

**MEMORANDUM TO REVIEWERS:**

*Comments are requested on the attached DRAFT Section 403(b) Prototype Plan sample language for use in a new Employee Plans Section 403(b) Prototype Plan Program. The Section 403(b) Prototype Program will operate generally in the same manner as the current Master and Prototype Program for plans qualified under section 401(a) of the Internal Revenue Code. A Section 403(b) Prototype Plan sponsor will submit a section 403(b) plan document to the IRS for review. If the plan satisfies the requirements of section 403(b), the IRS will issue a favorable Opinion Letter to the sponsor with respect to the plan document. The sponsor may then offer the approved plan document for adoption by employers.*

*The DRAFT sample language is based on language previously developed for other IRS prototype plan programs (see Listing of Required Modifications for Defined Contribution Plans, Cash or Deferred Arrangements, Traditional IRAs and Roth IRAs) as well as the model section 403(b) plan language published in Revenue Procedure 2007-71.*

**SECTION 403(B) PROTOTYPE PLANS**  
**Sample Plan Provisions and Information Package**

**To Sponsors of Section 403(b) Prototype Plans:**

This information package contains samples of plan provisions that have been found to satisfy certain requirements of section 403(b) of the Internal Revenue Code, the final regulations issued July 26, 2007, Revenue Procedure 2007-71, and Revenue Procedure \_\_\_\_\_ [*section 403(b) prototype plan revenue procedure*]. This language may or may not be acceptable in different plans depending on the context in which used. We have prepared this package to assist prototype sponsors who are drafting section 403(b) prototype plans, and to enable us to process and approve section 403(b) prototype plans more quickly.

Part I of the package contains sample plan provisions appropriate for section 403(b) prototype plans that are limited to elective deferrals. Part II contains additional sample provisions for section 403(b) prototype plans that accept contributions other than elective deferrals.

Certain section 403(b) plans may be covered by Title I of ERISA. Since the IRS does not have jurisdiction over Title I, this package does not contain sample Title I plan provisions. Prototype sponsors may find that certain plan provisions developed to enable section 401(a) master and prototype plans comply with Internal Revenue Code qualification requirements that have parallel Title I requirements may be helpful in drafting plan provisions intended to comply with Title I (see, e.g., Listing of Required Modifications for Defined Contribution Plans). However, even if such provisions are used, IRS opinion letters do not provide reliance for section 403(b) prototype plans with respect to Title I requirements.

**Prototype Sponsor:** \_\_\_\_\_

**Type of Eligible Employer:**

- Public School
- Section 501(c)(3) Organization

**Type of Plan:**

- Governmental Plan as Defined in Section 414(d) (“Governmental Plan”)
- Church Plan as Defined in Section 414(e) for Which the Election Under Section 410(d) Has Not Been Made (“Nonelecting Church Plan”)
- Plan of Section 501(c)(3) Organization (Other Than Governmental Or Nonelecting Church Plan)

**Contributions:**

- Elective Deferrals (other than Roth)

**Form of Prototype Plan:**

- Standardized

[ DRAFT 04/09/2009 ]

- Roth Elective Deferrals
- Employer Contributions
- Matching Contributions
- After-Tax Employee Contributions

Nonstandardized

[ April 2009 ]

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<b>PART I. GENERAL PROVISIONS AND ELECTIVE DEFERRAL PROVISIONS</b>
<b>Section 1. Definitions</b>
<p><b>1. Account</b> <b>Reference: Regs. §1.403(b)-2(b)(1)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Account” means the account maintained for the benefit of any Participant or Beneficiary under an Annuity Contract or a Custodial Account.</p>
<p><b>2. Account Balance</b> <b>Reference: Regs. § 1.403(b)-2(b)(1)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Account Balance” means the bookkeeping account maintained for each Participant which reflects the aggregate amount credited to the Participant’s Account under all Accounts, including the Participant’s Elective Deferrals, the earnings or loss of each Annuity Contract or a Custodial Account (net of expenses) allocable to the Participant, any transfers for the Participant’s benefit, and any distribution made to the Participant or the Participant’s Beneficiary. The Account Balance includes any account established for rollover contributions and plan-to-plan transfers made for a Participant, the account established for a Beneficiary after a Participant’s death, and any account or accounts established for an alternate payee (as defined in section 414(p)(8) of the Internal Revenue Code).</p> <p><b>(Note to reviewer: A plan is not required to maintain a separate account for each Beneficiary in order to satisfy section 401(a)(9) of the Code, but this sample plan language provides for such separate accounts so that installment payments are permitted to be made over each beneficiary's life expectancy as permitted under section 1.401(a)(9)-8, A-2(a)(2) of the Regulations. However, because, under the sample plan language, each separate account is permitted to have only a single beneficiary, certain beneficiary designations are not permitted under the sample plan language, such as a death benefit in the form of a fixed dollar payment that is not determined as of the date of death and that is not to be maintained in a separate account to which gains and losses are credited.)</b></p>
<p><b>3. Plan Administrator</b> <b>Reference: _____ of Rev. Proc. _____</b></p> <p><b>Sample Plan Language:</b></p> <p>“Plan Administrator” means the person, committee, or organization selected in the Adoption</p>

Agreement to administer the Plan.
<p><b>4. Annuity Contract</b> <b>Reference: Code §403(b)(1), §401(g), Regs. §1.403(b)-2(b)(2)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Annuity Contract” means a nontransferable contract, as defined in sections 403(b)(1) and 401(g) of the Internal Revenue Code, that is issued by an insurance company qualified to issue annuities in a State and that includes payment in the form of an annuity.</p>
<p><b>5. Beneficiary</b> <b>Reference: Regs §1.403(b)-2(b)(3)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Beneficiary” means the designated person who is entitled to receive benefits under the Plan after the death of a Participant.</p>
<p><b>6. Custodial Account</b> <b>Reference: Code §403(b)(7), Regs. §1.403(b)-8(d)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Custodial Account” means the group or individual custodial account or accounts, as defined in section 403(b)(7) of the Internal Revenue Code, established for each Participant by the Employer, or by each Participant individually, to hold assets of the Plan.</p>
<p><b>7. Disability</b> <b>Reference: Code §22(e)(3), and imputed compensation, Code §415(c)(3)(C)</b></p> <p><b>Sample Plan Language:</b></p> <p>“Disability” means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. The permanence and degree of such impairment shall be supported by medical evidence.</p>
<p><b>8. Elective Deferral</b> <b>Reference: Regs. §1.403(b)-2(b)(7), (17)</b></p>

**Sample Plan Language:**

“Elective Deferral” means the Employer contributions made to the Plan at the election of the participant in lieu of receiving cash compensation. The term “Elective Deferral” includes Roth Elective Deferrals if permitted under the Adoption Agreement.

**9. Employee**

**Reference: Regs. §1.403(b)-2(b)(9), (10)**

**Sample Plan Language:**

**A. Definition for Public School:**

“Employee” means each individual who is a common law employee of the Employer performing services for a public school as an Employee of the Employer, including an individual who is appointed or elected. This definition is not applicable unless the Employee’s compensation for performing services for a public school is paid by the Employer. Further, a person occupying an elective or appointive public office is not an Employee performing services for a public school unless such office is one to which an individual is elected or appointed only if the individual has received training, or is experienced, in the field of education. A public office includes any elective or appointive office of a State or local government.

**B. Definition for Section 501(c)(3) Organization:**

“Employee” means any common law employee of the Employer.

**10. Employer**

**Reference: Regs. §1.403(b)-2(b)(8)**

**(Note to reviewer: For public schools, the Employer means a State, but only with respect to an Employee of the State performing services for a public school. An entity is not an Employer if it treats itself as not being a State for any other purpose of the Code. A “Public School” means a State-sponsored educational organization described in section 170(b)(1)(A)(ii) of the Internal Revenue Code (relating to educational organizations that normally maintain a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where educational activities are regularly carried out.**

**For section 501(c)(3) organizations, the Employer means a Code section 501(c)(3) organization.)**

**Sample Plan Language for a section 501(c)(3) organization:**

“Employer” means the person or organization identified in the Adoption Agreement.  
“Employer” also includes any Related Employer that is an eligible employer within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations as designated in the Adoption Agreement.

**Adoption Agreement Language:**

Name of Employer: \_\_\_\_\_

Related Employers:

- “Employer” includes the Related Employers identified below that are eligible employers within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations.

Related Employer: \_\_\_\_\_

Related Employer: \_\_\_\_\_

- “Employer” includes all Related Employers that are eligible employers within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations.

**11. Funding Vehicle**

**Reference: Regs. §1.403(b)-8(c), (d)**

**Sample Plan Language:**

“Funding Vehicle” means the Annuity Contracts and/or Custodial Accounts as selected in the Adoption Agreement issued for funding amounts held under the Plan and specifically approved by the Employer for use under the Plan.

**Adoption Agreement Language:**

The Funding Vehicles for this Plan are:

- Annuity Contracts
- Custodial Accounts
- Annuity Contracts and Custodial Accounts

**12. Individual Agreement**

**Sample Plan Language:**

“Individual Agreement” means the agreement between a Vendor and the Employer or a Participant that constitutes or governs an Annuity Contract or a Custodial Account.

**13. Participant**

**Reference: Regs. § 1.403(b)-2(b)(12), §1.403(b)-5(b)(4)**

**Sample Plan Language:**

“Participant” means an individual for whom contributions are currently being made, or for whom contributions have previously been made, under the Plan and who has not received a distribution of his or her benefit under the Plan. All Employees of the Employer will be eligible to participate in the Plan except for those Employees excluded in the Adoption Agreement.

**Sample Adoption Agreement Language:**

The following Employees are excluded from eligibility to have Elective Deferrals made on their behalf under the Plan:

- Employees who are eligible under another section 403(b) plan of the Employer which permits an amount to be contributed or deferred at the election of the Employee.
- Employees who are eligible under a section 457(b) eligible governmental plan of the Employer which permits an amount to be contributed or deferred at the election of the Employee.
- Employees who are eligible to make a cash or deferred election (as defined at section 1.401(k)-1(a)(3) of the Treasury Regulations) under a section 401(k) plan of the Employer.
- Employees who are nonresident aliens described in section 410(b)(3)(C) of the Internal Revenue Code.
- Employees who are students performing services described in section 3121(b)(10) of the Internal Revenue Code.
- Employees who normally work fewer than 20 hours per week. An Employee normally works fewer than 20 hours per week if, for the 12-month period beginning on the date the Employee’s employment commenced, the Employer reasonably expects the Employee to work fewer than 1,000 hours of service (as defined under section 410(a)(3)(C) of the Internal Revenue Code) and, for each Plan Year ending after the close of that 12-month period, the Employee has worked fewer than 1,000 hours of service.

**(Note to reviewer: With respect to the last paragraph, see section 202(a)(1) of ERISA and regulations under section 410(a) of the Code.)**

**14. Plan**

**Reference: Regs. §1.403(b)-2(b)(13)**

**Sample Plan Language:**

"Plan" means the plan identified in the Adoption Agreement.

**Sample Adoption Agreement Language:**

Name of Plan: \_\_\_\_\_

**15. Plan Year**

**Sample Plan Language:**

"Plan Year" means the calendar year unless a different 12 consecutive month period is designated by the Employer in the Adoption Agreement.

**Sample Adoption Agreement Language:**

Plan Year means the calendar year unless the following is selected:

the 12-consecutive month period commencing on \_\_\_\_\_ and each anniversary thereof.

**16. Related Employer**

**Reference: §1.414(c)-5, Notice 89-23 (1989-1 C. B. 654)**

**Sample Plan Language:**

"Related Employer" means the Employer and any other entity which is under common control with the Employer under section 414(b), (c), (m) or (o) of the Internal Revenue Code.

**(Note to reviewer: The following provision may be used for governmental plans and church plans)**

For this purpose, the Employer shall determine which entities are Related Employers based on a reasonable, good faith standard and taking into account the special rules applicable under IRS Notice 89-23 (1989-1 C.B. 654).

**17. Severance from Employment**  
**Reference: Regs. §1.403(b)-2(b)(19)**

**Sample Plan Language:**

“Severance from Employment” means that the Employee ceases to be employed by the Employer maintaining the Plan or a Related Employer that is eligible to maintain a section 403(b) Plan.

**(Note to Reviewer: The following additional language may be used by a State or local government maintaining a section 403(b) plan for its Employees who perform services for a public school.)**

However, a Severance from Employment also occurs on any date on which an Employee ceases to be an Employee of a public school, even though the Employee may continue to be employed by a Related Employer that is another unit of the State or local government that is not a public school or in a capacity that is not employment with a public school (e.g., ceasing to be an Employee performing services for a public school but continuing to work for the same State or local government Employer).

**18. State**  
**Reference: Regs. §1.403(b)-2(b)(20)**

**Sample Plan Language:**

“State” means a State, a political subdivision of a State, or any agency or instrumentality of a State. “State” includes the District of Columbia (pursuant to section 7701(a)(10) of the Internal Revenue Code). An Indian tribal government is treated as a State pursuant to section 7871(a)(6)(B) of the Internal Revenue Code for purposes of section 403(b)(1)(A)(ii) of the Internal Revenue Code.

**19. Vendor**

**Sample Plan Language:**

“Vendor” means the provider of an Annuity Contract or Custodial Account.

**20. Year of Service**  
**Reference: Regs. §1.403(b)-2(b)(21), 1.403(b)-4(e)**

**(Note to reviewer: “Year of Service” applies for purposes of the limitations for Special**

**Catch-up Contributions (see Sample Plan Provision #30) and for determining a Participant's Includible Compensation (see Sample Plan Provision #31. The definition of "Year of Eligibility Service" contained in Sample Plan Provision #60 applies for the nondiscrimination requirements for contributions other than Elective Deferrals.)**

**Sample Plan Language:**

**"Year of Service."** For purposes of determining Includible Compensation or Special Catch-Up Contributions, "Year of Service" means each full year during which an individual is a full-time Employee of the Employer, plus fractional credit for each part of a year during which the individual is either a full-time Employee of the Employer for a part of a year or a part-time Employee of the Employer. The Employee must be credited with a full year of service for each year during which the Employee is a full-time Employee and a fraction of a year for each part of a work period during which the Employee is a full-time or part-time Employee of the Employer. An Employee's number of years of service equals the aggregate of the annual work periods during which the Employee is employed by the Employer. The work period is the Employer's annual work period.

