INSTRUCTIONS FOR 403(b) PROTOTYPE PLAN AND COMPLETION OF ELECTIVE DEFERRALS ONLY ADOPTION AGREEMENT

The 403(b) Prototype Plan authorizes elections, either by adoption agreement selection or by other action. Each election in the adoption agreement is numbered and the individually designed formatted documents use the same numbering. The section references that correspond with the section references in the basic plan document are in parentheses after the section description (*e.g.*, 1.12. ***Compensation.***). The definitions in Article I of the basic plan document are in alphabetical order. However, we have placed them in the adoption agreement in their logical order rather than in numerical order. Each section of the adoption agreement requires the employer to make a selection, unless the instructions indicate otherwise. Note that the IRS does not presently have an approval program for prototype plans, although it has announced it plans to adopt such a program in the future. This document has not been submitted to the IRS.

There is a blank at the top of the Adoption Agreement. There the employer can specify the name of the employer or the name of the plan.

This adoption agreement is designed for use by plans which only permit elective deferrals (no employer contributions) and where custodial accounts and/or annuity contracts all are "individual" rather than "group" accounts/contracts.

ARTICLE I DEFINITIONS

1. EMPLOYER **(1.27)**. The employer should enter the employer's name, address, and employer ID number. The employer must be a public school, a Code §501(c)(3) tax-exempt organization, the employer of a minister, or a self-employed minister. A governmental entity can sponsor a 403(b) plan only with regard to its public school employees or for endeavors it operates as a 501(c)(3) organization, such as a county charity hospital or a city symphony. Except for churches, 501(c)(3) organizations, including those operated by governmental entities, must apply for a determination of exempt status with the IRS. The employer should also describe what type of entity it is, such as "public school," "church," "governmental 501(c)(3) organization," or "501(c)(3) organization" The employer should complete the name of the plan, *e.g.*, "San Diablo Elementary School District 403(b) Plan." The adoption agreement includes a line for the employer to enter the plan number used for 5500 reporting purposes. Plans exempt from ERISA, such as governmental and church plans, should leave this line blank.

2. TYPE OF 403(b) PLAN **(1.66)**. Churches and self-employed ministers may use a retirement income account to hold 403(b) plan investments, and may select option (d) to make that choice. Retirement income accounts provide much more investment flexibility than is available to other 403(b) plans. Self-employed ministers must use a retirement income account. Other 403(b) sponsors are limited to custodial accounts holding mutual funds, annuity contracts, or a combination of both. Churches may also use custodial accounts, annuity contracts, or both. This election should reflect the investment products the plan currently offers as well as those it has offered in the past. For example, if a plan now offers annuity contracts only, but in the past has offered custodial accounts, the plan should select option (c), both.

3. ERISA PLAN **(1.32).** If a governmental entity or a church sponsors a 403(b) plan, the plan is exempt from ERISA, and the employer should select option 3(a) to indicate that ERISA does not apply. If the sponsor is not a governmental entity or a church, but the plan only permits elective deferrals and the employer intends the plan to be exempt from ERISA, the employer should elect option 3(b). A 403(b) plan that only permits elective deferrals is exempt from ERISA if the employer has "limited" involvement with the plan which satisfies the requirements of DOL Reg. §2510.3-2(f). The DOL has indicated that

certain actions of the employer, consistent with satisfying the final 403(b) regulations, will not jeopardize the ERISA exemption. See DOL Field Assistance Bulletin 2007-02. If the plan will be subject to ERISA even though the plan is a deferral-only plan, the employer should elect option 3(c).

4. PLAN/LIMITATION YEAR **(1.52/1.44).** The employer must define the plan year by electing option (a) (calendar year) or option (b) (fiscal year). The plan year normally will correspond to the employer's taxable year. The employer may use option (c) to designate an initial short plan year or a short plan year that occurred between the restated effective date of the plan and the date of adoption. For administrative convenience, the limitation year will be the same as the plan year unless the employer indicates otherwise in option (b).

