

May 1, 2008

Dear Plan Sponsor:

The attached sample plan document is an example of a document that might be used by a private tax-exempt employer for a voluntary 403(b) program intended to be exempt from the requirements of Title I of ERISA. **It is only a sample document, and neither the sample document nor letter is intended or authorized for reliance by an individual or organization as tax or legal advice. Employers should consult with counsel as appropriate with regard to any significant employee benefit plan matters.**

A private tax-exempt employer might have a voluntary non-ERISA 403(b) plan in one or more of several circumstances, including:

- The employer may have frozen a voluntary non-ERISA program and established an ERISA 403(b) or 401(k) plan for future contributions;
- The employer may have maintained the voluntary 403(b) arrangement to accept all employee deferrals which were not matched by the employer under the plan or under a separate plan.

Many employers with these non-ERISA 403(b) programs have not maintained a written plan document governing the program because of concerns that such a document could be viewed as maintaining a plan, for purposes of Title I of ERISA, and thus forfeit the ERISA exemption.

The issuance last year by the United States Treasury Department and the Internal Revenue Service (IRS) of final 403(b) regulations, which now include a requirement that 403(b) programs be maintained pursuant to a written plan, was followed quickly by guidance from the United States Department of Labor (DOL). **A copy of that guidance is also attached.** In general, that guidance expressed the DOL's view that an employer could satisfy the requirements of the final 403(b) regulations while still preserving the plan's exemption from Title I of ERISA, provided that care was taken to avoid the creation of employer discretionary authority, such as making decisions about withdrawals or loans, or otherwise exercising or limiting the exercise of a participant's rights under the investment product they had selected. The attached sample document would require, among other things, that providers under the plan coordinate with each other with respect to certain transactions, including loans and financial hardship withdrawals, for those participants maintaining accounts with more than one provider under the plan.

IRS guidance in November 2007 provided clarification regarding which contracts and accounts must be included in an employer's 403(b) plan. **A copy of that guidance is also attached.** It provides generally that any provider that has received contributions after 2004 generally must be incorporated into the plan's compliance coordination procedures, except that:

- Accounts of former employees and beneficiaries with providers that were deselected between 2005 and 2008 generally can be excluded.
- Accounts of current employees with that same group of previously deselected providers generally may be disregarded if (a) the employer has made a reasonable good faith effort to

include them in the plan's compliance coordination procedures, and (b) the provider refuses to agree to such compliance procedures.

The sample document references a list of approved providers under the plan. Such a list would need to be added by the plan sponsor

The November guidance also provided sample plan language for public schools. The attached sample document does not incorporate that sample plan language.

As a general matter employers are required to adopt a written plan for their non-ERISA 403(b) programs not later than January 1, 2009.

Sincerely,

AIG Retirement

Employer's Plan Document for Salary Reduction Only 403(b) Arrangement

_____ (the **Employer**) has established this plan (the **Plan**) under Section 403(b) of the Internal Revenue Code (**Code**) to allow its employees to make voluntary salary reduction contributions to annuity contracts or custodial accounts that satisfy the applicable requirements of Section 403(b) of the Code and that the Employer has approved for maintenance under the Plan (**TSAs**). The Employer shall exercise no discretionary authority in the administration of the Plan, except as specifically provided herein and as otherwise permitted to preserve the status of the Plan as exempt from Title I of ERISA under guidelines approved by the Department of Labor.

Article I – Definitions

1 **Eligible Employees.** Eligible Employee means, for any calendar year, any common-law employee of the Employer who is entitled to receive compensation during the calendar year for employment services performed for the Employer, other than nonresident aliens who perform no services in the U.S. during the calendar year *and* (check all that apply):

- Employees who are eligible to participate in a Section 457(b) plan of the Employer during the calendar year.
- Employees who are eligible to participate in a Section 401(k) plan of the Employer during the calendar year.
- Employees who are eligible to make salary reduction contributions to another Section 403(b) plan of the Employer during the calendar year.
- Employees who are students and regularly attending classes at the Employer institution during the calendar year (limited to Employers that are educational institutions).
- Employees who normally work fewer than ___ hours per week (must be 20 or less) during the calendar year. (An employee will be considered to normally work less than 20 hours per week only if, for the first 12 months of employment, the Employer reasonably expects the employee to have fewer than 1,000 hours of service, and for calendar years ending after the first 12 months of employment, the employee had fewer than 1,000 hours of service, as determined in accordance with the regulations under Section 403(b); if an exclusion based on fewer than 20 hours per week is chosen, the 1,000 hours of service threshold is reduced proportionately.

Employees of other 501(c)(3) Organizations. The Eligible Employees include (subject to any exceptions designated above) the common-law employees of the following Section 501(c)(3) organizations (that are under common control or regularly coordinate their activities with the Employer, as determined under Treasury Regulation Section 1.414(c)-5:

- 2 **Participants.** Participant means an Eligible Employee or former Eligible Employee for whom a TSA is maintained under the Plan.
- 3 **Providers.** Provider means, in the case of an approved TSA that is an annuity contract, the insurance company that issues the annuity contract, or, in the case of an approved TSA that is a custodial account to hold shares in regulated investment companies, the trustee or custodian of the account.

Article II – Approved TSAs

- 1 **Approved TSAs.** No contributions will be remitted to the TSA of any Provider unless the Provider has provided written certification to the Employer under Section 2 of this Article II, and the Employer has accepted that certification and approved the availability of the Provider's TSAs under the Plan. The Employer may limit its approval to specific TSAs offered by a Provider, and the Employer may approve certain TSAs only for exchanges without agreeing to remit salary reduction contributions to that Provider's TSAs.
- 2 **Provider Certification.** The Provider's certification will include its agreement to comply with all applicable requirements under Code Section 403(b), including the limits on salary reduction contribution (to the extent determinable by the Provider) and the requirements of Article IV relating to distributions (whether or not that Provider's TSAs are approved or continue to be approved to receive salary reduction contributions under the Plan).

- 3 **List of Approved TSAs.** Attached hereto as Schedule A is a list of approved TSAs currently available or otherwise maintained under the Plan. Subject to the requirements set forth above, the Employer may update this list from time to time, and the list shall reflect restrictions (*e.g.*, non-approved for salary reduction contributions) on the availability of any TSAs. The Employer will periodically notify Eligible Employees of the Providers and TSAs that have been approved under the Plan.

Article III - Contributions

- 1 **Salary Reduction Contributions.** Subject to the contribution limits described below, an Eligible Employee's salary reduction contributions will be remitted by the Employer to the Provider of the TSA chosen by the Eligible Employee as soon as practicable after the dates on which the salary reduction amounts otherwise would have been paid to the Eligible Employee. An Eligible Employee may allocate the contributions made to any Provider among the investment options available under that Provider's TSA. An Eligible Employee will at all times have a fully vested and nonforfeitable interest in any TSA acquired on his or her behalf under the plan.
- Roth 403(b)s. (Optional). An Eligible Employee may elect to have part or all of his or her salary reduction reductions made on an after-tax basis to any approved TSA that accepts and separately accounts for Roth 403(b) contributions.
- 2 **Salary Reduction Elections.** Eligible Employees may make or modify salary reduction elections in accordance with procedures established by Employer and will be permitted to do so at least once per calendar year. No salary reduction election may apply to compensation otherwise payable on or before the date of the salary reduction election.
- Minimum Contributions. (Optional) No salary reduction election will be accepted if made at a rate that would result in total contributions of less than \$200 for the calendar year.
- 3 **Contribution Limits.** The salary reduction contributions on behalf of an Eligible Employee for any calendar year may not exceed the applicable dollar limit under Code Section 402(g), increased by the additional catch-up limit under Code Section 414(v) for any Eligible Employee who will have attained age 50 by the end of the calendar year, and may not exceed the Eligible Employee's limit on contributions under Code Section 415(c). The Employer will terminate or reduce an Eligible Employee's salary reduction election to the extent necessary to assure that the Participant's contributions to one or more Providers during a calendar year do not exceed these limits.
- 4 **Exchanges, Transfers, and Rollover Contributions to TSAs Maintained under the Plan.** If and to the extent permitted under the terms of any TSA maintained under the Plan, an Eligible Employee may transfer or contribute amounts to that TSA by means of:
- (a) an exchange from another TSA maintained under the Plan;
 - (b) a direct transfer from another Section 403(b) plan; or
 - (c) a rollover contribution of any eligible rollover distribution described in Code Section 402(c).

Article IV – Distributions

- 1 **General.** All distributions from a TSA maintained under the Plan shall be made by the Provider, subject to applicable distribution restrictions and requirements, including the minimum distribution requirements of Code Section 401(a)(9), and subject to such further conditions or restrictions imposed by the Provider that are not inconsistent with the applicable provisions of Section 403(b). Each Provider will be responsible for all information reporting and tax withholding required by applicable federal and state law in connection with distributions and loans.
- 2 **Withdrawal restrictions.** Except in the case of hardship, disability, and distributions from a separate account maintained under a TSA for rollover contributions made under Section 4(c) of Article III, no distribution will be made to a Participant under any TSA maintained under the Plan until the Participant has attained age 59½ or had a severance of employment with the Employer (and other organizations described in Section 2 of Article I), whichever is earlier. As part of its certification, each Provider must agree that no distribution will be available from a TSA by reason of a Participant's severance from employment before age 59½, unless the Employer has notified the Vendor that such severance from employment has occurred.
- 3 **Hardship Withdrawals.** As part of its certification, each Provider must agree that it will not approve any hardship withdrawal unless the Participant has provided the Provider with specific information to support the existence of an immediate and heavy financial need that qualifies for a hardship withdrawal and of the amount necessary to meet the financial need. In the absence of information to the contrary, the Provider may rely on a Participant's representation that the immediate and heavy financial need may not be reasonably satisfied from other sources. However, the Provider must promptly notify the Employer (or its designated representative) of any hardship withdrawal by a Participant. The Employer

**SCHEDULE A
AUTHORIZED 403(b) PROVIDER LIST**

This list identifies the Providers available under the designated 403(b) Plan maintained by the Employer, on or after the effective date of this Schedule A ("Effective Date"). Providers on this Schedule A shall be subject to requirements and restrictions under the written plan, if any, provided however that such requirements and restrictions are not intended to enlarge the rights and benefits otherwise set forth in the Individual TSA(s).

