

## **SECTION 403(b) PRE-APPROVED PLANS**

### **Sample Plan Provisions and Information Package**

**Revised March 2015**

#### **To Sponsors 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 and the regulations thereunder, Rev. Proc. 2007-71, and Rev. Proc. 2013-22, 2013-18 I.R.B. The Service has prepared this package to assist sponsors who are drafting section 403(b) pre-approved plans (that is, prototype and volume submitter plans), and to accelerate the review and approval of the plans.

The sample provisions address requirements the Service will consider in reviewing section 403(b) pre-approved plans. Whether a section 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 section 403(b) pre-approved plan must satisfy the requirements of Rev. Proc. 2013-22.

The sample provisions have been written for section 403(b) prototype plans. However, except for those sample provisions that relate to requirements applicable only to prototype plans, the sample provisions in this information package are also generally suitable for use in volume submitter plans that include an adoption agreement. The sample provisions may also be appropriately modified to be suitable in volume submitter plans that do not include an adoption agreement. 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 section 403(b).

Part I of the package contains sample plan provisions appropriate for section 403(b) prototype plans that do not accept contributions other than elective deferrals. Part II contains additional sample provisions for section 403(b) prototype plans that accept contributions other than elective deferrals.

Certain section 403(b) plans may be covered by Title I of ERISA. Since the IRS does not have jurisdiction over Title I, this package does not contain sample Title I plan provisions. However, the Service has developed sample plan provisions to enable section 401(a) master and prototype plans to comply with Internal Revenue Code qualification requirements that have parallel Title I requirements, and sponsors of section 403(b) pre-approved plans may find these sample plan provisions helpful in drafting plan provisions intended to comply with Title I (see Listing of Required Modifications for Defined Contribution Plans and related LRMs ([http://www.irs.gov/pub/irs-tege/dc\\_lrm1011.pdf](http://www.irs.gov/pub/irs-tege/dc_lrm1011.pdf) and [http://www.irs.gov/pub/irs-tege/coda\\_lrm1011.pdf](http://www.irs.gov/pub/irs-tege/coda_lrm1011.pdf)).

**March 2013****March 2015**

**Pre-approved Plan Sponsor:** \_\_\_\_\_

**Form of the Pre-approved Plan:**

- ☐ Standardized Prototype
- ☐ Nonstandardized Prototype
- ☐ Volume Submitter with Adoption Agreement
- ☐ Volume Submitter without Adoption Agreement

**Type of Investment Arrangement(s) Allowed Under the Pre-approved Plan (check all that apply):**

- ☐ Annuity Contracts
- ☐ Custodial Accounts
- ☐ Retirement Income Account

**Contributions That May Be Provided Under the Plan:**

- ☐ Elective Deferrals (other than Roth)
- ☐ Roth Elective Deferrals
- ☐ Nonelective Employer Contributions
- ☐ Matching Contributions
- ☐ After-Tax Voluntary Employee Contributions
- ☐ After-Tax Mandatory Employee Contributions

## **TABLE OF CONTENTS**

### **PART I. GENERAL PROVISIONS AND ELECTIVE DEFERRAL PROVISIONS**

#### **Section 1. Definitions**

1. Account
2. Account Balance
3. Accumulated Benefit
4. Administrator
5. Annuity Contract
6. Beneficiary
7. Church
8. Church Plan
9. Custodial Account
10. Denominational Service
11. Disabled
12. Elective Deferral
13. Employee
14. Employer
15. Investment Arrangement
16. Non-qualified Church-  
Controlled Organization or  
Non-QCCO
17. Participant
18. Plan
19. Plan Year
20. Public School
21. Qualified Church-Controlled  
Organization or QCCO
22. Related Employer
23. Retirement Income Account
24. Severance from Employment
25. State
26. Vendor
27. Year of Service

#### **Section 2. Administration**

28. Plan Administration

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

29. Eligibility of Employees
30. Compensation Reduction  
Election
31. Eligible Automatic  
Contribution Arrangement
32. Information Provided by the  
Employee
33. Change in Compensation  
Reduction Election
34. Timing of Contributions
35. Leave of Absence
36. Roth Contributions

#### **Section 4. Contributions**

37. Elective Deferrals

#### **Section 5. Limitations on Annual Additions**

38. Limitations on Annual  
Additions

#### **Section 6. Distribution Provisions**

39. Distribution Limitations for  
Elective Deferrals
40. Small Accumulated Benefits
41. Minimum Distribution  
Requirements - I
42. Minimum Distribution  
Requirements - II
43. Distribution of Amounts Held  
in a Rollover Account
44. Direct Rollovers

#### **Section 7. Hardship Distributions**

45. Hardship Distributions of  
Elective Deferrals

**Section 8. Plan Loans**

- 46. Loans to Participants

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

- 47. Eligible Rollover Contributions to the Plan
- 48. Transfers Between Plans
- 49. Exchanges
- 50. Purchase of Service Credit

**Section 10. Investment of Contributions**

- 51. Investment

**Section 11. Plan Termination and Amendment**

- 52. Termination
- 53. Amendment by Prototype Sponsor
- 54. Amendment by Adopting Employer

**Section 12. Other Plan Provisions**

- 55. Domestic Relations Orders and Qualified Domestic Relations Orders
- 56. IRS Levy
- 57. Mistaken Contributions
- 58. USERRA – Military Service Credit

**Section 13. Adoption Agreement Requirements**

- 59. Adoption Agreement Requirements

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

*(Note: The section numbers in Part II correspond to the related sections in Part I.)*

**Section 1. Definitions**

- 60. Compensation
- 61. After-Tax Employee Contribution
- 62. Highly Compensated Employee
- 63. Hour of Service
- 64. Year of Eligibility Service

\* \* \* \* \*

**Section 4. Contributions**

- 65. Vesting
- 66. Contribution Formula
- 67. Matching Contributions
- 68. After-Tax Employee Contributions
- 69. Limitations on Matching and After-Tax Employee Contributions
- 70. Distribution of Excess Aggregate Contributions
- 71. Qualified Nonelective Contributions
- 72. ACP Test Safe Harbor

\* \* \* \* \*

**Section 6. Distribution Provisions**

- 73. Distribution Limitations for Nonelective Employer Contributions
- 74. Distribution of After-Tax Employee Contributions

\* \* \* \* \*

**Section 14. Standardized Plan Provisions**

- 75. Coverage
- 76. Nondiscrimination

**Section 15. Nonstandardized Plan Provisions**

- 77. Coverage and  
Nondiscrimination
- 78. Nonelective Employer  
Contributions for Former  
Employees
- 79. Additional Adoption  
Agreement Requirements
- 80. Retirement Income Account

## **PART I. GENERAL PROVISIONS AND ELECTIVE DEFERRAL PROVISIONS**

### **Section 1. Definitions**

#### **1. Account**

**Reference:** Regs. §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**

**Reference:** Regs. §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) (or another applicable provision of the Internal Revenue Code) applies.

#### **3. Accumulated Benefit**

**Reference:** Regs. §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**

**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**

**Reference: Code §403(b)(1), §401(g), Regs. §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**

**Reference: Regs §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**

**Reference: Code § 3121(w)(3)(A)**

**Sample Plan Language:**

"Church" means an organization described in section 3121(w)(3)(A) of the Internal Revenue Code and the Treasury Regulations thereunder, and generally refers to a church, a convention or association of churches, or an elementary, secondary school or seminary that is controlled, operated, or principally supported by a church or a convention or association of churches.

**8. Church Plan**

**Reference: Code §414(e), section 3(33) of Title I of ERISA**

**Sample Plan Language:**

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

**9. Custodial Account**

**Reference: Code §403(b)(7), Regs. §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**

**Reference: Code §415**

**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 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**

**Reference: Code §72(m)(7)**

**Sample Plan Language:**

~~“Disabled” shall have the meaning provided in the Investment Arrangement. If not defined in the Investment Arrangement,~~ “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 **instead** 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.)

**12. Elective Deferral**

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

**Sample Plan Language:**

**A. Definition for Public School:**

“Employee” means each individual who is a common law employee of 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.

**(Note to reviewer: See Rev. Rul. 80-139, 1980-1 C.B. 88, and Rev. Rul. 73-607, 1973-2 C.B. 145, for guidance regarding when an individual is a common law employee of a state performing services for a public school of the state.)**

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

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

**(Note to reviewer: Section 414(e)(5) permits self-employed ministers and chaplains to participate in their denominational section 403(b) plans. A section 403(b)(9) plan sponsored by an organization described in section 414(e)(3)(A) (a “section 414(e)(3)(A) benefit board”) may include the following definition of employee.)**

**C. Definition for Churches and Church-Related Organizations**

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

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

**Sample Plan Language:**

“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 that is designated in the Adoption Agreement.

**(Note to reviewer: The following sentence may be added to the preceding definition of employer in a section 403(b)(9) plan that defines employee to include self-employed ministers and chaplains (see LRM 13C).)**

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) that employs a minister described in section 414(e)(5)(A)(i)(II), 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 section 403(b)(9) prototype plan sponsored by a section 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 Treasury 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:

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For purposes of eligibility to participate in and contribute to the Plan:

- ☐ “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: If the Plan is a standardized plan that also provides for nonelective contributions, the nonelective part of the Plan **must** benefit all nonexcludable Employees of the Employer and all Related Employers that are eligible employers.)*

- ☐ “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:

- ☐ “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.