**(Note to reviewer: Plans designed to include nonelective contributions that give adopting eligible employers an option to exclude employees from eligibility for such contributions until the employees complete a minimum service requirement must also include the definition of Year of Eligibility Service in Sample Plan Provision #60.)**

**Section 2. Administration**

**21. Plan Administration and Allocation of Duties**

**Reference: Regs. §1.403(b)-3(b)(3); \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_**

**(Note to reviewer: Section 1.403(b)-3(b)(3) of the Treasury Regulations provides that a section 403(b) plan (1) must contain all the material terms and conditions for eligibility, benefits, applicable limitations, the investments available under the plan, and the time and form under which benefit distributions are made; and (2) may provide for optional features such as hardship withdrawals, loans, transfers between Plans or Annuity Contracts, and acceptance of rollovers. The regulations provide that the plan may allocate administrative duties to various persons. Any such allocation should identify how the duties are allocated to ensure compliance with the various requirements under section 403(b).**

**In drafting administrative plan provisions and deciding how to allocate administrative duties, prototype sponsors should be aware that the type of duties allocated to the Employer might result in coverage under Title I of ERISA in the case of plans other than governmental or nonelecting church plans. See DOL Regulation section 2510.3-2(f) and DOL Field Assistance Bulletin No. 2007-02 (July 24, 2007).**

**Sample Plan Language:**

1. Plan Administrator. The Plan Administrator is the person, committee or organization identified in the Adoption Agreement. If no Plan Administrator is designated in the Adoption Agreement, then the Employer is the Plan Administrator.
2. Administrative Duties. The Plan Administrator shall be responsible for administering the Plan according to its terms and for coordinating the provisions of the various documents consistent with the requirements of section 403(b) of the Internal Revenue Code. These provisions and requirements include but are not limited to –
  - 2.1 Determining whether an employee is eligible to participate in the Plan.
  - 2.2 Determining whether contributions comply with the applicable limitations.
  - 2.3 Determining whether hardship withdrawals and loans comply with applicable requirements and limitations.
  - 2.4 Determining that any transfers, rollovers, or purchases of service credit comply with applicable requirements and limitations.
  - 2.5 Maintaining a list of all Vendors under the Plan.
  - 2.6 Determining that the requirements of the Plan and section 403(b) of the Internal Revenue Code are properly applied, including whether the Employer is a member of a controlled group.
  - 2.7 Determining the status of domestic relations orders or qualified domestic relations orders.
3. Allocation of Duties. Administrative duties may be allocated among persons designated in the Adoption Agreement. However, in no case shall administrative duties be allocated to Plan Participants (other than permitting participants to make investment elections for self-directed accounts).

**Sample Adoption Agreement Language**

1. Plan Administrator:  
 Employer: \_\_\_\_\_  
 Committee: \_\_\_\_\_  
 Organization: \_\_\_\_\_  
 Vendor: \_\_\_\_\_  
 Other: \_\_\_\_\_

2a. Allocation of Duties. Administrative duties are allocated as follows:

Employer: \_\_\_\_\_

Committee: \_\_\_\_\_

Organization: \_\_\_\_\_

Vendor: \_\_\_\_\_

Other: \_\_\_\_\_

2b Allocation of Duties. Administrative duties are allocated among the persons specified above according to a Memorandum of Understanding executed by each of the parties. Such Memorandum of Understanding is incorporated herein by reference into the Plan.

### **Section 3. Eligibility and Participation**

#### **22. Eligibility of Employees**

**Reference: Regs. §1.403(b)-5(b)**

##### **Sample Plan Language:**

Each Employee who is not excluded under section \_\_\_\_ of the Adoption Agreement may elect to have Elective Deferrals made on his or her behalf hereunder immediately upon becoming employed by the Employer.

**(Note to reviewer: The blank should be filled in with the Plan section number corresponding to Sample Plan Provision #13.)**

#### **23. Compensation Reduction Election**

**Reference: Regs. §1.403(b)-5(b)**

##### **Sample Plan Language:**

##### Compensation Reduction Election.

1. An Employee elects to participate by executing an election to reduce his or her Compensation (and have that amount contributed as an Elective Deferral on his or her behalf) and filing it with the Plan Administrator. This Compensation Reduction Election shall be made on the agreement provided by the Plan Administrator under which the Employee agrees to be bound by all the terms and conditions of the Plan. The Plan Administrator may establish an annual minimum deferral amount no higher than

\$200 as specified in the Adoption Agreement, and may change such minimum to a lower amount from time to time. The participation election shall also include designation of the Funding Vehicles and Accounts therein to which Elective Deferrals are to be made and a designation of Beneficiary. Any such election shall remain in effect until a new election is filed. Only an individual who performs services for the Employer as an Employee may reduce his or her Compensation under the Plan. The election shall take effect as soon as administratively practicable following the date applicable under the Employee's election.

2. For purposes of the Compensation Reduction Election, "Compensation" means all cash compensation for services to the Employer, including salary, wages, fees, commissions, bonuses and overtime pay, that is includible in the Employee's gross income for the Plan Year.

**Adoption Agreement Language:**

No minimum deferral amount.

The minimum deferral amount will be \$\_\_\_\_\_ (no higher than \$200).

**24. Automatic Enrollment**  
**Reference: Code §414(w)**

**Sample Plan Language:**

**[RESERVED.]**

**MEMORANDUM TO REVIEWERS:**

*Sample plan language for the automatic enrollment provisions of Code § 414(w), which was in development when Announcement 2009-34 was issued, will be posted to the internet as soon as possible. The other sample plan language in this draft Listing of Required Modifications does not reflect the provisions of § 414(w).*

**25. Information Provided by the Employee**

**Sample Plan Language:**

Each Participant shall provide to the Plan Administrator at the time of initial enrollment, and later if there are any changes, any information necessary or advisable for the Plan Administrator to administer the Plan, including any information required under the Individual Agreements.

**26. Change in Compensation Reduction Election**

**Reference: Regs. §1.403(b)-5(b)(2)**

**Sample Plan Language:**

A Participant may at any time revise his or her participation election, including a change of the amount of his or her Elective Deferrals, his or her investment direction, and his or her designated Beneficiary. A change in the investment direction shall take effect as of the date provided by the Plan Administrator on a uniform basis for all Employees.

**(Note to reviewer: The Plan must specify a reasonable period at least once each Plan Year during which a Participant may elect to commence or change the election. Such election may not be made retroactively. A Participant's election to commence Elective Deferrals must stay in effect until the Participant elects to change it.)**

**27. Timing of Contributions**

**Reference: Regs. §1.403(b)-8(b)**

**Sample Plan Language:**

Contributions to the Plan must be transferred to the Vendor within 15 days following the month in which the amounts would have been paid to the Employee.

**(Note to reviewer: Section 1.403(b)-8(b) of the Treasury Regulations provides that a plan may specify a period of time, such as 15 days, for the transfer of contributions to the annuity contract. A plan may use other time periods that are not longer than what is reasonable for the proper administration of the plan.**

**With regard to a section 403(b) plan covered by Title I of ERISA, see Department of Labor Regulation 29 C.F.R. § 2510.3-102 (amounts that a participant pays to or has withheld by an employer for contribution to a plan become plan assets as of the earliest date they can reasonably be segregated from the employer's general assets but in no event later than the 15<sup>th</sup> business day of the month following the month in which the amounts were received by the employer (in the case of amounts paid to the employers) or in which the amounts would otherwise have been payable to the participant (in the case of amounts withheld by the employer from a participant's wages.)**

**28. Leave of Absence**

**Sample Plan Language:**

Unless a Compensation Reduction Election is otherwise revised, if an Employee is absent from work by leave of absence, Elective Deferrals under the Plan shall continue to the extent that Compensation continues.

**29. Roth Contributions**

**Reference: Regs. §1.403(b)-3(c); Notice 2006-44**

**Sample Plan Language:**

1. General Application. If elected in the Adoption Agreement, the Plan shall accept Roth Elective Deferrals made on behalf of Participants. A Participant's Roth Elective Deferrals shall be allocated to a separate account maintained for such deferrals. Unless specifically stated otherwise, Roth Elective Deferrals shall be treated as Elective Deferrals for all purposes under the plan.
2. Separate Accounting.
  - 2.1 Contributions and withdrawals of Roth Elective Deferrals shall be credited and debited to the Roth elective deferral account maintained for each Participant.
  - 2.2 The Plan shall maintain a record of the amount of Roth Elective Deferrals in each Participant's account.
  - 2.3 Gains, losses, and other credits or charges must be separately allocated on a reasonable and consistent basis to each Participant's Roth Elective Deferral Account and the Participant's other accounts under the Plan.
  - 2.4 No contributions other than Roth Elective Deferrals and properly attributable earnings shall be credited to each Participant's Roth Elective Deferral Account.
3. Definition of Roth Elective Deferrals. A "Roth Elective Deferral" means an Elective Deferral that is:
  - 3.1 Designated irrevocably by the Participant at the time of the Compensation Reduction Election as a Roth Elective Deferral that is being made in lieu of all or a portion of the pre-tax Elective Deferrals the Participant is otherwise eligible to make under the Plan; and
  - 3.2 Treated by the Employer as includible in the Participant's income at the time the Participant would have received that amount in cash if the Participant had not made a Compensation Reduction Election.

**Sample Adoption Agreement Language:**

[ ] The Plan will accept Roth Elective Deferrals.

**Section 4. Contributions**

**30. Elective Deferrals**

**Reference: Regs. §1.403(b)-4, Code §402(g), §414(u), §414(v), and §415**

**Sample Plan Language:**

1. Limitations on Elective Deferrals.

1.1 Except as provided in Sections 1.2 and 1.3, the maximum amount of the Elective Deferral under the Plan for any calendar year shall not exceed \$16,500, which is the applicable dollar amount established under section 402(g)(1)(B) of the Internal Revenue Code and adjusted for cost-of-living to the extent provided under section 402(g)(4) of the Internal Revenue Code for periods after 2009.

**(Note to reviewer: Section 402(g) of the Code provides a limitation on elective deferrals, and further provides that the limitation will be adjusted each year for cost-of-living increases. The limit for 2009 is \$16,500 (see IRS Notice 2008-102).)**

1.2 Special Section 403(b) Catch-up Limitation for Employees with 15 Includible Years of Service. If the Employer is a qualified organization (within the meaning of section 1.403(b)-4(c)(3)(ii) of the Treasury Regulations) and if elected in the Adoption Agreement, the applicable dollar amount under Section 1.1 for any “Qualified Employee” is increased by the least of:

- (a) \$3,000;
- (b) The excess of:
  - (i) \$15,000, over
  - (ii) The total Special Section 403(b) Catch-up Elective Deferrals made for the Qualified Employee by the qualified organization for prior years; or
- (c) The excess of:
  - (i) \$5,000 multiplied by the number of Years of Service of the Employee with the qualified organization, over
  - (ii) The total Elective Deferrals made for the Employee by the qualified organization for prior years.
- (d) For purposes of this Section 1.2, a “Qualified Employee” means an Employee who has completed at least 15 Years of Service taking into account only employment with the Employer.

**(Note to reviewer: A “qualified organization” eligible for the Special Section 403(b) Catch-up Limitation for Employees with 15 Includible Years of Service includes an**

**educational organization described in section 170(b)(1)(A)(ii), a hospital, a health and welfare service agency (including a home health service agency), a church related organization, or any organization described in section 414(e)(3)(B)(ii). See section 1.403(b)-4(c)(3)(ii) of the regulations).**

- 1.3 Age 50 Catch-up Contribution. If elected by the Employer in the Adoption Agreement, an Employee who is a Participant who will attain age 50 or more by the end of the calendar year is permitted to elect an additional amount of Elective Deferrals, up to the maximum age 50 catch-up Elective Deferrals for the year. The maximum dollar amount of the age 50 catch-up Elective Deferrals for a year is \$5,500, and is adjusted for cost-of-living to the extent provided under the Internal Revenue Code for periods after 2009.

**(Note to reviewer: Section 414(v)(2) of the Code provides a limitation on catch-up elective deferrals, and further provides that the limitation will be adjusted each year for cost of living increases. The limit for 2009 is \$5,500 (see IRS Notice 2008-102).)**

- 1.4 Coordination. Amounts in excess of the limitation set forth in Section 1.1 shall be allocated first to the Special Section 403(b) Catch-up under Section 1.2 and next as an age 50 catch-up contribution under Section 1.3. However, in no event can the amount of the Elective Deferrals for a year be more than the Participant's Compensation for the year.
- 1.5 Special Rule for a Participant Covered by Another Section 403(b) Plan. For purposes of this Section 1, if the Participant is or has been a Participant in one or more other plans under section 403(b) of the Internal Revenue Code (and any other plan that permits elective deferrals under section 402(g) of the Internal Revenue Code), then this Plan and all such other plans shall be considered as one plan for purposes of applying the limitation in this Section 1. For this purpose, the Plan Administrator shall take into account any other such plan maintained by any Related Employer and shall also take into account any other such plan for which the Plan Administrator receives from the Participant sufficient information concerning his or her participation in such other plan. Notwithstanding the foregoing, another plan maintained by a Related Employer shall be taken into account for purposes of Section 1.2 only if the other plan is a section 403(b) plan.
- 1.6 Correction of Excess Elective Deferrals. If the Elective Deferral on behalf of a Participant for any calendar year exceeds the limitations described above, or the Elective Deferral on behalf of a Participant for any calendar year exceeds the limitations described above when combined with other amounts deferred by the Participant under another plan of the Employer under section 403(b) of the Internal Revenue Code (and any other plan that permits elective deferrals under section 402(g) of the Internal Revenue Code for which the Participant provides information that is accepted by the Plan Administrator), then the Elective Deferrals, to the extent in excess of the applicable limitation (adjusted for any income or loss in value, if any, allocable thereto), shall be distributed to the

Participant.

**(Note to reviewer: Corrective distributions are generally required to be made by April 15.)**

**Sample Adoption Agreement Language:**

Special Section 403(b) Catch-up Contributions

Section \_\_\_\_\_, Special Section 403(b) Catch-up Limitation: (Choose one.)

shall apply.

shall not apply.

Age 50 Catch-up Contributions

Section \_\_\_\_\_, Age 50 Catch-up Contributions:  
(Choose one.)

shall apply.

shall not apply.

**Section 5. Limitations on Annual Additions**

**31. Limitations on Annual Additions**

**Reference: Code §415; Regs. §1.403(b)-2(b)(11)**

**Sample Plan Language:**

1. Limitations on Aggregate Annual Additions.

1.1 General Limitation on Annual Additions. A Participant cannot receive an allocation for a Limitation Year greater than the Maximum Annual Addition as set forth in section 2.4 below.

