INSTRUCTIONS FOR 403(b) PROTOTYPE PLAN AND COMPLETION OF 403(b) ADOPTION AGREEMENTS

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.

ARTICLE I
DEFINITIONS

1. EMPLOYER; PLAN **(1.27; 1.50)**. 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 (a) to indicate that ERISA does not apply. The document assumes that all other sponsors (tax-exempt organizations) are making employer contributions and are subject to ERISA. Accordingly, sponsors other than governmental entities or churches should select option (b).

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 option (a) if the plan is a new plan, and option (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 specifying 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. CONTRIBUTION TYPES **(1.13).** The employer must select one or more options to indicate the type of contributions to the plan. Most employers will select option (a) to show the plan accepts pre-tax elective deferrals. Select both options (a) and (b) if the plan selects Roth deferrals as well. (You cannot select option (b) without selecting option (a).) Select option (e) (and do not select option (c) if a plan subject to ERISA wishes to use (or may use) the ACP safe harbor for matching contributions. There is no reason for a governmental plan or a church plan to use the ACP safe harbor since such plans are not subject to ACP testing. Select option (c) for matching contributions for a governmental or church plan, or for a plan subject to ERISA for which the employer will perform the ACP test. If the only nonelective contribution is a 3% safe harbor contribution, select option (e) and not option (d). Otherwise select option (d) for nonelective contributions, which may include mandatory employee contributions. Select option (f) if the employer allows after-tax employee contributions. Note that Roth deferrals are elective deferrals (option (b)) and not after-tax contributions. If the plan is frozen and will not receive further contributions, select option (g).

7. EXCLUDED EMPLOYEES **(1.34).** Election 7 allows the employer to exclude classifications of employees for some or all of the contribution types the plan provides. If the employer wishes to allow all classifications of employees to receive all contribution types, the employer should select option (a). Otherwise, select option (b). If the employer wishes to allow all classifications of employees to receive a specific contribution type, select option (b)(1) and then select the appropriate contribution type or types. Options (b)(2) through (b)(8) allow the exclusion of different classifications. The employer can apply the exclusion to all contributions by using the first column or to some contribution types by using the appropriate column or columns to the right. The adoption agreement follows this "grid" format throughout.

- Option (b)(2) excludes nonresident aliens without US source income.
- Option (b)(3) 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 (b)(4) excludes student employees who work at their school.
- Option (b)(5) excludes employees who are eligible to defer to another plan the employer maintains.
- Options (b)(6), (7), and (8) do not apply to elective deferrals because applying those exclusions would violate the 403(b) universal availability requirements. They exclude union employees, highly compensated employees, and reclassified employees, respectively. Using one or more of these exclusions may cause a plan subject to ERISA to fail the coverage requirements for

employer contributions. A reclassified employee is a worker, who may be a common law employee, which the employer does not treat as an employee for payroll tax purposes, such as a worker on the payroll of a leasing company or a worker who receives a 1099-MISC. Note that misclassifying workers is potentially a greater problem for a 403(b) plan than for a qualified plan because if the plan denies a common law employee from being able to defer, the plan likely violates the universal availability rule.

- Option (b)(9) allows the employer to describe one or more groups of employees which the plan will exclude from one or more contribution types. The employer can use this election to allow employees otherwise excluded under regulatory transition rules to defer (see Section 1.34(F)) or to exclude all Employees in a geographically distinct business unit under Treas. Reg. §1.403(b)-5(b)(3)(ii). Employers other than churches cannot otherwise use this election to exclude employees from deferrals. Churches can use this election to exclude employees from deferrals as well as other contribution types because churches are not subject to the universal availability rule.

8. COMPENSATION **(1.12).** In election 8 the employer selects the plan's "base" definition of compensation. This is compensation used to allocate plan contributions. The employer may modify that definition in subsequent elections. Generally, the employer will select a single definition for all contribution types, although the employer may select a different definition for different types. Each definition has been "grossed up" for elective deferrals.

9. PLAN YEAR/ PARTICIPATING/ POST SEVERANCE/ DEEMED INCLUDIBLE COMPENSATION **(1.12(I), (J), (K) AND (N)).** The employer must select whether to use entire plan year compensation or limit compensation to compensation paid while a participant. Since the nondiscrimination rules permit an employer to test using compensation paid while a participant, many employers elect option (b) to reduce the employer's contribution for new participants. Option (c) allows the plan to count certain post-severance compensation (*e.g.*, regular pay, leave cash-outs, and nonqualified deferred compensation). The employer can attach an addendum to make different post-severance compensation elections. The plan will not count any post-severance compensation, including the final paycheck, unless the employer checks option (c). Option (d) allows the plan to provide employer contributions to some former employees. The employer can make other timing choices in option (e).

10. EXCLUDED COMPENSATION **(1.12(H)).** This election allows the employer to select certain items of compensation which the plan will disregard for some or all contribution types. Select option (a) if the plan counts all compensation for some or all contribution types. Otherwise, select the compensation item or items which the plan will exclude. Option (b)(7) requires additional explanation. A related employer is a company which is part of a controlled group, group under common control, or affiliated service group with the employer. A related employer which signs a participation agreement to cosponsor the plan becomes a participating employer. Option (b)(7)a. excludes compensation paid by related employers which are not a participating employer. Option (b)(7)a. excludes compensation paid by participating employers, which is particularly valuable if the employer selects option 22(e)(2)b. or 26(d)(2)a.

11. HOURS OF SERVICE **(1.40).** The employer must select the method of crediting hours of service. If the employer chooses the "actual method" (option (a)), the plan administrator credits hours of service on the basis of hours actually completed or for which payment is due. The Department of Labor ("DOL") regulations permit an employer to use hour of service equivalencies in lieu of the "actual completion" method. The employer may select a permitted "equivalency" by electing option (b) and completing the blank with the desired equivalency method (*e.g.*, "monthly"). Section 1.40(A)(2) of the basic plan document defines these equivalency methods. The employer may elect option (d) to apply the actual method to hourly paid employees and an equivalency to salaried employees. Under option (c), the employer may choose to use the elapsed time method instead of hours of service. Under elapsed time, an employee will receive credit for a year of service if he/she is employed for twelve months, regardless of

the hours of service completed. If the employer elects elapsed time, the employer will need to indicate whether it will use elapsed time for eligibility, vesting or contribution allocations. If the employer designates elapsed time for eligibility or vesting, it should *not* define a year of service under the respective eligibility or vesting provisions. Before selecting an equivalency method or elapsed time, the employer should consider carefully the economic effect of the methods upon the continued operation of the plan, *e.g.*, possible inclusion of part-time employees. The method the employer selects applies to all employees covered under the plan.