#### **15. Investment Arrangement**

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

##### **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, including sufficient information to identify the approved Investment Arrangements, 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 section 403(b)(9) prototype plan, the definition of investment arrangement should be modified to include a retirement income account that satisfies the requirements of section 1.403(b)-9(a)(2) of the Treasury Regulations. 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 49). Additionally, any contract that is permitted to be excluded under section 8 of Revenue Procedure 2007-71, 2007-51 I.R.B. 1184, need not be considered part of the Plan.))

#### **16. Non-Qualified Church-Controlled Organization or Non-QCCO**

**Reference: § 3121(w)(3)(B)**

##### **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.

## 17. Participant

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

### **Sample Plan Language:**

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

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

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

- [ ] Employees who are eligible under another section 403(b) plan of the Employer which permits an amount to be contributed or deferred at the election of the Employee.
- [ ] Employees who are eligible under a section 457(b) eligible governmental plan of the Employer which permits an amount to be contributed or deferred at the election of the Employee.
- [ ] Employees who are eligible to make a cash or deferred election (as defined at section 1.401(k)-1(a)(3) of the Treasury Regulations) under a section 401(k) plan of the Employer.
- [ ] Employees who are nonresident aliens described in section 410(b)(3)(C) of the Internal Revenue Code.
- [ ] Employees who are students performing services described in section 3121(b)(10) of the Internal Revenue Code.
- [ ] Employees who normally work fewer than 20 hours per week. An Employee normally works fewer than 20 hours per week if, for the 12-month period beginning on the date the Employee’s employment commenced, the Employer reasonably expects the Employee to work fewer than 1,000 hours of service (as defined under section 410(a)(3)(C) of the Internal Revenue Code) in such period, and, for each Plan Year ending after the close of that 12-month period, the Employee has worked fewer than 1,000 hours of service 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 a Plan Year ending after the close of that 12-month period 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 63) should substitute a reference to that definition for the phrase in parentheses in the preceding paragraph.)

(Note to reviewer: Although a section 403(b) plan is not subject to the requirements of section 410(a) of the Code, a section 403(b) plan that is subject to Title I of ERISA must satisfy requirements of section 202(a) of Title I of ERISA that are parallel to the requirements of section 410(a). The Sample Adoption Agreement Language will satisfy those requirements. See section 202(a)(1) of Title I of ERISA and regulations under section 410(a) of the Code.)

(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.)

#### **18. Plan**

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

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

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

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

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

#### **19. Plan Year**

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

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

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

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

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

[ ] 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.)**

**20. Public School**  
**Reference: Regs. §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 out).

**21. Qualified Church-Controlled Organization or QCCO**  
**Reference: Code § 3121(w)(3)(B)**

**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 Internal Revenue 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.

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

**Sample Plan Language:**

“Related Employer” means any entity which is under common control with the Employer under section 414(b), (c), (m) or (o) of the Internal Revenue Code. If the Employer is a

Public School, a Church, or a QCCO, the Employer shall determine which entities are Related Employers based on a reasonable, good faith standard and taking into account the special rules applicable under IRS Notice 89-23, 1989-1 C.B. 654.

**23. Retirement Income Account**

**Reference: Code §403(b)(9); Regs. §1.403(b)-9**

**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 Internal Revenue Code for its Employees or their Beneficiaries as described in section 1.403(b)-9 of the Treasury Regulations.

**24. Severance from Employment**

**Reference: Regs. §1.403(b)-2(b)(19) and §1.403(b)-6(h)**

**Sample Plan Language:**

“Severance from Employment” ~~means that occurs when~~ the Employee ceases to be employed by the Employer maintaining the Plan or a Related Employer that is eligible to maintain a section 403(b) Plan under section 1.403(b)-2(b)(8) of the 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 ~~or in a capacity that is not employment with an eligible employer. For example, if the Employer is a Public School, “Severance from Employment” means that the Employee ceases to be employed by the Employer and is not an Employee of any other Public School of the same State, even though the Employee may continue to be employed by a Related Employer that is another unit of the State that is not a Public School or in a capacity that is not employment with a Public School.~~

(Note to reviewer: Section 1.403(b)-2(b)(19) of the Treasury Regulations defines “severance from employment” in a manner that is generally the same as the Treasury Regulations under section 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,” please see section 1.403(b)-6(h) of the Treasury Regulations.

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 ~~A~~ section 403(b)(9)

**plan sponsored by a section 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.)**

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

**Sample Plan Language:**

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

**26. Vendor**

**Sample Plan Language:**

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

**(Note to reviewer: In the case of a section 403(b)(9) prototype plan, the definition of “vendor” should be modified to include the provider of a retirement income account.)**



**27. Year of Service**

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

**(Note to reviewer: “Year of service” applies for purposes of the limitations for special catch-up contributions (see LRM 37) and for determining a participant’s includible compensation (see LRM 38). The definition of “year of eligibility service” contained in LRM 64 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)(9) plan.)**

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 64, unless the plan is a governmental plan or church plan that is exempt from the requirements of section 202 of Title I of ERISA.)**

**Section 2. Administration**

**28. Plan Administration**

**Reference: Regs. §1.403(b)-3(b)(3); section 8.08 of Rev. Proc. 2013-22**

**(Note to reviewer: Section 1.403(b)-3(b)(3) of the Treasury Regulations provides that a section 403(b) plan (1) must contain all the material terms and conditions for eligibility, benefits, applicable limitations, the investments available under the plan, and the time and form under which benefit distributions are made; and (2) may provide for optional features such as hardship withdrawals, loans, transfers between plans or annuity contracts, and acceptance of rollovers. The regulations provide that the plan may**

**allocate administrative duties to various persons. Any such allocation should identify how the duties are allocated to ensure compliance with the various requirements under section 403(b).**

**In drafting administrative plan provisions and deciding how to allocate administrative duties, prototype sponsors should be aware that the type of duties allocated to the employer might result in coverage under Title I of ERISA in the case of plans other than governmental or church plans. See DOL Regulation section 2510.3-2(f) and DOL Field Assistance Bulletins No. 2007-02 (July 24, 2007) and No. 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 Internal Revenue 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 Internal Revenue 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, including sufficient information to identify the approved Investment Arrangements. 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 49))**

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

#### **29. Eligibility of Employees**

**Reference: Regs. §1.403(b)-(b)**

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

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

**(Note to reviewer: The blank should be filled in with the plan section number corresponding to LRM 17. 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 §1.403(b)-5(b)(2) of the Treasury Regulations 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 §1.403(b)-5(b)(2).)**

#### **30. Compensation Reduction Election**

**Reference: Regs. §1.403(b)-(b)**

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

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

1. An Employee elects to participate by executing an election to reduce his or her Compensation (and have that amount contributed as an Elective Deferral on his or her behalf 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 under the Employee's election.

2. For purposes of the Compensation Reduction Election, "Compensation" means all cash compensation for services to the Employer, including salary, wages, fees, commissions, bonuses and overtime pay, that is includible in the Employee's gross income for the calendar year and amounts that would be cash compensation includible in gross income but for a reduction election under section 125, 132(f), 401(k), 403(b), or 457(b) of the Code (including a Compensation Reduction Election under the Plan).

**(Note to reviewer: Section 3401(h) of the Code provides that a differential wage payment shall be treated as a payment of wages under section 3401(a) for a payment made after December 31, 2008. These amounts must be treated as compensation under section 415(c)(3) but are not required to be treated as compensation for purposes of determining contributions and benefits under a plan. See Notice 2010-15, Q&A-9.)**

**Adoption Agreement Language:**

☐ No minimum annual deferral amount.

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

**31. Eligible Automatic Contribution Arrangement (EACA)**

**Reference: Code §§ 414(w) and 4979(f)(1) and Regs. §§ 1.414(w)-1 and 54.4979-1(c)**

**(Note to reviewer: The following is an optional provision which may be included in a section 403(b) plan to allow the employer to elect to provide an eligible automatic contribution arrangement ("EACA"), within the meaning of section 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 section 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 section 403(b) 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 §§ ~~401(a)(17)~~, 402(g), and 415 of the Internal Revenue Code and to satisfy any suspension period required after a distribution.

### 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 Code § 402(g). 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 Code § 4979 10% excise tax.

#### **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 one percentage point 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]

### **32. 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.

### **33. Change in Compensation Reduction Election**

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

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

Subject to the terms governing the applicable Investment 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.)**

### **34. Timing of Contributions**

**Reference: Regs. §1.403(b)-8(b)**

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

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

**(Note to reviewer: Section 1.403(b)-8(b) of the Treasury Regulations provides that 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.**

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



wages).