1.2 Aggregation of Section 403(b) Contracts. All Section 403(b) Annuity Contracts purchased by the Employer (including plans purchased through compensation reduction elections) for the Participant are treated as one section 403(b) Annuity Contract and contributions received under all section 403(b) Annuity Contracts of the Employer will be aggregated for purposes of this Section 1. For purposes of this section, the term "Annuity Contract" includes Custodial Accounts maintained pursuant to section 403(b) of the Code. Contributions made for a Participant are aggregated to the extent applicable under section 414 (b) and (c) (each as modified by section 415(h) of the Internal Revenue Code).

1.3 Aggregation where Participant is in Control of Employer. If a Participant receives an allocation under an Annuity Contract and such Participant is in control of any employer for a Limitation Year, the Annuity Contract will be considered a defined contribution plan maintained by both the controlled employer and the Participant for such Limitation Year. Accordingly, the Annuity Contract will be aggregated with all defined contribution plans maintained by the controlled employer and the limitations of section 415(c) will be applied in the aggregate to all annual additions allocated to the Participant in the Annuity Contract and all other defined contribution plans of the controlled employer. For purposes of this paragraph, a Participant is in control of an employer based upon the rules of section 414(b) and 414(c) (each as modified by section 415(h) of the internal Revenue Code).”

1.4 Coordination of Limitation on Annual Additions Where Employer Maintains Another Section 403(b) Prototype Plan or Participant is in Control of Employer. The Annual Additions which may be credited to a Participant’s Account under this Plan for any Limitation year will not exceed the Maximum Annual Addition under section 2.4, reduced by the Annual Additions credited to the Participant’s Account under any other section 403(b) prototype plans maintained by the Employer in addition to this Plan and under any defined contribution plans maintained by an employer that is controlled by the Participant, provided in the later case that the Administrator receives sufficient information from the Participant concerning his or her participation in such defined contribution plan. The contributions allocated to the Participant’s Account under this Plan will be reduced to the extent necessary to prevent this limitation from being exceeded.

1.5 Excess Annual Additions.

(a) Notwithstanding section \_\_\_ and sections 1.1 through 1.4, if a participant’s Annual Additions under this Plan, or under this Plan and any other section 403(b) prototype plans maintained by the Employer and any defined contribution plans maintained by an employer controlled by the Participant, result in an excess Annual Addition for a Limitation Year, the excess Annual Addition will be deemed to consist of the Annual Additions last allocated, except Annual Additions to a defined contribution plan maintained by an employer controlled by the Participant will be deemed to have been allocated first.

**(Note to reviewer: The blank should be filled in with the Plan section corresponding to section 1.1 of Sample Plan Provision #31.)**

(b) If an excess Annual Addition was allocated to a Participant on an allocation date of this Plan which coincides with an allocation date of another section 403(b) Prototype Plan maintained by the Employer, the excess Annual Addition attributable to this Plan will be the product of:

- (i) the total excess Annual Addition allocated as of such date, times
- (ii) the ratio of (i) the Annual Additions allocated to the participant for the Limitation Year as of such date under this plan to (ii) the total Annual Additions allocated to the participant for the Limitation Year as of such date under this and all other section 403(b) Prototype Plans maintained by the Employer.
- (c) Any excess Annual Addition attributable to this Plan will be corrected in the manner described in section 1.7.

1.6 Coordination of Limitation on Annual Additions Where Employer Maintains Another Section 403(b) Plan that is Not a Prototype Plan. If the Participant is covered under another section 403(b) plan maintained by the Employer which is not a section 403(b) Prototype Plan, Annual Additions which may be credited to the Participant's account under this Plan for any Limitation Year will be limited in accordance with sections 1.4 and 1.5 as though the other plan were a section 403(b) Prototype Plan unless the Employer provides other limitations in the Adoption Agreement.

1.7 Correction of Excess Annual Additions. The portion of the section 403(b) contract that includes the excess Annual Additions attributable to this Plan fails to be a Section 403(b) Annuity Contract and the remaining portion of the contract is a Section 403(b) Annuity Contract. The issuer of the section 403(b) contract that includes the Excess Annual Addition shall maintain a separate account for such Excess Annual Addition for the year of the excess and for each year thereafter. In the case where a Participant is in control of an employer and the Excess Annual Addition needs to be maintained in a separate account under this Plan, the Administrator shall only be required to establish such separate account if it receives sufficient information from the Participant concerning his or her participation in such other defined contribution plan controlled by the Participant.

## 2. Definitions.

2.1 Annual Additions: The sum of the following amounts credited to a Participant's Account for the Limitation Year under this Plan, any other section 403(b) plan of the employer, or a defined contribution plan maintained by an employer controlled by the Participant:

- (a) Employer contributions;
- (b) Employee contributions;
- (c) forfeitures;
- (d) amounts allocated to an individual medical account, as defined in section

415(l)(2) of the Code, which is part of a pension or annuity plan are treated as annual additions to a defined contribution plan. Also amounts derived from contributions paid or accrued which are attributable to post-retirement medical benefits, allocated to the separate account of a key employee, as defined in section 419A(d)(3) of the Code, under a welfare benefit fund, as defined in section 419(e) of the Code, are treated as annual additions to a defined contribution plan; and

- (e) allocations under a simplified employee pension.

**(Note to reviewer: Subsection 2.1(d) and 2.1(e) above will only apply if the Participant controls an employer that has a plan that provides for those types of annual additions.)**

## 2.2 Includible Compensation.

- (a) “Includible Compensation” means an Employee’s compensation received from the Employer that is includible in the Participant’s gross income for Federal income tax purposes (computed without regard to section 911 of the Internal Revenue Code relating to United States citizens or residents living abroad) for the most recent period that is a Year of Service. Includible Compensation also includes any elective deferral or other amount contributed or deferred by the Employer at the election of the Employee that would be includible in gross income but for the rules of section 125, 132(f)(4), 402(e)(3), 402(h)(1)(B), 402(k), or 457(b) of the Internal Revenue Code. The amount of Includible Compensation is determined without regard to any community property laws. The amount of Includible Compensation of each Participant taken into account in determining contributions shall not exceed \$245,000, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after 2009.

**(Note to reviewer: Section 401(a)(17) of the Code limits the compensation taken into account in determining contributions to \$200,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for 2009 is \$245,000 (see IRS Notice 2008-102).)**

- (b) For purposes of applying the limitations on Annual Additions to nonelective employer contributions pursuant to section 415 of the Internal Revenue Code, Includible Compensation for a Participant who is permanently and totally disabled (as defined in section 22(e)(3) of the Internal Revenue Code) is the compensation such Participant would have received for the limitation year if the Participant had been paid at the rate of compensation paid immediately before becoming permanently and totally disabled.

2.3. Limitation Year: The Limitation Year means the Calendar Year. However, if the Participant is in control of an Employer pursuant to section 1.3 above, the Limitation Year shall be the Limitation Year in the defined contribution plan

controlled by the Participant.

2.4 Maximum Annual Additions. Except for Age 50 Catch up contributions described in Code section 414(v) of the Internal Revenue Code, the Annual Addition that may be contributed or allocated to a Participant's account under the plan for any Limitation Year shall not exceed the lesser of:

- (a) \$49,000, as adjusted for increases in the cost-of-living under § 415(d) of the Internal Revenue Code for periods after 2009, or
- (b) 100 percent of the Participant's Includible Compensation for the Limitation Year.

**(Note to reviewer: Section 415(c)(1)(A) of the Code provides a dollar limitation on annual additions of \$40,000, and provides that the limitation will be adjusted each year for cost of living increases pursuant to section 415(d) of the Code. The limit for 2009 is \$49,000 (see IRS Notice 2008-102).)**

2.5 The Includible Compensation limit referred to in 2.4(b) shall not apply to any contribution for medical benefits after separation from service (within the meaning of section 401(h) or section 419A(f)(2) of the Internal Revenue Code) which is otherwise treated as an Annual Addition.

2.6 Section 403(b) Prototype Plan. A Section 403(b) Prototype Plan means a section 403(b) plan the form of which is the subject of a favorable opinion letter from the Internal Revenue Service.

2.7 Employer. Solely for purposes of section 1 and 2, "Employer" means the employer that has adopted the Plan and any employer required to be aggregated with that employer under section 414(b) and (c) (each as modified by section 415(h)), (m), (o), of the Internal Revenue Code and section 1.414(c)-5 of the Treasury Regulations.

**Sample Adoption Agreement Language:**

If the Participant is covered under another section 403(b) plan maintained by the Employer, other than a section 403(b) prototype plan:

- The provisions of section 1.4 and 1.5 will apply as if the other plan were a section 403(b) prototype plan.
- (Provide the method under which the plan will limit total Annual Additions to the Maximum Annual Additions in a manner than precludes employer discretion.)

**Section 6. Distribution Provisions**

**32. Distribution Limitations for Elective Deferrals**

**Reference: Code §403(b)(11) and Regs. §1.403(b)-10(d)**

**Sample Plan Language:**

Except as permitted in the case of excess Elective Deferrals, amounts rolled over into the Plan, a distribution made in the event of hardship, a qualified reservist distribution as defined in section 72(t)(2)(G) of the Internal Revenue Code, or termination of the Plan, distributions of Elective Deferrals from a Participant's Account may not be made earlier than the date on which the Participant has a Severance from Employment, dies, becomes disabled (within the meaning of section 72(m)(7) of the Internal Revenue Code), or attains age 59 ½.

**33. Small Account Balances**

**Sample Plan Language:**

If elected in the Adoption Agreement, distributions may be made in the form of a lump-sum payment, without the consent of the Participant or Beneficiary, but no such payment may be made without the consent of the Participant or Beneficiary unless the Account Balance does not exceed \$5,000 (determined without regard to any separate account that holds rollover contributions) and any such distribution shall comply with the requirements of section 401(a)(31)(B) of the Internal Revenue Code (relating to automatic distribution as a direct rollover to an individual retirement plan for distributions in excess of \$1,000).

**Adoption Agreement Language:**

[ ] The Plan permits distribution of small Account Balances.

**34. Minimum Distribution Requirements**

**Reference: Code §403(b)(10), Regs. §1.403(b)-6(e)**

**Sample Plan Language:**

Minimum Distributions. The Plan shall comply with the minimum distribution requirements of section 401(a)(9) of the Internal Revenue Code and the regulations thereunder, as modified by the regulations under section 403(b) of the Internal Revenue Code.

**35. Minimum Distribution Requirements--Accounts--Distributions Before Death**

**Reference: Regs. §1.403(b)-6(e), Code §408(a)(6), Regs. §1.408-8**

**Sample Plan Language:**

**(Note to reviewer: Paragraph 1 below applies to section 403(b) plans that are**

**governmental plans or church plans.)**

1. The entire value of the Account of the Participant for whose benefit the Account is maintained will commence to be distributed no later than the first day of April following the later of (1) the calendar year in which such Participant attains age 70½ or (2) the calendar year in which the Participant retires from employment (the "required beginning date") over the life of such Participant or the lives of such Participant and his or her designated Beneficiary.

**(Note to reviewer: Paragraph 1 below applies to section 403(b) plans that are not governmental plans or church plans.)**

1. The entire value of the Account of the Participant for whose benefit the Account is maintained will commence to be distributed no later than the first day of April following the later of (1) the calendar year in which such Participant attains age 70½ or (2) the calendar year in which the Participant retires from employment (the "required beginning date") over the life of such Participant or the lives of such Participant and his or her designated Beneficiary, except that distributions to a 5-percent owner must commence by April 1 of the calendar year following the calendar year in which the owner attains age 70½.
2. The amount to be distributed each year, beginning with the calendar year the Participant attains age 70 ½ or retires and continuing through the year of death, shall not be less than the quotient obtained by dividing the value of the Account, including outstanding rollovers and transfers, as of the end of the preceding year by the distribution period in the Uniform Lifetime Table in Q&A-2 of section 1.401(a)(9)-9 of the Treasury Regulations, using the Participant's age as of his or her birthday in the year. However, if the Participant's sole designated Beneficiary is his or her surviving spouse and such spouse is more than 10 years younger than the Participant, then the distribution period is determined under the Joint and Last Survivor Table in Q&A-3 of section 1.401(a)(9)-9, using the ages as of the Participant's and spouse's birthdays in the year.
3. The required minimum distribution for the year the Participant attains age 70 ½ or retires can be made as the required beginning date. The required minimum distribution for any other year, including the year that contains the required beginning date, must be made by the end of such year.

**36. Minimum Distribution Requirements--Accounts--Distribution Upon Death  
Reference: Code §408(a)(6) and Regs. §1.408-8**

**Sample Plan Language:**

1. Death On or After Required Beginning Date. If the Participant dies on or after the required beginning date, the remaining portion of his or her interest will be distributed at least as rapidly as follows:

- 1.1 If the designated Beneficiary is someone other than the Participant's surviving spouse, the remaining interest will be distributed over the remaining life expectancy of the designated Beneficiary, with such life expectancy determined using the Beneficiary's age as of his or her birthday in the year following the year of the Participant's death, or over the period described in paragraph 1.3 below if longer.
  - 1.2 If the Participant's sole designated Beneficiary is the Participant's surviving spouse, the remaining interest will be distributed over such spouse's life or over the period described in paragraph 1.3 below if longer. Any interest remaining after such spouse's death will be distributed over such spouse's remaining life expectancy determined using the spouse's age as of his or her birthday in the year of the spouse's death, or, if the distributions are being made over the period described in paragraph 1.3 below, over such period.
  - 1.3 If there is no designated Beneficiary, or if applicable by operation of paragraph 1.1 or 1.2 above, the remaining interest will be distributed over the Participant's remaining life expectancy determined in the year of the Participant's death.
  - 1.4 The amount to be distributed each year under paragraph 1.1, 1.2 or 1.3, beginning with the calendar year following the calendar year of the Participant's death, is the quotient obtained by dividing the value of the account as of the end of the preceding year by the remaining life expectancy specified in such paragraph. Life expectancy is determined using the Single Life Table in Q&A-1 of section 1.401(a)(9)-9 of the Treasury Regulations. If distributions are being made to a surviving spouse as the sole designated Beneficiary, such spouse's remaining life expectancy for a year is the number in the Single Life Table corresponding to such spouse's age in the year. In all other cases, remaining life expectancy for a year is the number in the Single Life Table corresponding to the Beneficiary's or Participant's age in the year specified in paragraph 1.1, 1.2 or 1.3 and reduced by 1 for each subsequent year.
2. Death Before Required Beginning Date. If the Participant dies before the required beginning date, his or her entire interest will be distributed at least as rapidly as follows:
- 2.1 If the designated Beneficiary is someone other than the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar year following the calendar year of the individual's death, over the remaining life expectancy of the designated Beneficiary, with such life expectancy determined using the age of the Beneficiary as of his or her birthday in the year following the year of the Participant's death, or, if elected, in accordance with paragraph 2.3 below.
  - 2.2 If the Participant's sole designated Beneficiary is the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar

year following the calendar year of the Participant's death (or by the end of the calendar year in which the Participant would have attained age 70½, if later), over such spouse's life, or, if elected, in accordance with paragraph 2.3 below. If the surviving spouse dies before distributions are required to begin, the remaining interest will be distributed, starting by the end of the calendar year following the calendar year of the spouse's death, over the spouse's designated Beneficiary's remaining life expectancy determined using such Beneficiary's age as of his or her birthday in the year following the death of the spouse, or, if elected, will be distributed in accordance with paragraph 2.3 below. If the surviving spouse dies after distributions are required to begin, any remaining interest will be distributed over the spouse's remaining life expectancy determined using the spouse's age as of his or her birthday in the year of the spouse's death.

