Section 403(b) Pre-Approved Plans
Listing of Required Modifications and Information Package (LRM)
Revised April 2022

To Providers of Section 403(b) Pre-approved 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 ("Code") and the regulations thereunder, for purposes of complying with Rev. Proc. 2021-37. The Service has prepared this package to assist Providers who are drafting § 403(b) Pre-approved Plans, and to accelerate their review.

This information package has been updated to reflect changes made to the various Statements of Requirement throughout for guidance contained in the 2022 Cumulative List of Changes in Section 403(b) Requirements for Section 403(b) Pre-approved Plans (2022 Cumulative List), Notice 2022-8. Plans submitted by Providers of § 403(b) Pre-approved Plans applying to the Internal Revenue Service for Opinion Letters for the second remedial amendment cycle (Cycle 2) under the Service's § 403(b) Pre-approved Plan program must comply with those changes on the 2022 Cumulative List.

These sample provisions address those specific requirements the Service will consider in reviewing § 403(b) Pre-approved Plans. Whether a § 403(b) Pre-approved Plan must include plan provisions corresponding to particular sample provisions generally depends on the features of the plan, and the language of a sample provision may or may not be acceptable or suitable in different plans depending on the context in which used. However, every § 403(b) Pre-approved Plan must satisfy the requirements of Rev. Proc. 2021-37.

Although this package is intended to assist § 403(b) Pre-approved Plan Providers drafting plan documents, insurance companies and custodians generally may also look to the language of the sample provisions in drafting those terms of annuity contracts and custodial accounts that are required by Code § 403(b).

A § 403(b) Pre-approved Plan may use either a single plan document format or a basic plan document with an adoption agreement. The sample provisions included in this package may generally be used with either format, but a plan design utilizing a single document format will need to make appropriate adjustments.

Part I of this package contains general sample plan provisions applicable to all § 403(b) Pre-approved Plans and provisions that are appropriate for § 403(b) Pre-approved Plans that do not accept contributions other than elective deferrals. Part II contains additional sample provisions for § 403(b) Pre-approved Plans that accept contributions other than elective deferrals. As discussed below, Part III and Part IV contain sample provisions for Standardized and Nonstandardized § 403(b) Pre-approved Plans, respectively. Part V

contains a sample plan provision for a Retirement Income Account.

Certain § 403(b) Pre-approved 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. However, the Service has developed sample plan provisions to enable § 401(a) Pre-approved Plans to comply with those Internal Revenue Code qualification requirements that have parallel Title I requirements, and Sponsors of § 403(b) Pre-approved Plans may find these sample plan provisions helpful in drafting plan provisions intended to comply with Title I. See Defined Contribution Listing of Required Modifications and Information Package (DC LRMs) and Cash or Deferred Arrangement Listing of Required Modifications and Information Package (CODA LRMs). In addition, an Opinion Letter does not express an opinion, and may not be relied upon, with respect to whether any plan is subject to the requirements of Title I of ERISA or whether a plan satisfies any of those requirements.

In addition to the provisions for Standardized Plans set forth in Section III (LRMs 80-82), Section 5.18 of Rev. Proc. 2021-37 identifies certain plan provisions that must appear in any Standardized § 403(b) Pre-approved Plan. These provisions are in LRM 14 (Employer), LRM 40 (Limitations on Annual Additions), LRM 47 (Hardship Distributions of Elective Deferrals), LRM 57 (Amendment by Provider), LRM 58 (Amendment by Adopting Employer), LRM 64 (Compensation), LRM 70 (Contribution Formula) and LRM 71 (Matching Contributions).

In addition to the provisions for Nonstandardized Plans set forth in Section IV (LRMs 83-85), certain provisions of the LRMs may be modified for a Nonstandardized § 403(b) Pre-approved Plan. These provisions are in LRM 40 (Limitations on Annual Additions), LRM 47 (Hardship Distributions of Elective Deferrals), LRM 57 (Amendment by Provider), LRM 64 (Compensation), LRM 69 (Vesting), LRM 70 (Contribution Formula), LRM 73 (Limitation on Matching and After-Tax Contributions) and LRM 76 (ACP Test Safe Harbor (Including Qualified Automatic Contribution Arrangement (QACA))).

A § 403(b) Pre-approved Plan can be a Retirement Income Account within the meaning of Code § 403(b)(9). A § 403(b) Pre-approved Plan that is a Retirement Income Account may not be combined with a plan that is not a Retirement Income Account. See Rev. Proc. 2021-37, sections 10.06(2) and 10.07. Most of the requirements for Retirement Income Accounts contained in section 5.19 of Rev. Proc. 2021-37 are set forth in LRM 18 (Participant), LRM 24 (Retirement Income Account), LRM 81 (Nondiscrimination) and Part V (LRM 86) (Retirement Income Account).

A § 403(b) Pre-approved Plan may be subject to requirements that are also applicable to Code § 401(a) qualified plans. Sample plan language for those requirements may be found in the DC and CODA LRMs.

Certain capitalized terms used throughout this LRM have their meanings defined at section 4 of Rev. Proc. 2021-37.

April 2022

Contents

PART I. GENERAL PROVISIONS AND ELECTIVE DEFERRAL PROVISIONS

Definitions

1. Account

Statement of Requirement: Reg. § 1.403(b)-2(b)(1)

Sample Plan Language:

"Account" means the account maintained for the benefit of any Participant or Beneficiary under an Investment Arrangement.

2. Account Balance

Statement of Requirement: Reg. § 1.403(b)-2(b)(1)

Sample Plan Language:

"Account Balance" means the total benefit to which a Participant or the Participant's Beneficiary is entitled under an Investment Arrangement, taking into account all contributions made to the Investment Arrangement and all earnings or losses (including expenses) that are allocable to the Participant's Account, any rollover contributions or transfers held under the Participant's Account, and any distribution made to the Participant, the Participant's Beneficiary, or any Alternate Payee. The Account Balance includes any part of the Participant's Account that is treated under the Plan as a separate contract to which section 403(c) of the Internal Revenue Code (or another applicable provision of the Code) applies.

3. Accumulated Benefit

Statement of Requirement: Reg. § 1.403(b)-2(b)(1)

Sample Plan Language

"Accumulated Benefit" means the sum of a Participant's or Beneficiary's Account Balances under all Investment Arrangements under the Plan.

4. Administrator

Statement of Requirement: Reg. § 1.403(b)-3(b)(3)(ii); Rev. Proc. 2021-37, sec. 5.07

Sample Plan Language:

"Administrator" means the person, committee, or organization selected in the Adoption Agreement to administer the Plan. If no Administrator is identified in the Adoption Agreement, then the Employer is the Administrator. Functions of the Administrator, including those described in the Plan, may be performed by Vendors, designated agents of the Administrator, or others (including Employees a substantial portion of whose duties is administration of the Plan) pursuant to the terms of Investment Arrangements, written service agreements or other documents under the Plan. For this purpose, an Employee is treated as having a substantial portion of his or her duties devoted to administration of the Plan if the Employee's duties with respect to administration of the Plan are a regular part of the Employee's duties and the Employee's duties relate to Participants and Beneficiaries generally (and the Employee only performs those duties for himself or herself as a consequence of being a Participant or Beneficiary).

Sample Adoption Agreement Language:

Administrator: _____

5. Annuity Contract

Statement of Requirement: Code §§ 403(b)(1) & 401(g); Reg. § 1.403(b)-2(b)(2)

Sample Plan Language:

"Annuity Contract" means a nontransferable group or individual contract as defined in sections 403(b)(1) and 401(g) of the Internal Revenue Code, established for each Participant by the Employer, or by each Participant individually, that is issued by an insurance company qualified to issue annuities in a State and that includes payment in the form of an annuity.

6. Beneficiary

Statement of Requirement: Reg. § 1.403(b)-2(b)(3)

Sample Plan Language:

"Beneficiary" means the designated person(s) or entity(ies) entitled to receive benefits under the Plan after the death of a Participant, as identified under the terms governing each Investment Arrangement or in other records maintained under the Plan.

7. Church

Statement of Requirement: Code § 3121(w)(3)(A); Rev. Proc. 2021-37, secs. 4.03 & 8.03(5)

Sample Plan Language:

"Church" means an organization described in section 3121(w)(3)(A) of the Internal Revenue Code and the Treasury Regulations thereunder.

(Note to reviewer: The issuance of an Opinion Letter does not constitute a determination that an Employer is a Church.)

8. Church Plan

Statement of Requirement: Code § 414(e); ERISA § 3(33)

Sample Plan Language:

"Church Plan" means a plan described in section 414(e) of the Internal Revenue Code.

(Note to reviewer: The issuance of an Opinion Letter does not constitute a determination that a plan is a Church Plan.)

9. Custodial Account

Statement of Requirement: Code § 403(b)(7); Reg. § 1.403(b)-8(d)

Sample Plan Language:

"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.

10. Denominational Service

Statement of Requirement: Code § 415(c)(7)(B)

Sample Plan Language:

"Denominational Service" means a person's completed years and months in the paid employment of a church or convention or association of churches with which the Employer is associated, and/or in the paid employment of an agency or organization that is exempt from tax under section 501 of the Internal Revenue Code and that is controlled by or associated with the church or convention or association of churches with which the Employer is associated. Denominational Service also includes all years of service by a duly ordained, commissioned, or licensed minister of a church.

11. Disabled

Statement of Requirement: Code § 72(m)(7)

Sample Plan Language:

"Disabled" means unable 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 to be of long continued and indefinite duration. The permanence and degree of such impairment shall be supported by medical evidence.

For purposes of annuity contracts distributing amounts not attributable to elective deferrals, 'Disabled' shall have the same meaning as above unless an alternative definition is provided in the Investment Arrangement.

(Note to reviewer: A plan may modify the preceding definition for annuity contracts distributing amounts not attributable to elective deferrals, for example, to provide that an individual is disabled if (or only if) the individual is determined to be disabled for purposes of section 223(d)(1) of the Social Security Act, Pub. L. 74-271, 42 U.S.C. § 423(d).)

12. Elective Deferral

Statement of Requirement: Reg. § 1.403(b)-2(b)(7), (17)

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 Plan.

13. Employee

Statement of Requirement: Code § 403(b)(9)(B); Rev. Proc. 2021-37, sec. 5.13

Sample Plan Language:

"Employee" means a common law employee of the Employer maintaining the Plan or any other employer aggregated with the Employer under section 414(b), (c), (m), or (o) of the Internal Revenue Code and the Treasury Regulations thereunder. For a § 403(b) Pre-approved Plan that is a Governmental Plan, Employee means an employee of the Employer maintaining the Plan or any other employer aggregated with the Employer in a manner consistent with Notice 89-23.

A. Public Schools:

(Note to reviewer: See Rev. Ruls. 73-607 and 80-139 for guidance regarding when an individual is a common law employee of a state performing services for a public school of the state. A public school may add the following language:)

"Employee" means each individual who is a common law employee of a State performing services for a Public School of the State, 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 State. 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.

B. Churches and Church-Related Organizations

(Note to reviewer: Code § 414(e)(5) permits self-employed ministers and chaplains to participate in their denominational 403(b) plans. Thus, § 403(b) Pre-approved Plans of Churches and Church-Related Organizations may add the following language:)

"Employee" shall also include a self-employed minister described in section 414(e)(5)(A)(i)(I) of the Internal Revenue Code or a minister described in section 414(e)(5)(A)(i)(II) of the Code.

C. Retirement Income Accounts under § 403(b)(9)

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account may add the following language:)

"Employee" shall also include an employee described in section 414(e)(3)(B) of the Internal Revenue Code. "Employee" shall also include a self-employed minister described in section 414(e)(5)(A)(i)(I) of the Code or a minister described in section 414(e)(5)(A)(i)(II) of the Code.

14. Employer

Statement of Requirement: Code § 403(b)(1)(A); Reg. § 1.403(b)-2(b)(8); Rev. Proc. 2021-37, secs. 4.01, 5.17 & 8.01(1)(c)

Sample Plan Language:

"Employer" or "Adopting Employer" means the section 501(c)(3) tax-exempt organization or Public School named in the Adoption Agreement that has adopted the Plan. For purposes of eligibility to participate in and make contributions to the Plan, "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 and is so designated in the Adoption Agreement.

(Note to reviewer: The following sentence may be added to the preceding definition of Employer in a § 403(b) Pre-approved Plan that is a Retirement Income Account that defines Employee to include self-employed ministers and chaplains (see LRM 13, option C).)

The term "Employer" may also include a self-employed minister described in section 414(e)(5)(A)(i)(I) of the Internal Revenue Code or any organization other than an organization described in section 501(c)(3) of the Code that employs a minister described in section 414(e)(5)(A)(i)(II) of the Code, but solely with respect to the participation in the Plan by the minister, and only if such Employer's participation is approved by the Administrator in accordance with rules and procedures adopted for such purposes.

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account sponsored by a Code § 414(e)(3)(A) benefit board may include the following sentence in the definition of Employer.)

Solely for purposes of eligibility to make contributions to the Plan, the term "Employer" also includes any entity that is an eligible employer within the meaning of section 1.403(b)-2(b)(8) of the Regulations through which Participants are eligible to accrue Denominational Service and which makes contributions to the Plan for the benefit of Participants.

Sample Adoption Agreement Language:

Name of the Employer that is adopting the Plan:

_____

For purposes of eligibility to participate in and contribute to the Plan (select one):

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

(Note to reviewer: If the Plan is a Standardized § 403(b) Pre-approved Plan that provides for nonelective employer contributions, the nonelective part of the Plan must benefit all nonexcludable Employees of the Employer and all Related Employers, all of whom must be eligible employers within the meaning of Reg. § 1.403(b)-2(b)(8).)

[ ] "Employer" also includes all Related Employers that are eligible employers within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations, except the following:

Excluded Related Employers: _____

[ ] "Employer" also 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 Employers: _____

[ ] "Employer" means only the entity named above.

(Note to reviewer: Each Employer adopting or participating in the Plan must indicate in the adoption agreement what type of Employer it is under Code § 403(b)(1)(A). Each Employer must also indicate in the adoption agreement, for nondiscrimination purposes, if it is a Church, a Governmental Plan, a QCCO, a Non-QCCO or a minister. See LRM 63.)

15. Governmental Plan

Statement of Requirement: Code § 414(d); Rev. Proc. 2021-37, sec. 4.10 & 8.03(5)

Sample Plan Language:

"Governmental Plan" means a governmental plan within the meaning of section 414(d) of the Internal Revenue Code.

(Note to reviewer: The issuance of an Opinion Letter does not constitute a determination that a plan is a Governmental Plan.)

16. Investment Arrangement

Statement of Requirement: Reg. § 1.403(b)-8(c), (d); Rev. Proc. 2021-37, sec. 4.13, 5.03, 5.04, 5.05 & 5.07; Section 336(e) of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113 (PATH Act)

Sample Plan Language:

"Investment Arrangement" means an Annuity Contract or Custodial Account that satisfies the requirements of section 1.403(b)-3 of the Treasury Regulations and that is issued or established for funding amounts held under the Plan. A list of Vendors of Investment Arrangements approved for use under the Plan shall be maintained in an appendix to the Plan. The terms governing each Investment Arrangement under the Plan, excluding those terms that are inconsistent with the Plan or section 403(b) of the Internal Revenue Code, are hereby incorporated by reference in the Plan.

(Note to reviewer: In the case of a § 403(b) Pre-approved Plan that is a Retirement Income Account, the definition of Investment Arrangement should be modified to include a Retirement Income Account that satisfies the requirements of Reg. § 1.403(b)-9(a)(2).

Vendors of Investment Arrangements approved for use under the Plan consist of those

that are eligible to receive new contributions under the Plan (i.e., payroll slot vendors) and those that are eligible to conduct exchanges under the Plan (see LRM 53).

Additionally, any contract that is permitted to be excluded under section 8 of Rev. Proc. 2007-71 need not be considered part of the Plan.)

(Note to reviewer: In the case of a Church Plan (including a § 403(b) Pre-approved Plan that is a Retirement Income Account), the definition of Investment Arrangement includes a group trust as described in Rev. Rul. 81-100 (as modified or superseded by subsequent revenue rulings.)

17. Non-Qualified Church-Controlled Organization or Non-QCCO

Statement of Requirement: Code § 3121(w)(3)(B); Rev. Proc. 2021-37, sec. 4.17

Sample Plan Language

"Non-Qualified Church-Controlled Organization" (Non-QCCO) means a church-controlled, tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code that does not meet the definition of a QCCO.

18. Participant

Statement of Requirement: Reg. §§ 1.403(b)-2(b)(12) & 1.403(b)-5(b)(4); Rev. Proc. 2021-37, sec. 25.02

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) in such period, and, for each Exclusion Year ending after the close of that 12-month period, the Employee has worked fewer than 1,000 hours of service in the preceding 12-month period. Under this provision, an Employee who works 1,000 or more hours of service in the 12-month period beginning on the date the Employee's employment commenced or in any Exclusion Year beginning immediately after the 12-month period beginning on the date the Employee's employment commenced with the Employer shall then be eligible to participate in the Plan. Once an Employee becomes eligible to have Elective Deferrals made on his or her behalf under the Plan under this standard, the Employee cannot be excluded from eligibility to have Elective Deferrals made on his or her behalf in any later year under this standard.

(Note to reviewer: A plan that includes a definition of hour of service (see LRM 67) should substitute a reference to that definition for the phrase in parentheses in the preceding paragraph.)

The Exclusion Year is:

( ) The Plan Year

( ) The 12-consecutive month period beginning on each anniversary of the date the Employee's employment with the Employer commenced.

(In the absence of an election, the Exclusion Year will be the Plan Year.)

(Note to reviewer: Notice 2018-95 provides transition relief from the "once-in-always-in" ("OIAI") condition for including part-time employees under Reg. § 1.403(b)-5(b)(4)(iii)(B). Section 3.02 of Notice 2018-95 states that a § 403(b) Pre-approved Plan does not require any specific language to use the transition relief set forth in the Notice.)

(Note to reviewer: Although a 403(b) plan is not subject to the requirements of Code § 410(a), a 403(b) plan that is subject to Title I of ERISA must satisfy requirements of ERISA § 202(a) that are parallel to the requirements of Code § 410(a). The Sample

Adoption Agreement Language will satisfy those requirements. See ERISA § 202(a)(1) and regulations under Code § 410(a).)

(Note to reviewer: If the adopting eligible employer is a Church or QCCO, the plan may exclude other categories of employees from eligibility to participate.)