12. PREDECESSOR EMPLOYER **(1.63).** The law does not require the employer to credit service with a predecessor employer. Under the adoption agreement, the employer may elect to recognize predecessor service. To recognize predecessor service, the employer should complete the appropriate blank with the name(s) of the predecessor employer(s). Option (b)(2) allows the employer to limit the application of a credit of predecessor service.

ARTICLE II
ELIGIBILITY REQUIREMENTS

13. ELIGIBILITY/ELECTIVE DEFERRALS **(2.01(A)).** Assuming the plan permits elective deferrals under election 6, 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.

14. ELIGILIBILITY NONELECTIVE/MATCHING CONTRIBUTIONS. **(2.01(B)).** For election 14, unless described otherwise in option (f), or the context otherwise requires, matching includes all matching contributions and employee contributions; and nonelective includes all nonelective contributions (except operational QNECs). This election does not apply to safe harbor contributions, but see election 24(g). If the plan is subject to ERISA, eligibility conditions must comply with ERISA §202, which is similar to Code §410(a). If the employer will apply the same eligibility conditions to matching and to nonelective contributions the employer should make its election in column (1). If the employer wishes to apply different eligibility conditions to matching versus nonelective contributions the employer should use columns (2) and (3).

- Option (a) is for no age and service conditions. This option will result in immediate entry or entry upon the next entry date following date of hire as provided in election 16.
- Option (b) applies an age condition. The age may not exceed 21.
- Option (c) applies a 1 year of service condition. Election 15 defines 1 year of service.
- Option (d) applies a 2 year of service condition without an intervening break in service. Election of this condition requires that the plan provide 100% immediate vesting as to the contribution subject to the 2 year requirement.
- Option (e) applies a specified monthly service requirement which may not exceed 24 months. If the plan imposes a requirement exceeding 12 months, 100% immediate vesting is required. Under this option, there is no minimum service required. The employee completes the requirement when the specified number of months have elapsed, even if service with the employer is not continuous.
- Option (f) permits the employer to describe eligibility conditions provided such conditions are permitted under applicable law as described above. The employer might use this option to describe different conditions applicable to different employee groups.

15. YEAR OF SERVICE-ELIGIBILITY **(2.02(A)).** If the employer under election 14 elects a 1 or 2 year(s) of service condition or elects to apply a year of service for eligibility under any other adoption agreement election, the employer should complete election 15. The employer should not complete election 15 if it elects the elapsed time method for eligibility.

- Option (a) is to indicate the number of hours of service within the relevant eligibility computation period which constitute 1 year of service. The maximum number of hours the plan may apply is 1,000.
- Option (b) provides which eligibility computation period applies in the event that an employee does not complete 1 year of service in the first eligibility computation period. The plan may switch to the plan year under option (b)(1) or may stay on the anniversary date of hire year under option (b)(2). Switching to the plan year may ease administration but in the year of the switch, the relevant plan year will include the employee's 1 year anniversary date, resulting in inclusion of some service previously counted in the initial 12 month computation period.
- Option (c) permits the employer to describe a different number of hours of service constituting 1 year of service as applied to different employee groups or to elect a different subsequent computation period for one employee group versus another. The employer also may make another election consistent with applicable law.

16. ENTRY DATE **(2.02(D)).** For election 16, unless described otherwise in option (f), matching includes all matching contributions and employee contributions and nonelective includes all nonelective contributions (except operational QNECs). Election 16 does not apply to elective deferrals. Make elections in column (1) for matching contributions and in column (2) for nonelective contributions.

- Option (a) provides for semiannual entry dates.
- Option (b) provides for a single entry date on the first day of the plan year. Under applicable law, this may require that the single entry date be applied retroactively under election 17 unless the plan does not apply more than age 20½ and 6 months of service for eligibility.
- Option (c) provides for quarterly entry dates.
- Option (d) provides for monthly entry dates.
- Option (e) provides for immediate entry. If the plan does not impose any eligibility conditions on matching or nonelective contributions, an employee will enter on date of hire. Otherwise, the employer will enter the plan on the date he/she completes the plan's eligibility condition for the relevant contribution type.
- Option (f) permits the employer to describe different entry dates as permitted under applicable law such as different dates for different employee groups.

17. PROSPECTIVE/RETROACTIVE ENTRY DATE **(2.02(D)).** Unless otherwise excluded under election 8, if this is an ERISA plan, an employee who remains employed by the employer on the relevant date must become a participant by the earlier of: (i) the first day of the plan year beginning after the date the employee completes the age and service requirements of ERISA §202 (Code §410(a)); or (ii) 6 months after the date the employee completes those requirements. For election 17, unless described otherwise in option (f), matching includes all matching contributions and employee contributions; and nonelective includes all nonelective contributions, (except operational QNECs). Election 17 does not apply to elective deferrals. Make elections in column (1) for matching contributions and in column (2) for nonelective contributions.

- Option (a) provides for entry on the plan entry date immediately following or coincident with the employee's completion of the plan's eligibility conditions.
- Option (b) provides for entry on the plan entry date immediately following the employee's completion of the plan's eligibility conditions.
- Option (c) provides for entry on the plan entry date immediately preceding or coincident with the employee's completion of the plan's eligibility conditions.
- Option (d) provides for entry on the plan entry date immediately preceding the employee's completion of the plan's eligibility conditions.

- Option (e) provides for entry on the plan entry date nearest the employee's completion of the plan's eligibility conditions.
- Option (f) permits the employer to describe different prospective or retroactive effect as to the plan's entry dates as permitted under applicable law, such as for different employee groups.

ARTICLE III
PLAN CONTRIBUTIONS AND FORFEITURES

18. 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).

19. AUTOMATIC DEFERRALS **(3.02(B)).** Election 19 is for a non-QACA automatic deferral or "negative election" plan. If the plan is a safe harbor plan that applies the QACA provisions of section 3.04(J), complete election 20(b) and select election 19(a).

- Option (a) is to indicate the automatic deferral provisions of election 19 do not apply.
- Option (b) applies the automatic deferral provisions of election 19. The employer should specify the effective date of the automatic deferral feature. The employer should also complete option (b)(1) to select a constant automatic deferral percentage or option (b)(2) to select an automatic deferral percentage which increases over time based on the plan years or partial plan years a participant has been subject to the plan's automatic deferral feature. The employer must complete option (b)(3) to indicate whether the feature applies to all participants under option a.; only to those participants who are not deferring an amount at least to the automatic deferral amount under option b.; only to those participants who have not made any salary reduction election (including an actual election of zero) under option c.; or only to those employees who enter the plan after the automatic deferral election date under option d. The employer also may complete option (b)(4) to describe the plan's automatic deferral feature.