2.3 If there is no designated Beneficiary, or if applicable by operation of paragraph 2.1 or 2.2 above, the entire interest will be distributed by the end of the calendar year containing the fifth anniversary of the Participant's death (or of the spouse's death in the case of the surviving spouse's death before distributions are required to begin under paragraph 2.2 above).

2.4 The amount to be distributed each year under paragraph 2.1 or 2.2 is the quotient obtained by dividing the value of the account as of the end of the preceding year by the remaining life expectancy specified in such paragraph. Life expectancy is determined using the Single Life Table in Q&A-1 of section 1.401(a)(9)-9 of the Treasury Regulations. If distributions are being made to a surviving spouse as the sole designated Beneficiary, such spouse's remaining life expectancy for a year is the number in the Single Life Table corresponding to such spouse's age in the year. In all other cases, remaining life expectancy for a year is the number in the Single Life Table corresponding to the Beneficiary's age in the year specified in paragraph 2.1 or 2.2 and reduced by 1 for each subsequent year.

3. The "value" of the account includes the amount of any outstanding rollover and transfer.

**37. Minimum Distribution Requirements--Annuities--Distributions Before Death**  
**Reference: Code §408(b)(3) and Regs. §1.403(b)-6(e), § 1.408-8**

**Sample Plan Language:**

**(Note to reviewer: Paragraph 1 below applies to section 403(b) plans that are governmental plans or church plans.)**

1. The entire interest of the Participant for whose benefit the contract is maintained will commence to be distributed no later than the first day of April following the later of (1) the calendar year in which such Participant attains age 70½ or (2) the calendar year in which the Participant retires from employment (the "required beginning date") over (a) the life of such Participant or the lives of such Participant and his or her designated

Beneficiary or (b) a period certain not extending beyond the life expectancy of such Participant or the joint and last survivor expectancy of such Participant and his or her designated Beneficiary. Payments must be made in periodic payments at intervals of no longer than 1 year and must be either non-increasing or they may increase only as provided in Q&As-1 and -4 of section 1.401(a)(9)-6 of the Treasury Regulations. In addition, any distribution must satisfy the incidental benefit requirements specified in Q&A-2 of section 1.401(a)(9)-6.

**(Note to reviewer: Paragraph 1 below applies to section 403(b) plans that are not governmental plans or church plans.)**

1. The entire interest of the Participant for whose benefit the contract is maintained will commence to be distributed no later than the first day of April following the later of (1) the calendar year in which such Participant attains age 70½ or (2) the calendar year in which the Employee retires from employment (the "required beginning date") over (a) the life of such Participant or the lives of such Participant and his or her designated Beneficiary or (b) a period certain not extending beyond the life expectancy of such Participant or the joint and last survivor expectancy of such Participant and his or her designated Beneficiary, except that benefit distributions to a 5-percent owner must commence by April 1 of the calendar year following the calendar year in which the owner attains age 70½. Payments must be made in periodic payments at intervals of no longer than 1 year and must be either non-increasing or they may increase only as provided in Q&As-1 and -4 of section 1.401(a)(9)-6 of the Treasury Regulations. In addition, any distribution must satisfy the incidental benefit requirements specified in Q&A-2 of section 1.401(a)(9)-6 of the Treasury Regulations.
2. The distribution periods described in paragraph 1 above cannot exceed the periods specified in section 1.401(a)(9)-6 of the Treasury Regulations.
3. The first required payment can be made as late as the required beginning date and must be the payment that is required for one payment interval. The second payment need not be made until the end of the next payment interval.

**38. Minimum Distribution Requirements--Annuities--Distribution Upon Death  
Reference: Code §408(b)(3) and Regs. §1.403(b)-6(e), §1.408-8**

**Sample Plan Language:**

1. Death On or After Required Distributions Commence. If the Participant dies on or after required distributions commence, the remaining portion of his or her interest will continue to be distributed under the contract option chosen.
2. Death Before Required Distributions Commence. If the Participant dies before required distributions commence, his or her entire interest will be distributed at least as rapidly as follows:

- 2.1 If the designated Beneficiary is someone other than the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar year following the calendar year of the Participant's death, over the remaining life expectancy of the designated Beneficiary, with such life expectancy determined using the age of the Beneficiary as of his or her birthday in the year following the year of the individual's death, or, if elected, in accordance with paragraph 2.3 below.
- 2.2 If the Participant's sole designated Beneficiary is the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar year following the calendar year of the Participant's death (or by the end of the calendar year in which the Participant would have attained age 70½, if later), over such spouse's life, or, if elected, in accordance with paragraph 2.3 below. If the surviving spouse dies before required distributions commence to him or her, the remaining interest will be distributed, starting by the end of the calendar year following the calendar year of the spouse's death, over the spouse's designated Beneficiary's remaining life expectancy determined using such Beneficiary's age as of his or her birthday in the year following the death of the spouse, or, if elected, will be distributed in accordance with paragraph 2.3 below. If the surviving spouse dies after required distributions commence to him or her, any remaining interest will continue to be distributed under the contract option chosen.
- 2.3 If there is no designated Beneficiary, or if applicable by operation of paragraph 2.1 or 2.2 above, the entire interest will be distributed by the end of the calendar year containing the fifth anniversary of the Participant's death (or of the spouse's death in the case of the surviving spouse's death before distributions are required to begin under paragraph 2.2 above).
- 2.4 Life expectancy is determined using the Single Life Table in Q&A-1 of section 1.401(a)(9)-9 of the Treasury Regulations. If distributions are being made to a surviving spouse as the sole designated Beneficiary, such spouse's remaining life expectancy for a year is the number in the Single Life Table corresponding to such spouse's age in the year. In all other cases, remaining life expectancy for a year is the number in the Single Life Table corresponding to the Beneficiary's age in the year specified in paragraph 2.1 or 2.2 and reduced by 1 for each subsequent year.
3. The "interest" in the annuity includes the amount of any outstanding rollover and transfer and the actuarial value of any other benefits provided under the annuity such as guaranteed death benefits.
4. For purposes of paragraphs 1 and 2 above, required distributions are considered to commence on the Participant's required beginning date or, if applicable, on the date distributions are required to begin to the surviving spouse under paragraph 2.2 above. However, if distributions start prior to the applicable date in the preceding sentence, on

an irrevocable basis (except for acceleration) under an Annuity Contract meeting the requirements of section 1.401(a)(9)-6 of the Treasury Regulations, then required distributions are considered to commence on the annuity starting date.

**39. Distribution of Amounts Held in a Rollover Account**

**Reference: Regs. §1.403(b)-6(i), Rev. Rul. 2004-12, 2004-1 C.B. 478**

**Sample Plan Language:**

If a Participant has a separate account attributable to rollover contributions to the Plan, to the extent permitted by the Plan, the Participant may at any time elect to receive a distribution of all or any portion of the amount held in the rollover account.

**40. Direct Rollovers**

**Reference: Code §403(b)(8), §401(a)(31), §402(c); Regs. §1.403(b)-7(b), 1.401(a)(31)-1; Notice 2001-57, 2001-2 C.B. 279; Notice 2002-3, 2002-1 C.B. 289; Notice 2005-5, 2005-3 I.R.B. 337; Notice 2006-44, 2006-20 I.R.B. 889; Rev. Rul. 2004-12, 2004-7 C.B. 478**

**Sample Plan Language:**

1. Notwithstanding any provision of the Plan to the contrary that would otherwise limit a Distributee's election, a Distributee may elect, at the time and in the manner prescribed by the Plan Administrator, to have any portion of an Eligible Rollover Distribution that is equal to at least \$500 paid directly to an Eligible Retirement Plan specified by the Distributee in a direct rollover. If an Eligible Rollover Distribution is less than \$500, a Distributee may not make the election described in the preceding sentence to roll over only a portion of the Eligible Rollover Distribution.
2. Definitions.
  - 2.1 Eligible Rollover Distribution. An Eligible Rollover Distribution is any distribution of all or any portion of the balance to the credit of the Distributee, except that an Eligible Rollover Distribution does not include:
    - (a) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the Distributee or the joint lives (or joint life expectancies) of the Distributee and the Distributee's designated beneficiary, or for a period of 10 years or more;
    - (b) any distribution to the extent such distribution is required under section 401(a)(9) of the Internal Revenue Code;

- (c) any hardship distribution;
- (d) the portion of any other distribution(s) that is not includible in gross income (determined without regard to the exclusion for net unrealized appreciation with respect to employer securities); and
- (c) any distribution(s) that is reasonably expected to total less than \$200 during a year.

A portion of a distribution shall not fail to be an Eligible Rollover Distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in section 408(a) or 408(b) of the Internal Revenue Code, or to a qualified defined contribution plan described in section 401(a) or 403(a) of the Internal Revenue Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

2.2 Eligible Retirement Plan. An Eligible Retirement Plan is a qualified plan described in section 401(a) of the Internal Revenue Code, an annuity plan described in section 403(a) of the Internal Revenue Code, an annuity contract described in section 403(b) of the Internal Revenue Code, an individual retirement account described in section 408(a) of the Internal Revenue Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code, or an eligible plan under section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan, that accepts the Distributee's Eligible Rollover Distribution. The definition of Eligible Retirement Plan shall also apply in the case of a distribution to a surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order as defined in section 414(p) of the Internal Revenue Code.

2.3 Distributee. A Distributee includes an employee or former employee. In addition, the employee's or former employee's surviving spouse and the employee's or former employees' spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in section 414(p) of the Internal Revenue Code, are Distributees with regard to the interest of the spouse of former spouse. If elected by the employer in section \_\_\_\_ of the Adoption Agreement, a Distributee also includes the Participant's nonspouse designated beneficiary under section \_\_\_\_ of the Plan. In the case of a nonspouse beneficiary, the Direct Rollover may be made only to an individual retirement account or annuity described in section 408(a) or section 408(b) ("IRA") that is established on behalf of the designated beneficiary and that will be treated as an inherited IRA pursuant to the provisions of section 402(c)(11) of the Internal Revenue Code. Also, in this

case, the determination of any required minimum distribution under section 401(a)(9) of the Internal Revenue Code that is ineligible for rollover shall be made in accordance with IRS Notice 2007-7, Q&A-17 and 18, 2007 I.R.B. 395.

**(Note to reviewer: The first blank should be filled in with the section number of the Adoption Agreement where the employer may elect to offer direct rollovers to nonspouse beneficiaries. The second blank should be filled in with the section number of the plan corresponding to Sample Plan Provision #36 or #38.)**

2.4 Direct Rollover. A Direct Rollover is a payment by the Plan to the eligible retirement plan specified by the Distributee.

3. Automatic Rollovers. In the event of a mandatory distribution greater than \$1,000, in accordance with the provisions of section \_\_\_ of the Plan, if the Participant does not elect to have such distribution paid directly to an Eligible Retirement Plan specified by the Participant in a Direct Rollover or to receive the distribution directly, then the Plan Administrator will pay the distribution in a Direct Rollover to an individual retirement plan designated by the Plan Administrator. For purposes of determining whether a mandatory distribution is greater than \$1,000, the portion of the Participant's distribution attributable to any rollover contribution is included.

**(Note to reviewer: the first blank should be filled in with the plan section number which corresponds to the mandatory distribution provisions of Sample Plan Provision #33.)**

4. The Plan Administrator shall provide, within a reasonable time period before making an Eligible Rollover Distribution, an explanation to the Participant of his or her right to elect a Direct Rollover and the income tax withholding consequences of not electing a Direct Rollover.

5. Roth Elective Deferrals.

5.1 A Direct Rollover of a distribution from a Roth Elective Deferral Account under the Plan will only be made to another Roth Elective Deferral Account under an applicable retirement plan described in section 402A(e)(1) or to a Roth IRA described in section 408A, and only to the extent the rollover is permitted under the rules of section 402(c).

5.2 The Plan will not provide for a Direct Rollover (including an automatic rollover) for distributions from a Participant's Roth Elective Deferral Account if the amount of the distributions that are Eligible Rollover Distributions are reasonably expected to total less than \$200 during a year. In addition, any distribution from a Participant's Roth Elective Deferral Account is not taken into account in determining whether distributions from a Participant's other Accounts are reasonably expected to total less than \$200 during a year. However, Eligible Rollover Distributions from a Participant's Roth Elective Deferral Account are taken into account in determining whether the total amount of the Participant's

account balances under the plan exceeds \$1,000 for purposes of mandatory distributions from the Plan.

- 5.3 The provisions of the Plan that allow a Participant to elect a Direct Rollover of only a portion of an Eligible Rollover Distribution but only if the amount rolled over is at least \$500 is applied by treating any amount distributed from the Participant's Roth Elective Deferral Account as a separate distribution from any amount distributed from the Participant's other accounts in the plan, even if the amounts are distributed at the same time.