Retirement Income Accounts

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account plan may allow employees described in Code § 414(e)(3)(B) to participate retroactively to July 1, 2020. In such case, the plan must include the nondiscrimination requirements of Code § 403(b)(12) and state that such requirements apply to any employee other than an employee of a Church or QCCO. See LRM 80 (Eligibility and Coverage), LRM 81 (Nondiscrimination), LRM 83 (Eligibility, Coverage and Nondiscrimination) and LRM 86 (Retirement Income Account).

Sample Adoption Agreement Language

Employees described in section 414(e)(3)(B) of the Internal Revenue Code are eligible to participate in the Plan effective _____ [Insert a date no earlier than July 1, 2020].

19. Plan

Statement of Requirement: Reg. § 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:_____

20. Plan Year

Statement of Requirement: Reg. §§ 1.415(f)-1(f)(2) & 1.415(j)-1(e)

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 ending on _____ and each anniversary thereof.

(Note to reviewer: The adoption agreement may also allow the employer to specify the initial plan year.)

21. Public School

Statement of Requirement: Reg. § 1.403(b)-2(b)(14)

Sample Plan Language:

"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 on).

22. Qualified Church-Controlled Organization or QCCO

Statement of Requirement: Code § 3121(w)(3)(B); Rev. Proc. 2021-37, secs. 4.17, 4.22 & 8.03(5)

Sample Plan Language:

"Qualified Church-Controlled Organization" (QCCO) means an organization described in section 3121(w)(3)(B) of the Internal Revenue Code and the Treasury Regulations thereunder, and generally refers to any church controlled, tax-exempt organization described in section 501(c)(3) of the Code, other than an organization which:

(A) Offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and

(B) Normally receives more than 25% of its support from either: (1) governmental sources, or (2) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

(Note to reviewer: The issuance of an Opinion Letter does not constitute a determination that an Employer is a QCCO.)

23. Related Employers

Statement of Requirement: Code § 414(c)(2); Reg. § 1.414(c)-5, Notice 2018-81,

Notice 89-23; Rev. Proc. 2021-37, secs. 4.23 & 5.14; Section 336(a) of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113 (PATH Act)

Sample Plan Language:

For a plan that is not a Governmental Plan, "Related Employers" means all employers that are aggregated with the Employer under section 414(b) and (c) (each as modified by section 415(h), (m), and (o)) of the Code and the Treasury Regulations thereunder. For a Governmental Plan, "Related Employers" means all employers that are aggregated with the Employer in a manner consistent with IRS Notice 89-23.

(Note to reviewer: Section 336(a) of the PATH Act amended Code § 414(c) by adding new § 414(c)(2) that addresses when certain church-related organizations are under common control. Under Code §§ 414(c)(2)(C) and (D), an election may be made to aggregate or disaggregate certain church-related organizations, respectively, for purposes of treatment as a single employer under Code § 414(c). Notice 2018-81 provides procedures for notifying the IRS when such an election is revoked.)

24. Retirement Income Account

Statement of Requirement: Code § 403(b)(9); Reg. § 1.403(b)-9; Rev Proc. 2021-37, secs. 4.26, 5.16 & 5.19

Sample Plan Language:

"Retirement Income Account" means a defined contribution program established or maintained by a church, or a convention or association of churches, including an organization described in section 414(e)(3)(A) of the Internal Revenue Code, to provide benefits under section 403(b) of the Code for its Employees (including an employee described in section 414(e)(3)(B) of the Code) or their Beneficiaries as described in section 403(b)(9) of the Code.

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account must be separate from a § 403(b) Pre-approved Plan that is not a Retirement Income Account. See Rev. Proc. 2021-37, sections 5.16, 10.06(2) and 10.07, and LRM 63 (Adoption Agreement Requirements—All Plans). See also Part V and LRM 86 (Retirement Income Account).)

25. Severance from Employment

Statement of Requirement: Regs. §§ 1.403(b)-2(b)(19) & 1.403(b)-6(h); Rev. Proc. 2021-37, sec. 5.14

Sample Plan Language:

"Severance from Employment" occurs when the Employee ceases to be employed by the Employer maintaining the Plan or a Related Employer that is eligible to maintain a 403(b) Plan under section 1.403(b)-2(b)(8) of the Treasury Regulations (an "eligible employer"), even if the Employee remains employed with another entity that is a Related Employer where either (a) such Related Employer is not an eligible employer or (b) the Employee is employed in a capacity that is not employment with an eligible employer**.**

(Note to reviewer: Reg. § 1.403(b)-2(b)(19) defines "severance from employment" in a manner that is generally the same as provided for in regulations under Code § 401(k). (Rev. Proc. 2007-71 provided definitions and model plan language for "related employer" and "severance from employment" that were tailored specifically for use by public schools.) For examples of a "severance from employment," see Reg. § 1.403(b)-6(h). Alternatively, a plan may define severance from employment more narrowly so as to preclude certain distributions that would be permitted under the sample plan language. For example, the sample plan language could be modified to provide that a severance does not occur if an employee continues to be employed by another unit of the State, even if that unit is not a public school. In addition, a § 403(b) Pre-approved Plan that is a Retirement Income Account and sponsored by a Code § 414(e)(3)(A) benefit board may provide that a severance from employment does not occur if an employee moves between churches in the denomination or to another employer participating in the plan.)

26. State

Statement of Requirement: Reg. § 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 Code for purposes of section 403(b)(1)(A)(ii) of the Code.

27. Vendor

Statement of Requirement: Rev. Proc. 2021-37, sec. 5.07

Sample Plan Language:

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

(Note to reviewer: A § 403(b) Pre-approved Plan must list all Vendors of Investment Arrangements approved for use under the plan in an appendix. See LRM 29 (Plan Administration).

In the case of a § 403(b) Pre-approved Plan that is a Retirement Income Account, the definition of "Vendor" should be modified to include the Provider of a Retirement Income Account.)

28. Year of Service

Statement of Requirement: 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 LRM 39 (Elective Deferrals)) and for determining a participant's includible compensation (see LRM 40 (Limitations on Annual Additions)). The definition of "year of eligibility service" contained in LRM 68 (Year of Eligibility Service) 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: The following should be added to the definition of "year of service" in the case of a § 403(b) Pre-approved Plan that is a Retirement Income Account:)

A Year of Service shall also include all years of Denominational Service.

(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 LRM 68 unless the plan is a Governmental Plan or Church plan that is exempt from the requirements of ERISA § 202.)

Administration

29. Plan Administration

Statement of Requirement: Reg. § 1.403(b)-3(b)(3); Rev. Proc. 2021-37, sec. 5.07

(Note to reviewer: Reg. § 1.403(b)-3(b)(3) and Rev. Proc. 2021-37, sec. 5.05 provide that a § 403(b) Pre-approved 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 Code § 403(b).

In drafting administrative plan provisions and deciding how to allocate administrative duties, Providers 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 Church Plans. See DOL Reg. § 2510.3-2(f) and DOL Field Assistance Bulletin Nos. 2007-02 (July 24, 2007) and 2010-01 (February 17, 2010).)

Sample Plan Language:

1. Plan Administration. The Plan shall be administered, and the provisions of the various documents comprising the Plan shall be coordinated, in accordance with the terms of the Plan and the requirements of section 403(b) of the Internal Revenue Code. These provisions and requirements include but are not limited to –

1.1 Determining whether an employee is eligible to participate in the Plan.

1.2 Determining whether contributions comply with the applicable limitations.

1.3 Determining whether hardship withdrawals and loans comply with applicable requirements and limitations.

1.4 Determining that any transfers, rollovers, or purchases of service credit comply with applicable requirements and limitations.

1.5 Determining that the requirements of the Plan and section 403(b) of the Code are properly applied, including whether the Employer is a member of a controlled group.

1.6 Determining the status of domestic relations orders or qualified domestic relations orders.

Administrative functions, including functions to comply with section 403(b) of the Code and other tax requirements, may be allocated among various persons pursuant to service agreements or other written documents. However, in no case shall administrative functions be allocated to Participants (other than permitting Participants to make investment elections for self-directed accounts). Any administrative functions not allocated to other persons are reserved to the Administrator.

2. Administrative Appendix. Persons to whom administrative functions have been allocated and the specific functions allocated to such persons shall be identified in an administrative appendix to the Plan. Service agreements and other records or information pertaining to the administration of the Plan may be included or incorporated by reference in the appendix. The appendix will also include a list of all the Vendors of Investment Arrangements approved for use under the Plan. The appendix may be modified from time to time. A modification of the appendix is not an amendment of the Plan.

(Note to reviewer: Vendors of Investment Arrangements approved for use under the Plan consist of Vendors of Investment Arrangements that are eligible to receive new contributions under the Plan (i.e., payroll slot vendors) and Vendors of Investment Arrangements that are eligible to conduct exchanges under the Plan (see LRM 53 (Exchanges)).)

30. Conflicting Provisions in Investment Arrangements or Other Documents

Statement of Requirement: Rev. Proc. 2021-37, secs. 5.04, 6.01 & 8.03(4)

(Note to reviewer: Every § 403(b) Pre-approved Plan must contain a statement that the provisions of the plan override any conflicting provision contained in an Investment Arrangement or other document incorporated by reference in the plan or used with the plan. The Opinion Letter issued to a § 403(b) Pre-approved Plan will not express an opinion with respect to the terms of an Investment Arrangement or any other documents that may be incorporated by reference.)

Sample Plan Language:

In the event of any conflict between the terms of this Plan and the terms of any Investment Arrangement under the Plan or any other document incorporated by reference under the Plan, the terms of the Plan will govern.

Eligibility and Participation

31. Eligibility of Employees

Statement of Requirement: Reg. § 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 which corresponds to LRM 18 (Participant). A plan may allow for reasonable administrative procedures for plan entry for making elective deferrals, including a reasonable period for providing a participant notice of the right to defer and a reasonable election period, provided that Reg. § 1.403(b)-5(b)(2) is satisfied. A plan that provides notice of the right to defer no later than 30 days after commencement of employment, allows the participant to make an election up to 30 days after notice is provided, and provides that the participant's election will be effective as soon as administratively practicable will be treated as having reasonable administrative procedures that do not cause the plan to fail to satisfy Reg. § 1.403(b)-5(b)(2).)

32. Compensation Reduction Election

Statement of Requirement: Regs. §§ 1.403(b)-4 and 1.403(b)-5

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 to one or more Investment Arrangements) and filing it with the Administrator or its designated agent. The Employee's elections with respect to Investment Arrangements and allocations (and reallocations) among Accounts, if not included in the Compensation Reduction Election, shall be included in other records maintained under the Plan. This Compensation Reduction Election shall be made through an agreement provided by the Administrator or its designated agent under which the Employee agrees to be bound by all the terms and conditions of the Plan. The 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 different amount (but not in excess of $200 or such lower amount as specified in the Adoption Agreement) from time to time. Any such election shall remain in effect until a new election is filed. The election shall take effect as soon as administratively practicable following the date indicated in 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 calendar year and amounts that would be cash compensation includible in gross income but for a reduction election under sections 125, 132(f), 401(k), 403(b), or 457(b) of the Internal Revenue Code (including a Compensation Reduction Election under the Plan).

(Note to reviewer: Code § 3401(h) provides that a differential wage payment shall be treated as a payment of wages under Code § 3401(a) for a payment made after December 31, 2008. Similarly, Code § 415(c)(8) provides that all plans must include difficulty of care payments in a participant's compensation for purposes of calculating the annual additions limit of Code § 415(c)(1). See Notice 2020-68, Section E. All plans

must include these amounts in a participant's compensation for purposes of calculating the annual additions limit of Code § 415(c)(3).)

Adoption Agreement Language:

[ ] No minimum annual deferral amount.

[ ] The minimum annual deferral amount will be $____ (no higher than $200).

33. Eligible Automatic Contribution Arrangement (EACA)

Statement of Requirement: Code §§ 414(w) & 4979(f)(1); Reg. §§ 1.414(w)-1 & 54.4979-1(c)

(Note to reviewer: The following is an optional provision which may be included in a § 403(b) Pre-approved Plan to allow the employer to elect to provide an eligible automatic contribution arrangement ("EACA") within the meaning of Code § 414(w) and the regulations. Under an EACA, an employee can request a distribution of default elective deferrals within 90 days of the first contribution of default elective deferrals without violating the restriction on distribution of elective deferrals under Code § 403(b)(11).

This provision may be elected only where the participant's signature is not required to establish the investment arrangement(s) selected to receive the default elective deferrals (The "default investment arrangement"). Thus, this provision generally could not be used where the default investment arrangement is an individual annuity contract or individual custodial account.) An EACA may not be added to a § 403(b) Pre-approved Plan for any plan year unless notice of the EACA is provided to employees prior to the beginning of such plan year.)

Sample Plan Language:

Article [ ] Eligible Automatic Contribution Arrangement (EACA)

Section 1. Rules of Application

1.1 Employer Election of EACA Option. If an EACA is permitted under the terms of an Investment Arrangement and the Employer has elected the EACA option in the Adoption Agreement, the provisions of this Article shall apply for the Plan Year and, to the extent that any other provision of the Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Default Elective Deferrals. Default Elective Deferrals will be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. The amount of Default Elective Deferrals made for a Covered Employee each pay period is equal to the Default Percentage specified in the Adoption Agreement multiplied by

the Covered Employee's Compensation for that pay period. If the Employer has so elected in the Adoption Agreement, a Covered Employee's Default Percentage will increase by one percentage point each Plan Year, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the Adoption Agreement, the first pay period in such Plan Year that begins on or after the date specified in the Adoption Agreement.

1.3 Right to Make Affirmative Election. A Covered Employee will have a reasonable opportunity after receipt of the notice described in Section 4 of this Article to make an affirmative election regarding Elective Deferrals (either to have no Elective Deferrals made or to have a different amount of Elective Deferrals made) before Default Elective Deferrals are made on the Covered Employee's behalf. Default Elective Deferrals being made on behalf of a Covered Employee will cease as soon as administratively feasible after the Covered Employee makes an affirmative election to have no Elective Deferrals made or to have a different amount of Elective Deferrals made.

Section 2. Definitions

2.1 EACA. An "EACA" is an automatic contribution arrangement that satisfies the uniformity requirement in Section 3 of this Article and the notice requirement in Section 4 of this Article.

2.2 Automatic Contribution Arrangement. An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of the Covered Employee's Compensation will be contributed to the Plan as an Elective Deferral in lieu of being included in the Covered Employee's pay.

2.3 Covered Employee. A "Covered Employee" is a Participant identified in the Adoption Agreement as being covered under the EACA.

2.4 Default Elective Deferrals. "Default Elective Deferrals" are the Elective Deferrals contributed to the Plan under the EACA on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals.

2.5 Default Percentage. The "Default Percentage" is the percentage of a Covered Employee's Compensation contributed to the Plan as a Default Elective Deferral for the Plan Year. The Default Percentage is specified in the Adoption Agreement.

Section 3. Uniformity Requirement

3.1 Non-increasing Default Percentage. Except as provided in Section 3.2 below or if the Employer has elected an increasing Default Percentage in the Adoption Agreement, the same percentage of Compensation will be withheld as Default Elective Deferrals from all Covered Employees subject to the Default Percentage.

3.2 Required Reduction or Cessation of Default Elective Deferrals. Default Elective

Deferrals will be reduced or stopped to meet the limitations under sections 402(g) and 415 of the Internal Revenue Code.

Section 4. Notice Requirement

4.1 Timing of Notice. At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Covered Employee a notice of the Covered Employee's rights and obligations under the EACA as described in section 4.2 of this Article, written in a manner calculated to be understood by the average Covered Employee. If an Employee becomes a Covered Employee after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice will be provided no more than

90 days before the Employee becomes a Covered Employee but not later than the date the Employee becomes a Covered Employee.

4.2 Content of Notice. The notice must accurately describe:

(a) The amount of Default Elective Deferrals that will be made on the Covered Employee's behalf in the absence of an affirmative election;

(b) The Covered Employee's right to elect to have no Elective Deferrals made on his or her behalf or to have a different amount of Elective Deferrals made;

(c) How Default Elective Deferrals will be invested in the absence of the Covered Employee's investment instructions; and

(d) The Covered Employee's right under section 5.1 of this Article to make a withdrawal of Default Elective Deferrals and the procedures for making such a withdrawal.

Section 5. Withdrawal of Default Elective Deferrals

5.1 90-Day Withdrawal Period. No later than 90 days after a Covered Employee's pay is first reduced by Default Elective Deferrals, the Covered Employee may request a distribution of his or her Default Elective Deferrals. No spousal consent is required for a withdrawal under this Section 5.

5.2 Amount of Withdrawal. The amount to be distributed from the Plan upon the Covered Employee's request is equal to the amount of Default Elective Deferrals made through the earlier of (a) the pay date for the second payroll period that begins after the Covered Employee's withdrawal request and (b) the first pay date that occurs after 30 days after the Covered Employee's request, plus attributable earnings through the date of distribution. Any fee charged to the Covered Employee for the withdrawal may not be greater than any other fee charged for a cash distribution.

5.3 Effect of Withdrawal on Elective Deferrals. Unless the Covered Employee affirmatively elects otherwise, any withdrawal request will be treated as an affirmative election to stop having Elective Deferrals made on the Covered Employee's behalf as of the date specified in

Section 5.2 above.

5.4 Treatment of Withdrawn Amounts. Default Elective Deferrals distributed pursuant to this Section 5 are not counted towards the dollar limitation on Elective Deferrals contained in section 402(g) of the Code. Matching Contributions that might otherwise be allocated to a Covered Employee's Account on behalf of Default Elective Deferrals will not be allocated to the extent the Covered Employee withdraws such Elective Deferrals pursuant to this Section 5 and any Matching Contributions already made on account of Default Elective Deferrals that are later withdrawn pursuant to this Section 5 will be forfeited.

Section 6. Special Rule for Distribution of Excess Aggregate Contributions

If the Employer has elected in the Adoption Agreement that all Participants are Covered Employees, then the Plan has until 6 months (rather than 2½ months) after the end of the Plan Year to distribute Excess Aggregate Contributions and avoid the 10% excise tax under section 4979 of the Code.

(Note to reviewer: See LRM 74 for the definition of and distribution requirements applicable to Excess Aggregate Contributions.)

Sample Adoption Agreement Language:

Article [ ] Eligible Automatic Contribution Arrangement (EACA)

[ ] If checked, the Eligible Automatic Contribution Arrangement (EACA) provisions of Article [ ] apply.

Section 1. Covered Employee

Employees covered under the EACA are: [CHECK ONE OF THE OPTIONS BELOW]

[ ] All Participants.

[ ] All Participants who do not have an affirmative election in effect regarding Elective Deferrals.

[ ] All Participants who become Participants on or after the effective date of the EACA and who do not have an affirmative election in effect regarding Elective Deferrals.