Employer: _____ Plan Name: _____

Effective Date: _____ This Schedule A was prepared/revised on: _____

A. Providers authorized to receive contributions and, subject to the terms of the Plan, exchanges, and/or transfers

<u>Name of Provider</u>	<u>Name of TSA(s) (Products)</u>	<u>Contact Name</u>	<u>Contact Phone</u>	<u>If Available Under the Plan and the Individual TSA(s):</u>	
				<u>Approved for hardship distributions (Yes or No)</u>	<u>Approved for loans (Yes or No)</u>
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

B. Providers included in the Plan (in accordance with applicable law) but which are not authorized to receive new contributions under the Plan:

<u>Name of Provider</u>	<u>Name of TSA(s) (Products)</u>	<u>Contact Name</u>	<u>Contact Phone</u>	<u>If Available Under the Plan and the Individual TSA(s):</u>		
				<u>Approved for hardship distributions (Yes or No)</u>	<u>Approved for loans (Yes or No)</u>	<u>Exchanges and/or transfers-in permitted, subject to terms of the Plan (Yes or No)</u>
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____

Subject to the provisions of the Plan, exchanges from these Providers are permitted to a Provider (i) authorized to receive contributions and identified in Section A or (ii) authorized to receive exchanges and/or transfers pursuant to an information sharing agreement and identified in Section C or (iii) authorized to receive transfers in a Plan to Plan transfer in accordance with and subject to the terms of the Plan and applicable law.

C. Providers that may receive exchanges/transfers under the Plan pursuant to an information sharing agreement, (never approved to receive contributions under the Plan):

<u>Name of Provider</u>	<u>Name of TSA(s) (Products)</u>	<u>Contact Name</u>	<u>Contact Phone</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(Providers identified in Section C prior to January 1, 2009 are presumed to reflect a commitment by the Vendor and the Employer to enter into an information sharing agreement not later than January 1, 2009).

Important Notes:

- As provided under the Plan, any authorized Provider named in Schedule A agrees to share information necessary for compliance purposes with Employer, an Administrator and/or with any other 403(b) provider as may be required or desirable to facilitate compliance with the Plan and all applicable laws and regulations.
- Each Provider named above is required to maintain records of the TSA(s) offered under the Plan to comply with the information sharing requirements of the Plan and applicable information sharing agreements.

(Use an additional page for additional listings in any category above.)

Rev 09/04/08



FIELD ASSISTANCE BULLETIN NO. 2007-02

DATE: JULY 24, 2007

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: ERISA COVERAGE OF IRC § 403(b) TAX-SHELTERED ANNUITY
PROGRAMS

ISSUE: How do the Department of the Treasury/Internal Revenue Service regulations governing Internal Revenue Code § 403(b) tax-sheltered annuity programs affect the status of such programs under the Department of Labor's safe harbor regulation at 29 C.F.R. § 2510.3-2(f)?

BACKGROUND:

A tax-sheltered annuity (TSA) program under section 403(b) of the Internal Revenue Code (Code), also known as a "403(b) plan," is a retirement plan for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts or establish custodial accounts invested only in mutual funds for the purpose of providing retirement income. Annuity contracts must be purchased from a state licensed insurance company, and the custodial accounts must be held by a custodian bank or IRS approved non-bank trustee/custodian. The annuity contracts and custodial accounts may be funded by employee salary deferrals, employer contributions, or both. Although not subject to the qualification requirements of section 401 of the Code, some of the requirements that apply to qualified plans also apply, with modifications, to 403(b) plans.

These TSA programs, if established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce, generally are "pension plans" within the meaning of section 3(2) of ERISA and covered by Title I pursuant to

section 4(a) of ERISA.¹ The terms “establish” or “maintain” are not defined in ERISA, and uncertainty as to the application of ERISA to TSA programs funded entirely with employee contributions prompted the Department of Labor in 1979 to issue a “safe harbor” regulation at 29 C.F.R. § 2510.3-2(f).

The safe harbor at § 2510.3-2(f) states that a program for the purchase of annuity contracts or custodial accounts in accordance with provisions set forth in section 403(b) of the Code and funded solely through salary reduction agreements or agreements to forego an increase in salary, are not “established or maintained” by an employer under section 3(2) of the Act, and, therefore, are not employee pension benefit plans subject to Title I, provided that certain factors are present. These factors are: (1) that participation of employees is completely voluntary, (2) that all rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary of such employee, or by an authorized representative of such employee or beneficiary, (3) that the involvement of the employer is limited to certain optional specified activities, and (4) that the employer receive no direct or indirect consideration or compensation in cash or otherwise other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer's duties pursuant to the salary reduction agreements. In this latter regard, if an employer, or a person acting in the interest of an employer, receives, for example, other consideration from an annuity contractor, the employer could be deemed to have “established or maintained” a plan.

The safe harbor allows the employer to engage in a range of activities to facilitate the operation of the program. The employer may permit annuity contractors – including agents or brokers who offer annuity contracts or make available custodial accounts – to publicize their products, may request information concerning proposed funding media, products, or annuity contractors, and may compile such information to facilitate review and analysis by the employees. The employer may enter into salary reduction agreements and collect annuity or custodial account considerations required by the agreements, remit them to annuity contractors, and maintain records of such collections. The employer may hold one or more group annuity contracts in the employer's name covering its employees and exercise rights as representative of its employees under the contract, at least with respect to amendments of the contract. The employer may also limit funding media or products available to employees, or annuity contractors who may approach the employees, to a number and selection designed to afford employees a reasonable choice in light of all relevant circumstances.²

¹ Under ERISA § 4(b) (1) and (2), “governmental plans” and “church plans” generally are excluded from coverage under Title I of ERISA. Therefore, § 403(b) contracts and custodial accounts purchased or provided under a program that is either a “governmental plan” under § 3(32) of ERISA or a non-electing “church plan” under § 3(33) of ERISA are not subject to Title I.

² The regulation at 29 C.F.R. § 2510.3-2(f) provides a “safe harbor” for TSA programs that conform to its provisions. The safe harbor does not preclude the possibility that programs that do not fully conform (footnote continued)

The Department of the Treasury/Internal Revenue Service has issued final regulations at 26 C.F.R. 1.403(b)-0 et seq. (July 2007) reflecting legislative changes made to § 403(b) since the existing regulations were adopted in 1964. The § 403(b) regulations also incorporate interpretive positions that the Department of the Treasury/Internal Revenue Service have taken in other guidance on § 403(b). This Bulletin is intended to provide guidance to EBSA's national and regional offices concerning the extent to which compliance with the updated regulations would cause employers to exceed the limitations on employer involvement permitted under the Department of Labor's safe harbor for tax-sheltered annuity programs at 29 C.F.R. § 2510.3-2(f).

ANALYSIS:

The new § 403(b) regulations have not led the Department of Labor to change its view on the principles that apply in determining whether any given TSA program is covered by Title I of ERISA. Even though the differences between the tax rules for TSA programs and those governing other ERISA-covered pension plans may have diminished, the Department's safe harbor regulation at 29 C.F.R. § 2510.3-2(f) remains operative. The new § 403(b) regulations allow significant flexibility regarding the employer's functions in the structure and operation of the arrangement. Thus, compliance with the new § 403(b) regulations will not necessarily cause a TSA program to become covered by Title I of ERISA.

The Department has acknowledged that employers have an interest separate from acting as their employees' authorized representatives in ensuring that the annuity contracts and custodial accounts in TSA programs are tax compliant. The Code's qualification requirements impose obligations directly on employers in connection with the employees' annuity contracts and custodial accounts. If individual contracts or accounts fail to satisfy the tax qualification requirements, even if due to actions or errors of an employee or annuity contractor, the employer can be liable to the IRS for potentially substantial penalty taxes, correction fees, and employment taxes on employee salary deferrals. Accordingly, in the Department's view, the safe harbor at section 2510.3-2(f) subsumes certain employer activities designed to ensure that a TSA program continues to be tax compliant under section 403(b) of the Code.

The Department of Labor has issued advisory opinions and other guidance on whether specific employer functions are compatible with the safe harbor. The Department believes that the safe harbor allows an employer to conduct administrative reviews of the program structure and operation for tax compliance defects. Such reviews may include discrimination testing and compliance with maximum contribution limitations

with the regulation may nevertheless not be "established or maintained" by an employer for purposes of Title I of ERISA.

under the Treasury regulations. As noted in previous guidance issued by the Department, the employer may also fashion and propose corrections; develop improvements to the plan's administrative processes that will obviate the recurrence of tax defects; obtain the cooperation of independent entities involved in the program needed to correct tax defects; and keep records of its activities.³

A program could fit within the section 2510.3-2(f) safe harbor and include terms that require employers to certify to an annuity provider a state of facts within the employer's knowledge as employer, such as employee addresses, attendance records or compensation levels. The employer may also transmit to the annuity provider another party's certification as to other facts, such as a doctor's certification of the employee's physical condition. The employer could not, however, consistent with the safe harbor, have responsibility for, or make, discretionary determinations in administering the program. Examples of such discretionary determinations are authorizing plan-to-plan transfers, processing distributions, satisfying applicable qualified joint and survivor annuity requirements, and making determinations regarding hardship distributions, qualified domestic relations orders (QDROs), and eligibility for or enforcement of loans.⁴

An important requirement in the Treasury regulations is that a TSA program must be maintained pursuant to a "written defined contribution plan" that satisfies the Code's regulatory requirements and contains all the material terms and conditions for benefits under the plan. An employer, by adopting such a written plan, does not automatically establish a Title I plan. Compiling the benefit terms of the contracts and the responsibilities of the employer, annuity providers and participants is a function similar to the information collection and compilation activities expressly permitted under the Department's TSA safe harbor. Indeed, the preamble to the final Treasury regulations makes clear that the "plan" required to satisfy the Code does not have to be a single document, but may incorporate by reference other documents, including insurance policies and custodial account agreements and other documents governing the contracts and accounts prepared by the annuity providers. 26 C.F.R. § 1.403(b)-3(b)(3).