20. QACA AUTOMATIC DEFERRALS **(3.04(J)).** Election 20 is for automatic deferrals which will follow the QACA rules. Following the QACA rules requires the employer to make specified contributions to the plan but, if certain conditions are met, the plan escapes the ACP test on matching contributions. Even under a QACA, if the plan permits employee (after-tax) contributions, the plan must run the ACP test. Government and church 403(b) plans are not subject to the ACP test. No 403(b) plan is subject to the ADP test as to elective deferrals.

- Option (a) is to indicate the QACA automatic deferral provisions of election 20 do not apply.
- Option (b) applies the QACA automatic deferral provisions of election 20. The employer should specify the effective date of the automatic deferral feature. The employer should also complete option (b)(1) to select a constant automatic deferral percentage (which must be at least 6% and not more than 10%); option (b)(2) to select an automatic deferral percentage which increases over time in accordance with the statutory QACA schedule based on the plan years or partial plan years a participant has been subject to the plan's automatic deferral feature; or option (b)(3) under which the employer specifies an alternative schedule for increases which must be at least as much as the statutory amount under option (b)(2) but which may not exceed 10%. The employer must complete option (b)(4) to indicate whether the feature applies to all participants under option a.; only to those participants who are not deferring an amount at least to the automatic deferral

amount under option b.; or only to those participants who have not made any salary reduction election (including an actual election of zero) under option c.

21. CATCH-UP DEFERRALS **(3.02(D) AND (E)).** If the plan permits elective deferrals under election 6, the employer must elect under election 21 whether the plan permits one of both types of catch-up contributions permitted under Code §403(b). The employer elects option (a) if it will permit age 50 catch-ups under option (a)(1) and/or qualified organization catch-ups under option (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 option (b) if the plan will not permit any catch-up deferrals.

22. MATCHING CONTRIBUTIONS (EXCLUDING SAFE HARBOR MATCH AND ADDITIONAL MATCH UNDER SECTION 3.04) **(3.03(A))**. Election 22 is for plans which will permit or require matching contributions but which plans are not safe harbor plans, including under the QACA safe harbor. For safe harbor and QACA safe harbor plans, all matching contributions should be elected in election 24. All matching contributions apply to both pre-tax and Roth deferrals unless the employer indicates otherwise in option (f). The employer may elect both a fixed and a discretionary match and may elect multiple fixed matches.

- Columns (1)-(5) are where the employer will specify the plan's matching rate under option (1); the limit on deferrals which will be subject to match under option (2); whether the plan will "true-up" the match (apply the matching formula to the entire plan year) under option (3); whether the plan will apply the match separately as to each payroll period under option (4); or whether the plan will apply the match separately as to some other time period (less than the full plan year) which the employer specifies under option (5). For any fixed match, the employer must elect *both* options (1) and (2) and must elect *one* of options (3), (4) or (5). The employer may, but is not required to make such elections as to a discretionary match.
- Option (a) is for a discretionary match. Under this option, the employer retains discretion as to whether to make a match and as to the amount of the match. The employer may or may not elect to complete the columns as described above. By not doing so, the employer retains operational discretion over the matching formula which it will use to allocate its discretionary match.
- Option (b) is for a fixed match at a uniform rate regardless of the amount a participant defers (*e.g.*, 50% of deferrals).
- Option (c) is for a tiered match. The rate of match changes with the deferral interval (*e.g.*, 50% on the first 3% deferred and 25% on the next 2% deferred).
- Option (d) is for a match based on years of service. The rate of match changes with the participant's years of service with the employer (*e.g.*, 25% for the first 3 years of service and 50% for years of service exceeding 3).
- Note that for 403(b) plans subject to nondiscrimination testing, a non-uniform rate of match may violate Code §401(a)(4) where the match is a feature which must be available on a non-discriminatory basis.
- Option (e) applies where there are related and participating employers. In this case, the employer must elect option (e)(1) as to whether the matching formulas are the same option (e)(1)a., for all employers or there is at least one related employer which will apply a different match option (e)(1)b. The employer also must elect whether the plan will allocate the matching contributed by each related employer only to the employees of that employer option (e)(2)a., or will allocate all matching to all participants, regardless of which employer they work for option (e)(2)c.
- Option (f) permits the employer to describe its matching contributions, including applying a different match to different employee groups participating in the plan.

23. MATCHING CATCH-UP DEFERRALS **(3.03(B))**. If the plan permits catch-up deferrals under election 21, under election 23, the employer elects whether the plan will match age 50 catch-up deferrals. Especially where the employer contributes its match throughout the plan year, it likely will be easier to administer the plan if the plan matches all deferrals including age 50 catch-ups under option (a)(1). If the plan applies the safe harbor or QACA safe harbor, the plan must match age 50 catch-ups.

24. SAFE HARBOR CONTRIBUTIONS/ADDITIONAL MATCHING CONTRIBUTIONS **(3.04)**. If the plan is a safe harbor plan or may become a safe harbor plan during the plan year (using the minimum nonelective contribution and applying the "maybe" and "supplemental" notices), including under the QACA rules, the employer should elect 24. This includes the employer's election of any matching contributions under the plan which are "additional matches." An additional match is not a "basic" or "enhanced" match used to comply with the ADP safe harbor.

