**(10-~~2011~~2017)**

# Cash or Deferred Arrangement (CODA) Listing of Required Modifications and Information Package (LRMs)

**(For use with ~~master or prototype (M&P)~~ Pre-approved P~~p~~lans intending to satisfy the requirements of Code §§ 401(k) and 401(m).)**

**This information package contains samples of plan provisions that satisfy certain specific requirements of the Internal Revenue Code, as amended through the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. 114-41~~the Small Business Jobs Act of 2010 (P.L. 111-240)~~. Such language may or may not be acceptable in specific plans, depending on the context. For example, some language may not be necessary in a non-electing church plan or government plan. Note that these CODA LRMs assume the plan will permit catch-up contributions (defined in Code § 414(v)) for participants age 50 and over and~~, after 2005,~~ Roth Elective Deferrals (defined in § 402A).**

**Since a qualified CODA must be part of a defined contribution plan meeting the requirements of Code § 401(a), the plan submitted must also be compared to the Defined Contribution Plan LRMs and must otherwise satisfy the ~~M&P~~ requirements set forth in ~~Notice 2010-90, 2010-52 I.R.B. 909, and~~ Rev. Proc. ~~2011-49, 2011-44 I.R.B.~~2017-41, 2017-29 I.R.B. 89.**

**We have prepared this package to assist ~~sponsors~~ Providers, as that term is defined at section 4.08 of Rev. Proc. 2017-41, 2017-41 I.R.B. 92, who are drafting plans. To expedite the review process, ~~sponsors~~ Providers are encouraged to use the language in this package. Material added since the ~~1-2006~~October 2011 version of these LRMs is underlined ~~(other than LRM XXI, which is all new)~~; material deleted is shown in strikethrough.**

**Rev. Proc. 2017-41 permits a Pre-approved Plan to use either of two formats: a single plan document or a basic plan document with an adoption agreement. See section 4.07 therein. This LRM reflects the latter format, but recognizes that the former is also acceptable.**

**Also, a money purchase plan may be combined with a profit-sharing plan (with or without a qualified CODA) in the same Pre-approved Plan document. A nonstandardized plan that contains an ESOP may also include a qualified CODA. See sections 9.06 and 9.07 of Rev. Proc. 2017-41.**

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**(I) ADOPTION STATEMENT**

**[Reg. § 1.401(k)-1(a)]**

**Statement of Requirement: A cash or deferred arrangement ("CODA") is an arrangement under which eligible employees may make Elective Deferral elections. Such elections cannot relate to compensation that is payable prior to the adoption or effective date of the CODA. In addition, except for occasional, bona fide administrative considerations, contributions made pursuant to such an election cannot precede the earlier of (1) the performance of services relating to the contribution and (2) when the compensation that is subject to the election would be payable to the employee in the absence of an election to defer. A plan intending to satisfy the requirements of Code § 414(w) (an "eligible automatic contribution arrangement" or "EACA"), Code §§ 401(k)(12) and 401(m)(11) (a "Safe Harbor CODA") or §§ 401(k)(13) and 401(m)(12) (a "qualified automatic contribution arrangement," or "QACA") generally must satisfy such requirements, including the notice requirement, for the entire Plan Year. See Regulations §§ 1.401(k)-3 and 1.401(m)-3, for more information on Safe Harbor CODAs and QACAs.**

**(II) PARTICIPATION**

**[Code §§ 401(k)(2)(D) and 401(k)(4)(A); Reg. § 1.401(k)-1(e)]**

**Statement of Requirement: An employee's eligibility to make Elective Deferrals under a CODA may not be conditioned upon the completion of more than 1 year of service or the attainment of more than age 21. An employee's eligibility to receive Matching Contributions, Qualified Matching Contributions, or Qualified Nonelective Contributions may be conditioned upon the completion of up to 2 years of service. No contributions or benefits (other than Matching Contributions or Qualified Matching Contributions) may be conditioned upon an employee's Elective Deferrals.**

**(III) ELECTIVE DEFERRAL ELECTIONS**

**[Code §§ 401(k), 402A and 414(v); Reg. §§ 1.401(k)-1(e) and (f)]**

**Statement of Requirement: The Plan must provide a means by which an employee who is eligible to participate in the CODA may elect to have the Employer make payments either (1) as contributions to a trust under the Plan on behalf of the employee in accordance with a cash or deferred election, or (2) to the employee directly in cash. Such an employee, if age 50 or over by the end of his or her taxable year, must also be permitted to make Catch-up Contributions as defined in Code § 414(v). In addition, in the case of Roth Elective Deferrals ~~(after 2005)~~, participants must be able to designate some or all of their Elective Deferrals as Roth Elective Deferrals, which must be maintained in a separate account.**