Section 2. Default Percentage [CHECK ONE OF THE OPTIONS BELOW AND INSERT A PERCENTAGE OR PERCENTAGES AND, IF APPLICABLE, A DATE]

[ ] The Default Percentage is [ ]%.

[ ] The initial Default Percentage is [ ]% and will increase by [ ] [INSERT A NUMBER] percentage point(s) as described in Section 1.2 of Article [ ] of the Plan until the Default Percentage is [ ]%. [INSERT THE HIGHEST DEFAULT PERCENTAGE THAT WILL APPLY] Each increase will be effective at the beginning of the Plan Year unless a different

date is inserted here: _____. [INSERT THE DATE OF EACH INCREASE]

34. Information Provided by the Employee

Sample Plan Language:

Each Participant shall provide at the time of initial enrollment, and later if there are any changes, any information necessary or advisable for the administration of the Plan, including any information required under the terms governing the Investment Arrangement.

35. Change in Compensation Reduction Election

Statement of Requirement: Reg. § 1.403(b)-5(b)(2)

Sample Plan Language:

Subject to the terms governing the applicable Investment Arrangement, or circumstances associated with an amendment to a safe harbor arrangement, a Participant may change his or her Compensation Reduction Election, choice of Investment Arrangements, and designated Beneficiary, and such change shall take effect as of the date provided 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. See LRM 76 (ACP Test Safe Harbor) for circumstances associated with an amendment to a safe harbor arrangement requiring a participant to be afforded an opportunity to change his or her Compensation Reduction Election.)

36. Timing of Contributions

Statement of Requirement: Reg. § 1.403(b)-8(b)

Sample Plan Language:

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

(Note to reviewer: Reg. § 1.403(b)-8(b) provides that contributions to the plan must be transferred to the vendor within a period that is not longer than what is reasonable for the proper administration of the plan. A plan may specify a period of time, as in the sample plan language above, for the transfer of contributions.

For a 403(b) plan covered by Title I of ERISA, see DOL Reg. § 2510.3-102, requiring 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 15th 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).

The sample plan language may be modified to accommodate ERISA or applicable state laws which may require earlier remittance of contributions.)

37. 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.

38. Roth Contributions

Statement of Requirement: Code § 402A; Reg. §§ 1.403(b)-2(b)(17) & 1.403(b)-3(c); Notice 2006-44

Sample Plan Language:

1. General Application. If elected by the Employer in the Adoption Agreement and permitted under the terms of the applicable Investment Arrangement, a Participant may designate all or a portion of the Participant's Elective Deferrals as Roth Elective Deferrals. Any Roth Elective Deferrals under an Investment Arrangement shall be allocated to a separate designated Roth account (Roth Elective Deferral Account) maintained under the Investment Arrangement for a Participant's Roth Elective 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 the Participant under the Investment Arrangement.

2.2 A record of the amount of Roth Elective Deferrals in each Roth Elective Deferral Account shall be maintained.

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.

2.4 No contributions other than Roth Elective Deferrals, in-plan Roth rollovers as provided in section ___ of the Plan, and properly attributable earnings shall be credited to a Participant's Roth Elective Deferral Account.

(Note to reviewer: Insert in the above blank the Plan section number corresponding to LRM 49 (Rollover Contributions to the Plan)).

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.

[ ] The Plan will not accept Roth Elective Deferrals.

Contributions

39. Elective Deferrals

Statement of Requirement: Code §§ 402(g), 414(u), 414(v), & 415; Reg. § 1.403(b)-4

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 $20,500, 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 Code for periods after 2022.

(Note to reviewer: Code § 402(g) provides a limitation on elective deferrals, and further provides that the limitation will be adjusted each year for cost-of-living increases. For

limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.)

(Note to reviewer: A plan is not required to provide for catch-up contributions. Therefore, section 1.2 and/or section 1.3 of this sample plan language may be omitted.)

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 § 403(b) catch-up limitation for employees with 15 includible years of service includes an educational organization described in Code § 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 Code § 414(e)(3)(B)(ii). See Reg. § 1.403(b)-4(c)(3)(ii).)

(Note to reviewer: The following subsections (c) and (d) may be substituted for the above subsections (c) and (d) in a § 403(b) Pre-approved Plan that is a Retirement Income Account:)

(c) The excess of:

(i) $5,000 multiplied by the number of years of Denominational Service of the Employee, over

(ii) The total Elective Deferrals made for the Employee during prior years of Denominational Service.

(d) For purposes of this Section 1.2, a "Qualified Employee" means an Employee who has completed at least 15 Years of Denominational Service.

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 amount of the age 50 catch-up Elective Deferrals under the Plan for any calendar year shall not exceed $6,500, which is the applicable dollar amount established under section 402(g)(1)(B) of the Internal Revenue Code and adjusted for cost-of-living increases to the extent provided under section 402(g)(4) of the Internal Revenue Code for periods after 2022.

(Note to reviewer: Section 414(v)(2) of the Code provides a limitation on age 50 catch-up elective deferrals, and further provides that the limitation will be adjusted each year for cost-of-living increases. For limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.)

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 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 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 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 Code for which the Participant provides information that is accepted by the 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 through the end of the applicable calendar year), shall be distributed to the Participant.

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

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.

Limitations on Annual Additions

40. Limitations on Annual Additions

Statement of Requirement: Code § 415; Reg. § 1.403(b)-2(b)(11); Rev. Proc. 2021-37, secs. 5.09, 5.18, 8.01(2); 8.02(1)(b) & 8.04

(Note to reviewer: A § 403(b) Pre-approved Plan cannot incorporate by reference the Code § 415 limitations. See section 6.03(1) of Rev. Proc. 2021-37.)

Sample Plan Language:

1. Limitations on Aggregate Annual Additions.

1.1 General Limitation on Annual Additions. A Participant's Annual Additions under the Plan for a Limitation Year may not exceed the Maximum Annual Addition as set forth in section 2.4 below.

1.2 Aggregation of Section 403(b) Plans of the Employer. If Annual Additions are credited to a Participant under any section 403(b) plans of the Employer in addition to this Plan for a Limitation Year, the sum of the Participant's Annual Additions for the Limitation Year under this Plan and such other section 403(b) plans may not exceed the Maximum Annual Addition as set forth in section 2.4 below.

1.3 Aggregation Where Participant is in Control of Any Employer. If a Participant is in

control of any employer for a Limitation Year, the sum of the Participant's Annual Additions for the Limitation Year under this Plan, any other section 403(b) plans of the Employer, any defined contribution plans maintained by controlled employers, and any section 403(b) plans of any other employers may not exceed the Maximum Annual Addition as set forth in section 2.4 below. For purposes of this paragraph, a Participant is in control of an employer based upon the rules of sections 414(b), 414(c), and 415(h) of the Internal Revenue Code; and a defined contribution plan means a defined contribution plan that is qualified under section 401(a) or 403(a) of the Code, a section 403(b) plan, or a Simplified Employee Pension within the meaning of section 408(k) of the Code.

1.4 Annual Notice to Participants. The Administrator will provide written or electronic notice to Participants that explains the limitation in section 1.3 in a manner calculated to be understood by the average Participant and informs Participants of their responsibility to provide information to the Administrator that is necessary to satisfy section 1.3. The notice will advise Participants that the application of the limitations in section 1.3 will take into account information supplied by the Participant and that failure to provide necessary and correct information to the Administrator could result in adverse tax consequences to the Participant, including the inability to exclude contributions to the Plan under section 403(b) of the Code. The notice will be provided annually, beginning no later than the year in which the Employee becomes a Participant.

(Note to reviewer: A Standardized § 403(b) Pre-approved Plan must include the following sections 1.5 through 1.9. These sections preclude the possibility that a Standardized § 403(b) Pre-approved Plan could exceed the limitations imposed by Code § 415 because of the required aggregation of multiple plans where the other plan is a Standardized § 403(b) Pre-approved Plan and/or a "controlled plan" within the meaning of Section 1.3, above. A Nonstandardized § 403(b) Pre-approved Plan may also (but is not required to) include sections 1.5 through 1.9, modified accordingly. A Nonstandardized § 403(b) Pre-approved Plan that does not include such language must include alternative provisions in the adoption agreement.

Each § 403(b) Pre-approved Plan must provide that plan provisions may be amended by the Employer to the extent necessary to satisfy Code § 415 because of the required aggregation of multiple plans under that section. A space should be provided in the plan or the adoption agreement with instructions for the Employer to add language as necessary to satisfy § 415. See Sections 5.09, 5.18(1) and 8.01(2) of Rev. Proc. 2021-37.)

1.5 Coordination of Limitation on Annual Additions Where Employer Has Another Section 403(b) Standardized Pre-approved Plan or Participant is in Control of Employer. The Annual Additions which may be credited to a Participant 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 under any other Standardized § 403(b) Pre-approved Plan of the Employer in addition to this Plan and, if the Participant is in control of an employer, any defined contribution plans maintained by controlled employers and section 403(b) plans of any other employers. Contributions to the Participant's Accounts under this Plan will be reduced to the extent necessary to prevent this limitation from being

exceeded.

1.6 Excess Annual Additions.

(a) If, notwithstanding sections 1.1 through 1.5, a Participant's Annual Additions under this Plan, or under this Plan and any other Standardized § 403(b) Pre-approved Plans and/or any "controlled plan" within the meaning of Section 1.3 above aggregated with this Plan under sections 1.2 and 1.3, result in an Excess Annual Addition for a Limitation Year, the Excess Annual Addition will be deemed to consist of the Annual Additions last credited, except Annual Additions to a defined contribution plan qualified under section 401(a) of the Code or a Simplified Employee Pension maintained by an employer controlled by the Participant will be deemed to have been credited first.

(b) If an Excess Annual Addition is credited to a Participant under this Plan and another Standardized § 403(b) Pre-approved Plan of the Employer on the same date, the Excess Annual Addition attributable to this Plan will be the product of:

(i) the total Excess Annual Addition credited as of such date, times

(ii) the ratio of (i) the Annual Additions credited to the Participant for the Limitation Year as of such date under this Plan to (ii) the total Annual Additions credited to the Participant for the Limitation Year as of such date under this Plan and all other Standardized § 403(b) Pre-approved Plans of the Employer.

(c) Any Excess Annual Addition attributable to this Plan will be corrected in the manner described in section 1.9.

1.7 Coordination of Limitation on Annual Additions Among Annuity Contracts. All section 403(b) annuity contracts purchased by an Employer for a Participant are treated as one section 403(b) annuity contract for purposes of applying the limitations of section 415 of the Code. For these purposes, a 403(b) annuity contract includes Annuity Contracts, Custodial Accounts and Retirement Income Accounts.

1.8 Coordination of Limitation on Annual Additions Where Employer Has Another Section 403(b) Plan that is Not a Standardized § 403(b) Pre-approved Plan. If Annual Additions are credited to the Participant for the Limitation Year under another section 403(b) plan of the Employer which is not a Standardized § 403(b) Pre-approved Plan, the Annual Additions which may be credited to the Participant under this Plan for the Limitation Year will be limited in accordance with sections 1.5 and 1.6 as though the other plan were a Standardized § 403(b) Pre-approved Plan unless the Employer provides alternative limitation provisions in the Adoption Agreement.

1.9 Correction of Excess Annual Additions. A Participant's Excess Annual Additions for a taxable year are includible in the Participant's gross income for that taxable year. A Participant's Excess Annual Additions attributable to this Plan will be credited in the year of the excess to a separate account under the Plan for such Excess Annual Additions which will be maintained by the Vendor until the Excess Annual Additions are distributed. This

separate account will be treated as a separate contract to which section 403(c) (or another applicable provision of the Internal Revenue Code) applies. Amounts in the separate account may be distributed at any time, notwithstanding any other provisions of the Plan.

2. Definitions.

2.1 Annual Additions: "Annual Additions" means the following amounts credited to a Participant under the Plan or any other plan aggregated with the Plan under sections 1.2 and 1.3:

(a) Employer contributions, including Elective Deferrals (other than age 50 Catch up contributions described in section 414(v) of the Code and contributions that have been distributed to the Participant as Excess Elective Deferrals);

(b) After-tax Employee contributions;

(c) forfeitures allocated to the Participant's Account;

(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, and 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; and

(e) allocations under a simplified employee pension.

Amounts described in (a), (b), (c), and (e) are annual additions for purposes of both the dollar limitation under section 2.4(a) and the percentage of compensation limitation under section 2.4(b). Amounts described in (d) are annual additions solely for purposes of the dollar limitation under section 2.4(a).

(Note to reviewer: Subsections 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 Code, relating to United States citizens or residents living abroad). Includible Compensation for a minister who is self-employed means the minister's earned income as defined in section 401(c)(2) of the Code (computed without regard to section 911 of the Code). 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 Code. Includible Compensation does not include any compensation received during a period when the Employer was not an eligible employer within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations. Includible Compensation is increased by differential wage payments under section 3401(h) of

the Code for the most recent period that is a Year of Service and difficulty of care payments under section 131(c)(1)(A) of the Code that are otherwise excludible from income. The amount of Includible Compensation is determined without regard to any community property laws. Except as provided in section 1.401(a)(17)-1(d)(4)(ii) of the Treasury Regulations with respect to eligible participants in governmental plans, the amount of Includible Compensation of each Participant taken into account in determining contributions for any year shall not exceed $305,000, which is the annual compensation limit established under section 401(a)(17) of the Code and adjusted for cost-of-living increases to the extent provided under section 401(a)(17)(B) of the Code for periods after 2022.

(Note to reviewer: Code § 401(a)(17) provides a limitation on compensation taken into account, and further provides that the limitation will be adjusted each year for cost-of-living increases. For limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.

Differential wage payments and difficulty of care payments must be treated as compensation under Code § 415(c)(3).

The Code § 401(a)(17) limit does not apply to a plan of a Church or QCCO. The following sentence should be substituted for the last sentence of section 2.2(a). (The plan will also need to include the definition of Non-QCCO in LRM 17.)

If the Employer is a Non-QCCO, the amount of Includible Compensation of each Participant taken into account in determining contributions for any year shall not exceed $305,000, which is the annual compensation limit established under section 401(a)(17) of the Code and adjusted for cost-of-living increases to the extent provided under section 401(a)(17)(B) of the Code for periods after 2022.

(b) For purposes of applying the limitations on Annual Additions to nonelective Employer contributions pursuant to section 415 of the Code, Includible Compensation for a Participant who is permanently and totally disabled (as defined in section 22(e)(3) of the 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.

(Note to reviewer: A § 403(b) Pre-approved Plan that provides nonelective employer contributions may also provide that a participant who is permanently and totally disabled (as defined in Code § 22(e)(3)) will share in those contributions on the basis of the participant's imputed compensation as determined under the preceding paragraph.)

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 Addition: 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) $61,000, as adjusted for increases in the cost-of-living for years after 2022, or

(b) 100 percent of the Participant's Includible Compensation for the Limitation Year.

(Note to reviewer: Code § 415 provides a limitation on annual additions, and further provides that the limitation will be adjusted each year for cost-of-living increases. For limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.

The following provisions may be added to a § 403(b) Pre-approved Plan that is a Retirement Income Account:

(c) A Participant's Annual Additions shall not be treated as exceeding the limitation of this section 2.4 if contributions and other additions with respect to the Participant meet the requirements of section 415(c)(7)(A) of the Code and are not in excess of $10,000. The total amount of contributions with respect to any Participant which may be taken into account for purposes of this section 2.4(c) for all years may not exceed $40,000.

(d) In the case of a Participant described in section 415(c)(7)(B) of the Code who is performing services outside the United States, the Participant's Annual Additions shall not be treated as exceeding the limitation of this section 2.4 if the contributions and other additions with respect to the Participant are not in excess of $3,000, provided the Participant's adjusted gross income for the taxable year (determined separately and without regard to community property laws) exceeds $17,000.

2.5 Contributions for Medical Benefits After Separation From Service. 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 sections 401(h) or 419A(f)(2) of the Code) which is otherwise treated as an Annual Addition.

2.6 Standardized § 403(b) Pre-approved Plan. A Standardized § 403(b) Pre-approved Plan means a section 403(b) plan the form of which is the subject of a favorable opinion letter from the Internal Revenue Service on its status as a Standardized Plan as defined in Rev. Proc. 2021-37.

2.7 Employer. Solely for purposes of section 1 and 2, "Employer" means the employer that has adopted the Plan and its Related Employers.

2.8 Excess Annual Addition. "Excess Annual Addition" means the excess of the Annual Additions credited to the Participant for the Limitation Year under the Plan and plans aggregated with the Plan under sections 1.2 and 1.3 over the Maximum Annual Addition for the Limitation Year under section 2.4.

Sample Adoption Agreement Language:

[ ] (Insert provisions to the extent necessary to satisfy § 415 because of the required

aggregation of multiple plans under that section. Provide the method under which the Plan will limit total Annual Additions to the Maximum Annual Additions in a manner than precludes Employer discretion.)

(**Note to reviewer: The Provider should leave space for the Employer to provide language necessary to satisfy the limitations of Code § 415(c). Such language must preclude employer discretion. See also LRM 63 (Adoption Agreement Requirements—All Plans).**)

Distribution Provisions

41. Distribution Limitations for Elective Deferrals

Statement of Requirement: Code §§ 72(t)(2)(H)(iii)(I), 401(a)(38), 403(b)(7)(A), 403(b)(11) & 414(u)(12)(B); Reg. § 1.403(b)-10(d); Notice 2010-15; Notice 2020-50; Notice 2020-68

Sample Plan Language:

Except as permitted in the case of pre-1989 Elective Deferral contributions (excluding earnings thereon) to an Annuity Contract that are separately accounted for, 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, or attains age 59½. For purposes of this paragraph, a Participant shall be treated as having a Severance from Employment during any period the Participant is performing in the uniformed services described in section 3401(h)(2)(A) of the Internal Revenue Code. A Participant who elects to receive a distribution pursuant to the preceding sentence may not make an Elective Deferral or an employee contribution during the 6-month period beginning on the date of the distribution. The available forms of distribution will be based on the terms governing the applicable Investment Arrangement.

(Note to reviewer: Distributions may be made for certain other events, including a hardship (LRM 47); an IRS levy (LRM 60); termination of the Plan (LRM 56); correction of excess elective deferrals (LRM 39), distributions pursuant to LRM 59 (Domestic Relations Orders and Qualified Domestic Relations Orders); a qualified reservist distribution as provided in Code § 72(t)(2)(G); a federally declared disaster, where resulting legislation or guidance authorizes such a distribution; a Qualified Birth or Adoption Distribution; a coronavirus-related distribution; and a Lifetime Income Investment Distribution as provided in Code §§ 403(b)(7)(A)(ii) and 403(b)(11)(D), provided that the distribution is made no earlier than 90 days prior to the date the lifetime income investment may no longer be held as an investment option under the Plan. For additional information on qualified reservist distributions, see Section XVI of the CODA LRMs. For additional information on Lifetime Income Investment Distributions, see LRM 46 (Lifetime Income Investment Distributions).)