## **Section 7. Hardship Distributions**

### **41. Hardship Distributions of Elective Deferrals**

**Reference: Regs. §1.403(b)-6(d)(2), §1.401(k)-1(d)(3); IRS Notice 2007-7, Q&A-5**

#### **Sample Plan Language:**

1. If elected in the Adoption Agreement, distribution of Elective Deferrals may be made to a Participant in the event of hardship. A hardship distribution may only be made on account of an immediate and heavy financial need of the Participant and where the distribution is necessary to satisfy the immediate and heavy financial need.
2. The following are the only financial needs considered immediate and heavy: expenses incurred or necessary for medical care, described in Code section 213(d), of the Participant, the Participant's spouse or dependents, or the Participant's primary beneficiary (as defined in Q&A-5 of IRS Notice 2007-7); the purchase (excluding mortgage payments) of a principal residence for the Participant; payment of tuition and related educational fees for the next 12 months of post-secondary education for the Participant, the Participant's spouse, children or dependents, or the Participant's primary beneficiary; payments necessary to prevent the eviction of the Participant from, or a foreclosure on the mortgage of, the Employee's principal residence; payments for funeral or burial expenses for the Participant deceased parent, spouse, child or dependent, or the Participant's primary beneficiary; and expenses to repair damage to the Participant's principal residence that would qualify for a casualty loss deduction under Code section 165 (determined without regard to whether the loss exceeds 10 percent of adjusted gross income).
3. A distribution will be considered as necessary to satisfy an immediate and heavy financial need of the Participant only if:
  - 3.1 The distribution is not in excess of the amount of the immediate and heavy financial need (including amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution);
  - 3.2 The Participant has obtained all distributions, other than hardship distributions, and all nontaxable loans under all plans maintained by the Employer; and

- 3.3 All plans maintained by the Employer provide that the Participant's Elective Deferrals (and Employee Contributions) will be suspended for 6 months after the receipt of the hardship distribution.

**Sample Adoption Agreement Language:**

Section \_\_\_\_\_, Hardship Distributions,

shall apply

shall not apply

**Section 8. Plan Loans**

**42. Loans to Participants**

**Reference: Regs. §1.403(b)-6(f), Code §72(p), Regs. §1.72(p)-1**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, the Plan will permit loans to Participants and Beneficiaries.
2. No loan to any Participant or Beneficiary can be made to the extent that such loan when added to the outstanding balance of all other loans to the Participant or Beneficiary would exceed the lesser of (a) \$50,000 reduced by the excess (if any) of the highest outstanding balance of loans during the one year period ending on the day before the loan is made, over the outstanding balance of loans from the plan on the date the loan is made, or (b) one-half the present value of the nonforfeitable accrued benefit of the Participant or, if greater, the total accrued benefit up to \$10,000. For the purpose of the above limitation, all loans from all plans of the Employer and Related Employers are aggregated.
3. Any loan shall by its terms require that repayment (principal and interest) be amortized in level payments, not less frequently than quarterly, over a period not extending beyond five years from the date of the loan. If such loan is used to acquire a dwelling unit which within a reasonable time (determined at the time the loan is made) will be used as the principal residence of the Participant, the amortization period shall not extend beyond 15 years from the date of the loan.

**(Note to reviewer: With respect to loans used to acquire a principal residence, amortization periods other than 15 years are permissible.)**

4. An assignment or pledge of any portion of the Participant's interest in the plan and a loan, pledge, or assignment with respect to any insurance contract purchased under the plan, will be treated as a loan under this paragraph.

5. Repayment of any loan shall be through payroll withholding, unless another method of repayment is elected in the Adoption Agreement.

**Sample Adoption Agreement Language:**

Section \_\_\_\_\_, Plan Loans,

shall apply

shall not apply

Loan Repayment Method

Plan loans shall be repaid by [specify repayment method].

**Section 9. Rollover Contributions, Transfers, Exchanges**

**43. Rollover Contributions to the Plan**

**Reference: Regs. §1.403(b)-10**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, the Plan will accept rollover contributions as provided in this section.
2. Eligible Rollover Contributions. An Employee who is a Participant who is entitled to receive an Eligible Rollover Distribution from another Eligible Retirement Plan may request to have all or a portion of the Eligible Rollover Distribution paid to the Plan. Such rollover contributions shall be made in the form of cash only. The Plan Administrator may require such documentation from the distributing plan as it deems necessary to effectuate the rollover in accordance with section 402 of the Internal Revenue Code and to confirm that such plan is an Eligible Retirement Plan.
3. Eligible Rollover Distribution. For purposes of section (a), an Eligible Rollover Distribution means any distribution of all or any portion of a Participant's benefit under another Eligible Retirement Plan, except that an Eligible Rollover Distribution does not include (1) any installment payment for a period of 10 years or more, (2) any distribution made upon hardship, or (3) for any other distribution, the portion, if any, of the distribution that is a required minimum distribution under section 401(a)(9) of the Code.
4. Eligible Retirement Plan. An Eligible Retirement Plan means a qualified trust described in section 401(a) of the Internal Revenue Code, an annuity plan described in section 403(a) or 403(b) of the Internal Revenue Code, an individual retirement account described in section 408(a) of the Internal Revenue Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code, or an eligible

governmental plan described in section 457(b) of the Internal Revenue Code.

5. Roth Rollovers.

5.1 The Plan will accept rollovers of Roth Elective Deferrals only if the Employer has elected in the Adoption Agreement to permit Roth Elective Deferrals.

5.2 If provided by the Employer in the Adoption Agreement, the plan will accept a rollover contribution to a Roth Elective Deferral account only if it is a direct rollover from another Roth elective deferral account under an applicable retirement plan described in section 402A(e)(1) of the Internal Revenue Code and only to the extent the rollover is permitted under the rules of section 402(c) of the Internal Revenue Code.

6. Information Regarding Participant Basis Required. A rollover of an Eligible Rollover Distribution that includes after-tax employee contributions or Roth Elective Deferrals will only be accepted if the Plan Administrator obtains information regarding the Participant's tax basis under section 72 of the Internal Revenue Code in the amount rolled over.

7. Separate Accounts. Separate accounts shall be established and maintained for the Participant for any Eligible Rollover Distribution, and for the after-tax portion of any such Eligible Rollover Distribution, paid to the Plan.

**Sample Adoption Agreement Language:**

Direct Rollovers (other than Roth Elective Deferrals):

The Plan will accept a direct rollover of an Eligible Rollover Distribution (Other than Roth Elective Deferrals) from: (Check each that applies or none. Note that if the Plan accepts a direct rollover from a qualified plan, choose only one of the first two choices below.)

a qualified plan described in section 401(a) or 403(a) of the Internal Revenue Code, excluding after-tax employee contributions.

a qualified plan described in section 401(a) or 403(a) of the Internal Revenue Code, including after-tax contributions.

an annuity contract described in section 403(b) of the Internal Revenue Code.

an eligible governmental plan under section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

Direct Rollovers of Roth Elective Deferrals:

If the Plan permits Participants to make Roth Elective Deferrals, the Plan may accept a direct rollover of an Eligible Rollover Distribution of Roth Elective Deferrals from a designated Roth Elective Deferral account under:

- a qualified plan described in section 401(a) of the Internal Revenue Code.
- an annuity contract described in section 403(b) of the Internal Revenue Code.

**Participant Rollover Contributions from Other Plans:**

The Plan will accept participant rollovers of Eligible Rollover Distributions from:

- a qualified plan described in section 401(a) or 403(a) of the Internal Revenue Code, excluding after-tax employee contributions.
- an annuity contract described in section 403(b) of the Internal Revenue Code, excluding after-tax contributions.
- an eligible plan under section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

**Participant Rollover Contributions from IRAs:**

The Plan  will  will not accept a participant rollover contribution of the portion of a distribution from an individual retirement account or annuity described in section 408(a) or 408(b) of the Internal Revenue Code that is eligible to be rolled over and would otherwise be includible in gross income. The Plan will not accept a participant rollover contribution of any portion of a distribution from a Roth IRA described in section 408(A)(b) of the Internal Revenue Code.

**44. Transfers Between Plans**  
**Reference: Regs. §1.403(b)-10(b)**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, plan-to-plan transfers for a Participant shall be permitted as provided in this section.
2. Transfers to the Plan. The Plan Administrator may accept a transfer of assets to the Plan for a Participant or Beneficiary only if –
  - 2.1 The transferor plan provides for direct transfers of assets;

<p>2.2 The Participant is an Employee or former Employee of the Employer;</p> <p>2.3 The Participant or Beneficiary whose assets are being transferred has an accumulated benefit immediately after the transfer at least equal to the accumulated benefit with respect to that Participant or Beneficiary immediately before the transfer; and</p> <p>2.4 The transferred amounts are subject to restrictions on distributions that are not less stringent than those imposed by the transferor plan.</p> <p>3. <u>Transfers to Another Plan.</u> The Plan Administrator may permit the transfer of assets to another plan for a Participant or Beneficiary only if –</p> <p>3.1 The Plan provides for direct transfers of assets pursuant to the Adoption Agreement;</p> <p>3.2 The Participant is an Employee or former Employee of the Employer;</p> <p>3.3 The Participant or Beneficiary whose assets are being transferred has an accumulated benefit immediately after the transfer at least equal to the accumulated benefit with respect to that participant or beneficiary immediately before the transfer; and</p> <p>3.4 The transferred amounts are subject to restrictions on distributions that are not less stringent than those imposed by the transferor Plan.</p> <p>4. The Plan Administrator may require such documentation from the other plan as it deems necessary to effectuate the transfer in accordance with the requirements of this section and section 1.403(b)-10(b)(3) of the Treasury Regulations and to confirm that any other plan involved in the transfer satisfies section 403(b) of the Code.</p> <p><b>Sample Adoption Agreement Language:</b></p> <p><input type="checkbox"/> The Plan will accept transfers from other plans.</p> <p><input type="checkbox"/> The Plan will permit transfers to other plans.</p>
<p><b>45. Exchanges Within the Plan</b> <b>Reference: Regs. §1.403(b)-10(b)</b></p> <p><b>Sample Plan Language:</b></p> <p>1. If elected in the Adoption Agreement, exchanges within the Plan shall be permitted as provided in this section.</p>

2. A Participant or Beneficiary is permitted to change the investment of his or her Account Balance among the Vendors under the Plan. However, an investment change that includes an investment with a Vendor that is not eligible to receive contributions (referred to below as an exchange) is not permitted unless the conditions in paragraphs (3) through (5) of this Section are satisfied.
3. The Participant or Beneficiary must have an Account Balance immediately after the exchange that is at least equal to the Account Balance of that Participant or Beneficiary immediately before the exchange (taking into account the Account Balance of that Participant or Beneficiary under both section 403(b) contracts or custodial accounts immediately before the exchange).
4. The exchanged amounts are subject to restrictions on distributions that are not less stringent than those imposed on the transferor plan.
5. The Employer enters into an agreement with the receiving Vendor for the other contract or custodial account under which the Employer and the Vendor will from time to time in the future provide each other with the following information:
  - 5.1 Information necessary for the resulting contract or custodial account, or any other contract or custodial accounts to which contributions have been made by the Employer, to satisfy section 403(b) of the Internal Revenue Code, including the following: (i) the Employer providing information as to whether the Participant's employment with the Employer is continuing, and notifying the Vendor when the Participant has had a Severance from Employment (for purposes of the distribution restrictions in Section \_\_\_\_\_); (ii) the Vendor notifying the Employer of any hardship withdrawal if the withdrawal results in a 6-month suspension of the Participant's right to make Elective Deferrals under the Plan; and (iii) the Vendor providing information to the Eligible Employer or other Vendors concerning the Participant's or Beneficiary's section 403(b) contracts or custodial accounts or qualified Employer plan benefits (to enable a Vendor to determine the amount of any plan loans and rollover accounts that are available to the Participant under the Plan to satisfy the financial need the hardship withdrawal rules); and

**(Note to reviewer: the blank should be filled in with the plan section number which corresponds to the Sample Plan Provision #32.)**

- 5.2 Information necessary in order for the resulting contract or custodial account and any other contract or custodial account to which contributions have been made for the Participant by the Employer to satisfy other tax requirements, including the following: (i) the amount of any plan loan that is outstanding to the Participant in order for a Vendor to determine whether an additional plan loan satisfies the loan limitations, so that any such additional loan is not a deemed distribution under section 72(p)(1) of the Internal Revenue Code; and (ii) information concerning the Participant's or Beneficiary's after-tax Employee contributions in order for a Vendor to determine the extent to which a distribution is includible in gross

income.

6. If any Vendor ceases to be eligible to receive Elective Deferrals under the Plan, the Employer will enter into an information sharing agreement as described in section 5 to the extent the Employer's contract with the Vendor does not provide for the exchange of information described in section 5.1 and 5.2.

**Sample Adoption Agreement Language:**

The plan will allow exchanges within the Plan.

**46. Transfers to Purchase Service Credit**  
**Reference: Regs. §1.403(b)-10(b)(4)**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, purchases of service credit shall be permitted under the Plan as provided in this section.
2. If a Participant is also a Participant in a tax-qualified defined benefit governmental plan (as defined in section 414(d) of the Internal Revenue Code) that provides for the acceptance of plan-to-plan transfers with respect to the Participant, then the Participant may elect to have any portion of the Participant's Account Balance transferred to the defined benefit governmental plan. A transfer may be made before the Participant has had a Severance from Employment.
3. A transfer may be made only if the transfer is either for the purchase of permissive service credit (as defined in section 415(n)(3)(A) of the Internal Revenue Code) under the receiving defined benefit governmental plan or a repayment to which section 415 of the Internal Revenue Code does not apply by reason of section 415(k)(3) of the Internal Revenue Code.

**Sample Adoption Agreement Language:**

The plan will allow transfers to purchase service credit.

**(Note to reviewer: This provision is designed for use by public schools.)**

**Section 10. Investment of Contributions**

**47. Investment**  
**Reference: Regs. §1.403(b)-8**

**Sample Plan Language:**

1. Manner of Investment. All Elective Deferrals or other amounts contributed to the Plan, all property and rights purchased with such amounts under the Funding Vehicles, and all income attributable to such amounts, property, or rights shall be held and invested in one or more Annuity Contracts or Custodial Accounts.
2. Exclusive Benefit. Each Custodial Account shall provide for it to be impossible, prior to the satisfaction of all liabilities with respect to Participants and their Beneficiaries, for any part of the assets and income of the Custodial Account to be used for, or diverted to, purposes other than for the exclusive benefit of Participants and their Beneficiaries.
3. Investment of Contributions. Each Participant or Beneficiary shall direct the investment of his or her Account among the investment options available under the Annuity Contract or Custodial Account in accordance with the terms of the Individual Agreements.
4. The Plan Administrator shall maintain a list of all Vendors under the Plan. Such list is hereby incorporated as part of the Plan, excluding those terms which are inconsistent with the Plan.
5. Each Vendor and the Plan Administrator shall exchange such information as may be necessary to satisfy section 403(b) of the Internal Revenue Code or other requirements of applicable law. In the case of a Vendor which is not eligible to receive Elective Deferrals under the Plan (including a Vendor which has ceased to be a Vendor eligible to receive Elective Deferrals under the Plan and a Vendor holding assets under the Plan), the Eligible Employer shall keep the Vendor informed of the name and contact information of the Plan Administrator in order to coordinate information necessary to satisfy section 403(b) of the Code or other requirements of applicable law.