The Department of Labor expects that the written plan for a TSA program that complies with the safe harbor would consist largely of the separate contracts and related documents supplied by the annuity providers and account trustees or custodians. An employer's development and adoption of a single document to coordinate administration among different issuers, and to address tax matters that apply, such as the universal availability requirement in Code section 403(b)(12)(A)(ii), without reference to a particular contract or account, would not put the TSA program out of compliance with the safe harbor.

³ See DOL Information Letter to Siegel Benefit Consultants (Feb. 27, 1996).

⁴ See Advisory Opinion Nos. 94-30A, 83-23A, and 80-11A.

Because the Treasury regulations allow a plan to allocate responsibility for performing administrative functions to persons other than the employer, the relevant documents should identify the parties that are responsible for administrative functions, including those related to tax compliance. The documents should correctly describe the employer's limited role and allocate discretionary determinations to the annuity provider or participant or other third party selected by the provider or participant.

In addition, an employer seeking to take advantage of the safe harbor may periodically review the documents making up the plan for conflicting provisions and for compliance with the Code and the Treasury regulations. Negotiating with annuity providers or account custodians to change the terms of their products for other purposes, such as setting conditions for hardship withdrawals, would be a form of employer involvement outside the safe harbor.

A tax-sheltered annuity program will not, in the Department's view, become covered by Title I of ERISA merely because the written plan conforms to the new § 403(b) regulations by limiting employees to exchanges of contract funds only among providers who have adopted the written plan, or transfers from the program of a former employer to that of the current employer. Under the safe harbor, the employer may limit funding media or products available to employees, or annuity providers who may approach the employee, to a number designed to afford employees a reasonable choice in light of all relevant circumstances. The Code-mandated restrictions on transfers of funds may, however, require the employer to allow providers to offer a wider variety of products in order to afford employees a reasonable choice in light of all relevant circumstances for purposes of the safe harbor. Alternately, an employer may limit the number of providers to which it will forward salary reduction contributions as long as employees may transfer all or a part of their funds to any provider whose annuity contract or custodial account complies with the Code requirements and who agrees to the plan's division of tax compliance responsibilities among the employer, provider and participant.

Finally, in the event an employer decides that it does not want to continue to perform the ministerial and administrative functions required under the § 403(b) regulations, the Department does not believe that the employer's determination to terminate a TSA program in compliance with the Treasury regulations will cause a program not otherwise covered by Title I of ERISA to become covered.

CONCLUSION:

The Department is of the view that tax-exempt employers will be able to comply with the requirements in the new § 403(b) regulations and remain within the Department's safe harbor for TSA programs funded solely by salary deferrals. We note, however, that

the new § 403(b) regulations offer employers considerable flexibility in shaping the extent and nature of their involvement under a tax-sheltered annuity program. The question of whether any particular employer, in complying with the § 403(b) regulations, has established or maintained a plan covered under Title I of ERISA must be analyzed on a case-by-case basis applying the criteria set forth in 29 C.F.R. § 2510.3-2(f) and section 3(2) of ERISA.

Questions concerning the information contained in this Bulletin may be directed to the Division of Coverage, Reporting and Disclosure, Office of Regulations and Interpretations, 202.693.8523.

Part III --Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also, Part I, § 403; § 1.403(b)-3.)

Rev. Proc. 2007-71

SECTION 1. PURPOSE

This revenue procedure provides model plan language that may be used by public schools either to adopt a written plan to reflect the requirements of § 403(b) and the regulations thereunder or to amend its § 403(b) plan to reflect the requirements of § 403(b) and the regulations thereunder. This revenue procedure also provides rules for when plan amendments or a written plan are required to be adopted by public schools or other eligible employers to comply with the recently published final regulations under § 403(b) (72 FR 41128; TD 9340). This revenue procedure also provides guidance relating to the application of § 403(b) to certain contracts issued before 2009.

SECTION 2. BACKGROUND AND GENERAL INFORMATION

.01 Section 403(b) applies to contributions made for employees who are performing services for a public school of a State or a local government or for employees of employers that are tax-exempt organizations under § 501(c)(3). Section 403(b) also applies to contributions made for certain ministers. Under § 403(b), contributions are excluded from gross income only if made to certain funding arrangements: (1) contracts issued by an insurance company qualified to issue annuities in a State that includes payment in the form of an annuity; (2) custodial accounts that are exclusively invested in stock of a regulated investment company (as defined in

§ 851(a) relating to mutual funds); or (3) a retirement income account for employees of a church-related organization (as defined in §1.403(b)-2 of the Income Tax Regulations).

.02 Final regulations under § 403(b) (TD 9340) were published in the **Federal Register** (72 FR 41128) on July 26, 2007 (2007 regulations). The 2007 regulations replaced existing regulations that were published in the **Federal Register** (29 FR 18356) on December 24, 1964, 1965-1 C.B. 180, that provided guidance for complying with § 403(b), as well as certain provisions of regulations that were published in the **Federal Register** (60 FR 49199) on September 22, 1995, relating to eligible rollover distributions and regulations that were that were published in the **Federal Register** (67 FR 18987) on April 17, 2002, relating to minimum distributions under § 401(a)(9). The 2007 regulations reflected the numerous amendments made to § 403(b) by legislation enacted since 1964. Subject to a number of special effective date rules, the 2007 regulations are generally effective for taxable years beginning after December 31, 2008.

.03 The 2007 regulations include comprehensive guidance relating to § 403(b), including the requirement that § 403(b) contracts must be maintained pursuant to a written plan. (References in this revenue procedure to a contract or an issuer include a custodial account under § 403(b)(7) and an issuer of such an account, respectively.) As indicated in the preamble to the regulations, while § 403(b) contracts that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) are already maintained pursuant to written plans, there may be a potential cost associated with satisfying the written plan requirement for those employers that do not have existing plan documents, such as public schools. This revenue procedure is intended to address this concern by providing model plan language that may be used for this purpose by public schools.

.04 Section 1.403(b)-3(b)(3) of the 2007 regulations requires that contracts be issued under a plan, which, in both form and operation, satisfies the requirements of the 2007 regulations and which contains all the material terms and conditions for eligibility, benefits, applicable limitations, the contracts available under the plan, and the time and form under which benefit distributions would be made. Section 1.403(b)-10(b) of the 2007 regulations includes a special rule for situations in which a contract has been exchanged for another contract, under which the successor contract (an “exchange contract”) is treated as part of the plan if certain conditions are satisfied, including an information sharing agreement between the employer and the issuer. Section 1.403(b)-11(g) of the 2007 regulations provides that those conditions are not imposed with respect to a contract if the exchange occurred before September 25, 2007, and the exchange satisfied applicable requirements at that time (a “grandfathered exchange contract”).

SECTION 3. USE OF MODEL PLAN LANGUAGE BY PUBLIC SCHOOLS

.01 Any public school employer with respect to its employees performing services for it, to the extent provided, may comply with the written plan requirements of the 2007 regulations by adopting the model provision(s) contained in the Appendix to this revenue procedure. The model language has been prepared to take into account the general requirement that a § 403(b) plan include all the material terms and conditions for benefits under the plan. For example, the model language does not incorporate the applicable legal requirements by reference, but instead describes them in a manner intended to enable the plan administrator to implement the plan provisions on the basis of the model language to the extent feasible.

.02 The 2007 regulations provide that a § 403(b) plan, including one established

by a public school employer, may contain certain optional features not required to satisfy § 403(b), such as in-service distributions from rollover accounts, distributions for financial hardships, loans, contract exchanges, and plan to plan transfers. If optional provisions are used, the optional provisions must meet, in both form and operation, the relevant requirements under the Code and the 2007 regulations, as well as operate in accordance with the terms of the plan. If a public school employer adopts one or more of these optional model plan language provisions for its § 403(b) plan, the form of the plan will be treated as meeting the requirements under § 403(b) with respect to those provisions.

SECTION 4. RELIANCE BY PUBLIC SCHOOL EMPLOYERS ON MODEL PLAN LANGUAGE

.01 Amendments. (a) Reliance. If a public school employer amends its plan language to include any portion of the model language, the form of the written plan will be treated as meeting the requirements of § 403(b), to the extent covered by the model plan language that is adopted. This reliance applies only if the employer adopts the model language on a word-for-word basis or adopts an amendment that is substantially similar in all material respects.

(b) Effect on public schools. If a public school employer adopts any portion of the model plan language, the written plan must also be operated in accordance with the amendment, from and after the effective date of the amendment, and the § 403(b) plan must continue to satisfy, in both form and operation, all other requirements of § 403(b) in order to maintain § 403(b) status. To the extent a public school employer's § 403(b) plan does not include the model plan language or an amendment that is substantially similar in all respects, a public school that requests a private letter ruling from the Internal Revenue

Service (IRS) with respect to the qualification of its § 403(b) written plan must clearly highlight and describe in the written request how its plan provisions differ from the model language.

.02 Adoption of written plan. The model language is also designed for use by a public school that does not have a written § 403(b) plan. Thus, adoption of the entire model language (on a word-for-word basis or using language that is substantially similar in all material respects) by a public school has the same status as a private letter ruling which provides that the written form of the plan satisfies § 403(b). However, if a public school employer adopts the entire model plan language, the § 403(b) written plan must also be operated in accordance with that language, from and after the effective date of adoption, and must continue to satisfy in both form and operation all other requirements of § 403(b) in order for the plan to maintain its § 403(b) status.