5. EFFECTIVE DATE **(1.21)**. The employer must designate the effective date, using (a) if the plan is a new plan, and (b) if the plan is a restated plan. For a restated plan, the employer must complete *two* blanks: the first blank is to identify the restated effective date and the second blank is to identify the original effective date(s) or adoption date(s) of the plan(s) being restated. If the plan operated before 2009, but was not in writing, the employer should select option (b) and enter the date the plan began operations as the original effective date. (In some cases, the employer may need to estimate that date.) There is no need to have an effective date of this document before January 1, 2009. However, some employers may wish to put the final regulations in force early, and adopting an effective date before January 1, 2009 will reflect that decision. This plan operates under the final regulations, and an employer should not select an early effective date if the employer wishes to operate under old law before 2009.

6. EXCLUDED EMPLOYEES **(1.34).** Although the ability to make elective deferrals is subject to a universal availability requirement, the final 403(b) regulations permit limited exclusion of four specified employee groups. Election 6 lists the permissible exclusions. If the employer wishes to allow employees, without exclusion, to make elective deferrals, the employer should select option (a). Otherwise, the employer may elect one or more of the following exclusions.

- Option (b) excludes nonresident aliens without US source income.
- Option (c) excludes employees who normally work less than 20 hours per week. The regulations provide that an employee is deemed to work less than 20 hours per week during the employee's first year of employment if the employer reasonably expects the employee will have less than 1,000 hours of service during the year. In subsequent years, an employee works less than 20 hours per week if the employee had less than 1,000 hours of service in the prior plan year.
- Option (d) excludes student employees who work at their school.
- Option (e) excludes employees who are eligible to defer to another plan the employer maintains.

7. COMPENSATION **(1.12).** Notwithstanding the universal availability requirement for elective deferrals, the employer may elect to exclude certain items of compensation. The basic definition of compensation for purposes of the deferral-only plan is W-2 wages plus elective deferrals. If the employer wishes to permit employees to defer from all of their compensation, the employer should select option (a). The employer may exclude one or more categories of compensation by electing one or more of options (b) through (f). Any employee must have an effective opportunity, based on the facts and circumstances, to make elective deferrals. See Treas. Reg. §1.403-5(b)(2). Any exclusion from compensation must be consistent with the effective opportunity requirement.

- Option (b) excludes fringe benefit items.
- Option (c) excludes bonuses.
- Option (d) excludes overtime.
- Option (e) excludes all items of post-severance compensation. See section 1.12(K) for the definition of post-severance compensation.
- Option (f) excludes other items of compensation that the employer describes.

8. ELIGIBILITY (Universal Availability) **(2.01(A)).** Each employee who is not an excluded employee under election 7 must be eligible to defer from date of hire. Unlike a 401(k) plan, a 403(b) plan may not impose any age and service conditions upon an employee as to the right to make elective deferrals. See Treas. Reg. §1.403(b)-5(b) as to the universal availability requirement.

9. SALARY REDUCTION AGREEMENT **(1.61).** A participant may make an election to defer his/her compensation and have it contributed to the plan. The participant prospectively may modify or revoke a salary reduction agreement, or may file a new salary reduction agreement following a prior revocation, at least once per plan year or more frequently as specified in the plan's salary reduction agreement. The salary reduction agreement also may specify a maximum or minimum deferral limit and other conditions. The adoption agreement contains no elections regarding these administrative details. The employer should be mindful of the universal availability rules in creating administrative limitations on deferrals in its salary reduction agreement. See Treas. Reg. §1.403(b)-5(b).

10. CATCH-UP DEFERRALS **(3.02(D) AND (E)).** The employer must elect under 10 whether the plan permits one of both types of catch-up contributions permitted under Code §403(b). The employer elects (a) if it will permit age 50 catch-ups under (a)(1) and/or qualified organization catch-ups under (a)(2). Under the qualified organization catch-up, an employee with at least 15 years of service with a qualifying organization (school, hospital, health or welfare service agency or church-related organization) may increase his/her deferrals in accordance with a specified formula. An employee who is age 50 and who qualifies for the qualifying organization catch-up may apply both catch-up rules. The employer will elect (b) if the plan will not permit any catch-up deferrals.