Qualified Birth or Adoption Distributions

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant's Elective Deferrals may be distributed on or after the date specified in the Adoption Agreement as a Qualified Birth or Adoption Distribution. A Qualified Birth or Adoption Distribution is any distribution of up to $5,000 (or lesser amount as provided in the Adoption Agreement) from the Plan to a Participant if made during the 1-year period beginning on the date the child of the Participant is born or the legal adoption by the Participant of an eligible adoptee is finalized. A distribution of up to $5,000 for each child can be made with respect to multiple births and adoptions if the distribution is made within the 1-year period following the date on which the children are born, or the adoptions are finalized. An eligible adoptee is defined as any individual who has not attained age 18 or is physically or mentally incapable of self-support. An individual is physically or mentally incapable of self-support if they are unable to engage in any substantial gainful activity as described in section ____ of the Plan.

(Note to reviewer: Insert the Plan section number that defines disabled (LRM 11 (Disabled)) in the above blank. Unless the Administrator of the Plan has actual knowledge to the contrary, the Administrator may rely on reasonable representations from the Participant in determining whether a Participant is eligible for a Qualified Birth or Adoption Distribution. If the Plan permits Qualified Birth or Adoption Distributions, it must accept the recontribution of a Qualified Birth or Adoption Distribution if the Participant is eligible to make a rollover contribution to the Plan at the time of recontribution as provided in LRM 50 (Recontributions).)

Coronavirus-Related Distributions

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant's Elective Deferrals may be distributed as a coronavirus-related distribution. A coronavirus-related distribution is any distribution made from the Plan on or after January 1, 2020, and before December 31, 2020, to a qualified individual, as defined in section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act, Pub L 116-136 (CARES Act) and Section 1B of Notice 2020-50, which does not exceed, in the aggregate, ___ the amount specified in the Adoption Agreement under the Plan and other retirement plans maintained by the Employer and Related Employers.

(Note to reviewer: The Administrator of the Plan may rely on an individual's certification that they satisfy the conditions to be a qualified individual unless the Administrator already has actual knowledge to the contrary. A distribution properly designated as a coronavirus-related distribution under the Plan is treated as satisfying the above distribution restrictions if the Plan is amended to allow it by the last day of the first plan year beginning on or after January 1, 2022. For Governmental Plans, the plan must be amended by the last day of the first plan year beginning on or after January 1, 2024.)

Federally Declared Disasters

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant's Elective Deferrals may be distributed in the event of a federally declared disaster, where resulting legislation or guidance authorizes such a distribution to the Participant.

(Note to reviewer: See LRM 50 (Recontributions) for provisions governing recontributions of certain distributions.)

Sample Adoption Agreement Language:

Qualified Birth or Adoption Distributions

The Plan permits Qualified Birth or Adoption Distributions of a Participant's Elective Deferrals:

___ Yes (Complete remainder of this section)

___ No

A Qualified Birth or Adoption Distribution may be distributed on or after [insert date no earlier than January 1, 2020].

A Participant may take a Qualified Birth or Adoption Distribution in an amount equal to [insert an amount no greater than $5,000] for each child of the participant.

Coronavirus-Related Distributions

The Plan permits coronavirus-related distributions of a Participant's Elective Deferrals:

___ Yes (Complete remainder of this section)

___ No

The Plan permits coronavirus-related distributions of a Participant's Elective Deferrals in an amount that does not exceed, in the aggregate [insert amount no greater than $100,000] under the Plan and other retirement plans maintained by the Employer and Related Employers.

Federally Declared Disasters

The Plan permits a distribution of a Participant's Elective Deferrals for a federally declared disaster, as authorized by legislation or guidance.

___ Yes

___ No

42. Small Account Balances

Sample Plan Language:

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the terms governing the applicable Investment Arrangement, distributions may be made in the form of a lump-sum payment, without the consent of the Participant or Beneficiary, but not without the consent of the Participant or Beneficiary if the Participant's Accumulated Benefit (determined without regard to any separate account that holds rollover contributions) exceeds $5,000 or any lesser amount specified in the Investment Arrangement ("Small Account Balance"). 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).

(Note to reviewer: This is an optional provision. The provision may be modified to allow a higher cash-out limit in the case of a plan that is not subject to the requirements of Title I of ERISA.)

Adoption Agreement Language:

[ ] The Plan permits distribution of Small Account Balances, to the extent permitted under the terms governing the applicable Investment Arrangement.

[ ] The Plan does not permit distribution of Small Account Balances, to the extent permitted under the terms governing the applicable Investment Arrangement.

43. Minimum Distribution Requirements

Statement of Requirement: Code § 403(b)(10); Reg. §§ 1.403(b)-6(e) & 301.7701-18(b)(1)

Sample Plan Language:

The Plan shall comply with the minimum distribution requirements of section 401(a)(9) of the Internal Revenue Code and the regulations thereunder in accordance with the terms governing each Investment Arrangement, unless and to the extent otherwise permitted by law and in regulations or other rules of general applicability published by the Department of the Treasury or the Internal Revenue Service. For purposes of applying the distribution rules of section 401(a)(9) of the Code, each Investment Arrangement is treated as an individual retirement account (IRA) and distributions shall be made in accordance with the provisions of section 1.408-8 of the Treasury Regulations, except as provided in Regulation section 1.403(b)-6(e).

(Note to reviewer: Because the terms of § 403(b) annuity contracts and custodial accounts under the plan must satisfy the requirements of Code § 401(a)(9), it is not necessary that those requirements be set forth in a § 403(b) Pre-approved Plan.)

(Note to reviewer: For purposes of computing required minimum distributions under a 403(b) plan, a Participant's Accumulated Benefit does not include the value of any qualifying longevity annuity contract (QLAC). A QLAC is an annuity contract, purchased from an insurance company on or after July 2, 2014, for the benefit of an employee under the plan, stating its intent to be a QLAC and otherwise meeting the requirements of Reg. §§ 1.403(b)-6(e), 1.401(a)(9)-6 and 1.408-8.)

(Note to reviewer: Effective June 26, 2013, any requirement for a 403(b) plan set forth in the Internal Revenue Code that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex. See Notice 2014-19, Rev. Rul. 2013-17, and the decision in *U.S. v Windsor*, 570 U.S. 12 (2013). Accordingly, under the general rule in § 301.7701-18(b)(1) of the final regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile. See also FAQ-5 in *Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans FAQs.* For example, under the required minimum distribution rules of Code § 401(a)(9), certain options are provided for a surviving spouse that are not available to a non-spouse beneficiary. These options must be provided to a same-sex spouse.

See the Note to Reviewer at LRMs 45 (Direct Rollovers), 47 (Hardship Distributions of Elective Deferrals) and 59 (Domestic Relations Orders and Qualified Domestic Relations Orders) for additional provisions affected by guidance interpreting the *Windsor* decision.)

44. Distribution of Amounts Held in a Rollover Account

Statement of Requirement: Reg. § 1.403(b)-6(i); Rev. Rul. 2004-12; Notice 2013-74, Q&A-3

Sample Plan Language:

Notwithstanding section ___ of the Plan, if a Participant has a separate account attributable to rollover contributions to the Plan, then, to the extent permitted by the terms governing the applicable Investment Arrangement, the Participant may at any time elect to receive a distribution of all or any portion of the amount held in the rollover account.

(Note to reviewer: This provision is optional. The blank in the above provision should be the section of the Plan that corresponds to LRM 41 (Distribution Limitations for Elective Deferrals).)

45. Direct Rollovers

Statement of Requirement: Code §§ 403(b)(8), 401(a)(31), 402(c) & 402A; Reg. §§

1.403(b)-7(b), 1.401(a)(31)-1, 1.402(c)-2, 1.402A-1 & 301.7701-18(b)(1); Notice 2001-57; Notice 2005-5; Notice 2006-44; Notice 2013-74; Notice 2020-51; Notice 2020-62; Rev. Rul. 2004-12

Sample Plan Language:

1. Direct Rollovers. 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 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. The Plan will provide a direct trustee-to-trustee transfer of a Lifetime Income Investment Distribution (as defined in section ___ of the Plan) to an Eligible Retirement Plan.

(Note to reviewer: Insert the Plan section that corresponds to LRM 46 (Lifetime Income Investment Distributions) in the above blank).

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);

(e) any distribution(s) that is reasonably expected to total less than $200 during a year;

(f) any corrective distribution of excess amounts under sections 402(g), 401(k), 401(m), and/or 415(c) of the Code and income allocable thereto;

(g) any loans that are treated as deemed distributions pursuant to section 72(p) of the Code;

(h) dividends paid on employer securities as described in section 404(k) of the Code;

(i) the costs of life insurance coverage (P.S. 58 costs);

(j) prohibited allocations that are treated as deemed distributions pursuant to section 409(p) of the Code; and

(k) a distribution that is a permissible withdrawal from an eligible automatic contribution arrangement within the meaning of section 414(w) of the Code.

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 (i) an individual retirement account or annuity described in section 408(a) or

408(b) of the Code or a Roth individual retirement account or annuity described in 408A of the Code, or (ii) a qualified plan or annuity described in section 401(a) or 403(a) of the Code, or a tax-sheltered annuity described in section 403(b) of the 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.

(Note to reviewer: The CARES Act provided that required minimum distributions waived for 2020 are not treated as eligible rollover distributions under Code § 401(a)(31). Notice 2020-51 contains sample language providing that in the absence of an election in the adoption agreement, a direct rollover will be offered only for distributions that would be eligible rollover distributions in the absence of section Code § 401(a)(9)(I). Notice 2020-51 also provides sample adoption agreement language for available options.)

2.2 Eligible Retirement Plan. An Eligible Retirement Plan is a qualified plan described in section 401(a) of the Code, an annuity plan described in section 403(a) of the Code, an annuity contract described in section 403(b) of the Code, an individual retirement account or annuity described in section 408(a) or 408(b) of the Code, or an eligible plan under section 457(b) of the Code which is maintained by 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 Code.

(Note to reviewer: The PATH Act expands portability of retirement assets by permitting taxpayers to roll over assets from traditional and SEP IRAs, as well as from employer-sponsored retirement plans, such as a 401(k), 403(b), or 457(b) plan, into a SIMPLE IRA plan. Thus, after amendment by the PATH Act, a 403(b) plan can provide for a direct rollover to a SIMPLE IRA. However, the following restrictions apply: (1) the provision does not allow SIMPLE IRAs to accept rollovers from Roth IRAs or designated Roth accounts, and (2) the change applies only to rollovers made

after the two-year period beginning on the date the participant first participated in their employer's SIMPLE IRA plan.)

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 Code, are Distributees with regard to the interest of the spouse or former spouse. A Distributee also includes the Participant's nonspouse designated Beneficiary. In the case of a nonspouse designated Beneficiary, the Direct Rollover may be made only to an individual retirement account or annuity described in section 408(a) or 408(b) of the Code that is established on behalf of the Beneficiary and that will be treated as an inherited IRA pursuant to the provisions of section 402(c)(11) of the Code.

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 Administrator will pay the distribution in a Direct Rollover to an individual retirement plan designated by the 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 blank in the above paragraph should be filled in with the plan section number which corresponds to the mandatory distribution provisions of LRM 42 (Small Account Balances).)

4. Written Explanation of Right to Direct Rollover. The payor shall provide, within a reasonable time period before making an Eligible Rollover Distribution, a written explanation to the Participant that satisfies the requirements of section 402(f) of the Code.

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 designated Roth account under an applicable retirement plan described in section 402A(e)(1) of the Code, or to a Roth IRA described in section 408A of the Code, and only to the extent the rollover is permitted under the rules of section 402(c) of the Code.

(Note to reviewer: If elected in the adoption agreement, a § 403(b) Pre-approved Plan may permit in-plan Roth rollovers of distributable and/or otherwise nondistributable amounts as provided in LRM 49 (Rollover Contributions to the Plan)).

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 amounts 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 Accumulated Benefits 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.

(Note to reviewer: Effective June 26, 2013, any requirement for a 403(b) plan set forth in the Internal Revenue Code that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex. See Notice 2014-19, Rev. Rul. 2013-17, and the decision in U.S. v *Windsor*, 570 U.S. 12 (2013). Accordingly, under the general rule in § 301.7701-18(b)(1) of the final regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile. See also FAQ-5 in *Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans FAQs.* For example, under the rollover rules of Code § 402(c), certain options are provided for a surviving spouse that are not available to a non-spouse beneficiary. These options must be provided to a same-sex spouse.

See the Note to Reviewer at LRMs 43 (Minimum Distribution Requirements), 47 (Hardship Distributions of Elective Deferrals) and 59 (Domestic Relations Orders and Qualified Domestic Relations Orders) for additional provisions affected by guidance interpreting the *Windsor* decision.)

Sample Adoption Agreement Language:

Direct Rollovers (Roth Elective Deferrals):

A Direct Rollover (including an automatic rollover) of distributions from a Participant's Roth Elective Deferral Account will not be made from amounts that are Eligible Rollover Distributions if they are reasonably expected to total _____[INSERT AMOUNT NOT MORE THAN $200] during a year.

46. Lifetime Income Investment Distributions

Statement of Requirement: Code §§ 401(a)(38), 403(b)(7)(A)(ii) & 403(b)(11)(D)

A lifetime income investment held by the Plan may be distributed if the investment can no longer be held as an investment option under the Plan. Distributions must be made within the 90-day period ending on the date when the lifetime income investment is no longer authorized to be held as an investment option under the Plan, and [SELECT ONE OF THE FOLLOWING]:

1. _____The distribution must be made in a direct trustee-to-trustee transfer to an Eligible Retirement Plan; or

(Note to reviewer: See LRM 51, Transfers Between 403(b) Plans, for sample plan language in this regard.)

2. _____The distribution must be in the form of an of an annuity contract purchased for a Participant and distributed by the Plan to a Participant.

For purposes of this section, a lifetime income investment is an investment option designed to provide a Participant with election rights (1) that are not uniformly available with respect to other investment options under the Plan, and (2) that are rights to a lifetime income feature available through a contract or other arrangement offered under the Plan. A lifetime income feature is (1) a feature that guarantees a minimum level of income annually (or more frequently) for at least the remainder of the life of the Participant or the joint lives of the Participant and the Participant's designated beneficiary, or (2) an annuity payable on behalf of the Participant under which payments are made in substantially equal periodic payments (not less frequently than annually) over the life of the Participant and the Participant's designated beneficiary.

Hardship Distributions

47. Hardship Distributions of Elective Deferrals

Statement of Requirement: Code § 403(b)(11); Reg. §§ 1.401(a)-21(e), 1.403(b)-6(d)(2), 1.401(k)-1(d)(3) & 301.7701-18(b)(1); Rev. Proc. 2021-37, sec. 5.18(7) & 6.03(3)

(Note to reviewer: A Standardized § 403(b) Pre-approved Plan providing for hardship distributions must satisfy the safe harbor standards in Reg. § 1.401(k)-1(d)(3). The following sample plan language is intended to satisfy the standards in Reg. § 1.401(k)-1(d)(3). A Nonstandardized § 403(b) Plan may include hardship distribution provisions which do not meet this standard provided that the distributions are subject to nondiscriminatory and objective criteria contained in the plan. No sample plan language is provided for such provisions. See Rev. Proc. 2021-37, secs 5.18(7) and 6.03(3).)

(Note to reviewer: Reg. § 1.403(b)-6(d)(2) adopts the definition of a hardship distribution and related rules under Reg. § 1.401(k)-1(d)(3). Final amendments to Reg. § 1.401(k)-1(d)(3) issued in 2019 revised the hardship rules. Note that under those rules,

a 403(b) plan is no longer able to provide for a suspension of elective deferrals as a condition of obtaining a hardship distribution. Also, note under those rules, a participant is no longer required to take any available loan under the plan prior to becoming eligible for a hardship distribution (although such requirement can still be a permissible additional condition).)

(Note to reviewer: The Bipartisan Budget Act of 2018 added Code § 401(k)(14)(A), which allows a hardship distribution from a 401(k) plan to include earnings, qualified nonelective contributions and qualified matching contributions in addition to elective deferrals. However, no comparable amendment was made to Code §§ 403(b)(7) or 403(b)(11), so no income attributable to elective deferrals may be distributed on account of hardship. Note that an annuity contract may allow distributions of nonelective employer contributions on the occurrence of a designated event, such as a hardship. See LRM 78 (Distribution Limitations for Nonelective Employer Contributions).)

Sample Plan Language:

1. To the extent permitted by the terms governing the applicable Investment Arrangement, a 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: (1) expenses for (or necessary to obtain) medical care that would be deductible under section 213(d) of the Internal Revenue Code (determined without regard to the limitations in section 213(a) of the Code relating to the applicable percentage of adjusted gross income and recipients of the medical care) provided that, if the recipient of the medical care is not listed in section 213(a), the recipient is a primary beneficiary; (2) costs directly related to the purchase (excluding mortgage payments) of a principal residence for the Participant; (3) payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the Participant, the Participant's spouse, children or dependents, or for a primary beneficiary; (4) payments necessary to prevent the eviction of the Participant from, or a foreclosure on the mortgage of, the Participant's principal residence; (5) payments for funeral or burial expenses for the Participant's deceased parent, spouse, child or dependent, or for a deceased primary beneficiary; (6) expenses to repair damage to the Participant's principal residence that would qualify for a casualty loss deduction under section 165 of the Code (determined without regard to section 165(h)(5) and whether the loss exceeds 10 percent of adjusted gross income); and (7) expenses and losses (including loss of income) incurred by the Participant on account of a disaster declared by the Federal Emergency Management Agency (FEMA), if the Participant's principal residence or principal place of employment at the time of the disaster was in an area designated by FEMA for individual assistance with respect to the disaster. A "primary beneficiary" is an individual named as a beneficiary under the plan who has an unconditional right to all or a portion of the Participant's account balance under the plan upon the Participant's death.