SECTION 5. USE OF THE MODEL PLAN LANGUAGE BY EMPLOYERS THAT ARE NOT PUBLIC SCHOOLS

.01 The model plan language in the Appendix to this revenue procedure is designed for use by a public school employer with respect to its employees. The model language is intended for a basic plan under which contributions are limited to pre-tax elective deferrals (without any designated Roth, employer matching, or other employer nonelective contributions). An eligible employer that is not a public school may use the provisions of the Appendix as sample language to comply with one or more of the requirements imposed by the 2007 regulations issued under § 403(b).

.02 Because the model plan language in the Appendix has been designed for a State or local government with respect to its employees performing services for a public school, a § 501(c)(3) organization must determine the extent to which the model

language is appropriate for use in connection with its § 403(b) plan to comply with one or more of the requirements imposed by the regulations issued under § 403(b). Notes in the Appendix identify the principal provisions which require modification for use by an eligible employer that is not a public school maintaining a § 403(b) arrangement.

Moreover, if an eligible employer that is not a public school uses the model language in the Appendix, additional or revised provisions may be necessary or appropriate in order to comply with the 2007 regulations and, if applicable, ERISA, especially if either (i) the plan is not limited to elective deferrals, (ii) the plan is designed to not be an employee pension benefit plan under ERISA in accordance with 29 CFR 2510.3-2(f) of the Department of Labor Regulations, or (iii) the plan is maintained by a church (or a church-related organization described in § 414(e)(3)(A) or a qualified church-controlled organization under § 3121(w)(3)(B)) or applies with respect to one or more ministers.¹

.03 Adoption of the model plan language contained in the Appendix by an eligible employer that is not a public school does not have the same status as a private letter ruling with respect to the adopted language. However, if an eligible employer that is not a public school has received from the IRS a favorable private letter ruling under § 403(b), then, except as provided in section 5.02 of this revenue procedure, the eligible employer's adoption of appropriate plan model language contained in the Appendix will not result in the loss of its reliance on the private letter ruling for periods prior to the effective date of the 2007 regulations.

SECTION 6. DATE AMENDMENTS ARE ADOPTED

Pursuant to this revenue procedure, a § 403(b) plan will be treated as having been amended timely to reflect a requirement of the 2007 regulations if an amendment that

¹ See United States Department of Labor Field Assistance Bulletin No. 2007-02.

satisfies that requirement (such as the model language in the Appendix of this revenue procedure that reflects that requirement) is adopted no later than the first day of the first taxable year beginning after December 31, 2008, the amendment is effective as of the applicable effective date of the requirement under the 2007 regulations, and the written plan is operated as if that amendment is in effect. This section 6 applies to the requirement to have a written plan. However, for a special rule with respect to amendments made pursuant to the Pension Protection Act of 2006, Public Law 109-280 (PPA '06), see section 1107 of the PPA '06.

SECTION 7. AREAS NOT COVERED BY SECTIONS 3 AND 4 OF THIS REVENUE PROCEDURE

Except as provided in section 5 of this revenue procedure, the model plan language referenced in sections 3 and 4 of this revenue procedure is not designed to apply to any employer other than a State or local government with respect to its employees performing services for a public school.

SECTION 8. GUIDANCE REGARDING CERTAIN CONTRACTS ISSUED BEFORE 2009

.01 Contracts issued before 2009 as part of employer's plan. In the case of a contract issued after December 31, 2004 and before January 1, 2009 by an issuer that does not receive contributions under the plan in a year after the contract was issued (e.g., due to the issuer having been discontinued as an issuer under the plan or the issuer having become an issuer under the plan due to the contract having been issued in a post-September 24, 2007 exchange permitted under Rev. Rul. 90-24, 1990-1 CB 97), the contract will not fail to satisfy § 403(b) for the year merely because the contract is not part of a written plan that satisfies § 1.403(b)-3(b)(3) of the 2007 regulations if the

employer makes a reasonable, good faith effort to include the contract as part of the employer's plan that satisfies § 1.403(b)-3(b)(3) of the 2007 regulations. For this purpose, a reasonable, good faith effort to include those contracts as part of the employer's plan includes collecting available information concerning those issuers (for which purpose, the information is not required to be collected for issuers that ceased to receive contributions before January 1, 2005) and notifying them of the name and contact information for the person in charge of administering the employer's plan for the purpose of coordinating information necessary to satisfy § 403(b). As an alternative to the actions described in the preceding sentence, a reasonable, good faith effort to include that contract as part of the employer's plan also includes the issuer taking action before making any distribution or loan to the participant or beneficiary which constitutes a reasonable, good faith effort to contact the employer and exchange any information that may be needed in order to satisfy § 403(b) with the person in charge of administering the employer's plan.

.02 Contracts issued before 2009 held for former employees or beneficiaries. In the case of an issuer that holds § 403(b) contracts under a § 403(b) plan, but which ceases to receive contributions before January 1, 2009 (e.g., due to the issuer having been discontinued as an issuer under the plan, the employer having ceased to exist, or the issuer having become an issuer under the plan due to the contract having been issued in a post-September 24, 2007 exchange permitted under Rev. Rul. 90-24, 1990-1 CB 97), those contracts continue to be subject to the requirements of § 403(b) and the 2007 regulations to the extent applicable. However, pursuant to this revenue procedure, a § 403(b) plan will not be treated as failing to satisfy the requirements of § 1.403(b)-3(b)(3)

if the plan does not include terms relating to those contracts. If the participant or beneficiary requests a loan from the contract in accordance with § 72(p)(2), this relief applies only if the issuer makes such a loan only after the issuer has made reasonable efforts to determine: (1) whether the participant or beneficiary has in the prior 12 months had any other outstanding loans from qualified employer plans of the employer (taking into account §§ 72(p)(2)(D) and 72(p)(5)); and (2) if the participant or beneficiary has had any such loans, the highest outstanding balance of such loans during that period. For this purpose, assuming the employer is still in existence at the time of the loan, mere reliance on information from the participant or beneficiary about outstanding loans does not constitute reasonable efforts to determine whether the participant or beneficiary has other outstanding loans from plans of the employer.

The special rules in this section 8.02 apply only with respect to a contract that has been issued before January 1, 2009, under a § 403(b) plan that is held on behalf of a participant who, on January 1, 2009, is a former employee of the employer or for a beneficiary. For this purpose, the issuer can rely on information from the participant as to whether the participant is a former employee, assuming that reliance on that information is not unreasonable under the facts and circumstances.

8.03. Re-exchange back into plan. If, after September 24, 2007 and before January 1, 2009, a contract is issued in an exchange permitted under Rev. Rul. 90-24 (an “intermediate contract”) and, before July 1, 2009, the contract is exchanged in accordance with Rev. Rul. 90-24 for a contract issued by an issuer which is either receiving contributions as part of the plan or has an information sharing agreement as set forth in § 1.403(b)-10(b)(2)(i)(C)(1) and (2) of the 2007 regulations, then the information

sharing conditions in § 1.403(b)-10(b)(2)(i)(C)(1) and (2) of the 2007 regulations do not apply to the intermediate contract.

8.04. Information sharing agreements. The model plan in this revenue procedure includes optional provisions in Section 6.4(a) through (d) to allow contract exchanges with an issuer that is not receiving contributions. See Section 6.4(d) of the model language for the type of information that would satisfy the information sharing agreement conditions in § 1.403(b)-10(b)(2)(i)(C)(1) and (2) of the 2007 regulations.

SECTION 9. COMMENTS REQUESTED

Treasury and IRS are interested in receiving comments on the model language contained in this revenue procedure and any other model language that interested parties believe should be added to this revenue procedure. Comments are specifically requested on the following questions. While the model language has generally been prepared for use by employers based on provisions commonly found in defined contribution retirement plans, are there additional provisions which should be added to reflect features that are widely used? Are there changes that should especially be made to reflect the circumstances applicable to public schools, including not only revised versions of the model language, but also whether additional provisions are necessary or appropriate for them? Should the provisions found in section 7.3 of the model language, which have been prepared to satisfy the 2007 final regulations requirements for the plan document to reflect the available vendors, be expanded, including changes to reflect the special relief in section 8 of this revenue procedure?

Comments should be sent to the following address: Internal Revenue Service,
Attn: CC:PA:LPD:PR (Rev. Proc. 2007-71), Room 5203, P. O. Box 7604, Ben Franklin

Station, Washington, DC 20044. Written comments may be hand delivered Monday through Friday between 8 a.m. and 4 p.m. to: Internal Revenue Service, Courier's Desk, Attn: CC:PA:RU (Section 403(b) Plans), 1111 Constitution Avenue, NW., Washington, DC 20224. Alternatively, written comments may be submitted electronically via the Internet to notice.comments@irscounsel.treas.gov (Rev. Proc. 2007-71). Comments should be received by March 16, 2008.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective December 17, 2007.

DRAFTING INFORMATION

The principal author of this revenue procedure is Robert Architect of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans taxpayer assistance telephone service at (877) 829-5500 (a toll-free number) between the hours of 8:30 am and 4:30 pm Eastern Time, Monday through Friday. Mr. Architect may be e-mailed at RetirementPlanQuestions@irs.gov.

APPENDIX FOR REVENUE PROCEDURE 2007-71 **MODEL PLAN LANGUAGE**

Note to sponsors: *The model language in this Appendix is designed primarily for use by a public school in order for it to offer its employees the ability to elect to make pre-tax elective deferrals in accordance with § 403(b) of the Internal Revenue Code. (See section 5 of the revenue procedure for use of the model language by an organization that is a tax-exempt organization under § 501(c)(3) or for a church entity.) In addition, the contributions permitted under the model language are limited to pre-tax elective deferrals, and it is assumed that the plan is maintained on the basis of the calendar year. This model language is not designed for a plan that provides for matching contributions or other employer nonelective contributions, or for adoption by any other type of employer. The model language also includes certain optional alternatives, including an alternative under which the plan may automatically enroll employees for elective deferrals (or alternatively to enroll only employees who file an affirmative*

election) and an alternative under which the plan may permit a contract issued under the plan by a vendor to whom contributions are made to be exchanged for a contract issued by vendors to whom contributions are not made under the plan.