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

### **35. 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.

### **36. Roth Contributions**

**Reference: Regs. §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 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 and properly attributable earnings shall be credited to a Participant's Roth Elective Deferral Account.
3. Definition of Roth Elective Deferrals. A "Roth Elective Deferral" means an Elective Deferral that is:
  - 3.1 Designated irrevocably by the Participant at the time of the Compensation Reduction Election as a Roth Elective Deferral that is being made in lieu of all or a portion of the pre-tax Elective Deferrals the Participant is otherwise eligible to make under the Plan; and
  - 3.2 Treated by the Employer as includible in the Participant's income at the time the

Participant would have received that amount in cash if the Participant had not made a Compensation Reduction Election.

**Sample Adoption Agreement Language:**

- ☐ The Plan will accept Roth Elective Deferrals.
- ☐ The Plan will not accept Roth Elective Deferrals.

**Section 4. Contributions**

**37. Elective Deferrals**

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

**Sample Plan Language:**

**1. Limitations on Elective Deferrals.**

- 1.1 Except as provided in Sections 1.2 and 1.3, the maximum amount of the Elective Deferral under the Plan for any calendar year shall not exceed ~~\$18,000~~~~17,500~~, which is the applicable dollar amount established under section 402(g)(1)(B) of the Internal Revenue Code and adjusted for cost-of-living to the extent provided under section 402(g)(4) of the Internal Revenue Code for periods after ~~2015~~~~2013~~.

**(Note to reviewer: Section 402(g) of the Code provides a limitation on elective deferrals, and further provides that the limitation will be adjusted each year for cost-of-living increases. The limit for ~~2015~~~~2013~~ is ~~\$18,000~~~~17,500~~ (see ~~IR-2014-99, Oct. 23, 2014~~~~IR-2012-77, Oct. 18, 2012~~). For current limits, 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 section 403(b) catch-up limitation for employees with 15 includible years of service includes an educational organization described in section 170(b)(1)(A)(ii), a hospital, a health and welfare service agency (including a home health service agency), a church related organization, or any organization described in section 414(e)(3)(B)(ii). See section 1.403(b)-4(c)(3)(ii) of the regulations.)**

**(Note to reviewer: The following may be substituted for subsections (c) and (d) in a section 403(b)(9) prototype plan.)**

- (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 dollar amount of the age 50 catch-up Elective Deferrals for a year is ~~\$6,000~~~~5,500~~, and is adjusted for cost-of-living to the extent provided under the Internal Revenue Code for periods after ~~2015~~~~2013~~.

**(Note to reviewer: Section 414(v)(2) of the Code provides a limitation on catch-up elective deferrals, and further provides that the limitation will be adjusted each year for cost of living increases. The limit for ~~2015~~~~2013~~ is ~~\$6,000~~~~5,500~~ (see IR-2014-99, Oct. 23, 2014IR-2012-77, Oct. 18, 2012). For current limits, 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 Internal Revenue Code), then this Plan and all such other plans shall be considered as one plan for purposes of applying the limitation in this Section 1. For this purpose, the 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 Internal Revenue 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 15.)**

**Sample Adoption Agreement Language:**

**Special Section 403(b) Catch-up Contributions**

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

☐ shall apply.

☐ shall not apply.

**Age 50 Catch-up Contributions**

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

☐ shall apply.

☐ shall not apply.

**Section 5. Limitations on Annual Additions**

**38. Limitations on Annual Additions**

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

**2(b)(11) Sample Plan Language:**

1. Limitations on Aggregate Annual Additions.
  - 1.1 General Limitation on Annual Additions. A Participant'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 Internal Revenue Code, a section 403(b) plan, or a simplified employee pension within the meaning of section 408(k) of the Internal Revenue 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 Internal Revenue Code. The notice will be provided annually, beginning no later than the year in which the Employee becomes a Participant.
  - 1.5 Coordination of Limitation on Annual Additions Where Employer Has Another Section 403(b) Prototype 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 Section 403(b) Prototype Plans 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 plans 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 Internal Revenue 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 Section 403(b) Prototype 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 Section 403(b) Prototype Plans of the Employer.
- (c) Any Excess Annual Addition attributable to this Plan will be corrected in the manner described in section 1.8.

1.7 Coordination of Limitation on Annual Additions Where Employer Has Another Section 403(b) Plan that is Not a Prototype 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 Section 403(b) Prototype 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 Section 403(b) Prototype Plan unless the Employer provides other limitations in the Adoption Agreement.

1.8 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 Internal Revenue 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 Internal Revenue 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 Internal Revenue Code, under a welfare benefit fund, as defined in section 419(e) of the Internal Revenue 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: Subsection 2.1(d) and 2.1(e) above will only apply if the participant controls an employer that has a plan that provides for those types of annual additions.)**

## 2.2 Includible Compensation.

- (a) “Includible Compensation” means an Employee’s compensation received from the Employer that is includible in the Participant’s gross income for Federal income tax purposes (computed without regard to section 911 of the Internal Revenue Code, relating to United States citizens or residents living abroad), including differential wage payments under section 3401(h) of the Internal Revenue Code for the most recent period that is a Year of Service. Includible Compensation for a minister who is self-employed means the minister’s earned income as defined in section 401(c)(2) of the Internal Revenue Code (computed without regard to section 911 of the Internal Revenue 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 Internal Revenue 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. 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 shall not exceed ~~\$265,000~~255,000, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after ~~2015~~2013.

**(Note to reviewer: Differential wage payments must be treated as compensation under section 415(c)(3) of the Code and section 1.415(c)-2 of the regulations but are not required to be treated as compensation for purposes of determining contributions under a plan. See Notice 2010-15, Q&A-9.**

Section 401(a)(17) of the Code limits the compensation taken into account in determining contributions to \$200,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for ~~2015~~2013 is ~~\$265,000~~255,000 (see IR-2014-99, Oct. 23, 2014~~IR-2012-77, Oct. 18, 2012~~). For the current dollar amount, see COLA Increases for Dollar Limitations on Benefits and Contributions.

The section 401(a)(17) limit does not apply to a plan of a church within the meaning of Code section 3121(w)(3)(A) or qualified church-controlled organization within the meaning of Code section 3121(w)(3)(B). 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 16.)

If the Employer is a Non-QCCO, the amount of Includible Compensation of each Participant taken into account in determining contributions shall not exceed ~~\$265,000~~255,000, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after ~~2015~~2013.

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

**(Note to reviewer: A section 403(b) prototype plan, including a standardized plan, that provides nonelective employer contributions may also provide that a participant who is permanently and totally disabled (as defined in section 22(e)(3) of the Code) 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) ~~\$53,000~~~~51,000~~, as adjusted for increases in the cost-of-living under § 415(d) of the Internal Revenue Code for periods after ~~2015~~~~2013~~, or
- (b) 100 percent of the Participant's Includible Compensation for the Limitation Year.

**(Note to reviewer: The following provisions may be added to a section 403(b)(9) prototype plan.)**

- (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 Internal Revenue 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 Internal Revenue 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.

**(Note to reviewer: Section 415(c)(1)(A) of the Code provides a dollar limitation on annual additions of \$40,000, and provides that the limitation will be adjusted each year for cost of living increases pursuant to section 415(d) of the Code. The limit for ~~2015~~~~2013~~ is ~~\$53,000~~~~51,000~~ (see IR-2014-19, Oct. 23, 2014~~IR-2012-77, Oct. 18, 2012~~). For current limits, see COLA Increases for Dollar Limitations on Benefits and Contributions)**

- 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 section 401(h) or section 419A(f)(2) of the Internal Revenue Code) which is otherwise treated as an Annual Addition.
- 2.6 Section 403(b) Prototype Plan. A Section 403(b) Prototype Plan means a section 403(b) plan the form of which is the subject of a favorable opinion letter from the Internal Revenue Service.
- 2.7 Employer. Solely for purposes of section 1 and 2, "Employer" means the employer that has adopted the Plan and any employer required to be

aggregated with that employer under section 414(b) and (c) (taking into account section 415(h)), (m), (o), of the Internal Revenue Code and section 1.414(c)-5 of the Treasury Regulations.

- 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:**

If the Participant is covered under another section 403(b) plan of the Employer, other than a Section 403(b) Prototype Plan:

- ☐ The provisions of section 1.5 and 1.6 will apply as if the other plan were a Section 403(b) Prototype Plan.
- ☐ (Provide the method under which the Plan will limit total Annual Additions to the Maximum Annual Additions in a manner than precludes Employer discretion.)

**Section 6. Distribution Provisions**

**39. Distribution Limitations for Elective Deferrals**

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

**Sample Plan Language:**

Except as permitted in the case of excess Elective Deferrals, pre-1989 Elective Deferral contributions (excluding earnings thereon) to an Annuity Contract that are separately accounted for, amounts rolled over into the Plan, a distribution made in the event of hardship, a qualified reservist distribution as defined in section 72(t)(2)(G) of the Internal Revenue Code, termination of the Plan, a payment pursuant to section or section of the Plan, or as may otherwise be provided by law and in regulations or other rules of general applicability published by the Department of the Treasury or the Internal Revenue Service, 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 59 ½. For purposes of this paragraph, a Participant shall be treated as having a Severance from Employment during any period the Participant is performing service 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 a Nonelective 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: The first and second blanks in this provision should be filled in with the section numbers of the plan corresponding to LRMs 55, relating to qualified domestic relations orders and 56, relating to IRS levy, respectively.)**

#### **40. Small Account Balances**

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

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.