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 currently available distributions, other than hardship distributions, under the plan and all other plans of deferred compensation, whether qualified or nonqualified, maintained by the Employer;

3.3 The Participant has provided the Employer a representation in writing (including by electronic media) that the Employee has insufficient cash or other liquid assets reasonably available to satisfy the need; and

3.4 The Employer does not have actual knowledge that is contrary to the representation provided in 3.3.

(Note to reviewer: Effective June 26, 2013, any requirement for a 403(b) plan set forth in the Internal Revenue Code that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex. See Notice 2014-19, Rev. Rul. 2013-17, and the decision in *U.S. v Windsor*, 570 U.S. 12 (2013). Accordingly, under the general rule in § 301.7701-18(b)(1) of the final regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile. See also FAQ-5 in *Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans FAQs.* For example, a hardship distribution may be appropriate on behalf of a spouse. A spouse for this purpose must include a same-sex spouse. See the Note to Reviewer at LRMs 43 (Minimum Distribution Requirements), 45 (Direct Rollovers) and 59 (Domestic Relations Orders and Qualified Domestic Relations Orders) for additional provisions affected by guidance interpreting the *Windsor* decision.)

Plan Loans

48. Loans to Participants

Statement of Requirement: Code § 72(p); Reg. §§ 1.72(p)-1 & 1.403(b)-6(f); Rev. Proc. 2021-37, sec. 5.05; Notice 2020-50

Sample Plan Language:

1. To the extent permitted under the terms of the applicable Investment Arrangement, Participants and Beneficiaries may obtain loans under the Plan.

2. Loans shall be made available to all Participants and Beneficiaries on a reasonably equivalent basis.

3. Loans will be adequately secured and bear a reasonable rate of interest.

4. Loans will be evidenced by a legally enforceable agreement specifying the amount and date of the loan and the repayment schedule.

5. 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.

6. 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, the 15-year amortization period in the sample language is suggested; amortization periods other than 15 years are permissible.)

7. 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.

8. The terms governing the applicable Investment Arrangement shall determine the method of repayment of loans.

(Note to reviewer: The plan may provide or allow the Employer to elect in the adoption agreement that loans will be repayable by payroll withholding if permitted under the terms of the applicable Investment Arrangement.)

9. The Administrator will exchange information with Vendors as necessary to coordinate the loan limitations and other requirements of section 72(p) of the Internal Revenue Code.

<u>Coronavirus-Related Loans</u>

10. If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a loan to a Participant or Beneficiary may be treated as a

coronavirus-related loan. A coronavirus-related loan is a loan made from the Plan on or after March 27, 2020, and before December 31, 2020, to a qualified individual, as defined in section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act, Pub L 116-136 (CARES Act) and Section 1B of Notice 2020-50, which does not exceed the lesser of (a) $100,000 (minus outstanding plan loans of the individual), or (2) the individual's vested benefit under the Plan and other retirement plans maintained by the Employer and Related Employers.

10.1 If a loan is outstanding on or after March 27, 2020, and any repayment on the loan is due from March 27, 2020 to December 31, 2020, that due date may be delayed under the Plan for up to one year. Any payments after the suspension period must be adjusted to reflect the delay and any interest accruing during the delay, and the period of delay must be disregarded in determining the 5-year period and the term of the loan under Code sections 72(p)(2)(B) and (C).

(Note to reviewer: The Administrator of the Plan may rely on an individual's certification that they satisfy the conditions to be a qualified individual unless the Administrator already has actual knowledge to the contrary. A loan properly designated as a coronavirus-related plan loan is treated as satisfying the above restrictions if the Plan is amended by the last day of the first plan year beginning on or after January 1, 2022. For Governmental Plans, the plan must be amended by the last day of the first plan year beginning on or after January 1, 2024.)

Federally Declared Disasters

11. If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a loan to a Participant may be made in the event of a federally declared disaster, where resulting legislation or guidance authorizes such a loan to the Participant. The general loan rules set forth above and in section 72(p) of the Code may be modified pursuant to the resulting legislation or guidance.

Sample Adoption Agreement Language:

Coronavirus-Related Loans

The Plan permits coronavirus-related loans of a Participant's vested account balance to the extent permitted under the Investment Arrangement:

___ Yes

___ No

Federally declared Disaster Loans

The Plan permits loans of a Participant's account balance in the event of a Federally declared disaster, to the extent permitted under the Investment Arrangement:

___ Yes

___ No

Rollover Contributions, Transfers, Exchanges

49. Rollover Contributions to the Plan

Statement of Requirement: Code §§ 401(a)(31), 401(a)(38), 402(c)(4), 402A, 403(b)(8), 403(b)(7), 403(b)(11) & 6343(f); Reg. § 1.403(b)-10(d); Notice 2010-84; Notice 2013-74; Notice 2020-62

Sample Plan Language:

1. If elected in the Adoption Agreement and to the extent permitted under the terms of the applicable Investment Arrangement, the Plan will accept rollover contributions as provided in this section.

2. Eligible Rollover Contributions. 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 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 this section, an Eligible Rollover Distribution means any distribution of all or any portion of a Participant's benefit under an 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 is a qualified plan described in section 401(a) of the Internal Revenue Code, an annuity plan described in section 403(a) of the Code, an annuity contract described in section 403(b) of the Code, an individual retirement account or annuity described in section 408(a) or 408(b) of the Code, or an eligible governmental plan under section 457(b) of the 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 Code and only to the extent the rollover is permitted under the rules of section 402(c) of the 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 Administrator obtains information regarding the Participant's tax basis under section 72 of the 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.

(Note to reviewer: A § 403(b) Pre-approved Plan that includes a qualified Roth contribution program may allow in-plan Roth rollovers of Eligible Rollover Distributions and/or otherwise nondistributable amounts in accordance with Code § 402A(c)(4). An in-plan Roth rollover of an Eligible Rollover Distribution may be accomplished by a Direct Rollover (in-plan Roth direct rollover) or a rollover within 60 days (in-plan Roth 60-day rollover.) An in-plan Roth rollover of an otherwise nondistributable amount must be made in the form of a Direct Rollover.)

8. Lifetime Income Investment Distributions. The Plan will accept a direct trustee-to-trustee transfer of a Lifetime Income Investment Distribution from an Eligible Retirement Plan as defined in section ___ of the Plan.

(Note to reviewer: Insert the section of the Plan corresponding to LRM 46 (Lifetime Income Investment Distributions)).

9. If elected by the Employer in the Adoption Agreement, a Participant may roll over to the Plan property or money that was wrongfully levied upon by the Internal Revenue Service and returned to the Participant. The rollover must be made by the due date (not including extensions) for the Participant's income tax return for the year the money or property is returned. The Administrator may request documentation that is appropriate or necessary to accept the rollover and comply with section 6343(f) of the Code.

(Note to reviewer: see, LRM 60 (IRS Levy).)

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 the following plans. Rollovers of after-tax contributions will not be accepted unless otherwise indicated. (Check each that applies or none.)

[ ] 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 Code,

[ ] including after-tax contributions.

[ ] a section 457(b) plan maintained by a State.

In-Plan Roth Rollovers

If the Plan permits Participants to make Roth Elective Deferrals, the Plan may accept an in-plan Roth rollover to a Participant's Roth Elective Deferral Account of:

[ ] Eligible Rollover Distributions.

[ ] Otherwise Nondistributable Amounts (Direct Rollover only).

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) or 403(a) of the Code.

[ ] an annuity contract or custodial account described in section 403(b) of the Code.

[ ] a section 457(b) plan maintained by a State.

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 Code, excluding after-tax employee contributions.

[ ] an annuity contract described in section 403(b) of the Code, excluding after-tax contributions.

[ ] a section 457(b) plan which is maintained by 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 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 408A(b) of the Code.

50. Recontributions

Statement of Requirement: Notices 2020-50 & 2020-68

Recontributions of Qualified Birth or Adoption Distributions

A Participant who received one or more Qualified Birth or Adoption Distributions under the Plan is entitled to recontribute the distributions (not to exceed the amount of the distributions) if the Participant is eligible to make a rollover contribution to the Plan at the time of recontribution. A Participant who makes a recontribution to the Plan will be treated as having received the distributions in an eligible rollover distribution and as having transferred the amount to the Plan in a direct trustee-to-trustee transfer within 60 days of the distribution. The Plan will ensure that one or more Investment Arrangements are available to accept the recontribution.

(Note to reviewer: A plan that permits a Qualified Birth or Adoption Distribution as provided in LRM 41 (Distribution Limitations for Elective Deferrals) and LRM 78 (Requirement: Distribution Limitations for Nonelective Employer Contributions) must accept a repayment of the Qualified Birth or Adoption Distribution made under the Plan if the individual making the recontribution is eligible to make a rollover at the time of repayment.)

Recontributions of Coronavirus-Related Distributions

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant who is a qualified individual under section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub L 116-136, and Section 1B of Notice 2020-50 and who receives a coronavirus-related distribution that is eligible for tax-free rollover treatment may recontribute all or a portion of the coronavirus-related distribution at any time during the 3-year period beginning the day after the date of a coronavirus-related distribution made under the Plan. The recontribution of a coronavirus-related distribution that is eligible for tax-free rollover treatment and made within the 3-year period described above will be treated as a rollover contribution to the Plan.

(Note to reviewer: A plan is not required to provide a coronavirus-related distribution or accept a recontribution of a coronavirus-related distribution that is eligible for tax-free rollover treatment. The Administrator of a Plan that accepts recontributions of coronavirus-related distributions must reasonably conclude that the recontribution is eligible for Direct Rollover treatment.)

Recontributions of Disaster-Related Distributions

If elected by the Employer in the Adoption Agreement, the Plan will accept a recontribution of a distribution for a federally declared disaster if legislation or guidance authorizes such a recontribution and to the extent permitted under the Investment Arrangement.

(Note to reviewer: The above language is optional. Plans are generally not required to

accept repayment of disaster-related distributions, but a plan that chooses to do so should include the above language for repayments of disaster-related distributions.)

Sample Adoption Agreement Language:

The Employer [ ] will [ ] will not accept a recontribution of a coronavirus related distribution.

The Employer [ ] will [ ] will not accept a recontribution of a distribution for a federally declared disaster if legislation or guidance authorizes such a recontribution.

51. Transfers Between 403(b) Plans

Statement of Requirement: Reg. § 1.403(b)-10(b)

Sample Plan Language:

1. If elected in the Adoption Agreement, plan-to-plan transfers between 403(b) plans for a Participant shall be permitted as provided in this section.

2. Transfers to the Plan. The 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;

2.2 The Participant is an Employee or former Employee of the Employer;

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

2.4 The transferred amounts are subject to statutory restrictions on distributions that are not less stringent than those imposed under the transferor plan.

3. Transfers to Another Plan. The Administrator may permit the transfer of assets to another plan for a Participant or Beneficiary only if –

3.1 The Plan provides for direct transfers of assets pursuant to the Adoption Agreement;

3.2 The Participant is an Employee or former Employee of the Employer;

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

3.4 The transferred amounts are subject to statutory restrictions on distributions that are not less stringent than those imposed under the transferor Plan.

4. The 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 Internal Revenue Code.

(Note to reviewer: The following paragraphs may be added in the case of a § 403(b) Pre-approved Plan that is a Retirement Income Account, and sponsored by a Code § 414(e)(3)(A) benefit board:)

5. Automatic Transfers. A Participant who terminates (or has terminated) employment with the Employer and who is subsequently employed by another employer that participates in this Retirement Income Account shall have his or her Accumulated Benefit, if any, automatically transferred to such other employer's Retirement Income Account upon commencing employment with such other employer. Any such transfer must meet the requirements of paragraphs 3 and 4.

6. Transfer by Employer. To the extent permitted by applicable law and subject to rules and procedures established by the Administrator, an Employer may request a transfer of all Accounts maintained under its Plan to another section 403(b) plan that it has established.

Sample Adoption Agreement Language:

The Plan

[ ] will

[ ] will not

accept transfers from other plans.

[ ] The Plan will permit transfers to other plans for

[ ] All Participants

[ ] Former Employees only

52. Transfers or Mergers Between Church Plans and a 403(b) Plan

Statement of Requirement: Code § 414(z)

Sample Plan Language:

Plan-to-plan transfers for a Participant or Beneficiary between this Plan and a Church Plan that is either a qualified plan described in section 401(a) of the Internal Revenue Code or a section 403(b) plan (collectively referred to as a Church Plan), or a merger of this Plan and a

Church Plan are permitted if:

A. The Church Plan and this Plan are maintained by the same church or convention or association of churches within the meaning of 414(e) of the Code (including an organization described in §§ 414(e)(3)(A) or (B)(ii));

B. Each Participant's or Beneficiary's total accrued benefit immediately after the transfer or merger is equal to or greater than the Participant's or Beneficiary's total accrued benefit immediately before the transfer or merger; and

C. Each Participant's or Beneficiary's total accrued benefit is 100% nonforfeitable after the transfer or merger and at all times thereafter.

The Administrator may require such documentation from the other plan as it deems necessary to effectuate the transfer or merger in accordance with requirements of this section and section 414(z) of the Code.

For purposes of this section, the term "accrued benefit" means in the case of a defined benefit plan, the Participant's or Beneficiary's accrued benefit determined under the plan, and in the case of a plan other than a defined benefit plan, the balance of the Participant's or Beneficiary's account under the plan.

53. Exchanges

Statement of Requirement: Reg. § 1.403(b)-10(b)

Sample Plan Language:

1. If elected in the Adoption Agreement, exchanges shall be permitted as provided in this section.

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account sponsored by a Code § 414(e)(3)(A) organization may provide in the basic plan document whether exchanges are permitted.)

2. A Participant or Beneficiary is permitted to change the investment of his or her Accumulated Benefit among the Vendors of Investment Arrangements approved for use under the Plan. However, an investment change that includes an investment with a Vendor that is not eligible to receive new contributions (referred to below as an exchange) is not permitted unless the conditions in paragraphs (3) through (5) of this Section are satisfied.

(Note to reviewer: Vendors of Investment Arrangements approved for use under the Plan consist of those that are eligible to receive new contributions under the Plan (i.e., payroll slot vendors) and those that are eligible to conduct exchanges under the Plan.)

3. The Participant or Beneficiary must have an Accumulated Benefit immediately after

the exchange that is at least equal to the Accumulated Benefit of that Participant or Beneficiary immediately before the exchange (taking into account the Accumulated Benefit 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 statutory 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 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 ____), and (ii) 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 rollover accounts that are available to the Participant under the Plan in order to satisfy the financial need under the hardship withdrawal rules); and

(Note to reviewer: The blank should be filled in with the plan section number which corresponds to LRM 41 (Distribution Limitations for Elective Deferrals).)

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 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

[ ] will not

allow exchanges within the Plan.

The plan

[ ] will

[ ] will not

allow exchanges outside the Plan.

54. Transfers to Purchase Service Credit

Statement of Requirement: Reg. § 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 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 Accumulated Benefit 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 Code does not apply by reason of section 415(k)(3) of the Code.

Sample Adoption Agreement Language:

The plan

[ ] will

[ ] will not

allow transfers to purchase service credit.

(Note to reviewer: This provision is designed for use by Governmental Plans.)

Investment of Contributions

55. Investment

Statement of Requirement: Reg. § 1.403(b)-8; Rev. Proc. 2021-37, secs. 5.03 & 5.04

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 Investment Arrangements.

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. If elected in the Adoption Agreement, each Participant or Beneficiary shall direct the investment of his or her Account among the investment options available under the Investment Arrangement in accordance with the terms governing the Investment Arrangement.

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account should add a reference to Retirement Income Accounts in paragraphs 1, 2, and 3.)

4. Information Sharing. Each Vendor and the 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 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

[ ] will not

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.)

Plan Termination and Amendment

56. Termination

Statement of Requirement: Reg. § 1.403(b)-10(a); Rev. Rul. 2011-7; Rev. Rul. 2020-23

Sample Plan Language:

1. Termination of Contributions. The Employer has no obligation or liability whatsoever to maintain the Plan for any specific 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, all nonvested amounts under the Plan will be fully vested, and subject to any restrictions contained in the terms governing the applicable Investment Arrangement, 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.

(Note to reviewer: Rev. Ruls. 2011-7 and 2020-23 provide additional information pertaining to the distribution of annuity contracts and custodial accounts, respectively, following termination of a plan. Rev. Rul. 2020-23 authorizes the distribution of an individual custodial account for a distribution of a custodial account to a Participant or Beneficiary, who does not otherwise affirmatively elect to receive a distribution.)

57. Amendment by Provider

Statement of Requirement: Rev. Proc. 2021-37, secs. 4.14, 4.21, 5.08, 9.01, 9.02 & 9.05

(Note to reviewer: Providers are required to amend their § 403(b) Pre-approved Plans to ensure that the form of their plans continues to satisfy the § 403(b) Requirements. Providers must make reasonable and diligent efforts, as soon as practicable following the adoption of plan amendments, to ensure that Employers have actually received and are aware of the plan amendments. The date on which each amendment is adopted by the Provider must be included with the amendment provided to Employers.

Sample Plan Language:

The Provider may amend any part of the Plan. However, for purposes of reliance on an Opinion Letter, the Provider will no longer have the authority to amend the Plan on behalf of the Employer and the Plan will be treated as an individually designed plan, where: (1) the Employer makes any amendment to a Standardized Plan other than an amendment that is permissible pursuant to Section 9.05 of Rev. Proc. 2021-37; (2) the Employer amends the Plan to incorporate a type of plan that is not permitted under the Pre-approved Plan program, as described in Section 6.03 of Rev. Proc. 2021-37; (3) the Internal Revenue Service, in its sole discretion, determines that a Nonstandardized Plan is an individually designed plan due to the nature and extent of amendments to the Plan; (4) the Employer chooses to discontinue participation in a § 403(b) Pre-approved Plan that has been amended by the Provider without substituting another § 403(b) Pre-approved Plan; or (5) the Employer amends the Plan to remove any required provisions as described in section 5 of Revenue Procedure 2021-37 from the Plan.

For purposes of Provider amendments, a Mass Submitter, as defined in Section 4.14 of Rev. Proc. 2021-37, shall be recognized as the agent of the Provider. If the Provider does not adopt the amendments made by the Mass Submitter, it will no longer be identical to or a minor modifier of the Mass Submitter plan.

(Note to reviewer: Each § 403(b) Pre-approved Plan must include a procedure for amendments by the Provider, and to inform the Employer, when applicable, of the need to timely adopt or amend the plan, including in the case of both initial adoption and restatement of the plan so that changes in the Code, regulations, or other guidance published in the Internal Revenue Bulletin, and any correction of the plan, may be applied to all Employers. The Provider must also notify an Employer that failure to timely adopt the plan or restatement, when required, or failure to take into account plan amendments in the operation of the plan, could result in adverse tax consequences.)