The portions of this Appendix printed in italics are explanatory notes for the benefit of the public school plan sponsor and thus are not to be included in the model plan document. In addition, certain items indicated by brackets can be filled in by the plan sponsor as appropriate.

Section 403(b) Model Plan Language for a Public School

Section 1 Definition of Terms Used

The following words and terms, when used in the Plan, have the meaning set forth below.

1.1 "**Account**": The account or accumulation maintained for the benefit of any Participant or Beneficiary under an Annuity Contract or a Custodial Account.

1.2 "**Account Balance**": The bookkeeping account maintained for each Participant which reflects the aggregate amount credited to the Participant's Account under all Accounts, including the Participant's Elective Deferrals, the earnings or loss of each Annuity Contract or a Custodial Account (net of expenses) allocable to the Participant, any transfers for the Participant's benefit, and any distribution made to the Participant or the Participant's Beneficiary. If a Participant has more than one Beneficiary at the time of the Participant's death, then a separate Account Balance shall be maintained for each Beneficiary. The Account Balance includes any account established under Section 6 for rollover contributions and plan-to-plan transfers made for a Participant, the account established for a Beneficiary after a Participant's death, and any account or accounts established for an alternate payee (as defined in section 414(p)(8) of the Code).

***Note:** A vendor is not required to maintain a separate account for each beneficiary in order to satisfy § 401(a)(9), but this sample plan language provides for such separate accounts so that installment payments are permitted to be made over each beneficiary's life expectancy as permitted under § 1.401(a)(9)-8, A-2(a)(2) of the Income Tax Regulations. However, because, under the sample plan language, each separate account is permitted to have only a single beneficiary, certain beneficiary designations are not permitted under the sample plan language, such as a death benefit in the form of a fixed dollar payment that is not determined as of the date of death and that is not to be maintained in a separate account to which gains and losses are credited.*

1.3 "**Administrator**": [INSERT IDENTITY OF PERSON, COMMITTEE, OR ORGANIZATION APPOINTED TO ADMINISTER THE PLAN].

1.4 "**Annuity Contract**": A nontransferable contract as defined in section 403(b)(1) of the 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 [Insert name of State] and that includes payment in the form of an annuity.

1.5 "**Beneficiary**": The designated person who is entitled to receive benefits under the Plan after the death of a Participant, subject to such additional rules as may be set forth in the Individual Agreements.

1.6 "**Custodial Account**": The group or individual custodial account or accounts, as defined in section 403(b)(7) of the Code, established for each Participant by the Employer, or by each Participant individually, to hold assets of the Plan.

1.7 "**Code**": The Internal Revenue Code of 1986, as now in effect or as hereafter amended. All citations to sections of the Code are to such sections as they may from time to time be amended or renumbered.

1.8 "**Compensation**": 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, plus amounts that would be cash compensation for services to the Employer includible in the Employee's gross income for the calendar year but for a compensation reduction election under section 125, 132(f), 401(k), 403(b), or 457(b) of the Code (including an election under Section 2 made to reduce compensation in order to have Elective Deferrals under the Plan).

1.9 "**Disabled**": The definition of disability provided in the applicable Individual Agreement.

1.10 "**Elective Deferral**": The Employer contributions made to the Plan at the election of the Participant in lieu of receiving cash compensation. Elective Deferrals are limited to pre-tax salary reduction contributions.

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

1.12 "**Employer**": [NAME OF PUBLIC SCHOOL].

Note: The definitions of "Employee" and "Employer" are specifically tailored for use by a State or local government maintaining a § 403(b) plan for its employees who perform services for a public school and must be modified for use by any other employer.

1.13 "**Funding Vehicles** ": The Annuity Contracts or Custodial Accounts issued for funding amounts held under the Plan and specifically approved by Employer for use under the Plan.

1.14 "**Includible Compensation**": An Employee's actual wages in box 1 of Form W-2 for a year for services to the Employer, but subject to a maximum of \$200,000 (or such higher maximum as may apply under section 401(a)(17) of the Code) and increased (up to the dollar maximum) by any compensation reduction election under section 125, 132(f), 401(k), 403(b), or 457(b) of the Code (including any Elective Deferral under the Plan). The amount of Includible Compensation is determined without regard to any community property laws.

1.15 "**Individual Agreement**": The agreements between a Vendor and the Employer or a Participant that constitutes or governs a Custodial Account or an Annuity Contract.

1.16 "**Participant**": An individual for whom Elective Deferrals are currently being made, or for whom Elective Deferrals have previously been made, under the Plan and who has not received a distribution of his or her entire benefit under the Plan.

1.17 "**Plan**": [INSERT NAME OF PLAN].

1.18 "**Plan year**": The calendar year.

1.19 "**Related Employer**": The Employer and any other entity which is under common control with the Employer under section 414(b) or (c) of the Code. For this purpose, the Employer shall determine which entities are Related Employers based on a reasonable, good faith standard and taking into account the special rules applicable under Notice 89-23, 1989-1 C.B. 654.

*Note: The definition of "Related Employer" is specifically tailored for use by a State or local government maintaining a § 403(b) plan for its employees who perform services for a public school and must be modified for use by any other employer by deleting the sentence in Section 1.19 that begins "For this purpose ..." because Notice 89-23 only applies to employers that are State or local public schools and churches. See § 1.414(c)-5 of the Income Tax Regulations (and the related discussion at pages 41137 and 41138 of the **Federal Register** (72 FR 41128) in the preamble to those regulations).*

1.20 "**Severance from Employment**": For purpose of the Plan, Severance from Employment means Severance from Employment with the Employer and any Related Entity. However, a Severance from Employment also occurs on any date on which an Employee ceases to be an employee of a public school, even though the Employee may continue to be employed by a Related Employer that is another unit of the State or local government that is not a public school or in a capacity that is not employment with a

public school (e.g., ceasing to be an employee performing services for a public school but continuing to work for the same State or local government employer).

Note: The definition of “Severance from Employment” is specifically tailored for use by a State or local government maintaining a § 403(b) plan for its employees who perform services for a public school and must be modified for use by any other employer.

1.21 “**Vendor**”: The provider of an Annuity Contract or Custodial Account.

1.22 “**Valuation Date**”: [Each business day/The last day of the calendar month/The last day of the calendar quarter/ Each December 31].

Section 2 Participation and Contributions

2.1 **Eligibility.** Each Employee shall be eligible to participate in the Plan and elect to have Elective Deferrals made on his or her behalf hereunder immediately upon becoming employed by the Employer. However, an Employee who is a student-teacher (i.e., a person providing service as a teacher’s aid on a temporary basis while attending a school, college or university) or who normally works fewer than 20 hours per week is not eligible to participate in the Plan. 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 Code) and, for each plan year ending after the close of that 12-month period, the Employee has worked fewer than 1,000 hours of service.

Note: This model language assumes that the plan has immediate eligibility, that the plan is limited to pre-tax elective deferrals, and that the plan has no matching or other employer non-elective contributions.

The model language in Section 2.1 also assumes that employees who normally work fewer than 20 hours per week or who are student-teachers are not eligible. Either of these exclusions may be deleted on a uniform basis for all employees. If this model language is used by a § 501(c)(3) employer that is not a public school and the plan is subject to ERISA, the plan should delete the exclusion for employees who normally work fewer than 20 hours per week.

2.2 **Compensation Reduction Election.** (a) **General Rule.** An Employee elects to become a Participant by executing an election to reduce his or her Compensation (and have that amount contributed as an Elective Deferral on his or her behalf) and filing it with the Administrator. This Compensation reduction election shall be made on the agreement provided by the Administrator 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, and may change such minimum to a lower amount from time to time. The participation election shall also include designation of the Funding Vehicles and Accounts therein to which Elective Deferrals are to be made

and a designation of Beneficiary. Any such election shall remain in effect until a new election is filed. Only an individual who performs services for the Employer as an Employee may reduce his or her Compensation under the Plan. Each Employee will become a Participant in accordance with the terms and conditions of the Individual Agreements. All Elective Deferrals shall be made on a pre-tax basis. An Employee shall become a Participant as soon as administratively practicable following the date applicable under the employee's election.

(b) **Special Rule for New Employees.** (1) **Automatic Enrollment for New Employees.** For purposes of applying this Section 2.2, a new Employee is deemed to have elected to become a Participant and to have his or her Compensation reduced by [5%] (and have that amount contributed as an Elective Deferral on his or her behalf), at the time the Employee is hired, and to have agreed to be bound by all the terms and conditions of the Plan. Contributions made under this automatic participation provision shall be made to the Funding Vehicle or Vehicles selected for this purpose for all new Employees by the Administrator. Any Employee who automatically becomes a Participant under this Section 2.2(b) shall file a designation of Beneficiary with the Funding Vehicle or Vehicles to which contributions are made.

(2) **Right to File a Different Election; Notice to Employee.** This Section 2.2(b) shall not apply to the extent an Employee files an election for a different percentage reduction or elects to have no Compensation reduction, or designates a different Funding Vehicle to receive contributions made on his or her behalf. Any new Employee shall receive a statement at the time he or she is hired that describes the Employee's rights and obligations under this Section 2.2(b) (including the information in this Section 2.2(b) and identification of how the Employee can file an election or make a designation as described in the preceding sentence, and the refund right under Section 2.2(b)(3), including the specific name and location of the person to whom any such election or designation may be filed), and how the contributions under this Section 2.2(b) will be invested.

(3) **Refund of Contributions.** An Employee for whom contributions have been automatically made under Section 2.2(b)(1) may elect to withdraw all of the contributions made on his or her behalf under Section 2.2(b)(1), including earnings thereon to the date of the withdrawal. This withdrawal right is available only if the withdrawal election is made within 90 days after the date of the first contribution made under Section 2.2(b)(1).