#### **41. Minimum Distribution Requirements – I**

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

##### **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 section 1.403(b)-6(e) of the Treasury Regulations.

**(Note to reviewer: Because the terms of section 403(b) annuity contracts and custodial accounts under the plan must satisfy the requirements of section 401(a)(9), it is not necessary that those requirements be spelled out in the plan. However, the following alternative provisions (LRM 42) may be used to state the minimum distribution requirements in the plan, if desired. )**

## **42. Minimum Distribution Requirements - II**

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

### **Sample Plan Language:**

1. General Rules Regarding Minimum Distribution Requirements. 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, 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 paragraphs 2 through 6. The distribution requirements in paragraph 2 through 6 generally apply to a Participant's entire Accumulated Benefit. However, these requirements do not apply to the undistributed portion of a Participant's Accumulated Benefit valued as of December 31, 1986, exclusive of subsequent earnings (the pre-'87 account balance), provided that the applicable requirements of section 1.401(a)(9)-6(e)(6) of the Treasury Regulations are satisfied. In this case, a Participant's pre-'87 account balance shall be distributed in accordance with the incidental benefit requirements of section 1.401-1(b)(1)(i) of the Treasury Regulations. To the extent permitted under section 1.403(b)-6(e)(7), a Participant's Investment Arrangements under the Plan, or under the Plan and other section 403(b) plans in which the Participant participates as an Employee, may be aggregated and the minimum distribution requirements satisfied by distribution from any one or more of the Investment Arrangements.
2. Required Minimum Distributions. Distribution of the Participant's Accumulated Benefit will begin no later than the first day of April following the later of the calendar year in which the Participant attains age 70½ or the calendar year in which the Participant retires from employment (the "required beginning date") over (1) the life of the Participant, (2) the lives of the Participant and Beneficiary, or (3) a period certain not extending beyond the life expectancy of the Participant or the joint and last survivor expectancy of the Participant and Beneficiary. However, distributions to a 5-percent owner must commence by April 1 of the calendar year following the calendar year in which the owner attains age 70½.

**(Note to reviewer: The last sentence may be omitted in a governmental or church plan.)**

- 2.1 If the Participant's Accumulated Benefit is not distributed as an annuity, the amount to be distributed each year, beginning with the calendar year the Participant attains age 70 ½ or retires and continuing through the year of death, shall not be less than the quotient obtained by dividing the value of the Accumulated Benefit, including outstanding rollovers and transfers, as of the end of the preceding year by the distribution period in the Uniform Lifetime Table in Q&A-2 of section 1.401(a)(9)-9 of the Treasury Regulations, using the Participant's age as of his or her birthday in the year. However, if the Participant's sole Beneficiary is his or her surviving spouse and such spouse is more than 10 years younger than the Participant, then the distribution period is determined under the Joint and Last Survivor Table in Q&A-3 of section 1.401(a)(9)-9, using the ages as of the Participant's and spouse's birthdays in the

year.

- 2.2 If the Participant's Accumulated Benefit is distributed as an annuity, the distribution periods described in paragraph 1 above cannot exceed the periods specified in section 1.401(a)(9)-6 of the Treasury Regulations. Payments must be made in periodic payments at intervals of no longer than 1 year and must be either non-increasing or they may increase only as provided in Q&As-1 and -4 of section 1.401(a)(9)-6 of the Treasury Regulations. In addition, any distribution must satisfy the incidental benefit requirements specified in Q&A-2 of section 1.401(a)(9)-6.
- 2.3. The required minimum distribution for the year the Participant attains age 70 ½ or retires (or first required annuity payment) can be made as late as the required beginning date. The required minimum distribution (or required annuity payment) for any other year, including the year that contains the required beginning date, must be made by the end of such year.
3. Death On or After Required Beginning Date or Date Required Annuity Payments Begin. If the Participant's Accumulated Benefit is distributed as an annuity and the Participant dies on or after required payments begin, the remaining portion of the Participant's interest will continue to be distributed under the contract option chosen. If the Participant's Accumulated Benefit is not distributed as an annuity and the Participant dies on or after the required beginning date, the remaining portion of the Participant's interest will be distributed at least as rapidly as follows:
  - 3.1 If the Beneficiary is someone other than the Participant's surviving spouse, the remaining interest will be distributed over the remaining life expectancy of the Beneficiary, with such life expectancy determined using the Beneficiary's age as of his or her birthday in the year following the year of the Participant's death, or over the period described in paragraph 3.3 below if longer.
  - 3.2 If the Participant's sole Beneficiary is the Participant's surviving spouse, the remaining interest will be distributed over the spouse's life or over the period described in paragraph 3.3 below if longer. Any interest remaining after the spouse's death will be distributed over the spouse's remaining life expectancy determined using the spouse's age as of his or her birthday in the year of the spouse's death, or, if the distributions are being made over the period described in paragraph 3.3 below, over such period.
  - 3.3 If there is no Beneficiary, or if applicable by operation of paragraph 3.1 or 3.2 above, the remaining interest will be distributed over the Participant's remaining life expectancy determined in the year of the Participant's death.
  - 3.4 The amount to be distributed each year under paragraph 3.1, 3.2 or 3.3, beginning with the calendar year following the calendar year of the Participant's death, is the quotient obtained by dividing the value of the Accumulated Benefit as of the end of the preceding year by the remaining life expectancy specified in such paragraph. Life expectancy is determined using the Single Life Table in Q&A-1 of section 1.401(a)(9)-9 of the Treasury Regulations. If distributions are being made to a surviving spouse as the sole Beneficiary, the spouse's remaining life

expectancy for a year is the number in the Single Life Table corresponding to such spouse's age in the year. In all other cases, remaining life expectancy for a year is the number in the Single Life Table corresponding to the Beneficiary's or Participant's age in the year specified in paragraph 3.1, 3.2 or 3.3 and reduced by 1 for each subsequent year.

4. Death Before Required Beginning Date or Date Required Annuity Payments Begin.

If the Participant dies before the required beginning date (or the date required payments begin, in the case of an annuity), his or her entire interest will be distributed at least as rapidly as follows:

- 4.1 If the Beneficiary is someone other than the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar year following the calendar year of the Participant's death, over the remaining life expectancy of the Beneficiary, with such life expectancy determined using the age of the Beneficiary as of his or her birthday in the year following the year of the Participant's death, or, if elected, in accordance with paragraph 4.3 below.
- 4.2 If the Participant's Beneficiary is the Participant's surviving spouse, the entire interest will be distributed, starting by the end of the calendar year following the calendar year of the Participant's death (or by the end of the calendar year in which the Participant would have attained age 70½, if later), over the spouse's life, or, if elected, in accordance with paragraph 4.3 below. If the surviving spouse dies before distributions are required to begin, the remaining interest will be distributed, starting by the end of the calendar year following the calendar year of the spouse's death, over the spouse's Beneficiary's remaining life expectancy determined using the Beneficiary's age as of his or her birthday in the year following the death of the spouse, or, if elected, will be distributed in accordance with paragraph 4.3 below. If the surviving spouse dies after distributions are required to begin, any remaining interest will be distributed under the contract option chosen, in the case of an annuity, or over the spouse's remaining life expectancy determined using the spouse's age as of his or her birthday in the year of the spouse's death.
- 4.3 If there is no Beneficiary, or if applicable by operation of paragraph 4.1 or 4.2 above, the entire interest, to the extent required by regulations, will be distributed by the end of the calendar year containing the fifth anniversary of the Participant's death (or of the spouse's death in the case of the surviving spouse's death before distributions are required to begin under paragraph 4.2 above).

- 5. Except in the case of a distribution as an annuity, the amount to be distributed each year under paragraph 4.1 or 4.2 is the quotient obtained by dividing the value of the account as of the end of the preceding year by the remaining life expectancy specified in such paragraph. Life expectancy is determined using the Single Life Table in Q&A-1 of section 1.401(a)(9)-9 of the Treasury Regulations. If distributions are being made to a surviving spouse as the designated Beneficiary, the spouse's remaining life expectancy for a year is the number in the Single Life Table corresponding to the spouse's age in the year. In all other cases, remaining life expectancy for a year is the number in the

Single Life Table corresponding to the Beneficiary's age in the year specified in paragraph 4.1 or 4.2 and reduced by 1 for each subsequent year. The "value" of the Accumulated Benefit or the "interest" in the annuity includes the amount of any outstanding rollover and transfer and the actuarial value of any other benefits provided under the annuity such as guaranteed death benefits, to the extent required under applicable regulations.

6. For purposes of paragraphs 3 and 4 above, required annuity payments are considered to begin on the Participant's required beginning date or, if applicable, on the date distributions are required to begin to the surviving spouse under paragraph 4.2 above. However, if distributions start prior to the applicable date in the preceding sentence, on an irrevocable basis (except for acceleration) under an Annuity Contract meeting the requirements of section 1.401(a)(9)-6 of the Treasury Regulations, then required annuity payments are considered to begin on the annuity starting date.