- Option (a) is for the basic match. This is a fixed match equal to 100% of deferrals up to 3% deferred and an additional 50% match on the next 2% deferred. The match will be 4% for any participant who defers at least 5% of compensation.
- Option (b) is for the QACA safe harbor plan under election 20. The QACA match is a fixed match equal to 100% of deferrals up to 1% deferred and an additional 50% match on the next 5% deferred. The match will be 3.5% for any participant who defers at least 6% of compensation.
- Option (c) is for the enhanced match. This is a fixed match the employer describes either as a uniform rate option (c)(1) or as a tiered match option (c)(2). The matching rate may not increase as the elective deferral percentage increases, no HCE may be eligible for a greater rate of match than any NHCE at any level of elective deferrals, and at any rate of elective deferrals, a participant will receive a matching contribution that is at least equal to the match the participant would receive under option (a), or in the case of a QACA, under option (b).
- Option (d) is for the nonelective safe harbor contribution (including under a QACA) which must equal at least 3% of compensation.
- Option (e) is a year-by-year election of the nonelective safe harbor contribution (including under a QACA). This option, used in conjunction with the "maybe" and "supplemental" notices, permits the employer to minimize the number of plan amendments it must make year to year as it changes into and out of safe harbor status using the above notices. If the employer is using the nonelective contribution alternative each plan year, the employer should elect option (d). If the employer gives the maybe notice and the employer will or may make matching contributions, the Employer should elect additional matching under option (i) (and should not elect matching contributions under election 22) if it wishes to avoid ACP testing.
- Option (f) determines whether all participants will receive the safe harbor contribution under option (f)(1), only NHCEs will receive it under option (f)(2) or NHCEs and certain specified HCEs will receive it under option (f)(3). Note that regardless of its elections under option (f), option (g) may further limit the participants who receive the safe harbor contribution.
- Option (g) is to provide for allocation of the safe harbor contribution only to participants who have reached age 21 and completed 1 year of service. The employer should use this election where it wishes to delay the safe harbor contribution beyond the time that an employee has the right to defer to the plan under a 403(b) plan which is from date of hire. This will result in the disaggregation of the plan in applying the ACP test. Those in the "plan" who receive the safe harbor contribution avoid the ACP test. Those who have the right to defer but who do not receive the safe harbor contribution are subject to the ACP test assuming that there are HCEs in that "plan."
- Option (h) is to specify another plan into which the employer will make its safe harbor contribution.
- Option (i) is for additional matching. Additional matching contributions are those matching contributions which are not the basic or enhanced match but which are made to a safe harbor plan. The employer may elect additional matching as fixed, discretionary or both. The employer

may design its additional matching so as to avoid the ACP test or may design the match without regard to the ACP test safe harbor limitations. Option (i)(1)a., is for a uniform fixed additional match and option (i)(1)b. is for a tiered additional fixed match. Option (i)(2) is for a discretionary additional match. If the employer wishes to avoid ACP testing on its fixed additional matching contributions: (i) the matching rate may not increase as the elective deferral percentage increases; (ii) no HCE may be entitled a greater rate of match than any NHCE; and (iii) the plan must limit elective deferrals taken into account for the matching contribution to 6% of plan year compensation. In addition to these limitations, if the employer wishes to avoid ACP testing on its discretionary additional matching contributions the plan must limit the amount of a participant's discretionary additional match to 4% of plan year compensation.

- Option (j) provides for the time interval over which the employer will apply any match under election 24. If the employer will apply the match over an interval of less than the full plan year (*i.e.*, the employer will not "true-up" the match), special contribution timing rules apply.

25. NONELECTIVE CONTRIBUTIONS (AMOUNT/TYPE) **(3.05(A))**. In election 25, the employer elects a fixed or discretionary nonelective contribution formula, or both. The allocation method applicable to such contribution(s) is under election 26.

- Option (a) is for a discretionary nonelective contribution amount.
- Option (b) is for a fixed nonelective contribution amount which may be a uniform percentage of compensation over a specified time interval under option (b)(1), a fixed dollar amount over a specified time interval under option (b)(2) or a described amount under option (b)(3).
- Option (c) is for a fixed contribution based on application of the permitted disparity rules. The employer may elect an excess formula under option (c)(1) or a step-rate formula under option (c)(2). The employer under option (c)(3) will define "excess compensation" in applying the formula either as a percentage amount under option a., or as a dollar amount under option b.
- Option (d) permits a participant to make a one-time irrevocable election upon entry into the plan to defer an amount to his/her plan account. This amount is treated as a nonelective contribution.
- Option (e) applies if there are related and participating employers under the plan. In this case, the employer will elect whether the employers are all subject to the same contribution formula(s) under option (e)(1) or whether a different contribution formula may apply as to a given participating employer under option (e)(2).
- Option(f) permits the employer to describe a different contribution formula for different participant groups.

26. NONELECTIVE CONTRIBUTION ALLOCATION (**3.05(B)**). In election 26, the employer elects one or more allocation methods applicable to the contribution formulas the employer has elected under election 25. If there is more than one allocation method, the employer should indicate which method applies to which contribution formula in the describe line at option (e).

- Option (a) is for a pro rata allocation where each participant receives an allocation equal to the same percentage of his/her compensation as each other participant.
- Option (b) incorporates the contribution formula into the allocation. The employer may use this option where it has elected a fixed contribution formula and wishes to allocate the contribution exactly in accordance with that formula (*e.g.*, contribution amount is $1 per HOS per participant).
- Option (c) allocates the nonelective contribution is accordance with the permitted disparity rules. Unlike election 25(c) where the contribution itself is made in accordance with the permitted disparity rules, under option (c), whatever amount the employer contributes is allocated using permitted disparity. The employer will define "excess compensation" in applying the formula either as a percentage amount under option (c)(1), or as a dollar amount under option (c)(2).

- Option (d) applies where there are related and participating employers. In this case, the employer must elect whether the nonelective allocation formula(s) are the same for all employers under option (d)(1)a., or there is at least one related employer which will apply a different nonelective allocation formula under option (d)(1)b. The employer also must elect whether the plan will allocate the nonelective contribution contributed by each related employer only to the employees of that employer under option (d)(2)a., or will allocate all nonelective contributions to all participants, regardless of which employer they work for under option (d)(2)b. If the employer elects option (d)(2)a., the employer should also elect 10(b)(7)b., to disregard the compensation paid by "Y" participating employer in determining the allocation of the "X" participating employer contribution to a participant (and vice versa) who receives compensation from both X and Y. If the employer elects option (d)(2)b., the employer should not elect 10(b)(7)b. Option (d)(2)a. does not apply to safe harbor nonelective contributions.
- Option (e) permits the employer to elect a different allocation method for different participant groups.

27. ALLOCATION CONDITIONS **(3.06(B))**. The plan does not apply any allocation conditions to: (i) elective deferrals; (ii) safe harbor contributions; (iii) employee contributions; (iv) additional matching contributions; or (v) rollover contributions. The employer in eletion 27 may elect to apply allocation conditions to matching contributions, nonelective contributions (including QNECs except as described otherwise below and except as provided in Section 3.06(A)), or participant forfeitures.