Note: Section 2.2(b) is an optional provision that provides for any new employee to be automatically enrolled in the Plan, with 5% of Compensation to be contributed to the Plan, unless the employee elects otherwise. See §§ 414(w) and 4979(f) of the Code for special relief that applies to a plan that uses automatic enrollment, as provided in Section 2.2(b). Plan sponsors should make any revisions in this optional provision that may be necessary in order to take into account any additional guidance that may be provided by the Treasury Department or the IRS regarding automatic enrollment under §§ 414(w) and 4979(f) of the Code.

2.3 **Information Provided by the Employee.** Each Employee enrolling in the Plan should provide to the Administrator at the time of initial enrollment, and later if there are any changes, any information necessary or advisable for the Administrator to administer the Plan, including any information required under the Individual Agreements.

2.4 **Change in Elective Deferrals Election.** Subject to the provisions of the applicable Individual Agreements, an Employee may at any time revise his or her participation election, including a change of the amount of his or her Elective Deferrals, his or her investment direction, and his or her designated Beneficiary. A change in the investment direction shall take effect as of the date provided by the Administrator on a uniform basis for all Employees. A change in the Beneficiary designation shall take effect when the election is accepted by the Vendor.

2.5 **Contributions Made Promptly.** Elective Deferrals under the Plan shall be transferred to the applicable Funding Vehicle within 15 business days following the end of the month in which the amount would otherwise have been paid to the Participant.

2.6 **Leave of Absence.** Unless an 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.

Note: If this Section 2 is adopted separately, the following definitions from Section 1 should also be adopted: Account, Administrator, Beneficiary, Compensation, Elective Deferral, Employee, Employer, Funding Vehicles, Individual Agreement, Participant, Plan, and Vendor.

Section 3 Limitations on Amounts Deferred

3.1 **Basic Annual Limitation.** Except as provided in Sections 3.2 and 3.3, the maximum amount of the Elective Deferral under the Plan for any calendar year shall not exceed the lesser of (a) the applicable dollar amount or (b) the Participant's Includible Compensation for the calendar year. The applicable dollar amount is the amount established under section 402(g)(1)(B) of the Code, which is \$15,500 for 2007, and is adjusted for cost-of-living after 2007 to the extent provided under section 415(d) of the Code.

3.2 **Special Section 403(b) Catch-up Limitation for Employees With 15 Years of Service.** Because the Employer is a qualified organization (within the meaning of § 1.403(b)-4(c)(3)(ii) of the Income Tax Regulations), the applicable dollar amount under Section 3.1(a) for any "qualified employee" is increased (to the extent provided in the Individual Agreements) by the least of:

- (a) \$3,000;
- (b) The excess of:

- (1) \$15,000, over
- (2) The total special 403(b) catch-up elective deferrals made for the qualified employee by the qualified organization for prior years; or
- (c) The excess of:
 - (1) \$5,000 multiplied by the number of years of service of the employee with the qualified organization, over
 - (2) The total Elective Deferrals made for the employee by the qualified organization for prior years.

For purposes of this Section 3.2, a “qualified employee” means an employee who has completed at least 15 years of service taking into account only employment with the Employer.

Note: Section 3.2 is specifically written for use by a State or local government maintaining a § 403(b) plan for its employees who perform services for a public school and, if used by a § 501(c)(3) employer, must be limited to cases in which the Employer is a “qualified organization” under § 1.403(b)-4(c)(3)(iii) of the Income Tax Regulations.

3.3 Age 50 Catch-up Elective Deferral Contributions. An Employee who is a Participant who will attain age 50 or more by the end of the calendar year is permitted to elect an additional amount of Elective Deferrals, up to the maximum age 50 catch-up Elective Deferrals for the year. The maximum dollar amount of the age 50 catch-up Elective Deferrals for a year is \$5,000 for 2007, and is adjusted for cost-of-living after 2007 to the extent provided under the Code.

3.4 Coordination. Amounts in excess of the limitation set forth in Section 3.1 shall be allocated first to the special 403(b) catch-up under Section 3.2 and next as an age 50 catch-up contribution under Section 3.3. However, in no event can the amount of the Elective Deferrals for a year be more than the Participant’s Compensation for the year.

3.5 Special Rule for a Participant Covered by Another Section 403(b) Plan. For purposes of this Section 3, if the Participant is or has been a participant in one or more other plans under section 403(b) of the Code (and any other plan that permits elective deferrals under section 402(g) of the Code), then this Plan and all such other plans shall be considered as one plan for purposes of applying the foregoing limitations of this Section 3. 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 Entity shall be taken into account for purposes of Section 3.2 only if the other plan is a § 403(b) plan.

3.6 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 Code (and any other plan that permits elective deferrals under section 402(g) of the Code for which the Participant provides information that is accepted by the Administrator), then the Elective Deferral, to the extent in excess of the applicable limitation (adjusted for any income or loss in value, if any, allocable thereto), shall be distributed to the Participant.

Note: Corrective distributions are generally required to be made within 2½ months after the end of the calendar year, but can be made within 6 months after the end of the calendar year if the plan uses the optional provision at Section 2.2(b) and otherwise constitutes an eligible automatic contribution arrangement. See §§ 414(w)(3) and 4979(f) of the Code.

3.7 Protection of Persons Who Serve in a Uniformed Service. An Employee whose employment is interrupted by qualified military service under section 414(u) of the Code or who is on a leave of absence for qualified military service under section 414(u) of the Code may elect to make additional Elective Deferrals upon resumption of employment with the Employer equal to the maximum Elective Deferrals that the Employee could have elected during that period if the Employee's employment with the Employer had continued (at the same level of Compensation) without the interruption or leave, reduced by the Elective Deferrals, if any, actually made for the Employee during the period of the interruption or leave. Except to the extent provided under section 414(u) of the Code, this right applies for five years following the resumption of employment (or, if sooner, for a period equal to three times the period of the interruption or leave).

Note: If this Section 3 is adopted separately, the following definitions from Section 1 should also be adopted: Administrator, Code, Compensation, Elective Deferral, Employee, Employer, Includible Compensation, Participant, Plan, and Related Employer.

Section 4 Loans

4.1 Loans. Loans shall be permitted under the Plan to the extent permitted by the Individual Agreements controlling the Account assets from which the loan is made and by which the loan will be secured.

4.2 Information Coordination Concerning Loans. Each Vendor is responsible for all information reporting and tax withholding required by applicable federal and state law in connection with distributions and loans. To minimize the instances in which Participants have taxable income as a result of loans from the Plan, the Administrator shall take such steps as may be appropriate to coordinate the limitations on loans set forth in Section 4.3, including the collection of information from Vendors, and transmission of information requested by any Vendor, concerning the outstanding balance of any loans made to a Participant under the Plan or any other plan of the Employer. The

Administrator shall also take such steps as may be appropriate to collect information from Vendors, and transmission of information to any Vendor, concerning any failure by a Participant to repay timely any loans made to a Participant under the Plan or any other plan of the Employer.

4.3 **Maximum Loan Amount.** No loan to a Participant under the Plan may exceed the lesser of:

(a) \$50,000, reduced by the greater of (i) the outstanding balance on any loan from the Plan to the Participant on the date the loan is made or (ii) the highest outstanding balance on loans from the Plan to the Participant during the one-year period ending on the day before the date the loan is approved by the Administrator (not taking into account any payments made during such one-year period); or

(b) one half of the value of the Participant's vested Account Balance (as of the valuation date immediately preceding the date on which such loan is approved by the Administrator).

For purposes of this Section 4.3, any loan from any other plan maintained by the Employer and any Related Employer shall be treated as if it were a loan made from the Plan, and the Participant's vested interest under any such other plan shall be considered a vested interest under this Plan; provided, however, that the provisions of this paragraph shall not be applied so as to allow the amount of a loan to exceed the amount that would otherwise be permitted in the absence of this paragraph.

Note: Loans are included in taxable income under certain conditions, including: if the loan, when combined with the balance of all other loans from plans of the employer, exceeds the limitations described in Section 4.3; or if there is a failure to repay the loan in accordance with the repayment schedule. Because the tax treatment of a loan depends on information concerning aggregate loan balances under all annuity contracts and custodial accounts within the Plan (and under all plans of the employer), information about loan balances under the contracts and accounts of other vendors is needed before making a loan. That information may be obtained from the participant, but this sample language provides for the Administrator also to collect and coordinate that information in order to decrease the instances in which participants have taxable income from plan loans.

Note: See § 1.72(p)-1 of the Income Tax Regulations for the federal income tax treatment of loans generally.

Note: If this Section 4 is adopted separately, the following definitions from Section 1 should also be adopted: Account, Administrator, Account Balance, Employer, Individual Agreement, Participant, Plan, Related Employer, Valuation Date, and Vendor.

Section 5 Benefit Distributions

5.1 Benefit Distributions At Severance from Employment or Other Distribution Event. Except as permitted under Section 3.6 (relating to excess Elective Deferrals), Section 5.4 (relating to withdrawals of amounts rolled over into the Plan), Section 5.5 (relating to hardship), or Section 8.3 (relating to termination of the Plan), distributions from a Participant's Account may not be made earlier than the earliest of the date on which the Participant has a Severance from Employment, dies, becomes Disabled, or attains age 59½. Distributions shall otherwise be made in accordance with the terms of the Individual Agreements.

5.2 Small Account Balances. The terms of the Individual Agreement may permit distributions to be made in the form of a lump-sum payment, without the consent of the Participant or Beneficiary, but no such payment may be made without the consent of the Participant or Beneficiary unless the Account Balance does not exceed \$5,000 (determined without regard to any separate account that holds rollover contributions under Section 6.1) and any such distribution shall comply with the requirements of section 401(a)(31)(B) of the Code (relating to automatic distribution as a direct rollover to an individual retirement plan for distributions in excess of \$1,000).

5.3 Minimum Distributions. Each Individual Agreement shall comply with the minimum distribution requirements of section 401(a)(9) of the Code and the regulations thereunder. For purposes of applying the distribution rules of section 401(a)(9) of the Code, each Individual Agreement is treated as an individual retirement account (IRA) and distributions shall be made in accordance with the provisions of § 1.408-8 of the Income Tax Regulations, except as provided in § 1.403(b)-6(e) of the Income Tax Regulations.