The Provider of this § 403(b) Pre-approved Plan is:

Name:_____

Address:_____

Telephone Number:_____

(Note to reviewer: Each § 403(b) Pre-approved Plan must include the name, address and telephone number of the Provider or Provider's authorized representative for inquiries by Employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the Opinion Letter.)

58. Amendment by Adopting Employer

Statement of Requirement: Rev. Proc. 2021-37, secs. 8.01, 8.04 and 9.03

Sample Plan Language:

An Employer that amends the Plan, other than to make one or more of the following amendments, may no longer rely on the Opinion Letter for the Plan and will be considered to have an individually designed 403(b) plan:

1. Add sample or model amendments published by the IRS that specifically provide that their adoption will not cause a plan to fail to be identical to the § 403(b) Pre-approved Plan;

2. Add or change a provision (including choosing among options in the plan) or to specify or change the effective date of a provision, provided the Employer is permitted to make the modification or amendment under the terms of the § 403(b) Pre-approved Plan, as well as under section 403(b) of the Internal Revenue Code, and, in the case of a Standardized Plan, the provision is identical to a provision in the § 403(b) Pre-approved Plan, except for the effective date;

3. Amendments that adjust the limitations under sections 415, 402(g), 401(a)(17), and 414(q)(1)(B) of the Code to reflect annual cost-of-living increases;

4. Plan language completed by the Employer if the overriding language is necessary to satisfy section 415 of the Code because of the required aggregation of multiple plans under that section, in accordance with section 5.09 of Rev. Proc. 2021-37;

5. Interim amendments or discretionary amendments, as described in sections 11 and 12 of Rev. Proc. 2019-39, that are related to a change in the § 403(b) Requirements;

6. Amendments that reflect a change of a Provider's name, in which case the Provider must notify the IRS, in writing, of the change in name and certify that it still meets the conditions to be a Provider described in section 4.21 of Rev. Proc. 2021-37;

7. Amendments to the administrative provisions in the plan (such as provisions relating to investments, plan claims procedures, or the Adopting Employer’s contact information), provided the amended provisions are not in conflict with any other provision of the plan, still meet the requirements of Rev. Proc. 2021-37, and do not cause the plan to fail to satisfy the § 403(b) Requirements; and

8. Amendments with respect to which a closing agreement under the Audit Closing Agreement Program or a compliance statement under the Voluntary Correction Program of EPCRS has been issued.

(Note to reviewer: See sections 8.01, 8.04 and 9.03 of Rev. Proc. 2021-37 regarding an Employer’s ability to amend a § 403(b) Pre-approved Plan.)

Other Plan Provisions

59. Domestic Relations Orders and Qualified Domestic

Relations Orders

Statement of Requirement: Code § 414(p); Reg. §§ 1.403(b)-10(c) & 301.7701-18(b)(1)

(Note to reviewer: Effective June 26, 2013, any requirement for a section 403(b) plan set forth in the Internal Revenue Code that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex. See Notice 2014-19, Rev. Rul. 2013-17, and the decision in U.S. v *Windsor*, 570 U.S. 12 (2013). Accordingly, under the general rule in § 301.7701-18(b)(1) of the final regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile. See also FAQ-5 in *Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans FAQs.* For example, a qualified domestic relations order adjudicating marital property rights must be provided to a same-sex spouse.)

See the Note to Reviewer at LRMs 43 (Minimum Distribution Requirements), 45 (Direct Rollovers) and 47 (Hardship Distributions of Elective Deferrals) for additional provisions affected by guidance interpreting the *Windsor* decision.)

Sample Plan language:

(Note to reviewer: The subsequent two paragraphs of sample plan language are alternates. The following paragraph is written for use by Governmental Plans and 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 Code § 414(p).)

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 Accumulated Benefit 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 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 Plan or Church Plan for situations involving domestic relations orders that are "qualified" under Code § 414(p). This paragraph may also be used in place of the preceding paragraph.)

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 Accumulated Benefit awarded to an Alternate Payee (within the meaning of section 414(p)(8) of the Internal Revenue Code) shall be paid only if such domestic relations order is determined by the Administrator to be a qualified domestic relations order as defined in section 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

(Note to reviewer: The sample provision requires the 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 Code § 414(p).)

60. IRS Levy

Statement of Requirement: IRC §§ 6331 & 6343(f)

Sample Plan Language:

The Administrator may pay from a Participant's or Beneficiary's Accumulated Benefit the amount that the 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.

(Note to reviewer: The IRS can release a wrongful levy on property or money held in a retirement plan. The return of the property or money, along with interest thereon, can be rolled over to a retirement plan or IRA to the extent permitted by a retirement plan or IRA.)

(Note to reviewer: See ERISA § 206(d) for 403(b) plans that are subject to Title I of ERISA.)

61. 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 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

Administrator, to the Employer.

(Note to reviewer: This provision may be modified in the case of a plan not subject to Title I of ERISA, for example to modify or remove the one-year limitation.)

62. USERRA - Military Service Credit

Statement of Requirement: Code §§ 401(a)(37) & 414(u); Rev. Proc. 96-49; Notice 2010-15; Rev. Proc. 2021-37, sec. 5.15

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. In addition, the survivors of any Participant who dies on or after January 1, 2007, while performing qualified military service, are entitled to any additional benefits (other than contributions relating to the period of qualified military service) but including vesting service credit for such period and any ancillary life insurance or other survivor benefits) that would have been provided under the Plan had the Participant resumed employment on the day preceding the participant's death and then terminated employment on account of death.

(Note to reviewer: As added by the HEART Act, for deaths and disabilities occurring after January 1, 2007, Code § 414(u)(9) provides that the Employer may, for benefit accrual purposes, treat an individual who dies or becomes disabled while performing qualified military service as if that individual had resumed employment in accordance with USERRA reemployment rights on the day preceding the death or disability and then terminated employment on the actual date of death or disability. Any benefit accruals or contributions under Code § 414(u)(9) must be provided to all such individuals performing qualified military service with respect to the Employer and any Related Employer (see LRM 23 (Related Employers)) on terms that are reasonably equivalent. The sample language does not provide for contributions allowed under Code § 414(u)(9) but may be modified to do so or to allow the employer to elect in the adoption agreement that contributions will be provided under the plan with respect to all such deceased and/or disabled individuals.

Where an individual dies after January 1, 2007, while performing qualified military service, vesting credit for the period of the deceased individual's qualified military service must be provided in the case where the individual dies while performing such service. Vesting credit may be provided, but is not required, where the individual is disabled while performing qualified military service. See Part II of Notice 2010-15 and LRM 69 (Vesting).)

63. Adoption Agreement Requirements—All Plans

Statement of Requirement: Rev. Proc. 2021-37, secs. 5.09, 5.10, 5.11, 5.12, 5.17, 6.03(4) & 8.03(2) & (3)

(Note to reviewer: The adoption agreement of every § 403(b) Pre-approved Plan cannot include blanks or fill-in provisions for the employer to complete, beyond specific elections contained in the adoption agreement, unless the provisions have parameters that preclude the Adopting Employer from completing the provisions in a manner that could violate the § 403(b) Requirements. Additionally, the adoption agreement must satisfy the following requirements:

1. **The adoption agreement must allow the adopting Employer to add overriding plan language, if necessary, to satisfy section Code § 415 because of the required aggregation of multiple plans. (See LRM 40 (Limitations on Annual Additions).**

2. **The adoption agreement must identify the Employer and must contain a dated Employer signature line. The Employer must sign and date the adoption agreement when it first adopts the Plan and must complete, sign, and date a new adoption agreement if the Plan has been restated. The Employer must complete a new signature page if it modifies any prior elections or makes new elections in its adoption agreement. (See LRM 14 (Employer)).**

   (This signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the Adoption Agreement or single plan document, or the restatement, amendment, or modification thereof, by the Employer.)

3. **The adoption agreement must state that it is to be used with a single specific basic plan document and must identify that document.**

4. **The adoption agreement must contain a statement describing the limitations on employer reliance on an Opinion Letter and must contain a cautionary statement to the effect that the failure to properly fill out the adoption agreement may result in failure of the form of the Plan to meet the § 403(b) Requirements. (See LRMs 82 (Reliance on Opinion Letter for Standardized Plans) and 85 (Reliance on Opinion Letter for Nonstandardized Plans)).**

5. **The adoption agreement must state that the Provider will inform the adopting Employer of any amendments made to the Plan or of the discontinuance or abandonment of the Plan.**

6. The adoption agreement must include the name, address and telephone number of the Provider or the Provider'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.

7. The adoption agreement must require the adopting Employer to identify its status both as an eligible Employer, within the meaning of Reg. § 1.403(b)-2(b)(8), and with respect to whether the nondiscrimination requirements of Code § 403(b)(12) apply to the Plan.

8. The adoption agreement may not be signed prior to the issuance of an Opinion Letter for the Plan.)

Sample Adoption Agreement Language:

1. Eligible Employer Status. The Employer is:

a. [ ] An educational organization described in section 170(b)(1)(A)(ii) of the Internal Revenue Code ("Public School").

b. [ ] An organization that is exempt from tax under section 501(c)(3) of the Code.

(Note to reviewer: The following options should be included in the adoption agreement for a Retirement Income Account that defines employee to include self-employed ministers and chaplains. See LRM 13 (Employee)).

c. [ ] An Employer of a minister described in section 414(e)(5)(A)(i)(II) of the Code.

d. [ ] A self-employed minister described in section 414(e)(5)(A)(i)(I) of the Code.

2. Status of the Plan for Purposes of the Nondiscrimination Requirements. The Plan is:

a. [ ] A Governmental Plan

b. [ ] A plan of an Employer that is a Church or a Qualified Church Controlled Organization.

c. [ ] A plan of an Employer that is a Non-Qualified Church Controlled Organization.

d. [ ] A plan of an Employer (other than a plan described in a., b. or c.).

(Note to reviewer: The following option must be included in the adoption agreement for a § 403(b) Pre-approved Plan that is a Retirement Income Account.)

3. Retirement Income Account:

[ ] This plan is a Retirement Income Account within the meaning of section 403(b)(9) of the Code.

(Note to reviewer: A single § 403(b) Pre-approved Plan may not be used for both a § 403(b) Pre-approved Plan that is intended to be a Retirement Income Account and a § 403(b) Pre-approved Plan that is not intended to be a Retirement Income Account. Thus, separate basic plan documents and adoption agreements are required, and the adoption agreement for a § 403(b) Pre-approved Plan that is intended to be a Retirement Income Account must so state in accordance with election 3, above.)

PART II. ADDITIONAL PROVISIONS FOR NONELECTIVE EMPLOYER CONTRIBUTIONS AND EMPLOYEE CONTRIBUTIONS

Part II provides additional sample plan language for § 403(b) Pre-approved Plans that include contributions other than elective deferrals. Sample language may also be found in the DC and CODA LRMs.

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

Under the regulations, the requirements identified above do not apply to plans of Churches and QCCOs. Therefore, LRMs 66 through 68, 73 through 76, and 83 do not apply to these plans. Except for the compensation limit of Code § 401(a)(17), the requirements identified above do not apply to Governmental Plans. The requirements identified above do apply to all other § 403(b) Pre-approved Plans, except that the requirements of LRMs 67 (Hour of Service) and 68 (Year of Eligibility Service) do not apply to a plan, including a plan of a Non-QCCO, that is a Church Plan within the meaning of Code § 414(e) and ERISA § 3(33) that is exempt from the minimum participation standards of ERISA § 202. Governmental plans and plans of Non-QCCOs are required to satisfy the universal availability requirements of Code § 403(b)(12)(A)(ii). See LRM 17 (Non-Qualified Church-Controlled Organization or Non-QCCO).

Notwithstanding any provision in these LRMs to the contrary, a § 403(b) Pre-approved Plan that is Retirement Income Account must set forth the nondiscrimination requirements of Code § 403(b)(12). The plan must also state that such requirements apply to any Employee other than an Employee of a QCCO or Church.) See LRM 86 (Retirement Income Account).

64. Compensation

Statement of Requirement: Code § 414(s) & §401(a)(17); Reg. §§ 1.401(a)(4)-12, 1.401(a)(17)-1, 1.414(s)-1 & 1.415(c)-2; Rev. Proc. 2021-37, secs. 5.18(4) & 8.02(3)

(Note to reviewer: Standardized § 403(b) Pre-approved Plans that include nonelective employer contributions must define compensation as total compensation. Total compensation means a definition of compensation that includes all compensation within the meaning of Code § 415(c)(3), excluding all other compensation, or compensation that otherwise satisfies Code § 414(s) and Reg. § 1.414(s)-1(c).

Nonstandardized § 403(b) Pre-approved Plans may allow the Employer to elect an alternative definition of compensation, provided that, for purposes of determining the amount of nonelective employer contributions, compensation is limited pursuant to Code § 401(a)(17), unless the employer is a Church or a QCCO. A Nonstandardized § 403(b) Pre-approved Plan may, but is not required to, use any of the definitions of compensation below.)

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 sections 125, 132(f)(4), 402(e)(3), 402(h)(1)(B), or 403(b) of the Internal Revenue Code.

3. Except as provided in section 1.401(a)(17)-1(d)(4)(ii) of the Treasury Regulations with respect to eligible participants in Governmental Plans, the annual compensation of each Participant taken into account in determining allocations shall not exceed $305,000, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after January 1, 2022.

(Note to reviewer: Paragraph 3 can be omitted in a plan of a Church or QCCO. Code § 401(a)(17) 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 2022 is $305,000. For limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.)

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.

(Note to reviewer: Code § 3401(h) provides that a differential wage payment shall be treated as a payment of wages under Code § 3401(a) for a payment made after December 31, 2008. Similarly, Code § 415(c)(8) provides all plans must include difficulty of care payments in a participant's compensation for purposes of calculating the annual additions limit of Code § 415(c)(1). See Notice 2020-68, Section E. All plans must include these amounts in a participant's compensation for purposes of calculating the annual additions limit of Code § 415(c)(3).)

[ ] 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 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 Treasury Regulations) in section 125 for purposes of the definition of Compensation.

65. After-Tax Employee Contribution

Statement of Requirement: 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.

66. Highly Compensated Employee

Statement of Requirement: Code § 414(q); Reg. § 1.414(q)-1T; Notice 97-45

Sample Plan Language:

1. The term "Highly Compensated Employee" means:
   a. any Employee who for the preceding year had compensation from the Employer in excess of $135,000, and, if the employer so elects in the Adoption Agreement, was in the top-paid group for the preceding year; and
   b. any former Employee who was a Highly Compensated Employee for the year they separated from service or at any time after attaining age 55.

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. The $135,000 compensation threshold amount is adjusted for cost-of-living increases to the extent provided under section 414(q) of the Internal Revenue Code for years after 2022.

4. Whether a former Employee was a Highly Compensated Employee for a determination year that ended on or after the employee's 55th birthday, or that was a separation year, 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: Code § 414(q)(1)(B) provides the compensation threshold amount, and further provides that the threshold will be adjusted each year for cost-of-living increases. For limits in other years, see COLA Increases for Dollar Limitations on Benefits and Contributions.)

(Note to reviewer: There are two elections that an employer may make with respect to the definition of highly compensated employee. Under Code § 414(q)(1)(B)(ii), 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 the dollar limit for the look-back year is a highly compensated employee for the determination year only if the employee was in the top-paid group for the look-back year. Under Reg. § 1.414(q)-1T, A-14, an employer may 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. The top-paid group election and the calendar year data election are described in Notice 97-45.

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 § 403(b) Pre-approved Plans of the eligible employer.

If a § 403(b) Pre-approved Plan defines Highly Compensated Employee before 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 all that apply):

[ ] 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 $135,000 (as adjusted for periods after 2022) 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.

[ ] The Employer revokes its top-paid group election.

[ ] 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.

[ ] The Employer revokes its calendar year data election.

(If none of the boxes are checked, there is no top-paid group election and no calendar year data election.)

67. Hour of Service

Statement of Requirement: Code §§ 410(a)(5)(E) & 411(a)(6)(E); DOL Regs. §§ 2530.200b-2 & 2530.200b-3; Rev. Proc. 2021-37, sec. 5.14

Sample Plan Language:

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 section 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 § 403(b) Pre-approved 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. See LRM 80 (Eligibility and Coverage).)

68. Year of Eligibility Service

Statement of Requirement: Code §§ 410(a)(3)(A) & 411(a)(5)(A); Rev. Proc. 2021-37, sec. 5.14

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 § 403(b) Pre-approved 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 80 (Eligibility and Coverage). As an alternative to hours of service, a § 403(b) Pre-approved Plan may use the elapsed time method of crediting service. See DC LRM 4).

Contributions

69. Vesting

Statement of Requirement: Regs. §§ 1.403(b)-3(d)(2) & 1.403(b)-8(d)(4); Rev. Proc. 2021-37, sec. 5.06

Sample Plan Language:

(Note to reviewer: A § 403(b) Pre-approved Plan may provide that all contributions are immediately and fully vested. Alternatively, the plan may provide a vesting schedule for nonelective employer contributions. Except for certain Nonstandardized § 403(b) Pre-approved Plans (described below), nonelective employer contributions must vest according to a schedule that would satisfy the minimum standards of Code § 411(a)(2)(B) if the plan were a qualified plan under Code § 401(a), regardless of whether the plan is subject to the minimum vesting standards of ERISA § 203. In any case, any nonvested amounts must be treated as a separate contract to which Code § 403(c) (or Code § 401(a), in the case of a custodial account) applies and must fully vest on termination of the plan. If the plan is required to satisfy the requirements of Code § 401(m), any matching contributions under the plan must either be nonforfeitable when made or vest under a schedule permissible under Code § 411(a)(2)(B). Vesting schedules that satisfy Code § 411 and required related provisions, including definitions of vesting service and breaks in service, are included in LRMs 52 through 60 of the DC LRM.

The requirement that contributions made under different vesting schedules be made to a separate account is satisfied by maintaining separate bookkeeping accounts. Physically separate accounts are not required. Similarly, the plan merely needs to maintain bookkeeping records that separately reflect the portion of such account that is vested and the portion that is not vested.

In the case of an individual who dies while performing qualified military service after January 1, 2007, the plan must give vesting credit for the period of such service. Vesting credit may be provided, but is not required, where the individual is disabled while performing qualified military service. See Part II of Notice 2010-15.)

(Note to reviewer: A Nonstandardized § 403(b) Pre-approved Plan that is designed to be used for a plan that is not subject to the minimum vesting requirements under ERISA § 203 (for example, a Governmental Plan) is not required to provide that contributions other than elective deferrals will vest at least as rapidly as would be required under Code § 411(a)(2)(B).)