- The employer will elect in columns (1)-(4) whether to apply its elected allocation conditions to all contributions and forfeitures (column (1)) or to apply different allocation conditions to matching contributions (column (2)), nonelective contributions (column (3) and forfeitures (column (4)). To ease administration, most employers will make elections under column (1). If the employer makes elections under columns (2) or (3), the employer need not make elections under column (4) unless it wishes to apply different allocation conditions to forfeitures than apply to nonelective or matching. If the employer does not make an election under column (4), the forfeitures will be subject to the same allocation conditions as are the contribution type to which the forfeitures are applied in election 29.
- Option (a) applies if the plan will not apply any allocation conditions to the applicable contributions.
- Option (b) applies the 501 HOS/terminees rule. Any participant who terminates employment during the plan year will not receive an allocation of the applicable contributions unless he/she completes at least 501 HOS during that plan year.
- Option (c) requires a participant to be employed by the employer on the last day of the plan year to receive an allocation of the applicable contributions.
- Option (d) requires a participant to complete at least 1,000 HOS during the plan year to receive an allocation of the applicable contributions.
- Option (e) permits an employer to describe the allocation conditions. The employer might use this blank to describe a last day or HOS requirement applied to an interval of time which is less than the full plan year (*e.g.*, 250 HOS in a plan year quarter). Unless the plan is a governmental or church plan, the employer may not impose an HOS condition exceeding 1,000 HOS in a plan year. The employer might also use option (e) to describe different allocation conditions as applied to different participant groups.

28. ALLOCATION CONDITIONS – APPLICATION/WAIVER/SUSPENSION **(3.06(D)/(F))**. The employer under election 28 may elect to waive the plan's allocation conditions (under election 27) in the plan year a participant terminates employment based on certain conditions. The employer also may elect to suspend these allocation conditions in any plan year that the plan fails coverage after applying the allocation conditions. Except as the employer describes otherwise in election 27(e) or as provided in

section 3.05(C)(1) regarding operational QNECs, matching includes all matching contributions and nonelective includes all nonelective contributions to which allocation conditions may apply.

- Option (a)(1) waives allocation conditions if a Participant incurs a severance from employment on account of or following death, disability or attainment of normal retirement age. Most employers will make this election.
- Option (a)(2) continues to apply the plan's allocation conditions regardless of the reason for the participant's severance.
- Option (b) permits the employer to break-up the application or waiver based on the contribution type and based upon the reason for the severance. This permits a more selective application or waiver of the allocation conditions but will complicate plan administration.
- Option (c) permits the employer to suspend the allocation conditions as to either or both matching and nonelective contributions in the event the application of the conditions causes the plan to fail coverage. If the employer applies the suspension provision, the plan must satisfy the ratio percentage (70%) test and may not apply the average benefit test for coverage. This may result in the employer having to cover more NHCEs to pass coverage than if the plan applied the average benefit test. Under the suspension provision, the plan applies an ordering rule to bring back in enough NHCEs to pass coverage under the ratio percentage test. If the employer does not use the suspension provision and the plan fails coverage, the employer will need to amend the plan to bring back enough NHCEs to pass. Under option (c)(1)a., the plan applies the suspension rule to all contributions, under option (c)(1)b., applies it only to nonelective contributions, and under option (c)(1)c., applies it only to matching contributions. Under option (c)(2), the plan does not apply the suspension provision.

29. FORFEITURE ALLOCATION METHOD **(3.07(A))**. Under election 29, the employer elects how the plan will allocate forfeitures either from all sources under column (1) or from the nonelective and matching sources under columns (2) and (3). Even if the employer elects immediate vesting, the employer should complete election 29. See section 7.07.

- Option (a) allocates the designated forfeiture(s) as an additional nonelective contribution.
- Option (b) allocates the designated forfeiture(s) as an additional matching contribution.
- Option (c) allocates the designated forfeiture(s) to reduce the employer's nonelective contribution (including a safe harbor contribution). The employer may use this option even if the plan provides only for discretionary nonelective contributions, but the plan requires allocation of the forfeiture at the time elected in election 30 even if the employer does not make a discretionary nonelective contribution.
- Option (d) allocates the designated forfeiture(s) to reduce the employer's matching contribution (including a basic match or enhanced matching contribution). The employer may use this option even if the plan provides only for discretionary matching contributions, but the plan requires allocation of the forfeiture at the time elected in election 30 even if the employer does not make a discretionary matching contribution.
- Option (e) first applies the designated forfeiture(s) to pay reasonable plan expenses and applies any remaining forfeitures per one of the above elections. Option (e) is not a stand-alone election. The employer should also elect one of options (a)-(d) above.
- Option (f) permits the employer to describe some other forfeiture allocation method such as may apply to balances transferred from another 403(b) plan.

30. FORFEITURE ALLOCATION TIMING **(3.07(B))**. Under election 30, the employer elects when the plan will allocate forfeitures once they have occurred. The event giving rise to the forfeiture (cash-out, plan correction, lost participant), will determine *when* the forfeiture occurs. The employer may elect to allocate the forfeiture in the same plan year in which the forfeiture occurs under option (a) or in the next plan year under option (b). The employer may elect the same timing rule as to all forfeitures under

column (1) or may split its election as to nonelective sourced forfeitures under column (2) and matching sourced forfeitures under column (3). To simplify administration, most employers will elect the forfeiture allocation timing under column (1).

31. EMPLOYEE (AFTER-TAX) CONTRIBUTIONS **(3.10)**. If the employer under election 6 has permitted employee contributions, the employer should elect 31. Employee contributions are after –tax contributions but are not Roth deferrals. The earnings on the employee contributions will be taxed upon distribution unless the distribution is properly rolled over. If the plan permits employee contributions, the plan will run the ACP test even if the plan is a safe harbor plan, unless the plan is a government or church plan.

- Option (a) indicates whether employee contributions are subject to additional limitations beyond those the plan already imposes. Under option (a)(1) no additional limitations apply and the employer should specify any additional limitations under option (a)(2) (*e.g.*, a participant's employee contribution may not exceed 5% of compensation per plan year).
- Option (b) relates to matching on employee contributions. If the employer will not match employee contributions it elects option (b)(1). If the employer will match employee contributions, it elects option (b)(2) and describes the fixed or discretionary matching formula. Under a safe harbor plan, a matching formula which meets the ACP test safe harbor requirements avoids the ACP test. However, the employee contributions still must be tested under the ACP test except as noted above.

ARTICLE IV
LIMITATIONS AND TESTING

32. ANNUAL TESTING ELECTIONS (**4.05(B)**). Under election 32, the employer makes elections with respect to determining highly compensated employees and the ACP test.

A plan must determine who are HCEs and NHCEs to apply the coverage and nondiscrimination tests (including the ACP test). Government and church employers, however, are exempt from the coverage and nondiscrimination requirements. The more than 5% owner test rarely will apply in a 403(b) plan because the plans are sponsored by governments and tax-exempt organizations. The employer has the choice to apply the compensation test or the top-paid group test in determining who is highly compensated.