**Sample Adoption Agreement Language:**

[ ] The Plan will allow each participant to direct the investment of his or her account.

**(Note to reviewer: A plan may designate a specific form of investment where an Employee does not elect an investment choice either as a result of automatic enrollment or because of the failure to submit an election of investment form to the Plan, Employer or Vendor.)**

**Section 11. Plan Termination and Amendment**

**48. Termination**  
**Reference: Regs. §1.403(b)-10(a)**

**Sample Plan Language:**

1. Termination of Contributions. The Employer has no obligation or liability whatsoever to maintain the Plan for any length of time and may discontinue contributions under the

Plan at any time without any liability hereunder for any such discontinuance.

2. **Termination.** The Employer reserves the authority to terminate this Plan at any time. Upon termination of the Plan and subject to any restrictions contained in the Individual Agreements, all Accounts will be distributed, provided that the Employer and any Related Employer on the date of termination do not make contributions to an alternative section 403(b) contract that is not part of the Plan during the period beginning on the date of plan termination and ending 12 months after the distribution of all assets from the Plan, except as permitted by Treasury Regulations.

**49. Amendment by Sponsor**

**Reference:** \_\_\_\_\_ of Rev. Proc. 2009-\_\_\_\_\_

**Sample Plan Language:**

The Sponsor may amend any part of the Plan. For purposes of Sponsor amendments, the mass submitter shall be recognized as the agent of the Sponsor. If the Sponsor does not adopt the amendments made by the mass submitter, it will no longer be identical to the mass submitter Plan.

**50. Amendment by Adopting Employer**

**Reference:** \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_

**Sample Plan Language:**

An Employer that amends the Plan, other than to change the choice of options or procedures in the Adoption Agreement or to add certain sample or model amendments published by the Internal Revenue Service which specifically provide that their adoption will not cause the Plan to be treated as individually designed, will no longer participate in this section 403(b) prototype plan and will be considered to have an individually designed 403(b) plan.

**Section 12. Other Plan Provisions**

**51. Domestic Relations Orders and Qualified Domestic Relations Orders**

**Reference:** Regs. §1.403(b)-10(c), Code §414(p)

**Sample Plan language:**

**(Note to reviewer: The following paragraph is written for use by governmental and nonelecting church plans and, if used by other plans, must be revised to be limited to cases in which the domestic relations order is “qualified” under section 414(p) of the Code.)**

If a judgment, decree, or order (including approval of a property settlement agreement) that

relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State (“domestic relations order”), then the amount of the Participant’s Account Balance shall be paid in the manner and to the person or persons so directed in the domestic relations order. Such payment shall be made without regard to whether the Participant is eligible for a distribution of benefits under the Plan. The Plan Administrator shall establish reasonable procedures for determining the status of any such decree or order and for effectuating distribution pursuant to the domestic relations order.

**Sample Plan Language:**

**(Note to reviewer: The following paragraph is written for use for a plan other than a governmental or nonelecting church plan for situations involving domestic relations orders that are “qualified” under section 414(p) of the Code.)**

If a judgment, decree, or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State (“domestic relations order”), then the amount of the Participant’s Account Balance shall be paid only if such domestic relations order is determined to be a qualified domestic relations order as defined in section 414(p) of the Internal Revenue Code, or any domestic relations order entered before January 1, 1985.

**(Note to Reviewer: The sample provision requires the Plan Administrator to comply with a domestic relations order entered before January 1, 1985, regardless of whether payment of benefits pursuant to the order has commenced as of such date. The Plan may provide instead that a domestic relations order entered before January 1, 1985, will be treated as a qualified domestic relations order if payment of benefits pursuant to the order has commenced as of such date, and may be treated as a qualified domestic relations order if payment of benefits pursuant to the order has not commenced as of such date, even though the order does not satisfy the requirements of section 414(p) of the Internal Revenue Code.)**

**52. IRS Levy**

**Sample Plan Language:**

The Plan Administrator may pay from a Participant's or Beneficiary's Account Balance the amount that the Plan Administrator finds is lawfully demanded under a levy issued by the Internal Revenue Service with respect to that Participant or Beneficiary or is sought to be collected by the United States Government under a judgment resulting from an unpaid tax assessment against the Participant or Beneficiary.

**53. Mistaken Contributions**

**Sample Plan Language:**

If any contribution (or any portion of a contribution) is made to the Plan by a good faith mistake of fact, then within one year after the payment of the contribution, and upon receipt in good order of a proper request approved by the Plan Administrator, the amount of the mistaken contribution (adjusted for any income or loss in value, if any, allocable thereto) shall be returned directly to the Participant or, to the extent required or permitted by the Plan Administrator, to the Employer.

**54. USERRA - Military Service Credit**  
**Reference: Code §414(u), Rev. Proc. 96-49**

**Sample Plan Language:**

Notwithstanding any provision of this plan to the contrary, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with section 414(u) of the Internal Revenue Code.

**Section 13. Adoption Agreement Requirements**

**55. Adoption Agreement Requirements—All Plans**  
**Reference: \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_**

**Pursuant to section \_\_\_\_\_ of Revenue Procedure \_\_\_\_\_, each Adoption Agreement must contain plan language which satisfies the following requirements:**

1. The Adoption Agreement must indicate whether --
  - 1.1 The Plan is a governmental plan as defined in section 414(d) of the Internal Revenue Code;
  - 1.2 The Plan is a church plan as defined in § 414(e) of the Internal Revenue Code for which the election under § 410(d) of the Internal Revenue Code has not been made (a “nonelecting church plan”); or
  - 1.3 The adopting employer is an organization described in section 501(c)(3) of the Internal Revenue Code and the plan is not a governmental plan as defined in § 414(d) of the Internal Revenue Code or a nonelecting church plan.
2. The Adoption Agreement must allow the adopting employer to add overriding plan language, if necessary, to satisfy section 415 of the Internal Revenue Code because of the required aggregation of multiple plans.
3. The Adoption Agreement must identify who is responsible for administering the various functions under the Plan and maintaining a list of all Vendors (see Sample Plan

Provision #21).

4. The Adoption Agreement must contain a dated employer signature line. The employer must complete a new signature page if it modifies any prior elections or makes new elections in its Adoption Agreement.
5. The Adoption Agreement must state that it is to be used with a single specific basic plan document.
6. The Adoption Agreement must contain a cautionary statement to the effect that the failure to properly fill out the Adoption Agreement may result in loss of favorable tax treatment for this Plan.
7. The Adoption Agreement must state that the sponsor will inform the adopting employer of any amendments made to the Plan or of the discontinuance or abandonment of the Plan.
8. The Adoption Agreement must include the name, address and telephone number of the sponsor or the sponsor's authorized representative for inquiries by adopting employers regarding the adoption of the Plan, the meaning of plan provisions, or the effect of the opinion letter.

## **PART II. ADDITIONAL PROVISIONS FOR EMPLOYER CONTRIBUTIONS AND EMPLOYEE CONTRIBUTIONS**

**Part II provides additional sample plan language for section 403(b) prototype plans that include contributions other than elective deferrals.**

**Section 1.403(b)-5(a) of the Treasury Regulations provides that nonelective contributions (i.e., employer contributions or after-tax employee contributions) to a section 403(b) plan must satisfy certain nondiscrimination requirements in the same manner as a plan under section 401(a) of the Code. Specifically, nonelective contributions must satisfy the nondiscrimination requirements under section 401(a)(4) of the Code (relating to nondiscrimination in contributions and benefits) taking section 401(a)(5) into account, section 401(a)(17) (limiting the amount of compensation that can be taken into account), section 401(m) (relating to matching and employee contributions), and section 410(b) (relating to minimum coverage) in the same manner as a qualified plan under section 401(a).**

**Under the regulations, the requirements identified above do not apply to governmental plans or nonelecting church plans, except that the section 401(a)(17) compensation limit applies to all plans except plans of churches and qualified church-controlled organizations as described in § 3121(w)(3). However, section \_\_\_\_\_ of Revenue Procedure \_\_\_\_\_ provides that, for purposes of the section 403(b) prototype program, all section 403(b) prototype plans must comply with section 401(a)(17) of the Code.**

**Section 1. Definitions**

**56. Compensation**

**Reference: Code §414(s), §401(a)(17); Regs. §1.401(a)(4)-12, §1.401(a)(17)-1, §1.414(s)-1; Regs. §1.415(c)-2; \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_**

**(Note to reviewer: Standardized section 403(b) plans that include employer nonelective contributions must define compensation as total compensation. Total compensation means a definition of compensation that includes all compensation within the meaning of section 415(c)(3) (disregarding section 415(c)(3)(E)) and excludes all other compensation, or that otherwise satisfies section 414(s) under section 1.414(s)-1(c).**

**Nonstandardized § 403(b) plans may allow the adopting employer to elect an alternative definition of compensation, provided that, for purposes of determining the amount of employer nonelective contributions, compensation is limited pursuant to section 401(a)(17), regardless of whether the plan is a plan of a church or a qualified church-controlled organization as described in § 3121(w)(3). Thus, any of the definitions of compensation listed below for organizations exempt from tax under section 501(c)(3) to satisfy section 414(s) may, but are not required to, be used in a nonstandardized plan.)**

**Sample Plan Language:**

1. “Compensation” means compensation as selected in the Adoption Agreement. Except as provided elsewhere in this Plan, Compensation shall include only that compensation which is actually paid to the Participant during the Plan Year.
2. Notwithstanding the above, if elected by the Employer in the Adoption Agreement, Compensation shall not include any amount which is contributed by the Participant and which is not includible in the gross income of the Participant under section 125, 132(f)(4), 402(e)(3), 402(h)(1)(B), or 403(b) of the Internal Revenue Code.
3. The annual compensation of each Participant taken into account in determining allocations shall not exceed \$245,000, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after 2009.

**(Note to reviewer: Section 401(a)(17) of the Code limits the compensation taken into account in determining contributions to \$200,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for 2009 is \$245,000 (see IRS Notice 2008-102).)**

**Sample Adoption Agreement Language:**

Compensation will mean all of each Participant's:

[ ] Wages, tips, and other compensation as reported on Form W-2.

- Section 3401(a) wages.
- 415 safe-harbor compensation (as defined in section 1.415(c)-2(d) of the Treasury Regulations), which includes contributions (other than Roth Elective Deferrals) made pursuant to a Compensation Reduction Election which are not includible in the gross income of the participant under section 125, 132(f), 402(e)(3), 402(h)(1)(B) or 403(b) of the Internal Revenue Code.
- Check here if the Employer chooses to exclude contributions (other than Roth Elective Deferrals) made pursuant to a Compensation Reduction Election which are not includible in the gross income of the participant under section 125, 132(f), 402(e)(3), 402(h)(1)(B) or 403(b) of the Internal Revenue Code.
- Check here if the Employer chooses to include deemed section 125 compensation (as defined in § 1.415(c)-2(g)(6) of the Treasury Regulations) in section 125 for purposes of the definition of compensation.
- Check here if the Employer chooses not to include deemed section 125 compensation (as defined in section 1.415(c)-2(g)(6) of the Regulations) in section 125 for purposes of the definition of compensation.

**57. After-Tax Employee Contribution**

**Reference: Code §401(m)**

**Sample Plan Language**

"After-Tax Employee Contribution" means any contribution to the Plan (other than Roth Elective Deferrals, rollovers or transfers) made by the Employee and includible in gross income that is maintained under a separate account to which earnings and losses are allocated.

**58. Highly Compensated Employee**

**Reference: Code §414(q); Regs. §1.414(q)-1T, Notice 97-45, 1997-2 C.B. 296**

**(Note to reviewer: A governmental plan or nonelecting church plan is not required to include a definition of "Highly Compensated Employee.")**

**Sample Plan Language:**

1. "Highly Compensated Employee" means any Employee who for the preceding year had compensation from the Employer in excess of \$110,000 and, if the Employer so elects, was in the top-paid group for the preceding year. This compensation limitation is adjusted at the same time and in the same manner as under section 415(d) of the Internal Revenue Code for periods after 2009, except that the base period is the calendar quarter

ending September 30, 1996.

**(Note to reviewer: Section 414(q)(1)(B) of the Code limits the compensation taken into account to \$80,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for 2009 is \$110,000 (see IRS Notice 2008-102).)**

2. For this purpose, the applicable year of the Plan for which a determination is being made is called a determination year and the preceding 12-month period is called a look-back year.
3. A Highly Compensated former Employee is based on the rules applicable to determining Highly Compensated Employee status as in effect for that determination year, in accordance with section 1.414(q)-1T, A-4 of the Treasury Regulations and IRS Notice 97-45.

**(Note to reviewer: Notice 97-45 provides for additional elections under the amended section 414(q) that may be made. These elections are the top-paid group election and the calendar year data election. Under Notice 97-45, an Employer may make a top-paid group election for a determination year. The effect of this election is that an Employee with compensation in excess of \$80,000 (as adjusted) for the look-back year is a Highly Compensated Employee only if the Employee was in the top-paid group for the look-back year. An Employer may also make a calendar year data election for a determination year. The effect of this election is that the look-back year is the calendar year beginning with or within the look-back year. These elections, once made, apply for all subsequent determination years unless changed by the Employer.)**

**An Employer making one of the elections is not required also to make the other election. However, if both elections are made, the look-back year in determining the top-paid group must be the calendar year beginning with or within the look-back year. These elections must apply consistently to the determination years of all section 403(b) plans of the Eligible Employer.**

**If a section 403(b) plan contains the definition of Highly Compensated Employee and an Employer makes or changes either a top-paid group election or a calendar year data election for a determination year, the plan must reflect the choices made. Any retroactive amendments must reflect the choices made in the operation of the plan for each determination year.)**

**Sample Adoption Agreement Language (check one or both):**

- In determining who is a Highly Compensated Employee the Employer makes a top-paid group election. The effect of this election is that an Employee with compensation in excess of \$110,000 (as adjusted for periods after 2009) for the look-back year is a Highly Compensated Employee only if the Employee was in the top-paid group for the look-back year.

[ ] In determining who is a Highly Compensated Employee the Employer makes a calendar year data election. The effect of this election is that the look-back year is the calendar year beginning with or within the look-back year.