**(Note to reviewer: A section 403(b)(9) retirement income account may distribute benefits in the form of an annuity if certain requirements are met and such an annuity will not fail to satisfy section 401(a)(9) merely because the annuity is not issued by an insurance company. Therefore, a section 403(b)(9) prototype plan may replace the last sentence of section 6 with the following.)**

However, if distributions start prior to the applicable date in the preceding sentence, on an irrevocable basis (except for acceleration) under an Annuity Contract meeting the requirements of section 1.401(a)(9)-6 of the Treasury Regulations or under a Retirement Income Account meeting the requirements of section 1.403(b)-6(e)(5) of the Treasury Regulations, then required annuity payments are considered to begin on the annuity starting date.

#### **43. Distribution of Amounts Held in a Rollover Account**

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

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

If a Participant has a separate account attributable to rollover contributions to the Plan, 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.)**

#### **44. Direct Rollovers**

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

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

1. 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.

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 (other than amounts that would have been required but for a statutory waiver of the section 401(a)(9) requirements);
- (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 Internal Revenue Code and income allocable thereto;
- (g) any loans that are treated as deemed distributions pursuant to section 72(p) of the Internal Revenue Code;
- (h) dividends paid on employer securities as described in section 404(k) of the Internal Revenue 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 Internal Revenue 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 Internal Revenue 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 Internal Revenue Code, respectively, or (ii) a qualified plan described in section 401(a) or 403(a) of the Internal Revenue Code or a tax-sheltered annuity described in section 403(b) of the Internal Revenue Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

- 2.2 Eligible Retirement Plan. An Eligible Retirement Plan is a qualified plan described in section 401(a), an annuity plan described in section 403(a), an annuity contract described in section 403(b), an individual retirement account or annuity described in section 408(a) or 408(b), or an eligible plan under section 457(b) of the Internal Revenue 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 Internal Revenue Code.
- 2.3 Distributee. A Distributee includes an Employee or former Employee. In addition, the Employee's or former Employee's surviving spouse and the Employee's or former Employees' spouse or former spouse who is the Alternate Payee under a qualified domestic relations order, as defined in section 414(p) of the Internal Revenue Code, are Distributees with regard to the interest of the spouse or former spouse. A Distributee also includes the Participant's nonspouse designated Beneficiary. In the case of a nonspouse Beneficiary, the Direct Rollover may be made only to an individual retirement account or annuity described in section 408(a) or 408(b) of the Internal Revenue 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 Internal Revenue Code. Also, in this case, the determination of any required minimum distribution under section 401(a)(9) of the Internal Revenue Code that is ineligible for rollover shall be made in accordance with IRS Notice 2007-7, Q&A-17 and 18, 2007 I.R.B. 395.
- 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 first blank should be filled in with the plan section number which corresponds to the mandatory distribution provisions of LRM 40.)**

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 Internal Revenue 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 Roth Elective Deferral Account under an applicable retirement plan described in section 402A(e)(1) or to a Roth IRA described in section 408A, and only to the extent the rollover is permitted under the rules of section 402(c).
  - 5.2 The Plan will not provide for a Direct Rollover (including an automatic rollover) for distributions from a Participant's Roth Elective Deferral Account if the amounts of the distributions that are Eligible Rollover Distributions are reasonably expected to total less than \$200 during a year, or such lesser minimum amount (if any) elected by the Employer in the adoption agreement. 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.

## **Section 7. Hardship Distributions**

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

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

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

1. To the extent permitted by the terms governing the applicable Investment Arrangement, distribution of Elective Deferrals may be made to a Participant in the

event of hardship. A hardship distribution may only be made on account of an immediate and heavy financial need of the Participant and where the distribution is necessary to satisfy the immediate and heavy financial need.

2. The following are the only financial needs considered immediate and heavy: expenses incurred or necessary for medical care, described in Code section 213(d), of the Participant, the Participant's spouse or dependents, or the Participant's primary beneficiary (as defined in Q&A-5 of IRS Notice 2007-7); the purchase (excluding mortgage payments) of a principal residence for the Participant; payment of tuition and related educational fees for the next 12 months of post-secondary education for the Participant, the Participant's spouse, children or dependents, or the Participant's primary beneficiary; payments necessary to prevent the eviction of the Participant from, or a foreclosure on the mortgage of, the Employee's principal residence; payments for funeral or burial expenses for the Participant deceased parent, spouse, child or dependent, or the Participant's primary beneficiary; and expenses to repair damage to the Participant's principal residence that would qualify for a casualty loss deduction under Code section 165 (determined without regard to whether the loss exceeds 10 percent of adjusted gross income).
3. A distribution will be considered as necessary to satisfy an immediate and heavy financial need of the Participant only if:
  - 3.1 The distribution is not in excess of the amount of the immediate and heavy financial need (including amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution);
  - 3.2 The Participant has obtained all distributions, other than hardship distributions, and all nontaxable loans under all plans maintained by the Employer (except to the extent such actions would be counterproductive to alleviating the financial need); and
  - 3.3 All plans maintained by the Employer provide that the Participant's Elective Deferrals (and After-Tax Employee Contributions) will be suspended for 6 months after the receipt of the hardship distribution.

## **Section 8. Plan Loans**

### **46. Loans to Participants**

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

#### **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. No loan to any Participant or Beneficiary can be made to the extent that such loan when added to the outstanding balance of all other loans to the Participant or Beneficiary would exceed the lesser of (a) \$50,000 reduced by the excess (if any) of

the highest outstanding balance of loans during the one year period ending on the day before the loan is made, over the outstanding balance of loans from the plan on the date the loan is made, or (b) one-half the present value of the nonforfeitable accrued benefit of the Participant or, if greater, the total accrued benefit up to \$10,000. For the purpose of the above limitation, all loans from all plans of the Employer and Related Employers are aggregated.

3. Any loan shall by its terms require that repayment (principal and interest) be amortized in level payments, not less frequently than quarterly, over a period not extending beyond five years from the date of the loan. If such loan is used to acquire a dwelling unit which within a reasonable time (determined at the time the loan is made) will be used as the principal residence of the Participant, the amortization period shall not extend beyond 15 years from the date of the loan.

**(Note to reviewer: With respect to loans used to acquire a principal residence, the 15-year amortization period in the sample language is suggested; amortization periods other than 15 years are permissible.)**

4. An assignment or pledge of any portion of the Participant's interest in the plan and a loan, pledge, or assignment with respect to any insurance contract purchased under the plan, will be treated as a loan under this paragraph.
5. 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.)**

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

### **47. Rollover Contributions to the Plan Reference: Regs. §1.403(b)-10**

#### **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 section (a), an Eligible Rollover

Distribution means any distribution of all or any portion of a Participant's benefit under another Eligible Retirement Plan, except that an Eligible Rollover Distribution does not include (1) any installment payment for a period of 10 years or more, (2) any distribution made upon hardship, or (3) for any other distribution, the portion, if any, of the distribution that is a required minimum distribution under section 401(a)(9) of the Code.

4. Eligible Retirement Plan. An Eligible Retirement Plan means a qualified trust described in section 401(a) of the Internal Revenue Code, an annuity plan described in section 403(a) or 403(b) of the Internal Revenue Code, an individual retirement account described in section 408(a) of the Internal Revenue Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code, or an eligible governmental plan described in section 457(b) of the Internal Revenue Code.
5. Roth Rollovers.
  - 5.1 The Plan will accept rollovers of Roth Elective Deferrals only if the Employer has elected in the Adoption Agreement to permit Roth Elective Deferrals.
  - 5.2 If provided by the Employer in the Adoption Agreement, the plan will accept a rollover contribution to a Roth Elective Deferral account only if it is a direct rollover from another Roth elective deferral account under an applicable retirement plan described in section 402A(e)(1) of the Internal Revenue Code and only to the extent the rollover is permitted under the rules of section 402(c) of the Internal Revenue Code.
6. Information Regarding Participant Basis Required. A rollover of an Eligible Rollover Distribution that includes after-tax employee contributions or Roth Elective Deferrals will only be accepted if the Administrator obtains information regarding the Participant's tax basis under section 72 of the Internal Revenue Code in the amount rolled over.
7. Separate Accounts. Separate accounts shall be established and maintained for the Participant for any Eligible Rollover Distribution, and for the after-tax portion of any such Eligible Rollover Distribution, paid to the Plan.

**(Note to reviewer: A section 403(b) plan that includes a qualified Roth contribution program may allow in-plan Roth rollovers of eligible rollover distributions in accordance with section 402A(c)(4) of the Internal Revenue Code. See Notice 2010-84, 2010-51 I.R.B. 872.)**

**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 Internal Revenue Code, ☐ including after-tax contributions.

☐ an eligible governmental plan under section 457(b) of the Code which is maintained by a State.

**Direct Rollovers of Roth Elective Deferrals:**

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

☐ a qualified plan described in section 401(a) or 403(a) of the Internal Revenue Code.

☐ an annuity contract or custodial account described in section 403(b) of the Internal Revenue 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 Internal Revenue Code, excluding after-tax employee contributions.

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

☐ an eligible plan under section 457(b) of the Internal Revenue Code which is maintained by a State.