- The employer elects in determining HCE status that the top-paid group election does not apply under option (a)(1)a, the compensation test applies.
- If the employer wishes to use the-paid group test, it must elect option (a)(1)b. If the employer wishes to change the election in a subsequent year, it will need toamend the plan.
- Option (a)(2) permits a fiscal year plan to use calendar year data in determining highly compensated employees. The employer elects option (a)(2)b to apply the election and (a)(2)a to elect not to apply the election.
- The employer elects option (b)(1) if the plan does not include matching contribution or employee contributions or is not subject to the ACP test (*e.g.*, government employer).
- If the plan is subject to the ACP test (e.g., non-governmental employer) and provides a matching contribution formula that does not qualify as an ACP safe harbor matching formula, the employer elects option (b)(2) and then chooses between current year testing (2)a. and prior year testing (2)b. If an employer decides to switch testing methods, it must do so before the end of the plan year to which the test would apply. The regulations place no restrictions on switching to current year testing but they do place restrictions on switching to prior year testing.
- If the plan intends to qualify as an ACP safe harbor plan, the employer must elect option (b)(3). To qualify as an ACP test safe harbor plan, the employer must satisfy the ADP and the ACP safe harbor requirements. The employer must satisfy the ADP safe harbor requirements even though

the ADP test does not apply to 403(b) plans because it is one of the requirements to be an ACP safe harbor plan.

- If the 403(b) plan is a new plan and the employer elects prior year testing, it may elect option (c)(1) to assume 3% for the first plan year or it may utilize the actual average ACP percentage for the NHCEs for the first plan year by electing (c)(2).

ARTICLE V
VESTING

33**.** NORMAL RETIREMENT AGE (**5.01**). Election 33 provides two options: option (a) provides for a stated normal retirement age (e.g., age 65); and option (b) provides for a normal retirement age based on the later of a stated age or the anniversary of the first day of the plan year in which the participant commenced participation. The stated age may not exceed 65 and the anniversary date, if applicable, may not exceed the 5th anniversary.

34. ACCELERATION ON DEATH OR DISABILITY (**5.02**) Option (a) provides 100% vesting if the participant's employment terminates because of death or disability. If the employer wishes to apply to one of the events, it elects option (c) and then chooses the event to which it wishes to apply vesting acceleration. If the employer does not wish to provide acceleration for either of these vesting events, it should elect option (b).

35**.** VESTING SCHEDULE **(5.03).** An employee's account balance derived from elective deferrals under the 403(b) arrangement must be 100% vested at all times. The same 100% immediate vesting requirement applies to qualified nonelective contributions, employee (after-tax) contributions, safe harbor contributions (other than QACA safe harbor contributions), and rollover contributions. The employer must elect a vesting schedule for the nonelective contributions, matching contributions and QACA safe harbor contributions using the options described below.

- Option (a) provides 100% immediate vesting and is mandatory if the plan requires two years or more than 12 months of employment as a service condition under election 14. Also, the selection of a single plan entry date under election 16 may require the selection of option (a) if the plan requires a more than 6 months of employment condition.
- Option (b) provides five vesting options. The grid permits an employer to choose different vesting options for nonelective, matching contributions and additional matching under an ACP safe harbor plan. Option (b)(1) is immediate 100% vesting; option (b)(2) is the 6-year graded vesting schedule; and option (b)(3) is 3-year cliff vesting. Option (b)(4) permits the employer to design a modified graduated or cliff schedule. If the plan is subject to ERISA, the modified schedule must be at least as rapid at all times as the schedule in option (b)(2) or (b)(3). Option (b)(5) permits the employer to elect a non-ERISA vesting schedule (e.g., 7-year graded). Only a government or a church may elect a non-ERISA vesting schedule.
- Option (c) is for QACA vesting. An employer may apply one of three vesting options to the QACA safe harbor contributions: (c)(1) – 2-year cliff, (c)(2) – immediate 100% vesting; and (c)(3) – a modified 2-year vesting schedule.
- Under option (d), the employer may provide for any vesting provision for which we do not provide an election.
- Section 5.04 uses the cash-out means of forfeiture for a plan subject to ERISA. If a partially-vested participant receives distribution prior to incurring a forfeiture break in service, the participant *immediately* forfeits the nonvested portion. The forfeited participant later may restore the forfeited amount by repaying the cash-out distribution, but only if the participant returns to employment with the employer without incurring a forfeiture break in service and the participant makes the repayment within 5 years of that reemployment date.
- Section 5.04 applies the deemed cash-out rule to a 0% vested participant. Under the deemed

cash-out rule, the plan treats the 0% vested participant as having received a cash-out distribution on the date of his/her severance from employment. Under the "deemed cash-out rule," the plan also treats the participant as having repaid the $0 distribution and being entitled to restoration if he/she returns to employment with the employer before incurring a "forfeiture break in service" (i.e., 5 consecutive breaks-in-service) under Section 5.06.

36. YEAR OF SERVICE – VESTING **(5.05)**. Option (a) determines the number of hours of service required to complete a year of service for vesting purposes. The maximum number is 1,000 hours if the plan is subject to ERISA. If the plan provides 100% immediate vesting or uses elapsed time for vesting, the employer should disregard election 36. Option (b) specifies the vesting computation period: (b)(1) for plan year and (b)(2) for anniversary year. The employer should consider the additional administration required by using anniversary years under option (b)(2).

37. EXCLUDED YEARS OF SERVICE – VESTING **(5.05(C)).** Election 37 permits the employer to exclude certain years of service for vesting purposes.

- If the plan provides 100% immediate vesting or does not intend to disregard any years of service for vesting, the employer should check option (a).
- The employer may exclude years of service prior to the plan year in the participant attains age 18 by selecting option (b).
- For purposes of option (c), the regulations define a predecessor plan to mean any qualified plan terminated within the five-year period preceding or succeeding the establishment of the plan. For example, if the employer maintained a defined benefit plan within the five-year period ending on the establishment of this plan, service earned while the employer maintained the defined benefit plan is includible, even if the employer checks option (c).
- The employer may elect to exclude vesting years of service under the rule of parity by electing option (d).
- Option (e) permits an employer to continue an exclusion in effect under prior plan terms.
- The employer may use option (f) to exclude vesting service under the other permitted statutory exclusions.

ARTICLE VI
DISTRIBUTIONS

38. INDIVDUAL/GROUP ACCOUNTS **(6.01).** The first set of elections the employer makes under the distribution article is whether the plan contains individual annuity or custodial accounts only (individual accounts) or whether the plan contains a group annuity contract, a group custodial account, or a combination of group and individual accounts (group accounts).

