be drawn by the Chief Executive Officer. A representative of the appealing **Member** may be present at the drawing.
- (iii) The **Chief Executives** of the eleven **Members** shall be the pool of potential arbitrators. The eleven **Members** and the names of their **Chief Executives** shall be given in writing to the appealing **Member**.
- (iv) The appealing **Member** shall have the right to strike two or less names from the pool for any reason which shall not be disclosed. The **Authority** shall have the right to strike two or less names from the pool for any reason which shall not be disclosed. The appealing **Member** and the **Authority** must strike names within five business days of the drawing. The right of either party to strike names shall lapse at 5:00 PM on the fifth day following the drawing. Notice of names stricken by either party shall be given in writing to the other party prior to 5:00 PM on the fifth day following the drawing.
- (v) The remaining **Chief Executives** shall be contacted by the Chief Executive Officer to determine their willingness to serve on the arbitration panel. If more than five are willing to serve, each name shall be placed in an unmarked

envelope, put in a box, and the Chief Executive Officer shall draw five envelopes from the box. The individuals whose names are drawn shall be the arbitration panel and they shall be disclosed in writing to the appealing **Member**.

- (vi) If only five are willing to serve, they shall be the arbitration panel.
- (vii) If fewer than five are willing to serve, the name of each member not drawn in the previous selection drawing shall be placed in an unmarked envelope, put in a box, and four envelopes shall be drawn for each arbitration panel position needed to have a five-member panel. A representative of the appealing **Member** may be present at the drawing. The names drawn shall be disclosed to the appealing **Member** who may reject, for any reason which shall not be disclosed, one name for each four names drawn. The **Authority** may also reject one name for each four names drawn and shall not disclose the reason. Names rejected by the appealing **Member** and the **Authority** must be rejected within 48-hours of the drawing. The right to reject names shall lapse 48-hours following the drawing.
- (viii) The **Chief Executives** of the **Members** remaining shall be contacted by the Chief Executive Officer to determine their willingness to serve on the arbitration panel. The names of those willing to serve shall be placed in unmarked envelopes, put in a box, and the number necessary to fill out the arbitration panel shall be drawn by the Chief Executive Officer and disclosed in writing to the appealing **Member**. A representative of the appealing **Member** may be present at the drawing.
- (ix) This process shall be repeated until five members are obtained for the arbitration panel.
- (x) The arbitration panel members shall be compensated at the rate of \$125 per half-day or portion thereof. If a panel member is required to stay away from home overnight, lodging shall be paid by the **Authority**. Necessary meals shall be provided for all panel members. Mileage costs shall be reimbursed by the **Authority** at its standard rate.
- (xi) The cost of the arbitration panel shall be borne by the **Authority**. The cost of presentation by the appealing **Member**, including preparation, exhibits, attorneys, and all other costs of the **Member** shall be paid by the **Member**.
- (xii) The arbitration panel may request legal counsel that shall be selected by the Chief Executive Officer and paid for by the **Authority**. Legal counsel shall not be the counsel for the **Authority** that has advised the staff and Executive Committee. However, counsel for the **Authority** may participate in or make the presentation to the arbitration panel on behalf of the **Authority**, as requested by the Chief Executive Officer.
- (xiii) The parties to the arbitration shall not be governed by formal rules of evidence.
- (xiv) The arbitration panel's decision shall be final and binding on the **Member** and the **Authority**. Decisions of the arbitration panel shall be by majority vote.

- (xv) The decision of the arbitration panel shall be written and shall govern the issue decided but may be referred to by the **Authority** and future arbitration panels for precedent.