Note: This Section 5.3 assumes that each individual agreement with a vendor complies with the minimum distribution requirements of § 401(a)(9) of the Code. See section 5 of the Appendix for Rev. Proc. 2004-56, 2004-2 C.B. 37, for model language that may be used to set forth the minimum distribution requirements of § 401(a)(9) of the Code.

5.4 In-Service Distributions From Rollover Account. If a Participant has a separate account attributable to rollover contributions to the plan, to the extent permitted by the applicable Individual Agreement, 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: A plan is not required to permit in-service distribution from a rollover account. See Rev. Rul. 2004-12, 2004-1 C.B. 478.

5.5 Hardship Withdrawals. (a) Hardship withdrawals shall be permitted under the Plan to the extent permitted by the Individual Agreements controlling the Account assets to be withdrawn to satisfy the hardship. If applicable under an Individual Agreement, no Elective Deferrals shall be allowed under the Plan during the 6-month period beginning on the date the Participant receives a distribution on account of

hardship.

(b) The Individual Agreements shall provide for the exchange of information among the Employer and the Vendors to the extent necessary to implement the Individual Agreements, including, in the case of a hardship withdrawal that is automatically deemed to be necessary to satisfy the Participant's financial need (pursuant to § 1.401(k)-1(d)(3)(iv)(E) of the Income Tax Regulations), the Vendor notifying the Employer of the withdrawal in order for the Employer to implement the resulting 6-month suspension of the Participant's right to make Elective Deferrals under the Plan. In addition, in the case of a hardship withdrawal that is not automatically deemed to be necessary to satisfy the financial need (pursuant to § 1.401(k)-1(d)(3)(iii)(B) of the Income Tax Regulations), the Vendor shall obtain information from the Employer or other Vendors to determine the amount of any plan loans and rollover accounts that are available to the Participant under the Plan to satisfy the financial need.

5.6 Rollover Distributions. (a) A Participant or the Beneficiary of a deceased Participant (or a Participant's spouse or former spouse who is an alternate payee under a domestic relations order, as defined in section 414(p) of the Code) who is entitled to an eligible rollover distribution may elect to have any portion of an eligible rollover distribution (as defined in section 402(c)(4) of the Code) from the Plan paid directly to an eligible retirement plan (as defined in section 402(c)(8)(B) of the Code) specified by the Participant in a direct rollover. In the case of a distribution to a Beneficiary who at the time of the Participant's death was neither the spouse of the Participant nor the spouse or former spouse of the participant who is an alternate payee under a domestic relations order, a direct rollover is payable only to an individual retirement account or individual retirement annuity (IRA) that has been established on behalf of the Beneficiary as an inherited IRA (within the meaning of section 408(d)(3)(C) of the Code).

(b) Each Vendor shall be separately responsible for providing, within a reasonable time period before making an initial eligible rollover distribution, an explanation to the Participant of his or her right to elect a direct rollover and the income tax withholding consequences of not electing a direct rollover.

Note: Section 402(f) of the Code requires a plan administrator to provide a written explanation to any recipient of an eligible rollover distribution. The written explanation must cover the direct rollover rules, the mandatory income tax withholding on distributions not directly rolled over, the tax treatment of distributions not rolled over (including the special tax treatment available for certain lump sum distributions), and when distributions may be subject to different restrictions and tax consequences after being rolled over. Section 402(f) provides that this explanation must be given within a reasonable period of time before the plan makes an eligible rollover distribution. See Notice 2002-3, 2002-1 C.B. 289, that contains a Safe Harbor Explanation that plan administrators may provide to recipients of eligible rollover distributions from employer plans in order to satisfy the notice requirement.

Note: See generally § 1.403(b)-6 of the Income Tax Regulations for rules relating to restrictions on distributions.

Note: If this Section 5 is adopted separately, the following definitions from Section 1 should also be adopted: Account, Account Balance, Beneficiary, Code, Disabled, Elective Deferral, Employer, Individual Agreement, Participant, Plan, Severance from Employment, and Vendor.

Section 6

Rollovers to the Plan and Transfers

6.1 Eligible Rollover Contributions to the Plan.

(a) **Eligible Rollover Contributions.** To the extent provided in the Individual Agreements, an Employee who is a Participant who is entitled to receive an eligible rollover distribution from another eligible retirement plan may request to have all or a portion of the eligible rollover distribution paid to the Plan. Such rollover contributions shall be made in the form of cash only. The Vendor may require such documentation from the distributing plan as it deems necessary to effectuate the rollover in accordance with section 402 of the Code and to confirm that such plan is an eligible retirement plan within the meaning of section 402(c)(8)(B) of the Code. However, in no event does the Plan accept a rollover contribution from a Roth elective deferral account under an applicable retirement plan described in section 402A(e)(1) of the Code or a Roth IRA described in section 408A of the Code.

Note: This provision does not permit rollovers to be accepted from a Roth elective deferral account or a Roth IRA because the Plan does not provide for designated Roth contributions.

(b) **Eligible Rollover Distribution.** For purposes of Section 6.1(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 as a result of an unforeseeable emergency or other distribution which is made upon hardship of the employee, 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. In addition, an eligible retirement plan means an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, a qualified trust described in section 401(a) of the Code, an annuity plan described in section 403(a) or 403(b) of the Code, or an eligible governmental plan described in section 457(b) of the Code, that accepts the eligible rollover distribution.

(c) **Separate Accounts.** The Vendor shall establish and maintain for the Participant a separate account for any eligible rollover distribution paid to the Plan.

6.2 Plan-to-Plan Transfers to the Plan. (a) At the direction of the Employer, for a class of Employees who are participants or beneficiaries in another plan under section 403(b) of the Code, the Administrator may permit a transfer of assets to the Plan

as provided in this Section 6.2. Such a transfer is permitted only if the other plan provides for the direct transfer of each person's entire interest therein to the Plan and the participant is an employee or former employee of the Employer. The Administrator and any Vendor accepting such transferred amounts may require that the transfer be in cash or other property acceptable to it. The Administrator or any Vendor accepting such transferred amounts may require such documentation from the other plan as it deems necessary to effectuate the transfer in accordance with § 1.403(b)-10(b)(3) of the Income Tax Regulations and to confirm that the other plan is a plan that satisfies section 403(b) of the Code.

(b) The amount so transferred shall be credited to the Participant's Account Balance, so that 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.

(c) To the extent provided in the Individual Agreements holding such transferred amounts, the amount transferred shall be held, accounted for, administered and otherwise treated in the same manner as an Elective Deferral by the Participant under the Plan, except that (1) the Individual Agreement which holds any amount transferred to the Plan must provide that, to the extent any amount transferred is subject to any distribution restrictions required under section 403(b) of the Code, the Individual Agreement must impose restrictions on distributions to the Participant or Beneficiary whose assets are being transferred that are not less stringent than those imposed on the transferor plan and (2) the transferred amount shall not be considered an Elective Deferral under the Plan in determining the maximum deferral under Section 3.

Note: This provision limits transfer to the plan to cases involving a class of participants whose entire benefit is being transferred, such as where employees are being transferred from another employer to employment with the employer maintaining this plan and the portion of the other plan held on their behalf is being merged into this plan. Plan-to-plan transfers are not required to be limited to such situations. See § 1.403(b)-10(b)(3) of the Income Tax Regulations for rules relating to plan-to-plan transfers among § 403(b) plans and, in the case of plans that are subject to ERISA, see also § 1.414(l)-1 of the Income Tax Regulations.

6.3 Plan-to-Plan Transfers from the Plan.

(a) At the direction of the Employer, the Administrator may permit a class of Participants and Beneficiaries to elect to have all or any portion of their Account Balance transferred to another plan that satisfies section 403(b) of the Code in accordance with § 1.403(b)-10(b)(3) of the Income Tax Regulations. A transfer is permitted under this Section 6.3(a) only if the Participants or Beneficiaries are employees or former employees of the employer (or the business of the employer) under the receiving plan and the other plan provides for the acceptance of plan-to-plan transfers with respect to the Participants and Beneficiaries and for each Participant and Beneficiary to have an amount

deferred under the other plan immediately after the transfer at least equal to the amount transferred.

(b) The other plan must provide that, to the extent any amount transferred is subject to any distribution restrictions required under section 403(b) of the Code, the other plan shall impose restrictions on distributions to the Participant or Beneficiary whose assets are transferred that are not less stringent than those imposed under the Plan. In addition, if the transfer does not constitute a complete transfer of the Participant's or Beneficiary's interest in the Plan, the other plan shall treat the amount transferred as a continuation of a pro rata portion of the Participant's or Beneficiary's interest in the transferor plan (e.g., a pro rata portion of the Participant's or Beneficiary's interest in any after-tax employee contributions).

(c) Upon the transfer of assets under this Section 6.3, the Plan's liability to pay benefits to the Participant or Beneficiary under this Plan shall be discharged to the extent of the amount so transferred for the Participant or Beneficiary. The Administrator may require such documentation from the receiving plan as it deems appropriate or necessary to comply with this Section 6.3 (for example, to confirm that the receiving plan satisfies section 403(b) of the Code and to assure that the transfer is permitted under the receiving plan) or to effectuate the transfer pursuant to § 1.403(b)-10(b)(3) of the Income Tax Regulations.

Note: This provision limits transfer from the plan to cases involving a class of participants whose entire benefit is being transferred, such as where employees are being transferred from employment with the employer maintaining this plan to another employer and the portion of the plan held on their behalf is being merged into another plan. Plan-to-plan transfers are not required to be limited to such situations. See § 1.403(b)-10(b)(3) of the Income Tax Regulations for rules relating to plan-to-plan transfers among § 403(b) plans and, in the case of plans that are subject to ERISA, see also § 1.414(l)-1 of the Income Tax Regulations.