**Participant Rollover Contributions from IRAs:**

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

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

**Sample Plan Language:**

1. If elected in the Adoption Agreement, plan-to-plan transfers for a Participant shall be permitted as provided in this section.
2. Transfers to the Plan. The 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 Code.

**(Note to reviewer: The following paragraphs may be added in the case of a section 403(b)(9) plan sponsored by a section 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 section 403(b)(9) prototype plan shall have his or her Accumulated Benefit, if any, automatically transferred to such other employer's section 403(b)(9) prototype plan 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

**(Note to reviewer: This provision is optional.)**

**49. Exchanges**

**Reference: Regs. §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 section 403(b)(9) prototype plan sponsored by a section 414(e)(3)(A) benefit board 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 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.)**

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 Internal Revenue Code, including the following: (i) the Employer providing information as to whether the Participant's employment with the Employer is continuing, and notifying the Vendor when the Participant has had a Severance from Employment (for purposes of the distribution restrictions in Section \_\_\_\_); (ii) the Vendor notifying the Employer of any hardship withdrawal if the withdrawal results in a 6-month suspension of the Participant's right to make Elective Deferrals under the Plan; and (iii) the Vendor providing information to the Eligible Employer or other Vendors concerning the Participant's or Beneficiary's section 403(b) contracts or custodial accounts or qualified employer plan benefits (to enable a Vendor to determine the amount of any plan loans and rollover accounts that are available to the Participant under the Plan 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 the LRM 39.)**

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

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

**Sample Adoption Agreement Language:**

The plan

☐ will

☐ will not

allow exchanges within the Plan.

The plan  
[ ] will  
[ ] will not  
allow exchanges outside the Plan.

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

**Sample Plan Language:**

1. If elected in the Adoption Agreement, purchases of service credit shall be permitted under the Plan as provided in this section.
2. If a Participant is also a Participant in a tax-qualified defined benefit governmental plan (as defined in section 414(d) of the Internal Revenue Code) that provides for the acceptance of plan-to-plan transfers with respect to the Participant, then the Participant may elect to have any portion of the Participant's 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 Internal Revenue Code does not apply by reason of section 415(k)(3) of the Internal Revenue Code.

**Sample Adoption Agreement Language:**

The plan  
[ ] will  
[ ] will not  
allow transfers to purchase service credit.

**(Note to reviewer: This provision is designed for use by governmental plans.)**

**Section 10. Investment of Contributions**

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

**Sample Plan Language:**

1. Manner of Investment. All Elective Deferrals or other amounts contributed to the Plan, all property and rights purchased with such amounts under the Funding Vehicles, and

all income attributable to such amounts, property, or rights shall be held and invested in one or more Annuity Contracts or Custodial Accounts.

2. Exclusive Benefit. Each Custodial Account shall provide for it to be impossible, prior to the satisfaction of all liabilities with respect to Participants and their Beneficiaries, for any part of the assets and income of the Custodial Account to be used for, or diverted to, purposes other than for the exclusive benefit of Participants and their Beneficiaries.
3. Investment of Contributions. Each Participant or Beneficiary shall direct the investment of his or her Account among the investment options available under the Investment Arrangement in accordance with the terms governing the Investment Arrangement.

**(Note to reviewer: A section 403(b)(9) prototype plan 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.)**

**Section 11. Plan Termination and Amendment**

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

**Sample Plan Language:**

1. Termination of Contributions. The Employer has no obligation or liability whatsoever to maintain the Plan for any 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.

### **53. Amendment by Sponsor**

**Reference: Section 8.09 of Rev. Proc. 2013-22**

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

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

### **54. Amendment by Adopting Employer**

**Reference: Section 9.02 of Rev. Proc. 2013-22**

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

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

## **Section 12. Other Plan Provisions**

### **55. Domestic Relations Orders and Qualified Domestic Relations Orders**

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

#### **Sample Plan language:**

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

If a judgment, decree, or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a

spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State (“domestic relations order”), then the amount of the Participant’s 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 or church plan for situations involving domestic relations orders that are “qualified” under section 414(p) of the Code. 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 Internal Revenue 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 section 414(p) of the Internal Revenue Code.)**

**56. IRS Levy**

**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.

**57. 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.)**

#### **58. USERRA - Military Service Credit**

**Reference: Code §§401(a)(37), 414(u), Rev. Proc. 96-49, Notice 2010-15**

##### **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 benefit accruals relating to the period of qualified military service) that would have been provided under the Plan had the Participant resumed employment and then terminated employment on account of death.

**(Note to reviewer: For deaths and disabilities occurring after January 1, 2007, 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.)**

**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 65.)**

### **Section 13. Adoption Agreement Requirements**

#### **59. Adoption Agreement Requirements—All Plans**

**Reference: Section 9.03 of Rev. Proc. 2013-22**

**(Note to reviewer: The adoption agreement of every section 403(b) prototype plan must satisfy the following requirements.)**

1. The Adoption Agreement must allow the adopting Employer to add overriding plan

language, if necessary, to satisfy section 415 of the Internal Revenue Code because of the required aggregation of multiple plans.

2. The Adoption Agreement must contain a dated Employer signature line. The Employer must complete a new signature page if it modifies any prior elections or makes new elections in its Adoption Agreement.
3. The Adoption Agreement must state that it is to be used with a single specific Basic Plan Document.
4. The Adoption Agreement must contain a cautionary statement to the effect that the failure to properly fill out the Adoption Agreement may result in loss of favorable tax treatment for the Plan.
5. The Adoption Agreement must state that the sponsor will inform the adopting Employer of any amendments made to the Plan or of the discontinuance or abandonment of the Plan.
6. The Adoption Agreement must include the name, address and telephone number of the sponsor or the sponsor's authorized representative for inquiries by adopting Employers regarding the adoption of the Plan, the meaning of plan provisions, or the effect of the opinion letter.
7. The Adoption Agreement must require the adopting Employer to identify its status both as an Eligible Employer, within the meaning of section 1.403(b)-2(b)(8) of the Treasury Regulations, and with respect to whether the nondiscrimination requirements of section 403(b)(12) of the Internal Revenue Code apply to 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) ("Public School").
- b. ☐ An organization that is exempt from tax under section 501(c)(3) of the Internal Revenue Code.

**(Note to reviewer: The following options should be included in the adoption agreement for a section 403(b)(9) plan that defines employee to include self-employed ministers and chaplains. (See LRM 13C.))**

- c. ☐ An Employer of a minister described in section 414(e)(5)(A)(i)(II) of the Internal Revenue Code.
- d. ☐ A self-employed minister described in section 414(e)(5)(A)(i)(I) of the Internal Revenue Code.

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

- a. ☐ A Governmental Plan within the meaning of section 414(d) of the Internal Revenue Code of a Public School.
- b. ☐ A Governmental Plan of an organization described in section 501(c)(3) of the Internal Revenue Code.

- c. [ ] A plan of an Employer that is a Church as defined in section 3121(w)(3)(A) of the Internal Revenue Code or a Qualified Church-Controlled Organization described in section 3121(w)(3)(B).
- d. [ ] A plan (other than a plan described in a., b., or c.) of an Employer that is an organization described in section 501(c)(3) of the Internal Revenue Code.

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

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

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

**Under the regulations, the requirements identified above do not apply to plans of churches described in section 3121(w)(3)(A) and qualified church-controlled organizations described in section 3121(w)(3)(b). Therefore, LRMs 62 through 64, 69 through 72, and 77 do not apply to these plans. Except for the compensation limit of section 401(a)(17), the requirements identified above also do not apply to governmental plans. The requirements identified above do apply to all other section 403(b) plans, except that the requirements of LRMs 63 and 64 (hours of service and years of eligibility service) do not apply to a plan, including a plan of a non-qualified church-controlled organization (Non-QCCO), that is a church plan within the meaning of section 414(e) and section 3(33) of Title I of ERISA that is exempt from the minimum participation standards of section 202 of Title I of ERISA. Governmental plans and plans of Non- QCCOs are required to satisfy the universal availability requirements of section 403(b)(12)(A)(ii). See LRM 17.**

### **Section 1. Definitions**

#### **60. Compensation**

**Reference: Code §414(s), §401(a)(17); Regs. §1.401(a)(4)-12, §1.401(a)(17)-1, §1.414(s)-1; Regs. §1.415(c)-2; sections 6.02(4) and 8.06(3) of Rev. Proc. 2013-22**

**(Note to reviewer: Standardized section 403(b) 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 section 415(c)(3) (disregarding section 415(c)(3)(E)) and excludes all other compensation, or that otherwise satisfies section 414(s) under section 1.414(s)-1(c).

Nonstandardized section 403(b) plans may allow the adopting 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 section 401(a)(17), unless the employer is a church or a qualified church-controlled organization as described in section 3121(w)(3). A nonstandardized 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 section 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 \$~~265,000~~~~255,000~~, as adjusted for cost-of-living increases in accordance with section 401(a)(17)(B) of the Internal Revenue Code for periods after ~~2015~~~~2013~~.