11. ROTH CONTRIBUTIONS **(3.02(F))**. The employer may elect under 11 whether to permit Roth deferrals. Select option (a) if the plan will permit Roth deferrals. Select option (b) if the plan will not permit Roth deferrals.

ARTICLE VI
DISTRIBUTIONS

12. DISTRIBUTIONS **(6.01(A))**. The adoption agreement does not include any elections relating to distribution options under the plan, and instead defers to the individual annuity contract or individual custodial account which funds the plan, or any other agreement or form referenced in the annuity contract or custodial agreement.

EXECUTION PAGE

The execution page provides two signature blocks: one for the employer and one for the insurance company/custodian. The employer must complete the employer's name and date signed, and must sign the execution page, printing on the last line the name and title of the representative actually signing. Although it is not necessary for the insurance company/custodian to sign the execution page, the better practice is for the insurance company/custodian to do so, since signing the execution page clearly documents the insurance company's or custodian's acknowledgment of the employer's elections in the adoption agreement. If there is a single insurance company/custodian, that entity may sign the same execution page as the employer. If there are multiple insurance companies or custodians, the employer may reproduce multiple execution pages, so that each insurance company/custodian will sign the execution page. The employer may sign either a single execution page or each execution page an insurance company/custodian signs. A single original signature by the employer is legally sufficient to adopt the plan. If the insurance company/custodian does *not* sign the execution page, the contracts of the insurance company/custodian will control the plan assets in that vendor's possession.

APPENDIX A

13. FUNDING VEHICLES **(8.01)**. In Appendix A (election 13), the employer lists the vendors whose investment products the plan will offer as funding vehicles. See section 1.38 regarding the definition of funding vehicle. The employer need not list in Appendix A the investment products themselves (*e.g.*, mutual funds offered by a particular custodian).

CHECKLIST OF ADMINISTRATIVE ELECTIONS

The Checklist of Administrative Elections documents the employer's administrative elections relating to participant loans, hardship distributions, and rollover contributions. The Checklist of Administrative Elections will document conveniently the employer's administrative decisions regarding participant loans, and will trigger language in any summary plan description generated by the Relius software system if the employer uses the software system. Regardless of the employer's elections in the Checklist, participant loans will not be available from investment products which do not permit loans.

14. HARDSHIP DISTRIBUTIONS **(6.07)**. In election 14, the employer indicates whether the plan permits hardship distributions. However, this election does not apply if the annuity contract or custodial agreement provides otherwise. If the employer intends the plan to be a non-ERISA plan (see election 3 above), the employer may not exercise discretionary authority regarding a participant's eligibility for a hardship distribution. See DOL Field Assistance Bulletin 2007-02.

15. PARTICIPANT LOANS **(7.06)**. In election 15, the employer indicates whether the plan permits loans, and if so, what limitations on loans apply. If the Plan does not permit Participant loans, the Employer should elect 15(a). If the plan permits Participant loans, the employer should elect 15(a) and should complete 15(b)(1) through (5). These elections permit the Employer to limit respectively, consistent with Applicable Law, the loan amount, number, interest rate, term, and availability of suspension for an approved non-military leave of absence.

16. ROLLOVER CONTRIBUTIONS **(3.08)**. In election 16, the employer indicates whether the plan permits rollover contributions, subject to approval by the plan administrator, or does not permit rollover contributions. If the employer intends the plan to be a non-ERISA plan (see election 3 above), the employer may not exercise certain discretionary authority. This may include regarding the acceptance of a rollover contribution, assuming the plan permits such contributions. See DOL Field Assistance Bulletin 2007-02.

PARTICIPATION AGREEMENT

Each participating employer must execute a participation agreement for its employees to become participants in the plan. The plan terms may be the same as applied to the signatory employer and all participating employers or for some or each participating employer(s) the terms may be different.

17. PARTICIPATION EFFECTIVE DATE. In election 17, each participating employer should state the effective date of the participating employer's participation in the plan, even if this date is the same date as the effective date of the plan (see election 5).

18. SPECIAL PARTICIPATING EMPLOYER PLAN PROVISION EFFECTIVE DATES. In election 18, each participating employer may state any special effective date for one or more particular provision(s) that is (are) different from the participation effective date stated in election 17.