**59. Hour of Service**

**Reference: DOL Regs. §2530.200b-2, 2530.200b-3, Code §410(a)(5)(E), §411(a)(6)(E)**

**Sample Plan Provision:**

1. “Hour of Service” means:

1.1 Each hour for which an Employee is paid, or entitled to payment, for the performance of duties for the Employer. These hours will be credited to the Employee for the computation period in which the duties are performed; and

1.2 Each hour for which an Employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. No more than 501 hours of service will be credited under this paragraph for any single continuous period (whether or not such period occurs in a single computation period). Hours under this paragraph will be calculated and credited pursuant to § 2530.200b-2 of the Department of Labor Regulations which is incorporated herein by this reference; and

1.3 Each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the Employer. The same hours of service will not be credited both under paragraph 1.1 or paragraph 1.2, as the case may be, and under this paragraph 1.3. These hours will be credited to the Employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement or payment is made.

2. Hours of service will be credited for employment with other Related Employers.

**(Note to reviewer: A section 403(b) prototype plan does not need to include definitions of “Hour of Service” and “Year of Eligibility Service” if the plan does not give adopting eligible employers an option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan. Also see LRM #72.)**

**60. Year of Eligibility Service**

**Reference: Code §410(a)(3)(A), §411(a)(5)(A)**

**Sample Plan Language:**

“Year of Eligibility Service” means a computation period during which an Employee completes at least 1,000 Hours of Service. The initial computation period is the 12-consecutive month period beginning on the date the Employee first performs an Hour of Service for the Employer (employment commencement date). The succeeding computation periods are, as elected by the employer in the Adoption Agreement, either the 12-consecutive month periods commencing with the first anniversary of the Employee's employment commencement date or Plan Years, beginning with the first Plan Year which commences prior to the first anniversary of the Employee's employment commencement date regardless of whether the Employee is entitled to be credited with 1,000 Hours of Service during the initial computation period. An Employee who is credited with 1,000 Hours of Service in both the initial computation period and the first Plan Year which commences prior to the first anniversary of the Employee's employment commencement date will be credited with two Years of Eligibility Service.

**Sample Adoption Agreement Language:**

For purposes of whether an Employee has a Year of Eligibility Service, the computation periods subsequent to the initial computation period will be:

- The 12-consecutive month periods commencing on the first anniversary of the Employee's employment commencement date and succeeding anniversaries.
- Plan Years beginning with the first Plan Year commencing after the Employee's employment commencement date.

**(Note to reviewer: A section 403(b) prototype plan does not need to include definitions of “Hour of Service” and “Year of Eligibility Service” if the plan does not give adopting eligible employers the option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan. Also see LRM #72.)**

\* \* \*

**Section 4. Contributions**

**61. Nonforfeitable Contributions**

**Reference:** \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_

**Sample Plan Language:**

All contributions under the Plan are nonforfeitable.

**62. Contribution Formula.**

**Reference:** Regs. §1.401(a)(4)-2(b)(2); \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_

**(Note to reviewer: Standardized section 403(b) plans must satisfy the safe harbor contained in section 1.401(a)(4)-2(b)(2) of the regulations. Therefore, except for Employer matching contributions or elective deferrals, a standardized section 403(b) prototype plan must provide that contributions must be a uniform percentage of compensation, excluding compensation in excess of the limitation under section 401(a)(17) (see Sample Plan Provision #56 for the definition of compensation.**

**A nonstandardized plan may also use one of the formulas below or may provide an alternative formula including a contribution formula that requires up to 1,000 hours of service.**

**Sample Adoption Agreement Language:**

Discretionary Contribution Formula:

Employer contributions will be allocated to each Participant who either completes more than 500 Hours of Service during the plan year or who is employed on the last day of the Plan Year in the ratio that such Participant's Compensation bears to the compensation of all Participants to whom Employer contributions are allocated.

Definite Contribution Formula:

For each Plan Year, the Employer will contribute for each Participant who either completes more than 500 hours of service during the plan year or is employed on the last day of the plan year an amount equal to \_\_\_\_\_% of such Participant's compensation.

**63. Nonelective Contributions for Former Employees**

**Reference: Regs. §1.403(b)-4(d)**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, the Employer will make nonelective contributions for former employees. Such contributions are subject to the limits on Annual Additions set forth in section \_\_\_\_.

**(Note to reviewer. The blank should be filled in with the section corresponding to Sample Plan Provision #31.)**

2. A former Employee is deemed to have monthly Includible Compensation for the period through the end of the taxable year of the Employee in which he or she ceases to be an Employee and through the end of the next 5 taxable years. The amount of the monthly Includible Compensation is equal to one-twelfth of the former Employee's Includible Compensation during the Employee's most recent year of service. No contribution shall be made after the end of the Employee's fifth taxable year following the year in which

the Employee terminated employment.

**Sample Adoption Agreement Language:**

[ ] Nonelective contributions of [\_\_\_\_ percent] of compensation shall be made through the end of the \_\_\_\_ [INSERT: first, ..., fifth] taxable year of the Employee following the year in which the Employee terminated employment.

**64. Matching Contributions**

**Reference: Code §401(m) and Regs §1.401(m)-1**

**(Note to reviewer: governmental plans and nonelecting church plans are not subject to section 401(m) of the Code.)**

**Sample Plan Language:**

If elected by the Employer in the Adoption Agreement, the Employer will make Matching Contributions to the Plan.

**Sample Adoption Agreement Language:**

The Employer will make Matching Contributions to the Plan on behalf of [SELECT ONE]:

- [ ] a. All Participants
- [ ] b. All Participants who are Non-highly Compensated Employees who make [ELECT ONE OR BOTH]:
  - [ ] a. Elective Deferrals
  - [ ] b. After-Tax Employee Contributions to the Plan.

The Employer shall contribute and allocate to each Participant's Matching Contribution Account an amount equal to:

- [ ] a. [NOT MORE THAN 100] percent of the Participant's Elective Deferrals.
- [ ] b. [NOT MORE THAN 100] percent of the Participant's After-Tax Employee Contributions.

The Employer shall not match amounts provided above in excess of

[\$ ], or in excess of [ ] percent, of the Participant's Compensation.

**(Note to reviewer: Except for governmental and nonelecting church plans, if a plan**

**includes a tiered matching formula, then the rate of Matching Contributions cannot increase as the rate of Elective Deferrals or Employee Contributions increases.)**

**65. After-Tax Employee Contributions**  
**Reference: §411(c)(2), §411(a)(1)**

**Sample Plan Language:**

If elected in the Adoption Agreement, the Plan will accept After-Tax Employee Contributions. A separate account will be maintained for the After-Tax Employee Contributions of each Participant. Employee Contributions and earnings thereon are nonforfeitable at all times.

**Sample Adoption Agreement Language:**

[ ] The Plan will accept After-Tax Employee Contributions

**66. Limitations on Matching and After-Tax Employee Contributions**  
**Reference: Code §401(a)(4), Regs. §401(m)**

**(Note to reviewer: These nondiscrimination limitations are generally required in all plans (except governmental plans or nonelecting church plans) unless the Plan is designed to be an ACP Safe Harbor Plan.)**

**Sample Plan Language:**

1. Prior Year Testing.

1.1 The Actual Contribution Percentage ("ACP") for a Plan Year for Participants who are Highly Compensated Employees for each Plan Year and the prior year's ACP for Participants who were Non-Highly Compensated Employees for the prior Plan Year must satisfy one of the following tests:

- (a) The ACP for a Plan Year for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for Participants who were Non-Highly Compensated Employees for the prior Plan Year multiplied by 1.25; or
- (b) The ACP for a Plan Year for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for Participants who were Non-Highly Compensated Employees for the prior Plan Year multiplied by 2, provided that the ACP for Participants who are Highly Compensated Employees does not exceed the ACP for Participants who were Non-Highly Compensated Employees in the prior Plan Year by more than 2 percentage points.

- 1.2 For the first Plan Year this Plan permits any Participant to make Employee Contributions, provides for Matching Contributions or both, and this is not a successor plan, for purposes of the foregoing tests, the prior year's Non-Highly Compensated Employees' ACP shall be 3 percent unless the Employer has elected in the Adoption Agreement to use the Plan Year's ACP for these Participants.
2. Current Year Testing. If elected by the Employer in the adoption agreement, the ACP tests in (a) and (b), above, will be applied by comparing the current Plan Year's ACP for Participants who are Highly Compensated Employees for each Plan Year with the current Plan Year's ACP for Participants who are Non-Highly Compensated Employees. Once made, the Employer can elect Prior Year Testing for a Plan Year only if the Plan has used Current Year Testing for each of the preceding 5 Plan Years (or if lesser, the number of Plan Years the Plan has been in existence) or if, as a result of a merger or acquisition described in Code section 410(b)(6)(C)(i) of the Internal Revenue Code, the Employer maintains both a plan using Prior Year Testing and a plan using Current Year Testing and the change is made within the transition period described in section 410(b)(6)(C)(ii) of the Internal Revenue Code.
3. Special Rules.
  - 3.1. A Participant is a Highly Compensated Employee for a particular Plan Year if he or she meets the definition of a Highly Compensated Employee in effect for that Plan Year. Similarly, a Participant is a Non-Highly Compensated Employee for a particular Plan Year if he or she does not meet the definition of a Highly Compensated Employee in effect for that Plan Year.
  - 3.2. For purposes of this section, the Contribution Percentage for any Participant who is a Highly Compensated Employee and who is eligible to have Contribution Percentage Amounts allocated to his or her account under two or more plans or arrangements described in Code sections 401(a) or 403(b) of the Internal Revenue Code that are maintained by the Employer, shall be determined as if the total of such Contribution Percentage Amounts was made under each plan and arrangement. If a Highly Compensated Employee participates in two or more such plans or arrangements that have different plan years, all Contribution Percentage Amounts made during the Plan Year under all such plans and arrangements shall be aggregated.
  - 3.3. In the event that this Plan satisfies the requirements of Code sections 401(m), 401(a)(4) or 410(b) of the Internal Revenue Code only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this Plan, then this section shall be applied by determining the ACP of Employees as if all such plans were a single plan. If more than 10 percent of the Employer's Non-Highly Compensated Employees are involved in a plan coverage change as defined in Regulations section 1.401(m)-2(c)(4), then any adjustments to the Non-Highly Compensated

Employees' ACP for the prior year will be made in accordance with such Regulations, unless the Employer has elected in the adoption agreement to use the Current Year Testing method. Plans may be aggregated in order to satisfy Code section 401(m) only if they have the same Plan Year and use the same ACP testing method.

- 3.4. For purposes of the ACP test, After-Tax Employee Contributions are considered to have been made in the Plan Year in which contributed to the plan. Matching Contributions and Qualified Nonelective Contributions will be considered made for a Plan Year if made no later than the end of the 12-month period beginning on the day after the close of the Plan Year.

4. Definitions.

- 4.1 "Actual Contribution Percentage" ("ACP") means, for a specified group of Participants (either Highly Compensated Employees or Non-Highly Compensated Employees) for a Plan Year, the average of the Contribution Percentages of the Eligible Participants in the group.
- 4.2 "Contribution Percentage" means the ratio (expressed as a percentage) of the Participant's Contribution Percentage Amounts to the Participant's Compensation for the Plan Year.
- 4.3 "Contribution Percentage Amounts" means the sum of the Employee Contributions and Matching Contributions made under the Plan on behalf of the Participant for the Plan Year. If so elected in the Adoption Agreement the Employer may include Qualified Nonelective Contributions in the Contribution Percentage Amounts.
- 4.4 "Eligible Participant" means any Employee who is eligible to make an Employee Contribution, or to receive a Matching Contribution. If an Employee Contribution is required as a condition of participation in the Plan, any Employee who would be a Participant in the Plan if such Employee made such a contribution shall be treated as an eligible Participant on behalf of whom no Employee Contributions are made.
- 4.5 "Matching Contribution" means an Employer contribution made to this plan on behalf of a Participant on account of an Employee Contribution made by such Participant, or on account of a Participant's Elective Deferral under a plan maintained by the Employer.

**Sample Adoption Agreement Language:**

If this is not a successor plan, then, if checked [  ], for the first Plan Year this Plan permits any Participant to make Employee Contributions, provides for Matching Contributions or both, the ACP used in the ACP test for Participants who are Non-Highly Compensated Employees shall be such first Plan Year's ACP. (Do not check this box if the Employer has elected in the Adoption Agreement to use the Current Year Testing method.)

- [ ] If checked, this Plan is using the Current Year Testing method for purposes of the ACP test. (This box cannot be "unchecked" for a Plan Year unless (1) the Plan has used Current Year Testing for each of the preceding 5 Plan Years (or if lesser, the number of Plan Years the Plan has been in existence) or (2) if, as a result of a merger or acquisition described in Code section 410(b)(6)(C)(i), the Employer maintains both a plan using Prior Year Testing and a plan using Current Year Testing and the change is made within the transition period described in section 410(b)(6)(C)(ii).)

**67. Distribution of Excess Aggregate Contributions**

**Reference: Code §401(m)(6) and §4979 and Regs. §1.401(m)-2(b)**

**(Note to reviewer: governmental plans and nonelecting church plans are not subject to section 401(m) of the Code.)**

**(Excess Aggregate Contributions for a Plan Year must be distributed no later than 12 months after such Plan Year. However, any excess amounts distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose will be subject to a 10-percent excise tax under Code section 4979. This tax is imposed on the Employer with respect to such amounts.)**

**Sample Plan Language:**

1. Notwithstanding any other provision of the Plan, Excess Aggregate Contributions, plus any income and minus any loss allocable thereto, shall be distributed no later than 12 months after a Plan Year to Participants to whose accounts such Excess Aggregate Contributions were allocated for such Plan Year. Excess Aggregate Contributions are allocated to the Highly Compensated Employees with the largest Contribution Percentage taken into account in calculating the Actual Contribution Percentage test for the year in which the excess arose, beginning with the largest amount of such Contribution Percentage Amounts and continuing in descending order until all the Excess Aggregate Contributions have been allocated. If such Excess Aggregate Contributions are distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose, a 10-percent excise tax will be imposed on the Employer maintaining the Plan with respect to those amounts. Excess Aggregate Contributions shall be treated as Annual Additions under the Plan even if distributed.
2. Determination of Income or Loss. Excess Aggregate Contributions shall be adjusted for any income or loss. The income or loss allocable to Excess Aggregate Contributions allocated to each Participant is the income or loss allocable to the Participant's Employee Contribution account, Matching Contribution account, and, if applicable, Qualified Nonelective Contribution account for the Plan Year multiplied by a fraction, the numerator of which is such Participant's Excess Aggregate Contributions for the year and the denominator is the Participant's Account Balance(s) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan

Year.