(Note to reviewer: Paragraph 3 can be omitted in a plan of a church or qualified church-controlled organization. Section 401(a)(17) of the Code limits the compensation taken into account in determining contributions to \$200,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for ~~2015~~~~2013~~ is \$~~265,000~~~~255,000~~ (see ~~IR-2014-99, Oct. 23, 2014~~~~IR-2012-77, Oct. 18, 2012~~). For the current dollar amount, 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.

(Note to reviewer: Section 3401(h) of the Code provides that a differential wage payment shall be treated as a payment of wages under section 3401(a) for a payment made after December 31, 2008. These amounts may but are not required to be treated as compensation for purposes of determining contributions and benefits under a plan. See Notice 2010-15, Q&A-9. A nonstandardized plan may exclude

**differential wage payments from its definition of compensation.)**

☐ 415 safe-harbor compensation (as defined in section 1.415(c)-2(d) of the Treasury Regulations), which includes contributions (other than Roth Elective Deferrals) made pursuant to a Compensation Reduction Election which are not includible in the gross income of the participant under section 125, 132(f), 402(e)(3), 402(h)(1)(B) or 403(b) of the Internal Revenue Code.

☐ Check here if the Employer chooses to exclude contributions (other than Roth Elective Deferrals) made pursuant to a Compensation Reduction Election which are not includible in the gross income of the participant under section 125, 132(f), 402(e)(3), 402(h)(1)(B) or 403(b) of the Internal Revenue Code.

☐ Check here if the Employer chooses to include deemed section 125 compensation (as defined in § 1.415(c)-2(g)(6) of the Treasury Regulations) in section 125 for purposes of the definition of Compensation.

☐ Check here if the Employer chooses not to include deemed section 125 compensation (as defined in section 1.415(c)-2(g)(6) of the Treasury Regulations) in section 125 for purposes of the definition of Compensation.

**61. After-Tax Employee Contribution**  
**Reference: Code §401(m)**

**Sample Plan Language**

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

**(Note to reviewer: This provision is optional.)**

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

**Sample Plan Language:**

1. "Highly Compensated Employee" means any Employee who for the preceding year had compensation from the Employer in excess of \$~~120,000~~~~115,000~~, adjusted by the Secretary of the Treasury for cost-of-living increases after ~~2015~~~~2013~~, in accordance with section 414(q) of the Internal Revenue Code.

(Note to reviewer: Section 414(q)(1)(B) of the Code limits the compensation taken into account to \$80,000, and provides that the limit will be adjusted each year for cost of living increases. The limit for ~~2015~~~~2013~~ is ~~\$120,000~~~~115,000~~ (see IR-2014-99, Oct. 23, 2014~~IR-2012-77, Oct. 18, 2012~~). For the current limit, see COLA Increases for Dollar Limitations on Benefits and Contributions.)

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

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

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

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

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

- ☐ In determining who is a Highly Compensated Employee the Employer makes a top-paid group election. The effect of this election is that an Employee with compensation in excess of ~~\$120,000~~~~115,000~~ (as adjusted for periods after ~~2015~~~~2013~~) for the look-back year is a Highly Compensated Employee only if the Employee was in the top-paid group for the look-back year.
- ☐ In determining who is a Highly Compensated Employee the Employer makes a calendar year data election. The effect of this election is that the look-back year is the calendar year beginning with or within the look-back year.

**63. Hour of Service**

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

**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 § 2530.200b-2 of the Department of Labor Regulations which is incorporated herein by this reference; and
- 1.3 Each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the Employer. The same hours of service will not be credited both under paragraph 1.1 or paragraph 1.2, as the case may be, and under this paragraph 1.3. These hours will be credited to the Employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement or payment is made.

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

**(Note to reviewer: A section 403(b) prototype plan does not need to include definitions of “hour of service” and “year of eligibility service” if the plan does not give adopting eligible employers an option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan. Also see LRM 75.)**

**64. Year of Eligibility Service**

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

**Sample Plan Language:**

“Year of Eligibility Service” means a computation period during which an Employee completes at least 1,000 Hours of Service. The initial computation period is the 12-consecutive month period beginning on the date the Employee first performs an Hour of Service for the Employer (employment commencement date). The succeeding computation periods are, as elected by the employer in the Adoption Agreement, either the 12-consecutive month periods commencing with the first anniversary of the Employee's employment

commencement date or Plan Years, beginning with the first Plan Year which commences prior to the first anniversary of the Employee's employment commencement date regardless of whether the Employee is entitled to be credited with 1,000 Hours of Service during the initial computation period. An Employee who is credited with 1,000 Hours of Service in both the initial computation period and the first Plan Year which commences prior to the first anniversary of the Employee's employment commencement date will be credited with two Years of Eligibility Service.

**Sample Adoption Agreement Language:**

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

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

**(Note to reviewer: A section 403(b) prototype plan does not need to include definitions of "hour of service" and "year of eligibility service" if the plan does not give adopting eligible employers the option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan. Also see LRM 75. As an alternative to hours of service, a section 403(b) prototype plan may use the elapsed time method of crediting service. See the [DC LRM 4](#).)**

## **Section 2. Contributions**

### **65. Vesting**

**Reference: Section 8.07 of Rev. Proc. 2013-22**

**Sample Plan Language:**

**(Note to reviewer: A section 403(b) prototype plan may provide that all contributions are immediately and fully vested. Alternatively, the plan may provide for graduated vesting of nonelective employer contributions. In this case, the nonelective employer contributions must vest according to a schedule that would satisfy the minimum standards of § 411 if the plan were a qualified plan under § 401(a), regardless of whether the plan is subject to the minimum vesting standards of section 203 of Title I of ERISA. In any case, any nonvested amounts must be treated as a separate contract to which § 403(c) (or another applicable provision of the Internal Revenue Code) applies and must fully vest on termination of the plan. See the sample provision following this note. If the plan is required to satisfy the requirements of § 401(m), any matching contributions under the plan must either be nonforfeitable when made or vest under a schedule permissible under section 411. Vesting schedules that satisfy § 411 and required related provisions, including definitions of vesting service, 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.**

**Sample Plan Language:**

**Each type of contribution made by the Employer on behalf of a participant that is subject to a different vesting schedule 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 another applicable provision of the Internal Revenue Code) applies. ~~All contributions made by the Employer on behalf of a Participant, to the extent not vested, will be credited to a separate account and treated as made to a contract to which section 403(c) (or another applicable provision of the Internal Revenue Code) 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) 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 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) 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 Internal Revenue Code) applies. Each contribution (and earning thereon) that is subject to a different vesting schedule must be maintained in a separate account for the Participant.

**66. Contribution Formula.**

**Reference: Regs. §1.401(a)(4)-2(b)(2); section 6.02(3) of Rev. Proc. 2013-22**

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

under section 401(a)(17) (see LRM 59 for the definition of compensation).

A nonstandardized plan may also use one of the formulas below or may use an alternative formula. Some alternative formulas may be found in the [DC LRM](#). A governmental plan or a plan of a church within the meaning of section 3121(w)(3)(A) of the Code or a qualified church-controlled organization within the meaning of section 3121(w)(3)(B) 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 plan or volume submitter plan may require, as an option on the adoption agreement, up to 1,000 hours of service.)**

**67. Matching Contributions**

**Reference: Code §401(m) and Regs §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 section 411(a)(2)(B) applicable to such contributions. See LRM 65 of this document 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 plan includes a tiered matching formula, then the rate of matching contributions cannot increase as the rate of elective deferrals or employee contributions 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 § 1.401(m)-2(a)(5) of the Treasury Regulations.**

**The plan must either provide that matching contributions are nonforfeitable when made or set forth a vesting schedule permissible under section 411(a)(2)(B) applicable to such contributions. See LRM 65 and LRMs 52 through 60 of the [DC LRM](#).)**

## **68. After-Tax Employee Contributions**

**Reference: §411(c)(2), §411(a)(1)**

### **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. 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

**69. Limitations on Matching and After-Tax Employee Contributions**

**Reference: Code §401(a)(4), Regs. §401(m)**

**(Note to reviewer: These nondiscrimination limitations are generally required in all plans (except governmental plans or 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 69 and LRM 70 assumes that matching contributions under the plan are nonforfeitable when made. Sample plan language appropriate to plans that provide for graded vesting of matching contributions, as permitted under section 411(a)(2)(B) of the Code, may be found in LRMs X through XIII of the [CODA LRM.](#))**

**Sample Plan Language:**

**1. Prior Year Testing.**

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

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

1.2 For the first Plan Year this Plan permits any Participant to make Employee Contributions, provides for Matching Contributions or both, and this is not a successor plan, for purposes of the foregoing tests, the prior year's Non-Highly Compensated Employees' ACP shall be 3 percent unless the Employer has elected

in the Adoption Agreement to use the Plan Year's ACP for these Participants.

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

to have been made in the Plan Year in which contributed to the plan. Matching Contributions and Qualified Nonelective Contributions will be considered made for a Plan Year if made no later than the end of the 12-month period beginning on the day after the close of the Plan Year.