Sample Plan Language:

Each type of contribution made by the Employer on behalf of a participant that is subject to a different vesting schedule (and earnings thereon) will be credited to a separate bookkeeping account. Any portion of such account in which the participant is not vested shall be accounted for separately and treated as a contract to which section 403(c) (or section 401(a), in the case of a custodial account) applies.

On or after the date on which the Participant's interest in the separate account becomes nonforfeitable, the contract shall be treated as a section 403(b) Annuity Contract if:

1. No election has been made under section 83(b) of the Internal Revenue Code with respect to the contract;

2. The Participant's interest in the separate account has been subject to a substantial risk of forfeiture before becoming nonforfeitable;

3. Contributions (and earnings thereon) subject to different vesting schedules have been maintained in separate accounts; and

4. The separate account at all times satisfied the requirements of section 403(b) of the Code except for the nonforfeitability requirement in section 403(b)(1)(C).

If only a portion of the Participant's interest in a separate account becomes nonforfeitable in a year, then that portion of the contract will be considered a section 403(b) Annuity Contract and the remaining forfeitable portion will be considered a separate contract to which section 403(c) (or another applicable provision of the Code) applies.

70. Contribution Formula

Statement of Requirement: Reg. § 1.401(a)(4)-2(b)(2); Rev. Proc. 2021-37 secs. 5.18(2), (4), (5) & 8.01

(Note to reviewer: Standardized § 403(b) Pre-approved Plans must satisfy the safe harbor contained in Reg. § 1.401(a)(4)-2(b)(2). Therefore, except for employer matching contributions or elective deferrals, a Standardized § 403(b) Pre-approved Plan must provide that contributions must be a uniform percentage of compensation (excluding compensation in excess of the limitation under Code § 401(a)(17)), the same dollar amount, or the same amount per unit of service (not to exceed one week) to every Participant under the plan. (See LRM 64 for the definition of compensation).

A Standardized § 403(b) Pre-approved Plan generally may not deny an allocation to an Employee merely because the employee is not an active Employee on the last day of the Plan Year or has failed to complete a specified number of Hours of Service during the year. However, a Standardized § 403(b) Pre-approved Plan may deny an allocation to an Employee if the employee (a) terminates service during the Plan Year, (b) with not

more than 500 Hours of Service, and (c) is not an active Employee on the last day of the Plan Year.

A plan will not fail to satisfy these requirements merely because the plan provides, either as the result of an elective provision or by default in the absence of an election to the contrary, that individuals who become Employees as a result of a transaction described in Code § 410(b)(6)(C) are excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the earlier of the last day of the first plan year beginning after the date of the transaction or the date of a significant change in the plan or in the coverage of the plan. See LRM 80 (Eligibility and Coverage).)

(Note to reviewer: A Nonstandardized § 403(b) Pre-approved Plan may also use one of the formulas below or may use an alternative formula. Some alternative formulas may be found in the DC LRMs. A Governmental Plan or a plan of a Church or a QCCO may also provide that, subject to any applicable limitations or requirements under the plan, contributions will be made in accordance with the terms of a collective bargaining agreement or other written document, provided that those terms are incorporated by reference and made a part of the plan.)

Sample Adoption Agreement Language:

[ ] Discretionary Contribution Formula:

Nonelective 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 nonelective 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.

(Note to reviewer: A Nonstandardized § 403(b) Pre-approved Plan may require, as an option in the adoption agreement, up to 1,000 hours of service to receive an allocation of nonelective employer contributions.)

71. Matching Contributions

Statement of Requirement: Code § 401(m); Reg. § 1.401(m)-1

(Note to reviewer: A plan that provides for matching contributions must either state that matching contributions are nonforfeitable when made or set forth a vesting schedule permissible under Code § 411(a)(2)(B) applicable to such contributions. See

LRM 69 (Vesting) and LRMs 52 through 60 of the DC LRM.)

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 who make

[ELECT ONE OR BOTH]:

[ ] 1. Elective Deferrals

[ ] 2. After-Tax Employee Contributions to the Plan.

[ ] b. All Participants who are Non-highly Compensated Employees who make

[ELECT ONE OR BOTH]:

[ ] 1. Elective Deferrals

[ ] 2. After-Tax Employee Contributions to the Plan.

(Note to reviewer: A Governmental Plan or a plan of a Church or Qualified Church-Controlled Organization may include the following language.)

[ ] c. All Participants except the following:

[ ] 1. Employees who have not attained the age of _____

[ ] 2. Employees who have not completed Years(s) of Eligibility Service.

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: If a Standardized § 403(b) Pre-approved Plan includes a tiered

matching formula, then the rate of matching contributions cannot increase as the rate of elective deferrals or increases. Except for Governmental Plans and plans of Churches or Qualified Church-Controlled Organizations, matching formulas, other than those above, such as flat-dollar or ones that target matches at lower paid non-highly compensated employees, must satisfy additional requirements specified in Reg. § 1.401(m)-2(a)(5).)

72. After-Tax Employee Contributions

Statement of Requirement: Code §§ 411(a)(1) & 411(c)(2)

Sample Plan Language:

If elected in the Adoption Agreement and to the extent permitted under the terms governing the applicable Investment Arrangement, the Plan will accept After-Tax Employee Contributions. A separate account will be maintained for the After-Tax Employee Contributions of each Participant. After-Tax Employee Contributions and earnings thereon are nonforfeitable at all times.

Sample Adoption Agreement Language:

The Plan

[ ] will

[ ] will not

accept After-Tax Employee Contributions to the extent permitted under the terms governing the applicable Investment Arrangement.

73. Limitations on Matching and After-Tax Employee Contributions

Statement of Requirement: Code § 401(a)(4); Reg. § 1.401(m)-1; Rev. Proc. 2021-37, sec. 6.03(2)

(Note to reviewer: These nondiscrimination limitations are generally required in all plans (except Governmental Plans or plans of Churches or Qualified Church-Controlled Organizations) unless the plan is designed to be an ACP safe harbor plan.

The sample plan language of this LRM 73 and LRM 74 (Distribution of Excess Aggregate Contributions) assumes that matching contributions under the plan are nonforfeitable when made. Requirements for plans that provide for graded vesting of matching contributions, as permitted under Code § 411(a)(2)(B), are set forth in LRM 69 (Vesting). Sample plan language may be found in LRMs X through XIII of the

CODA LRM. Note that as provided in CODA LRM XII, any qualified matching contributions provided under this arrangement must be nonforfeitable and satisfy distribution requirements applicable to elective deferrals (other than for hardships) when allocated to Participants' accounts in the Plan. See also LRM 75, Qualified Nonelective Contributions.)

(Note to reviewer: The following provisions must be included in the plan and cannot be incorporated by reference.)

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 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 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 sections 401(a) or 403(b) of the 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. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under Code section 401(m) of the Code.

3.3. In the event that this Plan satisfies the requirements of sections 401(m), 401(a)(4) or 410(b) of the 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 section 1.401(m)-2(c)(4) of the Treasury Regulations, 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) of the Code 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.

(Note to reviewer: A "Participant's Compensation" for purposes of section 4.2 is as

defined in LRM 64 (Compensation).)

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 section 410(b)(6)(C)(i) of the 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 Code.)*

(If neither of the above boxes are checked, the plan is deemed to use Prior Year Testing.)

(Note to reviewer: If an Employer that adopts a Nonstandardized § 403(b) Pre-approved Plan that includes Code § 401(m) matching contributions elects to use a safe harbor definition of compensation within the meaning of Code § 414(s), the Employer may rely on the plan's Opinion Letter with respect to whether the form of the plan satisfies the ACP test of Code § 401(m)(2).)

74. Distribution of Excess Aggregate Contributions

Statement of Requirement: Code §§ 401(m)(6) & 4979; Reg. § 1.401(m)-2(b)

(Note to reviewer: Governmental Plans and plans of Churches and Qualified Church-

Controlled Organizations are not subject to Code § 401(m), therefore they will not have Excess Aggregate Contributions required to be distributed for this purpose, and this LRM is not applicable.)

(Note to reviewer: 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 ½ months (6 months in the case of certain plans with an Eligible Automatic Contribution Arrangement) 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 § 4979. This tax is imposed on the Employer with respect to such amounts.)

Sample Plan Language:

1. General: 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 2½ 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 Accumulated Benefit(s) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan Year.

(Note to reviewer: The Plan may use any reasonable method for computing the income or loss allocable to Excess Aggregate Contributions, provided that such method is used consistently for all participants and for all corrective distributions under the Plan for the Plan Year and is used by the Plan for allocating income or loss to participants' accounts. Gap-period income or loss must be excluded from any distribution of Excess Aggregate Contributions)

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.)

(Note to reviewer: Matching formulas, other than those above, such as flat-dollar or ones that target matches at lower paid Non-highly Compensated Employees, must satisfy additional requirements specified in Reg. § 1.401(m)-2(a)(5).)

75. Qualified Nonelective Contributions

Statement of Requirement: Regs. §§ 1.401(k)-2(a)(6), 1.401(k)-6 & 1.401(m)-2(a)(6)

(Note to reviewer: Governmental Plans and plans of Churches and Qualified Church-Controlled Organizations are not subject to Code § 401(m).)

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 either to all Participants or only 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 are nonforfeitable when allocated to Participants' accounts in the Plan and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

(Note to reviewer: Note that an annuity contract may allow distributions of qualified nonelective contributions on the occurrence of a designated event, such as a hardship. See LRM 78 (Distribution Limitations for Nonelective Employer Contributions).)

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.

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.

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.

(Note to reviewer: Regulations under Code § 401(m) were published on July 20, 2018, finalizing regulations initially proposed on January 18, 2017, and changing the definition of QNECs in Reg. §§ 1.401(k)-6 and 1.401(m)-5 to provide that they must satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts but need not meet these requirements when they are contributed to the plan.)

(Note to reviewer: Any allocation formula other than those in this LRM 75 must satisfy additional requirements specified in Reg. § 1.401(m)-2(a)(6).)

76. ACP Test Safe Harbor

Statement of Requirement: Code §§ 401(m)(11) & 401(m)(12); Reg. § 1.401(m)-3; Notice 2016-16; Notice 2020-52; Notice 2020-86; Rev. Proc. 2021-37, sec. 8.02(3)

(Note to reviewer: This language is not required for Governmental Plans or plans of Churches and Qualified Church-Controlled Organizations.

This language is required only in a plan using a design-based safe harbor contribution to satisfy the ACP test (ACP "safe harbor plan"). There are two design-based safe harbors for the ACP test, the traditional safe harbor and the QACA safe harbor. A plan that satisfies one of the ACP test safe harbors must satisfy all the other applicable requirements of the Code, including the nondiscriminatory availability of benefits, rights, and features under Code § 401(a)(4), and the limitations of Code §§ 401(a)(17), 401(a)(30), and 415.

The traditional ACP safe harbor requires that a plan meet contribution and notice requirements and, in addition, satisfy a special limit on matching contributions. The QACA ACP safe harbor requires that a plan provide for automatic contributions by eligible employees and meet contribution, notice and vesting requirements.

QACA ACP safe harbor sample plan language (including sample adoption agreement language) may be found in LRM XX of the CODA LRM. Note however, the SECURE Act increased the maximum default percentage for years after the initial period from 10% to 15%. The maximum default percentage during the initial period cannot exceed 10%. See Section III of Notice 2020-86.

A plan providing for after-tax employee contributions, or matching contributions that fails to satisfy the ACP safe harbors, must satisfy the regular ACP test under Code § 401(m)(2). See Regs. §§ 1.401(m)-2(a)(5)(iv) and 1.401(m)-3 for details.

The sample plan language of this LRM 76 assumes that safe harbor matching contributions under the plan are nonforfeitable when made. Sample plan language

appropriate to a plan that vests such contributions under a schedule permissible under Code §§ 411(a)(2)(B) or 401(m)(12) may be found in LRM XX of the CODA LRM.

An Employer that adopts a Nonstandardized § 403(b) Pre-approved Plan that meets the ACP Safe Harbor requirements described in Code §§ 401(m)(11) or 401(m)(12) may rely on the plan's Opinion Letter with respect to whether the form of the Employer's plan satisfies the requirements of Code § 401(m), unless the Employer's plan provides for the safe harbor contributions under Code §§ 401(m)(11) or 401(m)(12) to be made to another plan.)

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 in LRMs 73 (Limitations on Matching and After-Tax Employee Contributions) and 74 (Distribution of Excess Aggregate Contributions) using the current year testing method and specifying which contributions will be used in the ACP test. See Reg. §§ 1.401(m)-2(a)(5)(iv) and 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 LRM 64 (Compensation). 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 that such alternative definition is a reasonable definition within the meaning of Reg. § 1.414(s)-1(d)(2) 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 statutory limitations, such as sections 402(g) and 415 of the 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 Safe Harbor Contributions and earnings thereon shall be immediately and fully vested.

(c) The Participant's accrued benefit derived from Safe Harbor Contributions may not be distributed earlier than Severance from Employment, age 59½, death, the Participant's becoming Disabled, or termination of the Plan without the establishment or maintenance of another defined contribution plan.

(d) Notwithstanding the requirement in (a) above that the Employer make the Safe Harbor Matching Contribution to this Plan, if the Employer so provides in the Adoption Agreement, the Safe Harbor Matching Contribution will be made to the defined contribution plan indicated in the Adoption Agreement. However, such contributions will be made to this Plan unless (i) each Eligible Employee under this Plan is also eligible under the other plan and (ii) the other plan has the same Plan Year as this Plan.

(Note to reviewer: The option to make Safe Harbor Contributions to another defined contribution plan is permitted only if this Plan is a Nonstandardized § 403(b) Pre-approved Plan.)

(Note to reviewer: See Reg. § 1.401(m)-3 for safe harbor plan rules requiring certain provisions to remain in effect for an entire 12-month year. See also Notice 2016-16 for

permissible and impermissible mid-year safe harbor plan amendments. Additionally, Notice 2020-52 modified the rules for certain mid-year amendments and corresponding notice requirements for amendments adopted between March 13, 2020 and August 31, 2020.)

3.2 Notice Requirement.

(Note to reviewer: Section 103(a) of the SECURE Act amended the Code to eliminate the notice requirement for a traditional safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements. Section 103(a) did not amend Code § 401(m)(11). Therefore, Code § 401(m)(11)(A)(ii) continues to require all traditional safe harbor section 401(m) plans to satisfy the safe harbor notice requirements of Code § 401(k)(12)(D). Thus, Section 3.2 is required in all § 403(b) Pre-approved Plans which intend to meet the ACP safe harbor. See Section IV of Notice 2020-86.)

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 (the "Safe Harbor Notice"), 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 will be provided no more than 90 days before the Employee becomes eligible but not later than the date the Employee becomes eligible.

(Note to reviewer: Notice will be provided to all Eligible Employees if at any time the ACP safe harbor plan is amended by the Employer during a Plan Year to prospectively reduce or suspend Safe Harbor Contributions. The notice will provide that the reduction or suspension must apply no earlier than the later of the date the plan amendment reducing or suspending contributions is adopted or 30 days after the supplemental notice is provided to Eligible Employees.

Additionally, an updated notice of any permissible mid-year change to a plan's required safe harbor notice content, required pursuant to Notice 2016-16, will be provided to all Eligible Employees at least 30 days (and not more than 90 days) before the effective date of the change. The updated notice must describe the mid-year change and its effective date. If it is not practical for the updated notice to be provided before the effective date of the change, the notice, and an opportunity to make or change a deferral election must be provided as soon as practicable, but not later than 30 days after the change is adopted. See Notice 2016-16.)

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 a notice described in section 3.2 above.

Sample Adoption Agreement Language:

ACP Safe Harbor Matching Contributions

[THE BASIC PLAN DOCUMENT CONTAINS THE BASIC MATCHING CONTRIBUTION FORMULA NECESSARY TO SATISFY THE SAFE HARBOR REQUIREMENT. HOWEVER, IF THE EMPLOYER DESIRES TO MAKE ENHANCED MATCHING CONTRIBUTIONS OTHER THAN AS PROVIDED IN THE BASIC PLAN DOCUMENT, THEN COMPLETE THE FOLLOWING.]

[ ] For the Plan Year, in lieu of the Basic Matching Formula provided in the Basic Plan Document, the Employer elects to make Enhanced 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 that (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.)

77. Automatic Contribution Arrangements for Church Plans

Statement of Requirement: Section 336(c) of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113 (PATH Act).

(Note to reviewer: Section 336(c) of the PATH Act, which became law on December 18, 2015, allows a Church Plan to have an automatic contribution arrangement. The provision preempts any State law relating to wage, salary or payroll payment, collection, deduction, garnishment, assignment, or withholding that would directly or indirectly prohibit or restrict the inclusion of an automatic contribution arrangement in a church plan. For this purpose, an automatic contribution arrangement is an

arrangement under which a plan participant (1) may elect to have the plan sponsor or the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash, and (2) is treated as having elected to have the plan sponsor or the employer make contributions equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have contributions made or to have contributions made at a different percentage.

Within a reasonable period before the first day of each plan year, the plan sponsor, plan administrator or employer maintaining the arrangement must provide each participant with notice of the participant's rights and obligations under the arrangement. The notice must include an explanation of (1) the participant's right under the arrangement not to have contributions made on the participant's behalf (or to elect to have contributions made at a different percentage) and (2) how contributions made under the arrangement will be invested in the absence of any investment election by the participant. The notice must be sufficiently accurate and comprehensive to apprise the participant of such rights and obligations and must be written in a manner calculated to be understood by the average participant to whom the arrangement applies.

The participant must have a reasonable period of time, after receipt of the explanation described above and before the first contribution is made, to make an election not to have contributions made or to have contributions made at a different percentage. If a participant has not made an affirmative investment election, contributions made under the arrangement must be invested in a default investment selected with the care, skill, prudence, and diligence that a prudent person selecting an investment option would use.)

(Note to reviewer: Sample Plan Language for an automatic contribution arrangement is available in LRMs 33 (Eligible Automatic Contribution Arrangement (EACA), 76 (ACP Test Safe Harbor) and sections XX and XXI of the CODA LRMs.))

Distribution Provisions

78. Distribution Limitations for Nonelective Employer Contributions

Statement of Requirement: Code §§ 401(a)(38), 403(b)(7) & 403(b)(11); Reg. §§ 1.403(b)-6(b), (c) & 1.403(b)–11(e)(1); Notice 2020-50; Notice 2020-68

Sample Plan Language:

1. Custodial Account. Except as otherwise provided under the Plan, nonelective 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, or attains age 59 ½. The available forms of distribution will be based on the terms governing the applicable Investment Arrangement.

2. Annuity Contract. Except as otherwise provided under the Plan, nonelective Employer contributions held in an Annuity Contract 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 after the Participant becomes Disabled. The available forms of distribution will be based on the terms governing the applicable Investment Arrangement.