6.4 Contract and Custodial Account Exchanges. (a) A Participant or Beneficiary is permitted to change the investment of his or her Account Balance among the Vendors under the Plan, subject to the terms of the Individual Agreements. However, an investment change that includes an investment with a Vendor that is not eligible to receive contributions under Section 2 (referred to below as an exchange) is not permitted unless the conditions in paragraphs (b) through (d) of this Section 6.4 are satisfied.

(b) The Participant or Beneficiary must have an Account Balance immediately after the exchange that is at least equal to the Account Balance of that Participant or Beneficiary immediately before the exchange (taking into account the Account Balance of that Participant or Beneficiary under both section 403(b) contracts or custodial accounts immediately before the exchange).

(c) The Individual Agreement with the receiving Vendor has distribution restrictions with respect to the Participant that are not less stringent than those imposed on the investment being exchanged.

(d) 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:

(1) Information necessary for the resulting contract or custodial account, or any other contract or custodial accounts to which contributions have been made by the Employer, to satisfy section 403(b) of the Code, including the following: (i) the Employer providing information as to whether the Participant's employment with the Employer is continuing, and notifying the Vendor when the Participant has had a Severance from Employment (for purposes of the distribution restrictions in Section 5.1); (ii) the Vendor notifying the Employer of any hardship withdrawal under Section 5.5 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 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 any rollover accounts that are available to the Participant under the Plan in order to satisfy the financial need under the hardship withdrawal rules of Section 5.5); and

(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 of Section 4.3, so that any such additional loan is not a deemed distribution under section 72(p)(1); 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.

(e) 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 6.4(d) to the extent the Employer's contract with the Vendor does not provide for the exchange of information described in Section 6.4(d)(1) and (2).

Note: Section 6.4(a) through (d) are optional provisions for a plan that chooses to allow participants to exchange all or a portion of their account balance with vendors with respect to which the plan has no regular contact, i.e., insurance companies or mutual funds that do not receive regular contributions made for participants. Note also that additional information would be necessary in the case of an exchange involving a designated Roth account. See generally § 1.403(b)-10(b)(2) of the Income Tax Regulations for rules relating to exchanges of contracts.

6.5 Permissive Service Credit Transfers.

(a) If a Participant is also a participant in a tax-qualified defined benefit governmental plan (as defined in section 414(d) of the Code) that provides for the acceptance of plan-to-plan transfers with respect to the Participant, then the Participant may elect to have any portion of the Participant's Account Balance transferred to the defined benefit governmental plan. A transfer under this Section 6.5(a) may be made before the Participant has had a Severance from Employment.

(b) A transfer may be made under Section 6.5(a) only if the transfer is either for the purchase of permissive service credit (as defined in section 415(n)(3)(A) of the Code) under the receiving defined benefit governmental plan or a repayment to which section 415 of the Code does not apply by reason of section 415(k)(3) of the Code.

(c) In addition, if a plan-to-plan transfer does not constitute a complete transfer of the Participant's or Beneficiary's interest in the transferor plan, the Plan shall treat the amount transferred as a continuation of a pro rata portion of the Participant's or Beneficiary's interest in the transferor plan (e.g., a pro rata portion of the Participant's or Beneficiary's interest in any after-tax employee contributions).

Note: See § 1.403(b)-10(b)(4) of the Income Tax Regulations for rules relating to transfers for permissive service credit.

Note: If this Section 6 is adopted separately, the following definitions from Section 1 should also be adopted: Administrator, Account Balance, Beneficiary, Code, Elective Deferral, Employee, Employer, Individual Agreement, Participant, Plan, Severance from Employment, and Vendor.

Section 7 Investment of Contributions

7.1 **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. 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.

7.2 **Investment of Contributions.** Each Participant or Beneficiary shall direct the investment of his or her Account among the investment options available under the Annuity Contract or Custodial Account in accordance with the terms of the Individual Agreements. Transfers among Annuity Contracts and Custodial Accounts may be made to the extent provided in the Individual Agreements and permitted under applicable Income Tax Regulations.

Note: See generally § 1.403(b)-8 of the Income Tax Regulations for rules relating to funding.

Note: If this Section 7 is adopted separately, the following definitions from Section 1 should also be adopted: Annuity Contract, Beneficiary, Custodial Account, Individual Agreement, Elective Deferral, Participant, and Plan.

7.3 Current and Former Vendors. The Administrator shall maintain a list of all Vendors under the Plan. Such list is hereby incorporated as part of the Plan. Each Vendor and the Administrator shall exchange such information as may be necessary to satisfy section 403(b) of the 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 in accordance with Section 6.2 or 6.4), the 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.

Section 8 Amendment and Plan Termination

8.1 Termination of Contributions. The Employer has adopted the Plan with the intention and expectation that contributions will be continued indefinitely. However, the Employer has no obligation or liability whatsoever to maintain the Plan for any length of time and may discontinue contributions under the Plan at any time without any liability hereunder for any such discontinuance.

8.2 Amendment and Termination. The Employer reserves the authority to amend or terminate this Plan at any time.

8.3 Distribution upon Termination of the Plan. The Employer may provide that, in connection with a termination of the Plan and subject to any restrictions contained in the Individual Agreements, all Accounts will be distributed, provided that the Employer and any Related Employer on the date of termination do not make contributions to an alternative section 403(b) contract that is not part of the Plan during the period beginning on the date of plan termination and ending 12 months after the distribution of all assets from the Plan, except as permitted by the Income Tax Regulations.

Note: See generally § 1.403(b)-10(a) of the Income Tax Regulations for rules relating to discontinuance of contributions and plan termination.

Note: If this Section 8 is adopted separately, the following definitions from Section 1 should also be adopted: Account, Employer, Individual Agreement, Plan, and Related Employer.

Section 9 Miscellaneous

9.1 **Non-Assignability.** Except as provided in Section 9.2 and 9.3, the interests of each Participant or Beneficiary under the Plan are not subject to the claims of the Participant's or Beneficiary's creditors; and neither the Participant nor any Beneficiary shall have any right to sell, assign, transfer, or otherwise convey the right to receive any payments hereunder or any interest under the Plan, which payments and interest are expressly declared to be non-assignable and non-transferable.

Note: The anti-alienation rules of section 401(a)(13) of the Code generally do not apply to § 403(b) plans of public schools, but the parallel rule at section 206(d) of ERISA applies to plans that are subject to ERISA.

9.2 **Domestic Relation Orders.** Notwithstanding Section 9.1, if a judgment, decree or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State ("domestic relations order"), then the amount of the Participant's Account Balance shall be paid in the manner and to the person or persons so directed in the domestic relations order. Such payment shall be made without regard to whether the Participant is eligible for a distribution of benefits under the Plan. The 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.

Note: Section 9.2 is specifically written for use by a State or local government maintaining a § 403(b) plan for its employees who perform services for a public school and, if used by a § 501(c)(3) employer, must be revised to be limited to cases in which the domestic relations order is "qualified" under § 414(p) of the Code.

Note: See generally § 414(p) of the Code and § 1.403(b)-10(c) of the Income Tax Regulations for rules regarding domestic relations orders.

9.3 **IRS Levy.** Notwithstanding Section 9.1, the Administrator may pay from a Participant's or Beneficiary's Account Balance 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.

9.4 **Tax Withholding.** Contributions to the Plan are subject to applicable employment taxes (including, if applicable, Federal Insurance Contributions Act (FICA) taxes with respect to Elective Deferrals, which constitute wages under section 3121 of the Code). Any benefit payment made under the Plan is subject to applicable income tax withholding requirements (including section 3401 of the Code and the Employment Tax Regulations thereunder). A payee shall provide such information as the Administrator may need to satisfy income tax withholding obligations, and any other information that may be required by guidance issued under the Code.

9.5 **Payments to Minors and Incompetents.** If a Participant or Beneficiary entitled to receive any benefits hereunder is a minor or is adjudged to be legally incapable of giving valid receipt and discharge for such benefits, or is deemed so by the Administrator, benefits will be paid to such person as the Administrator may designate for the benefit of such Participant or Beneficiary. Such payments shall be considered a payment to such Participant or Beneficiary and shall, to the extent made, be deemed a complete discharge of any liability for such payments under the Plan.

9.6 **Mistaken Contributions.** 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.

9.7 **Procedure When Distributee Cannot Be Located.** The Administrator shall make all reasonable attempts to determine the identity and address of a Participant or a Participant's Beneficiary entitled to benefits under the Plan. For this purpose, a reasonable attempt means (a) the mailing by certified mail of a notice to the last known address shown on [INSERT NAME OF THE EMPLOYER]'s or the Administrator's records, (b) notification sent to the Social Security Administration or the Pension Benefit Guaranty Corporation (under their program to identify payees under retirement plans), and (c) the payee has not responded within 6 months. If the Administrator is unable to locate such a person entitled to benefits hereunder, or if there has been no claim made for such benefits, the funding vehicle shall continue to hold the benefits due such person.

9.8 **Incorporation of Individual Agreements.** The Plan, together with the Individual Agreements, is intended to satisfy the requirements of section 403(b) of the Code and the Income Tax Regulations thereunder. Terms and conditions of the Individual Agreements are hereby incorporated by reference into the Plan, excluding those terms that are inconsistent with the Plan or section 403(b) of the Code.

9.9 **Governing Law.** The Plan will be construed, administered and enforced according to the Code and the laws of the State in which the Employer has its principal place of business.

9.10 **Headings.** Headings of the Plan have been inserted for convenience of reference only and are to be ignored in any construction of the provisions hereof.

9.11 **Gender.** Pronouns used in the Plan in the masculine or feminine gender include both genders unless the context clearly indicates otherwise.

IN WITNESS WHEREOF, the Employer has caused this Plan to be executed this ___ day of _____, _____.

Employer: _____
By: _____
Title: _____
Date signed: _____
Effective Date of the Plan: _____

Note: The provisions in Section 9 are optional provisions that are not required to be adopted.

Note: If this Section 9 is adopted separately, the following definitions from Section 1 should also be adopted: Administrator, Account Balance, Beneficiary, Employer, Individual Agreement, Participant, and Plan.