- If the plan contains individual accounts *only*, the employer elects option (a) and does not make any further elections under Article VI. The reason an employer makes no further elections under Article VI if it elects (a) is because in an individual account the employer has no legal control over the individual account. The contract or the agreement is between the vendor and the participant. The contract or the agreement will set out the available distribution options. Any election the employer makes in the plan would probably not be recognized by the vendor and may cause a conflict between the plan and the contract. Therefore, if the plan provides individual accounts exclusively then the participant makes distribution elections pursuant to the options available under the individual accounts.
- If the employer maintains a group accoun*t, t*he employer elects option (b) and completes the balance of elections under Article VI. Under the final 403(b) regulations, the IRS now requires employer to exercise more responsibility over its

403(b) plan. Individual accounts often make it difficult to exercise the necessary oversight. Accordingly, in the future, more 403(b) plans probably will move to group accounts.

39. MANDATORY DISTRIBUTION **(6.01(F)).** Under election 39, the employer elects whether it will provide for mandatory distributions following severance from employment and the dollar threshold below which it will make mandatory distributions. The benefit of providing for mandatory distributions is that the employer may "clean out" small accounts of terminated participants which may: (1) reduce plan administrative costs; (2) for plans subject to ERISA, keep the participant count below the audit threshold; (3) effect a cash out distribution to trigger immediate forfeitures; and (4) reduce the number of lost participant accounts.

- If the employer elects option (a), the plan does not force out any distributions. The plan makes a distribution only at the participant's election unless the plan terminates.
- If the employer elects option (b), the employer then must specify the maximum amount at which it will make mandatory distributions to a terminated participant. The legal maximum level at which it can set for mandatory distributions is $5,000. The employer then must choose between disregarding rollover contributions in determining whether the participant is at/below the threshold under option (b)(1) or whether it includes rollover contributions under option (b)(2). An employer which sets the mandatory distribution amount above $1,000 will need to apply the automatic IRA rollover requirements (section 6.08). If the automatic rollover requirements apply, the plan must rollover a mandatory distribution to an IRA if the participant either does not elect to receive the distribution or does not elect to roll over the distribution to an IRA or another plan. An employer which sets the mandatory distribution level at $1,000 or less (including rollover contributions) will not be subject to the automatic rollover requirements.
- If a plan does not provide for mandatory distributions or if the plan provides for mandatory distributions but a participant's account exceeds the mandatory distribution threshold, the plan generally may not distribute to the participant without his/her consent. Of course the plan would be subject to the required minimum distribution requirements. Also, if the plan is subject to ERISA, the plan would need to distribute in accordance with section 6.01(B) unless the participant elected to defer distribution until his/her required beginning date.

40. SEVERANCE DISTRIBUTION TIMING **(6.01(B)).** Under election 40, the employer elects the timing of distribution for a participant who has severed employment.

- Under option (a), the plan makes distribution as soon as administratively practicable following the participant's severance from service.
- Under option (b), the plan will distribute as soon as administratively practicable following the next valuation date following severance from employment.
- Under option (c), the plan will postpone distribution until the designated plan year following the participant's severance from employment, then distribute as soon as practicable in that plan year.
- Under option (d), the plan will distribute in a designated plan year quarter following the participant's severance from employment. An employer that provides quarterly valuations may prefer to utilize this option.
- Under option (e), the plan will not permit any distributions before a participant attains normal retirement age. Requiring a participant to wait until normal retirement age is very uncommon in a 403(b) plan. The employer under option (e) also may draft specialized distribution timing language.

41. DISTRIBUTION METHOD **(6.03).** Under election 41, the employer will elect the method(s) of

distribution available under the plan. The options will be available to a participant who is not subject to mandatory distributions. A participant who is subject to mandatory distributions will receive his/her distribution in lump sum within a 12 month period following severance from employment (section 6.01(F)). However, the employer may select a different time of distribution by attaching an addendum to the plan.

- The employer elects a lump sum option (a).
- The employer elects installments under option (b).
- If the employer wishes to limit installments to required minimum distributions, it will elect option (c) instead of option (b).
- Option (d) permits the employer to design alternative annuity distribution methods. Providing for alternative annuity methods will trigger the application of the joint and survivor annuity requirements if the plan is subject to ERISA.
- Option (e) permits the employer to design an alternative method of distribution not provided in the adoption agreement.

42. JOINT AND SURVIVOR ANNUITY REQUIREMENTS **(6.04).** The employer must make an election under election 42 regarding the application of the joint and survivor annuity requirements.

- If the employer elects option (a), the joint and survivor requirements will apply only to the specific classes of participants described in section 6.04(G) of the basic plan document. Generally, the plan will not have any participants in these specified classes and will be exempt entirely from the joint and survivor requirements. If the joint and survivor requirements do not apply to a participant and the plan is subject to ERISA, any distribution election made by the participant, pursuant to election 41, whether after termination of employment or while in service, is *not* subject to spousal consent. However, the participant's beneficiary designation is *void* without spousal consent because one consequence of electing out of the joint and survivor requirements is to *increase* the spouse's beneficial interest in the *death benefits* under the plan.
- If the employer wishes to apply the joint and survivor requirements to all participants in the plan, it should select option (b). The notice and waiver requirements of section 6.04 of the basic plan document apply only to a participant who is subject to the joint and survivor requirements. If the 403(b) plan is invested in annuity contracts and the plan is subject to ERISA, the plan will be subject to the joint and survivor annuity requirements. However, if the plan is invested exclusively in custodial accounts, the plan likely will not elect to apply the joint and survivor annuity requirements.

43. DISTRIBUTIONS PRIOR TO SEVERANCE/EVENTS **(6.01(D)).** The plan may permit a participant to elect distribution prior to separation from service upon certain events. The rules applicable to in-service distributions in a 403(b) differ depending on the type of contribution (deferrals or employer contributions) and the type of investment into which the plan makes the contribution (annuity contract or custodial account). Therefore, we have established the elections in a grid which provides the appropriate "N/A" where the 403(b) rules do not permit in-service distributions. Where permissible, the employer may elect that an in-service distribution event applies to all contributions.

- If the employer does not wish to provide for in-service distributions under the plan, it elects (a)(1). The employer also may elect not to apply in-service distributions for a particular account by electing (a) under the column which includes the particular account.
- Under option (b), the employer may permit in-service distributions on attainment of age 59 ½ (or later age) by filling in the age and electing the accounts to which it wishes to apply the distribution option.
- Under option (c), the employer may elect to provide distribution on the attainment of a lower age. This option only is available for a non-deferral account invested in annuity contracts and an RIA.