3. Accounting for Excess Aggregate Contributions. Excess Aggregate Contributions allocated to a Participant shall be distributed on a pro-rata basis from the Participant's Employee Contribution account, Matching Contribution account, (and, if applicable, the Participant's Qualified Nonelective Contribution account).
4. Definitions.
  - 4.1 "Excess Aggregate Contributions" means, with respect to any Plan Year, the excess of:
    - (a) The aggregate Contribution Percentage Amounts taken into account in computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over
    - (b) The maximum Contribution Percentage Amounts permitted by the ACP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of their Contribution Percentages beginning with the highest of such percentages).

Such determination shall be made after first determining Excess Elective Deferrals.

**Sample Adoption Agreement Language:**

In computing the Actual Contribution Percentage, the Employer shall take into account, and include as Contribution Percentage Amounts:

- Qualified Nonelective Contributions under the Plan or any other plan of the Employer.

The amount of Qualified Nonelective Contributions that are made and taken into account as Contribution Percentage Amounts for purposes of calculating the Actual Contribution Percentage shall be:

- a. All such Qualified Nonelective Contributions.
- b. Such Qualified Nonelective Contributions that are needed to meet the Actual Contribution Percentage test. (Box b can only be checked if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

**68. Qualified Nonelective Contributions**

**Reference: Regs. §1.401(k)-2(a)(6), §1.401(k)-6 and §1.401(m)-2(a)(6)**

**(Note to reviewer: governmental plans and nonelecting church plans are not subject to**

**section 401(m) of the Code.)**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, the Employer may make Qualified Nonelective Contributions under the Plan on behalf of Employees.
2. In addition, if the Employer has elected in the Adoption Agreement to use the Current Year Testing method, in lieu of distributing Excess Aggregate Contributions, and to the extent elected by the Employer in the Adoption Agreement, the Employer will make Qualified Nonelective Contributions on behalf of Participants that are sufficient to satisfy the Actual Contribution Percentage test.
3. Qualified Nonelective Contributions will be allocated to participants who are Non-Highly Compensated Employees, as elected by the Employer in the Adoption Agreement, in the ratio which each such Participant's Compensation for the Plan Year bears to the total Compensation of all such Participants for such Plan Year.
4. Definitions.
  - 4.1 "Qualified Nonelective Contributions" means contributions (other than Matching Contributions) made by the Employer and allocated to Participants' accounts that the Participants may not elect to receive in cash until distributed from the Plan and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

**Sample Adoption Agreement Language:**

The Employer [ELECT ONE] [ ] will [ ] will not make Qualified Nonelective Contributions to the Plan. If the Employer does make such contributions to the Plan, then the amount of such contributions for each Plan Year shall be an amount determined by the Employer.

Allocation of Qualified Nonelective Contributions shall be made to the Accounts of [ELECT ONE]:

[ ] a. All Participants.

[ ] b. Only Participants who are Non-Highly Compensated Employees.

If the Employer is using Current Year Testing, in lieu of distributing Excess Aggregate Contributions, the Employer [ELECT ONE]

[ ] will

[ ] will not

make Qualified Nonelective Contributions to the Plan in an amount necessary to satisfy the ACP test.

**69. ACP Test Safe Harbor**

**Reference: Code §401(m)(11), Regs. §1.401(m)-3.**

**(Note to reviewers: This language is not required for governmental plans or nonelecting church plans.**

**This language is required only in a Plan offering a design-based safe harbor method for satisfying the ACP test (ACP "Safe Harbor Plan"). A Plan that satisfies the ACP test safe harbor must satisfy all the other applicable requirements of the Code, including the nondiscriminatory availability of benefits, rights, and features under section 401(a)(4), and the limitations of sections 401(a)(17), 401(a)(30), and 415.**

**The ACP test safe harbor requires that a plan meet the contribution and notice requirements and, in addition, satisfy a special limit on Matching Contributions. A plan providing for Employee Contributions, or Matching Contributions that fail to satisfy the ACP test safe harbor, must satisfy the regular ACP test under section 401(m)(2). See Regulations sections 1.401(m)-2(a)(5)(iv) and 1.401(m)-3 for details.)**

**Sample Plan Language:**

ACP Safe Harbor

1. Rules of Application

1.1 If the Employer has elected the ACP Safe Harbor option in the Adoption Agreement, the provisions of this section shall apply for the Plan Year and any provisions relating to the ACP test described in section 401(m)(2) of the Internal Revenue Code do not apply.

**(Note to reviewer: If Matching Contributions that do not satisfy the ACP Safe Harbor or Employee Contributions can be made under the Plan, then this language will have to be modified to satisfy the relevant portions of sample plan provisions using the Current Year Testing method and specifying which contributions will be used in the ACP test. See Regulations section 1.401(m)-2(a)(5)(iv) and section 1.401(m)-3.)**

1.2 To the extent that any other provision of the Plan is inconsistent with the provisions of this article, the provisions of this article govern.

2. Definitions.

2.1. "ACP Safe Harbor" is the method described in Section 3 of this article for

satisfying the ACP test of section 401(m)(2) of the Internal Revenue Code.

- 2.2 "Compensation" is defined in \_\_\_\_\_ of the Plan, except, for purposes of this article, no dollar limit, other than the limit imposed by section 401(a)(17)(B) of the Code, applies to the compensation of a Non-highly Compensated Employee.

**(Note to reviewer: The blank should contain the location of the Plan's definition of compensation that corresponds to Sample Plan Provision 56. However, solely for purposes of determining the compensation subject to a Participant's Compensation Reduction Election, the Plan may use an alternative definition to the one described above, provided such alternative definition is a reasonable definition within the meaning of section 1.414(s)-1(d)(2) of the Regulations and permits each Participant to elect sufficient Elective Deferrals to receive the maximum amount of Matching Contributions (determined using the definition of compensation described above) available to the Participant under the Plan.)**

- 2.4 "Eligible Employee" means an Employee eligible to make Elective Deferrals under the Plan for any part of the Plan Year or who would be eligible to make Elective Deferrals but for a suspension due to a hardship distribution or to statutory limitations, such as sections 402(g) and 415 of the Internal revenue Code.

**(Note to reviewer: The Plan may not condition an Eligible Employee's receipt of the ACP Safe Harbor Matching Contributions on completion of a certain number of hours during the Plan Year or on employment on a certain day during the Plan Year.)**

- 2.5 "Matching Contributions" are contributions made by the Employer on account of an Eligible Employee's Elective Deferrals.

### 3. ACP Safe Harbor.

#### 3.1 Safe Harbor Contributions.

- (a) Unless the Employer elects one of the alternatives in the Adoption Agreement, the Employer will contribute for the Plan Year a Safe Harbor Matching Contribution to the Plan on behalf of each Eligible Employee equal to (i) 100 percent of the amount of the Employee's Elective Deferrals that do not exceed 3 percent of the Employee's Compensation for the Plan Year, plus (ii) 50 percent of the amount of the Employee's Elective Deferrals that exceed 3 percent of the Employee's Compensation but that do not exceed 5 percent of the Employee's Compensation ("Basic Matching Contributions").
- (b) The Participant's accrued benefit derived from Safe Harbor Contributions may not be distributed earlier than Severance from Employment, age 59 ½, death, disability, or termination of the Plan without the establishment or maintenance of another defined contribution plan.

#### 3.2 Notice Requirement.

At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Eligible Employee a comprehensive notice of the Employee's rights and obligations under the Plan, written in a manner calculated to be understood by the average Eligible Employee. If an Employee becomes eligible after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice must be provided no more than 90 days before the Employee becomes eligible but not later than the date the Employee becomes eligible.

### 3.3 Election Periods.

In addition to any other election periods provided under the Plan, each Eligible Employee may make or modify a deferral election during the 30-day period immediately following receipt of the notice described in section 3.2 above.

#### **Sample Adoption Agreement Language:**

#### Section 4. ACP Safe Harbor Matching Contributions

[NO ADDITIONAL CONTRIBUTIONS ARE REQUIRED IN ORDER TO SATISFY THE REQUIREMENTS FOR A SAFE HARBOR. HOWEVER, IF THE EMPLOYER DESIRES TO MAKE MATCHING CONTRIBUTIONS OTHER THAN AS PROVIDED IN THE BASIC PLAN DOCUMENT, THEN COMPLETE THE FOLLOWING.]

For the Plan Year, the Employer will make additional ACP Safe Harbor Matching Contributions to the account of each Eligible Employee in the amount of [ELECT ONE]:

- a. \_\_\_\_ percent of the Employee's Elective Deferrals that do not exceed 6 percent of the Employee's Compensation for the Plan Year.
- b. \_\_\_\_ percent of the Employee's Elective Deferrals that do not exceed \_\_\_\_ percent of the Employee's Compensation for the Plan Year plus \_\_\_\_ percent of the Employee's Elective Deferrals thereafter, but no Matching Contributions will be made on Elective Deferrals that exceed 6 percent of Compensation. [THE NUMBER INSERTED IN THE THIRD BLANK CANNOT EXCEED THE NUMBER INSERTED IN THE FIRST BLANK.]
- c. the Employee's Elective Deferrals that do not exceed a percentage of the Employee's Compensation for the Plan Year. Such percentage is determined by the Employer for the year but in no event can exceed 4 percent of the Employee's Compensation.

**(Note to reviewer: Other formulas for ACP Safe Harbor Matching Contributions are permissible, provided (i) Matching Contributions are not made on Elective Deferrals in excess of 6 percent of Compensation (ii) the amount of Matching Contributions subject to**

**the Eligible Employer's discretion cannot exceed 4 percent of Compensation, (iii) no HCE can receive a greater rate of Matching Contributions than an NHCE at the same rate of Elective Deferrals, and (iv) the rate of Matching Contributions cannot increase as a Participant's Elective Deferrals increase.)**

**Section 6. Distribution Provisions**

**70. Requirement: Distribution Limitations for Employer Contributions**  
**Reference: Regs. §1.403(b)-6(b), (c)**

**Sample Plan Language:**

1. Custodial Account. Employer contributions held in a Custodial Account may not be distributed earlier than the earliest of the date on which the Participant has a Severance from Employment, dies, becomes disabled (within the meaning of section 72(m)(7) of the Internal Revenue Code), or attains age 59 ½.
2. Annuity Contract. Employer contributions held in an Annuity Contract issued after December 31, 2008, may not be distributed earlier than the earliest of the date on which the Participant has a Severance from Employment or upon the prior occurrence of an event as specified in the Adoption Agreement such as after a fixed number of years, attainment of a stated age, or disability.

**71. Distribution of After-Tax Employee Contributions**  
**Reference: Regs. §1.403(b)-6(b)**

**Sample Plan Language:**

After-Tax Employee Contributions. After-Tax Employee Contributions may be distributed at any time.

\* \* \*

**Section 14. Standardized Plan Provisions**

**72. Coverage**  
**Reference: \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_**

**Sample Adoption Agreement Language:**

With respect to any nonelective contributions under this plan, each Employee will be eligible to participate in the Plan, except the following:

- Employees who have not attained the age of \_\_\_\_ (cannot exceed 21).
- Employees who have not completed a Year of Eligibility Service.

**(Note to reviewer: A section 403(b) prototype plan that does not give adopting eligible employers an option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan does not have to include definitions of “Year of Eligibility Service” and “Hour of Service.” See LRM #59 and LRM #60.**

**Because all contributions under the plan must be immediately nonforfeitable, a section 403(b) prototype plan may require an employee to complete up to two years of eligibility service to be eligible for any nonelective contributions under the plan. If the year(s) of service required for eligibility with respect to nonelective contributions is or includes a fractional year, the plan may not require an employee to complete any specified number of hours of service to receive credit for such fractional year.)**

- [ ] Employees included in a unit of employees covered by a collective bargaining agreement between the employer and employee representatives, if retirement benefits were the subject of good faith bargaining and if two percent or less of the employees who are covered pursuant to that agreement are professional as defined in section 1.410(b)-9 of the Treasury Regulations. For this purpose, the term “employee representatives” does not include any organization more than half of whose members are employees who are owners, officers, or executives of the employer.
- [ ] Employees who are nonresident aliens (within the meaning of section 7701(b)(1)(B) of the Internal Revenue Code) and who receive no earned income (within the meaning of section 911(d)(2) of the Internal Revenue Code) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) of the Internal Revenue Code).
- [ ] Employees who became employees as the result of a transaction described in section 410(b)(6)(C) of the Internal Revenue Code. These employees will be excluded during the period beginning on the date of the transaction and ending on a date that is not later than the last day of the first plan year beginning after the date of the transaction.

For this purpose, “Employee” includes any Employee of the Employer and of any Related Employer that is an eligible employer within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations

### **73. Nondiscrimination**

**Reference: Regs. §1.401(a)(4)-4; \_\_\_\_\_ of Rev. Proc. \_\_\_\_\_**

**(Note to reviewer: All optional forms of benefit, ancillary benefits and other rights and features provided under a standardized plan must be made available to all Participants.)**

**Section 15. Nonstandardized Plan Provisions**

**74. Coverage and Nondiscrimination**

**Reference: Code §401(a)(4), §410(b); \_\_\_ of Rev. Proc. \_\_\_\_\_**

**(Note to reviewer: Except for eligibility for elective deferrals under the plan, a nonstandardized plan may exclude additional categories of Employees from participation; however, except for a governmental plan or a nonelecting church plan, the plan must satisfy on a continuing basis the requirements of sections 401(a)(4) and 410(b).)**

**75. Additional Adoption Agreement Requirements**

**Reference: Rev. Proc. \_\_\_\_\_**

**Each nonstandardized plan Adoption Agreement must contain language which complies with the following additional requirements:**

These Adoption Agreement requirements are in addition to the requirements listed in Sample Plan Provision #55:

1. The adoption agreement must state that, unless the plan is a governmental plan as defined in section 414(d) of the Internal Revenue Code, or a church plan as defined in § 414(e) for which the election under § 410(d) of the Internal Revenue Code has not been made (a “nonelecting church plan”), the plan must satisfy the requirements of sections 401(a)(4) and 410(b) of the Internal Revenue Code with respect to nonelective contributions under the plan on a continuing basis.
2. The adoption agreement must state that the opinion letter may not be relied upon with respect to whether the plan satisfies the requirements of sections 401(a)(4) and 410(b) of the Internal Revenue Code. The employer may request a determination letter in order to obtain reliance with respect to the requirements of sections 401(a)(4) and section 410(b) of the Internal Revenue Code.