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account should include the following provision.)

3. Retirement Income Account. Except as otherwise provided under the Plan, nonelective Employer contributions held in a Retirement Income Account 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 Basic Plan Document or Adoption Agreement such as after a fixed number of years, attainment of a stated age, or after the Participant becomes Disabled.

(Note to reviewer: Distributions may be made for certain other events, including a federally declared disaster, where resulting legislation or guidance authorizes such a distribution; termination of the Plan; an IRS levy; distributions pursuant to LRM 59 (Domestic Relations Orders and Qualified Domestic Relations Orders); a Qualified Birth or Adoption Distribution; a coronavirus-related distribution; and a Lifetime Income Investment Distribution as provided in Code §§ 403(b)(7)(A)(ii) and 403(b)(11)(D), provided that the distribution is made no earlier than 90 days prior to the date the lifetime income investment may no longer be held as an investment option under the Plan. For additional information on Lifetime Income Investment Distributions, see LRM 46 (Lifetime Income Investment Distributions)).

4. Qualified Birth or Adoption Distributions

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, nonelective Employer contributions made on behalf of the Participant may be distributed on or after the date specified in the Adoption Agreement, for the birth of the Participant's child or legal adoption of an eligible individual (Qualified Birth or Adoption Distribution). A Qualified Birth or Adoption Distribution is any distribution of up to $5,000 from the Plan to a Participant if made during the 1-year period beginning on the date the child of the Participant is born or the legal adoption by the Participant of an eligible adoptee is finalized. A distribution of up to $5,000 can be made with respect to multiple births and adoptions if the distribution is made within the 1-year period following the date on which the children are born or the adoptions are finalized. An eligible adoptee is defined as any individual who has not attained age 18 or is physically or mentally incapable of self-

support. An individual is physically or mentally incapable of self-support if they are unable to engage in any substantial gainful activity as described in section ____ of the Plan.

(Note to reviewer: Insert the Plan section number that defines disability (LRM 11) in the above blank. Unless the Administrator of the Plan has actual knowledge to the contrary, the Administrator may rely on reasonable representations from the Participant in determining whether a Participant is eligible for a Qualified Birth or Adoption Distribution. If the Plan permits Qualified Birth or Adoption Distributions, it must accept the recontribution of a Qualified Birth or Adoption Distribution if the Participant is eligible to make a rollover contribution to the Plan at the time of recontribution as provided in LRM 50 (Recontributions).)

5. Coronavirus-related Distributions

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant's nonelective contributions may be distributed as a coronavirus-related distribution. A coronavirus-related distribution is any distribution made from the Plan on or after January 1, 2020, and before December 31, 2020, to a qualified individual, as defined in section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act, Pub L 116-136 (CARES Act) and Section 1B of Notice 2020-50, which does not exceed, in the aggregate, the amount specified in the Adoption Agreement under the Plan and other retirement plans maintained by the Employer and Related Employers.

(Note to reviewer: The Administrator of the Plan may rely on an individual's certification that they satisfy the conditions to be a qualified individual unless the Administrator already has actual knowledge to the contrary. A distribution properly designated as a coronavirus-related distribution under the Plan is treated as satisfying the above distribution restrictions if the Plan is amended by the last day of the first plan year beginning on or after January 1, 2022. For a Governmental Plan, the plan must be amended by the last day of the first plan year beginning on or after January 1, 2024.)

6. Federally Declared Disasters

If elected by the Employer in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, a Participant's nonelective contributions may be distributed in the event of a federally declared disaster, where resulting legislation or guidance authorizes such a distribution to the Participant.

(Note to reviewer: The plan may provide or allow the employer to elect in the adoption agreement that the distribution limitation in paragraph (2) or paragraph (3) above applies only to nonelective employer contributions made on behalf of the Participant held in an Annuity Contract or Retirement Income Account, respectively, issued after December 31, 2008. For recontributions of certain distributions, see LRM 50 (Recontributions.)

Adoption Agreement Language:

Qualified Birth or Adoption Distributions

The Plan permits Qualified Birth or Adoption Distributions of a Participant's nonelective Employer contributions:

[ ] Yes (Complete remainder of this section)

[ ] No

A Qualified Birth or Adoption Distribution may be distributed on or after [INSERT DATE NO EARLIER THAN JANUARY 1, 2020].

A Participant may take a Qualified Birth or Adoption Distribution in an amount equal to [INSERT AN AMOUNT NO GREATER THAN $5,000] for each child of the participant.

Coronavirus-Related Distributions

The Plan permits coronavirus-related distributions of a Participant's nonelective Employer contributions:

[ ] Yes (Complete remainder of this section.)

[ ] No

The Plan permits coronavirus-related distributions of a Participant's nonelective Employer contributions in an amount that does not exceed, in the aggregate [INSERT AMOUNT NO GREATER THAN $100,000] under the Plan and other retirement plans maintained by the Employer and Related Employers.

Federally Declared Disasters

The Plan permits a distribution of a Participant's nonelective Employer contributions for a federally declared disaster, as authorized by legislation or guidance.

[ ] Yes

[ ] No

79. Distribution of After-Tax Employee Contributions

Statement of Requirement: Reg. § 1.403(b)-(6)(b)

Sample Plan Language:

After-Tax Employee Contributions. If provided in the Basic Plan Document or otherwise elected in the Adoption Agreement, and to the extent permitted under the Investment Arrangement, After-Tax Employee Contributions may be distributed at any time. The

available forms of distribution will be based on the terms governing the applicable Investment Arrangement.

Sample Adoption Agreement Language:

After-tax Contributions may be distributed

[ ] at any time

[ ] at such time as any other contribution under the Plan may be distributed.

PART III. STANDARDIZED PLAN PROVISIONS

80. Eligibility and Coverage

Statement of Requirement: Code § 410(b); Rev. Proc. 2021-37 secs. 5.18(2) & 8.01(1)(c)

(Note to reviewer: Although a Standardized § 403(b) Pre-approved Plan by its terms must benefit all Employees except those who may be excluded under Reg. § 1.410(b)-6, the plan may provide options as to whether some or all of the employees described in Reg. § 1.410(b)-6 are excluded, provided that the criteria for excluding those employees apply uniformly. The sample adoption agreement elections provided below enable a Standardized § 403(b) Pre-approved Plan to comply with these requirements.)

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 § 403(b) Pre-approved 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 67 (Hour of Service) and LRM 68 (Year of Eligibility Service).

A § 403(b) Pre-approved Plan may require an employee to complete up to two years of eligibility service to be eligible for any nonelective contributions under the plan, provided that the participant is 100% vested after two years of service. A § 403(b) Pre-approved Plan maintained by a tax-exempt employer exclusively for the benefit of employees of an educational institution described in Code § 170(b)(1)(A)(ii) may require an employee to attain age 26 to be eligible for any nonelective contributions under the plan, provided that the participant is 100% vested after one year of service.

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 Code) from the Employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) of the Code).

[ ] Employees who became Employees as the result of a transaction described in section 410(b)(6)(C) of the 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 or the date of a significant change in the plan or in the coverage of the plan.

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

(Note to reviewer: If a Standardized § 403(b) Pre-approved Plan provides for contributions other than elective deferrals, and the Employer's controlled group includes any Employer that is not an eligible Employer within the meaning of Reg. § 1.403(b)-2(b)(8), the Employer may not rely on the Opinion Letter as to whether those other contributions satisfy the requirements of Code § 410(b). For a Standardized § 403(b) Pre-approved Plan that is not a Governmental Plan, the Employer's controlled group is determined under § 414(b), (c), (m), or (o) of the Code and the regulations thereunder. Alternatively, for a Standardized § 403(b) Pre-approved Plan that is a Governmental Plan, the Employer's controlled group is determined in a manner consistent with Notice 89-23. See LRM 23 (Related Employers).)

(Note to reviewer: A Standardized § 403(b) Pre-approved Plan may exclude individuals who become Employees as a result of a transaction described in Code § 410(b)(6)(C) under the fifth exclusion election above. For this purpose, a transaction described in Code § 410(b)(6)(C) is an asset or stock acquisition, merger, or other similar transaction involving a change in the Employer of the employees of a trade or business.)

81. Nondiscrimination

Statement of Requirement: Reg. § 1.401(a)(4)-4; Rev. Proc. 2021-37, secs. 5.18 and 8.01(2)

(Note to reviewer: A Standardized § 403(b) Pre-approved Plan must provide that allocations are determined on the basis of total compensation within the meaning of Code § 415(c)(3), excluding all other compensation, or compensation that otherwise satisfies Code § 414(s) and Reg. § 1.414(s)-1(c). See LRM 40 (Limitations on Annual Additions) for the definition of compensation for purposes of calculating the annual additions limit of § 415(c)(3) and LRM 64 (Compensation) for the definition of compensation for purposes of determining allocations.)

(Note to reviewer: If a Standardized § 403(b) Pre-approved Plan provides for contributions other than elective deferrals and matching contributions, the plan must satisfy one of the design-based safe harbors described in Reg. § 1.401(a)(4)-2(b)(2) with respect to those other contributions. See LRM 70 (Contribution Formula). Additionally, if the Employer's controlled group includes any employer that is not an Employer within the meaning of Reg. § 1.403(b)-2(b)(8), the Employer may not rely on the Opinion Letter as to whether those other contributions satisfy the requirements of Code § 401(a)(4).)

(Note to reviewer: All optional forms of benefit, ancillary benefits and other rights and features provided under a Standardized § 403(b) Pre-approved Plan must be made available to all participants. However, a Standardized § 403(b) Pre-approved Plan Employer may not rely on the Opinion Letter as to whether the Employer's plan satisfies the effective availability requirement of Reg. § 1.401(a)(4)-4(c) with respect to any benefit, right, or feature.)

(Note to reviewer: A Standardized § 403(b) Pre-approved Plan cannot provide for eligibility requirements under the plan that are more favorable for Highly Compensated Employees than for other Employees. See LRM 66 (Highly Compensated Employee.)

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account must set forth the nondiscrimination requirements of Code § 403(b)(12). The plan must also state that the nondiscrimination requirements will be applied to any employee other than an employee of a QCCO or Church.)

82. Reliance on Opinion Letter

Statement of Requirement: Rev. Proc. 2021-37, secs. 5.10 & 8.01

(Note to reviewer: This sample language, or a similar provision, must appear in all Standardized § 403(b) Pre-approved Plans in close proximity to the Employer's signature line.)

Sample Adoption Agreement Language:

Except to the extent provided in Rev. Proc. 2021-37, an Employer may rely on a currently valid Opinion Letter issued by the Internal Revenue Service as evidence that the plan satisfies the § 403(b) Requirements, and including, if applicable, the requirements of sections 401(a)(4) and 410(b) of the Code if:

a. the Adopting Employer has not amended the Standardized § 403(b) Pre-approved Plan other than to choose options provided in the Adoption Agreement or to make amendments that are described in section 9.03 of Rev. Proc. 2021-37 (relating to employer amendments that will not affect reliance); and

b. either the only contributions under the plan are elective deferrals, or if the Employer has elected in section _____ [INSERT ADOPTION AGREEMENT SECTION RELATING TO EMPLOYER CONTRIBUTIONS] to provide for contributions other than elective deferrals, all the employers in the Employer's controlled group are eligible Employers within the meaning of Reg. § 1.403(b)-2(b)(8).

The Adopting Employer may not rely on the Opinion Letter in certain other circumstances, which are specified in the Opinion Letter issued with respect to the plan, or in Rev. Proc. 2021-37.

This Adoption Agreement may only be used only in conjunction with basic plan document # _____.

PART IV. NONSTANDARDIZED PLAN PROVISIONS

83. Eligibility, Coverage and Nondiscrimination

Statement of Requirement: Code §§ 401(a)(4), 410(b) & 414(s); Rev. Proc. 2021-37 sec. 8.02

(Note to reviewer: An Employer that adopts a Nonstandardized § 403(b) Pre-approved Plan may rely on the plan's Opinion Letter with respect to the requirements of Code § 410(b), if applicable, if all nonexcludable employees benefit under the Employer's plan. Alternatively, a Nonstandardized § 403(b) Pre-approved Plan may exclude additional categories of employees from being eligible to receive nonelective employer contributions under the plan. See sample adoption agreement language in LRM 80 (Eligibility and Coverage), pertaining to Standardized § 403(b) Pre-approved Plans and LRMs 17 through 23 of the DC LRMs.)

(Note to reviewer: Except as provided in the following note to reviewer, an Employer that adopts a Nonstandardized § 403(b) Pre-approved Plan may not rely on the plan's Opinion Letter with respect to the requirements of Code §§ 401(a)(4), 410(b) or 414(s). However, except for a Governmental Plan and plans of Churches and QCCOs, a Nonstandardized § 403(b) Pre-approved Plan must satisfy on a continuing basis the requirements of Code §§ 401(a)(4) and 410(b).)

(Note to reviewer: Nonstandardized § 403(b) Pre-approved Plans may – but are not required to – permit an Employer to select an allocation formula for contributions other than elective deferrals that satisfies one of the design-based safe harbors in Reg. § 1.401(a)(4)-2(b)(2), and to select a safe harbor compensation definition that satisfies Reg. § 1.414(s)-1(c). Notwithstanding the previous note to reviewer, if the Employer selects an allocation formula for contributions other than elective deferrals that satisfies one of the Reg. § 1.401(a)(4)-2(b)(2) design-based safe harbors, and if the allocation formula is based on a nondiscriminatory definition of compensation that satisfies Reg. § 1.414(s)-1(c), then the Employer may rely on the Opinion Letter with respect to whether the nondiscriminatory amounts requirement under Code § 401(a)(4) is satisfied. See LRM 70 (Contribution Formula), generally.)

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account must set forth the nondiscrimination requirements of Code § 403(b)(12). The plan must also state that the nondiscrimination requirements will be applied to any employee other than an employee of a QCCO or Church.)

84. Nonelective Contributions for Former Employees

Statement of Requirement: Code § 403(b)(3); Reg. § 1.403(b)-4(d)

Sample Plan Language:

For purposes of section ____ of the Plan, a Participant is deemed to have monthly Includible Compensation for the period through the end of the taxable year in which he or she ceases to be an Employee and through the end of the next 5 taxable years. Except as provided in section 1.403(b)-4(d) of the Treasury Regulations, the amount of the monthly Includible Compensation is equal to one-twelfth of the Participant's Includible Compensation during his or her most recent year of service. No contribution shall be made after the end of the Participant's fifth taxable year following the year in which the Participant terminated employment.

(Note to reviewer. The above blank should be filled in with the section corresponding to LRM 40 (Limitation on Annual Additions).)

(Note to reviewer: A Nonstandardized § 403(b) Pre-approved Plan that provides nonelective employer contributions may provide that a former employee will share in those contributions on the basis of the former employee's deemed includible compensation as determined under this sample plan provision. The sample plan provision merely allows this as an option. To make the option effective, the plan would have to include provisions for determining eligibility to benefit under this option and the amount of contributions.)

85. Reliance on Opinion Letter

Statement of Requirement: Rev. Proc. 2021-37, secs. 5.10 & 8.02

(Note to reviewer: This sample language, or a similar provision, must appear in all Nonstandardized § 403(b) Pre-approved Plans in close proximity to the employer's signature line.)

Sample Adoption Agreement Language:

Except to the extent provided in Rev. Proc. 2021-37, an Adopting Employer may rely on a currently valid Opinion Letter issued by the Internal Revenue Service as evidence that the plan satisfies the Code § 403(b) Requirements if:

a. the Adopting Employer's plan is identical to the Nonstandardized § 403(b) Pre-approved Plan and
b. the Adopting Employer has not amended the Nonstandardized § 403(b) Pre-approved Plan other than by choosing options provided in the Adoption Agreement or making amendments that are described in section 9.03 of Rev. Proc. 2021-37 (relating to employer amendments that will not affect reliance).

The Adopting Employer may not rely on the Opinion Letter in certain other circumstances, which are specified in the Opinion Letter issued with respect to the Plan, or in Rev. Proc. 2021-37.

This Adoption Agreement may only be used only in conjunction with basic plan document # _____.

PART V. RETIREMENT INCOME ACCOUNT

86. Retirement Income Account

Statement of Requirement: Code § 403(b)(9); Reg. § 1.403(b)-9(a)(2)(i)(C); Rev. Proc. 2021-37, secs. 4.26, 5.16, 5.19, 10.06(2), 25.01 & 25.02

(Note to reviewer: The following provision is required only in a § 403(b) Pre-approved Plan that is a Retirement Income Account.)

Sample Plan Language:

The Plan is intended to be a Retirement Income Account that satisfies the requirements of section 403(b)(9) of the Internal Revenue Code and any Treasury Regulations thereunder. It shall 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 Retirement Income Account to be used for, or diverted to, purposes other than for the exclusive benefit of Participants and their Beneficiaries.

(Note to reviewer: The terms of a § 403(b) Pre-approved Plan that is a Retirement

Income Account must also satisfy the separate accounting requirement of Reg. § 1.403(b)-9(a)(2)(i)(A), as well as the requirement of Reg. § 1.403(b)-9(a)(2)(i)(B) that investment performance be based on gains and losses on the assets of the account.

If the plan provides for benefits in a form that includes a life annuity, the plan must provide that the actuarial present value of the amount of the distribution form at the annuity starting date equals the participant's or beneficiary's accumulated benefit, based on reasonable actuarial assumptions, including assumptions regarding interest and mortality, set forth or incorporated by reference in the plan. The plan must also provide that the plan sponsor guarantees benefits if a payment is due that exceeds the participant's or beneficiary's accumulated benefit.)

(Note to reviewer: The terms of a § 403(b) Pre-approved Plan that is a Retirement Income Account must set forth the nondiscrimination requirements of Code § 403(b)(12). The plan must also state that the nondiscrimination requirements will be applied to any Employee other than an Employee of a Church or QCCO.)

(Note to reviewer: Each adopting Employer of a § 403(b) Pre-approved Plan that is a Retirement Income Account must identify whether it is a Church, QCCO, non-QCCO, or a minister. See LRMs 14 (Employer) and 63 (Adoption Agreement Requirements—All Plans)).

(Note to reviewer: A § 403(b) Pre-approved Plan that is a Retirement Income Account may allow employees described in Code § 414(e)(3)(B) to participate retroactive to July 1, 2020. See LRM 18 (Participant).)

(Note to reviewer: A § 403(b) Pre-approved Plan that is Retirement Income Account and a § 403(b) Pre-approved Plan that is not a Retirement Income Account may not be set forth in the same basic plan document.)

End of LRMs