- Under option (d), the employer may elect a safe harbor hardship distribution option for any of the accounts. The events and requirements for a safe harbor hardship option are set out in section 6.07 of the basic plan document.
- Under option (e), the employer may elect a non-safe harbor distribution option for non-deferral accounts invested in annuity contracts and for RIAs.
- The disability option in (f) is available for all accounts.
- Under option (g), the employer may design other in-service distribution events subject to the requirements of Code 403(b).
- Under section 6.01(D)(5), the plan permits a participant to withdraw all or any portion of his/her account balance attributable to *employee contributions* or to *rollover contributions*. If the employer wishes to eliminate this option or to restrict it, the employer may attach an addendum.

44. IN-SERVICE DISTRIBUTIONS/ADDITIONAL CONDITIONS **(6.01(C)).** If the employer elects any in-service distribution events, it must make an election under election 44 as to whether the plan imposes additional conditions to receive an in-service distribution.

- The employer may require the participant be 100% vested under option (a)(1)a. to receive an in-service distribution. The employer may want to impose this condition where it permits in-service distributions with respect to non-deferral accounts to avoid the necessity of applying the hypothetical vesting rules.
- Alternatively, the employer may elect option (a)(1)b. and require 100% vesting for in-service distribution events except for hardship distributions.
- Under option (a)(1)c., the employer may elect not to impose a vesting condition to receive an in-service distribution.
- Under option (a)(2), the employer may elect to impose a minimum dollar threshold to receive an in-service distribution to avoid small distributions. The amount should not exceed $1,000 to avoid creating a discrimination issue.
- Option (a)(3) permits the employer to design alternative conditions for receiving in-service distributions.
- If the employer does not want to impose additional conditions to receive an in-service distribution, it may elect option (b).

45. EACA PERMISSIBLE WITHDRAWALS **(6.01(D)(7)).** A 403(b) plan with automatic enrollment may satisfy the requirements of an eligible automatic contribution arrangement (EACA) and provide for permissible withdrawals by a participant for the first 90 days following the application of the first automatic contribution to the plan. The 90 days is measured from the first pay date on which the plan makes an automatic contribution for a participant. The withdrawal provision permits a plan to avoid having to administer a small account for a participant who changes his/her mind shortly after the automatic enrollment commences.

- Under option (a), the employer elects the group of participants to which it provides the withdrawal provision. Under (a)(1), it applies to all EACA participants; (b)(2) applies only to participants who do not have deferrals prior to the EACA's effective date; and (b)(3) allows the employer to describe a category of participants to which it applies the withdrawal provision.
- If the employer wishes to not apply the withdrawal provision, it elects option (b).

ARTICLE VII
ADMINISTRATIVE PROVISIONS

46. ALLOCATION OF EARNINGS **(7.04(B)(4))**.Election 46 provides two elections for different methods to allocate plan earnings.

- The employer will elect option (a) if the plan consists *solely* of individual custodial accounts or individual annuity contracts. The individual accounts method simply credits each individual account with the earnings or charges the account generates.
- The employer will elect op*tion(b*) if the plan *either* consists solely of one or more group accounts *or* includes at least one group account and at least one individual account. Under this election, the individual account method will apply to any individual account, and the employer's election will apply to the group account(s). If the employer elects option (b), the employer also must elect either the daily method, the balance forward method or the weighted average method. Section 7.04(B)(4) explains each of these methods. In addition, the employer must elect that the allocation method applies to all contributions, or must elect different allocation methods for elective deferrals, matching contributions and nonelective contributions, if any. The employer will election option (b)(1) to allocate earnings daily.
- The employer will elect option (b)(2) to allocate earnings using the balance forward method.
- The employer will elect option (b)(3) to allocate earnings using a weighted average method. Under this method, the employer may elect a weighting period which is other than monthly.
- The employer may use option (b)(4) to elect any other allocation method that does not fall within options (b)(1) through (3).

47. VALUATION DATES **(7.04(B)(2)).** Election 47 provides two elections for different valuation dates.

- The employer will elect option (a) if the plan consists *solely* of individual custodial accounts or individual annuity contracts. As in the case of allocation of earnings under election 46(a), the individual accounts method simply defers to the valuation dates provided under the individual custodial accounts or individual annuity contracts.
- The employer will elect option (b) if the plan *either* consists solely of one or more group accounts *or* includes at least one group account and at least one individual account. Under this election, the individual account method will apply to any individual account, and the employer's election will apply to the group account(s). If the employer elects 47(b), the employer may elect to apply no valuation dates other than the last day of the plan year (option (b)(1)), or the employer may elect to require the vendor to value the funding vehicles under one of three choices. If the employer elects option (b)(2), the vendor must value the group accounts on each business day of the plan year on which the plan assets for which there is an established market are valued and the vendor is conducting business. If the employer elects option (b)(3), the vendor must value the group accounts on the last day of each period specified in the adoption agreement. If the employer elects option (b)(4), the employer may specify valuation dates to the group accounts. Under each of options (b)(1) through (4), the employer either may elect to apply the elected valuation dates to all contributions or may elect to apply different valuation dates for elective deferrals, matching contributions and nonelective contributions, if any.

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.

Execution for Page Substitution Amendment Only. The execution page includes an additional provision to facilitate amendments to the adoption agreement. Under section 9.02(B)(3), the employer may amend the plan by completing and substituting the applicable adoption agreement pages and executing a new execution page. The new execution page should include a reference to the adoption agreement section(s) amended and the effective date of the amendment. Alternatively, the employer may amend the adoption agreement by another written instrument executed and dated by the employer. The better practice is to amend the adoption agreement and complete a new execution page with the employer's signature so that the adoption agreement itself is complete.

CHECKLIST OF ADMINISTRATIVE ELECTIONS

The Checklist of Administrative Elections documents the employer's administrative elections relating to Participant loans and rollover contributions.

48. PARTICIPANT LOANS **(7.06).** Election 48 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.

- If the plan does not permit participant loans, the employer should elect option (a).
- If the plan permits participant loans, the employer should complete options (b)(1) through (5). These elections permit the employer to limit respectively, consistent with applicable law, the loan amount, maximum number, interest rate, term, and availability of suspension for an approved non-military leave of absence.

49. ROLLOVER CONTRIBUTIONS **(3.08).** Under election 48 the employer elects whether the plan does not permit rollover contributions under option (a) or permits rollover contributions, subject to plan administrator approval under option (b).

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.

50. PARTICIPATION EFFECTIVE DATE. In election 50, 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).

51. SPECIAL_PARTICIPATING EMPLOYER PLAN PROVISION EFFECTIVE DATES. In election 51, 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 50.

APPENDIX A

52. FUNDING VEHICLES **(8.01)**. In Appendix A (election 51), 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).