4. Definitions.

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

**Sample Adoption Agreement Language:**

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

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

**70. Distribution of Excess Aggregate Contributions**

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

**(Note to reviewer: governmental plans and plans of churches and qualified church- controlled organizations are not subject to section 401(m) of the Code.**

**Excess aggregate contributions for a plan year must be distributed no later than 12 months after such plan year. However, any excess amounts distributed more than 2 1/2 months (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 section 4979. This tax is imposed on the employer with respect to such amounts.)**

**Sample Plan Language:**

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

computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over

- (b) The maximum Contribution Percentage Amounts permitted by the ACP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of their Contribution Percentages beginning with the highest of such percentages).

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

**Sample Adoption Agreement Language:**

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

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

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

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

**71. Qualified Nonelective Contributions**

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

**(Note to reviewer: governmental plans and plans of churches and qualified church- controlled organizations are not subject to section 401(m) of the Code.)**

**Sample Plan Language:**

1. If elected in the Adoption Agreement, the Employer may make Qualified Nonelective Contributions under the Plan on behalf of Employees.
2. In addition, if the Employer has elected in the Adoption Agreement to use the Current Year Testing method, in lieu of distributing Excess Aggregate Contributions, and to the extent elected by the Employer in the Adoption Agreement, the Employer will make Qualified Nonelective Contributions on behalf of Participants that are sufficient to satisfy the Actual Contribution Percentage test.
3. Qualified Nonelective Contributions will be allocated 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 allocated to Participants' accounts that the Participants may not elect to receive in cash until distributed from the Plan, that are nonforfeitable when made, and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

**Sample Adoption Agreement Language:**

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

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: Any allocation formula other than those in this LRM 71 must satisfy additional requirements specified in §§ 1.401(m)-2(a)(6) of the Treasury Regulations.)**

**72. ACP Test Safe Harbor**

**Reference: Code §401(m)(11), Regs. §1.401(m)-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 offering a design-based safe harbor method for satisfying the ACP test (ACP "safe harbor plan"). A plan that satisfies the ACP test safe harbor must satisfy all the other applicable requirements of the Code, including the nondiscriminatory availability of benefits, rights, and features under section 401(a)(4), and the limitations of sections 401(a)(17), 401(a)(30), and 415.**

**The ACP test safe harbor requires that a plan meet the contribution and notice requirements and, in addition, satisfy a special limit on matching contributions. A plan**

providing for after-tax employee contributions, or matching contributions that fail to satisfy the ACP test safe harbor, must satisfy the regular ACP test under section 401(m)(2). See Regulations sections 1.401(m)-2(a)(5)(iv) and 1.401(m)-3 for details.

The sample plan language of this LRM 72 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 section 411(a)(2)(B) may be found in LRM XX of the [CODA LRM.](#)

### **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 69 and 70 using the current year testing method and specifying which contributions will be used in the ACP test. See Regulations section 1.401(m)-2(a)(5)(iv) and section 1.401(m)-3.)**

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

##### **2. Definitions.**

- 2.1 "ACP Safe Harbor" is the method described in Section 3 of this article for satisfying the ACP test of section 401(m)(2) of the Internal Revenue Code.
- 2.2 "Compensation" is defined in of the Plan, except, for purposes of this article, no dollar limit, other than the limit imposed by section 401(a)(17)(B) of the Code, applies to the compensation of a Non-highly Compensated Employee.

**(Note to reviewer: The blank should contain the location of the plan's definition of compensation that corresponds to LRM 60. 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 section 1.414(s)-1(d)(2) of the Regulations and permits each participant to elect sufficient elective deferrals to receive the maximum amount of matching contributions (determined using the definition of compensation described above) available to the participant under the plan.)**

- 2.4 "Eligible Employee" means an Employee eligible to make Elective Deferrals under the Plan for any part of the Plan Year or who would be eligible to make Elective Deferrals but for a suspension due to a hardship distribution or to

statutory limitations, such as sections 402(g) and 415 of the Internal Revenue Code.

**(Note to reviewer: The plan may not condition an eligible employee's receipt of the ACP safe harbor matching contributions on completion of a certain number of hours during the plan year or on employment on a certain day during the plan year.)**

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

3. ACP Safe Harbor.

3.1 Safe Harbor Contributions.

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

3.2 Notice Requirement.

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

3.3 Election Periods.

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

**Sample Adoption Agreement Language:**



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

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

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

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

**(Note to reviewer: Other formulas for ACP safe harbor matching contributions are permissible, provided 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.)**

#### Section 3. Distribution Provisions

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

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

1. Custodial Account. Except for a payment pursuant to section or section of the Plan, or as may otherwise be provided by law and in regulations or other rules of general applicability published by the Department of the Treasury or the Internal Revenue Service, 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 for a payment pursuant to section or section of the plan, or as

may otherwise be provided by law and in regulations or other rules of general applicability published by the Department of the Treasury or the Internal Revenue Service, 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: The first and second blanks in each of the paragraphs of this provision should be filled in with the section numbers of the plan corresponding to LRMs 55, relating to qualified domestic relations orders and 56, relating to IRS levy, respectively. The plan may provide or allow the employer to elect in the adoption agreement that the distribution limitation in the preceding paragraph applies only to nonelective employer contributions held in an annuity contract issued after December 31, 2008.)**

**(Note to reviewer: A section 403(b)(9) prototype plan should include the following provision.)**

3. Retirement Income Account. Except for a payment pursuant to section or section of the Plan, or as may otherwise be provided by law and in regulations or other rules of general applicability published by the Department of the Treasury or the Internal Revenue Service, 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: The first and second blanks should be filled in with the section numbers of the plan corresponding to LRMs 55, relating to qualified domestic relations orders and 56, relating to IRS levy, respectively. The plan may provide or allow the employer to elect in the adoption agreement that the distribution limitation in the preceding paragraph applies only to nonelective employer contributions held in a retirement income account issued after December 31, 2008.)**

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

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

After-Tax Employee Contributions. If elected by the Employer in the Adoption Agreement and to the extent permitted under the terms governing the applicable Investment Arrangement, After-Tax Employee Contributions may be distributed at any time.

##### **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.

**(Note: This provision is optional.)**

#### **Section 4. Standardized Plan Provisions**

##### **75. Coverage**

**Reference: Section 6.02(1) of Rev. Proc. 2013-22**

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

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

☐ Employees who have not attained the age of \_\_\_\_ (cannot exceed 21).

☐ Employees who have not completed a Year of Eligibility Service.

**(Note to reviewer: A section 403(b) prototype plan that does not give adopting eligible employers an option to exclude employees who have not completed a minimum service requirement from eligibility for nonelective contributions under the plan does not have to include definitions of “year of eligibility service” and “hour of service.” See LRM 63 and LRM 64.**

**A section 403(b) prototype plan may require an employee to complete up to two years of eligibility service to be eligible for any nonelective contributions under the plan, provided that the participant is 100% vested after two years of service. A section 403(b) prototype plan maintained by a tax-exempt employer exclusively for the benefit of employees of an educational institution described in section 170(b)(1)(A)(ii) of the Code 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 Internal Revenue Code) from the Employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) of the Internal Revenue Code).

- [ ] Employees who became Employees as the result of a transaction described in section 410(b)(6)(C) of the Internal Revenue Code. These Employees will be excluded during the period beginning on the date of the transaction and ending on a date that is not later than the last day of the first Plan Year beginning after the date of the transaction.

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

**76. Nondiscrimination**

**Reference: Regs. §1.401(a)(4)-4; section 6.02(2) of Rev. Proc. 2013-22**

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

**Section 5. Nonstandardized Plan Provisions**

**77. Coverage and Nondiscrimination**

**Reference: Code §401(a)(4), §410(b); sections 6.03 and 14.03 of Rev. Proc. 2013-22**

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

**78. Nonelective Contributions for Former Employees**

**Reference: Regs. §1.403(b)-4(d)**

**Sample Plan Language:**

**(Note to reviewer. The blank should be filled in with the section corresponding to LRM 38.)**

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: A section 403(b) nonstandardized prototype 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.)**

**79. Additional Adoption Agreement Requirements**

**Reference: Section 9.04 of Rev. Proc. 2013-22**

**Each nonstandardized plan adoption agreement must contain language which complies with the following additional requirements. These adoption agreement requirements are in addition to the requirements listed in LRM 59:**

- 1. The adoption agreement must state that, unless the plan is a governmental plan as defined in section 414(d) of the Internal Revenue Code or the employer is a church within the meaning of section 3121(w)(3)(A) of the Code or a qualified church-controlled organization within the meaning of section 3121(w)(3)(B) of the Code, the plan must satisfy the requirements of sections 401(a)(4) and 410(b) of the Internal Revenue Code with respect to nonelective contributions under the plan on a continuing basis.**
- 2. The adoption agreement must state that the opinion letter may not be relied upon with respect to whether the plan satisfies the requirements of sections 401(a)(4) and 410(b) of the Internal Revenue Code.**

**80. Retirement Income Account**

**Reference: Regs. § 1.403(b)-9(a)(2)(i)(C)**

**(Note to reviewer: The following provision is required only in a section 403(b)(9) plan.)**

**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 section 403(b)(9) plan must also satisfy the separate accounting requirement of § 1.403(b)-9(a)(2)(i)(A) of the Regulations as well as the**

**requirement of § 1.403(b)-9(a)(2)(i)(B) of the Regulations 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.**