**The Plan must specify a reasonable period, at least once each Plan Year, during which a participant may elect to commence Elective Deferrals. Such election may not be made retroactively. A participant's election to commence Elective Deferrals must remain in effect until modified or terminated.**

**The Plan must also specify a reasonable period at least once each Plan Year during which a participant may elect to terminate an election or to modify the amount, type (Roth or Pre-tax) or frequency of his or her Elective Deferrals.**

**A plan that provides for automatic enrollment, whereby a stated amount is automatically withheld from a participant's salary and contributed to the plan as an Elective Deferral (either Roth, Pre-tax or a combination of both, as specified in the plan) unless he or she affirmatively elects a different amount (including no amount) or type of Elective Deferral, must provide the participant with an effective opportunity to elect a different amount (including no amount) and type. See also LRM XX, Qualified Automatic Contribution Arrangements (QACAs) and LRM XXI, Eligible Automatic Contribution Arrangement (EACA).**

**Sample Plan Language:**

An employee eligible to make Elective Deferrals under the Plan may submit a deferral election to the Plan administrator at any time, specifying the amount (in whole dollars or whole percentages) and type (either Roth, Pre-tax or a specific combination) of Elective Deferrals to be withheld from each wage payment. Such election will be effective for the first pay period beginning after 5 business days from receipt of the election, unless a later pay period is specified by the employee. An employee's election will remain in effect until superseded by another election. Except in the case of an in-plan Roth rollover (a rollover to a participant's Roth Elective deferral account from another account of the participant in this plan), Elective Deferrals contributed to the Plan as one type, either Roth or Pre-tax, may not later be reclassified as the other type.

A participant's Roth Elective Deferrals will be deposited in the participant's Roth Elective Deferral account in the Plan. No contributions other than Roth Elective Deferrals, in-plan Roth rollovers and properly attributable earnings will be credited to each participant's Roth Elective Deferral account, and gains, losses and other credits or charges will be allocated on a reasonable and consistent basis to such account.

The Plan will maintain a record of the amount of Roth Elective Deferrals in each participant's Roth Elective Deferral account.

**[Note to reviewer: See LRM V for definition of Elective Deferrals.]**

## (IV) ELECTIVE DEFERRALS -- CONTRIBUTION LIMITATION

**[Code §§ 401(a)(30), 402(g) and 414(v); Reg. § 1.414(v)-1]**

**Statement of Requirement: Elective Deferrals by a participant may not exceed the dollar limit in effect under Code § 402(g) in any calendar year.**

**Sample Plan Language:**

No participant shall be permitted to have Elective Deferrals made under this Plan, or any other plan, contract or arrangement maintained by the Employer, during any calendar year, in excess of the dollar limitation contained in Code § 402(g) in effect for the participant's taxable year beginning in such calendar year. In the case of a participant aged 50 or over by the end of the taxable year, the dollar limitation described in the preceding sentence includes the amount of Elective Deferrals that can be Catch-up Contributions. The dollar limitation contained in Code § 402(g) was $~~15~~17,000 for taxable years beginning in ~~2006~~2012. ~~After 2006, the $15,000~~This limit is adjusted by the Secretary of the Treasury, in multiples of $500, for cost-of-living increases under § 402(g)(4). ~~Any such adjustments will be in multiples of $500.~~

Catch-up Contributions

**"**Catch-up Contributions" are Elective Deferrals made to the Plan that are in excess of an otherwise applicable plan limit and that are made by participants who are aged 50 or over by the end of their taxable years. An otherwise applicable plan limit is a limit in the Plan that applies to Elective Deferrals without regard to Catch-up Contributions, such as the limits on annual additions, the dollar limitation on Elective Deferrals under Code § 402(g) (not counting Catch-up Contributions) and the limit imposed by the actual deferral percentage (ADP) test under § 401(k)(3). Catch-up Contributions for a participant for a taxable year may not exceed (1) the dollar limit on Catch-up Contributions under Code § 414(v)(2)(B)(i) for the taxable year or (2) when added to other Elective Deferrals, ~~75~~ _____ percent of the participant's Compensation for the taxable year. The dollar limit on Catch-up Contributions under Code § 414(v)(2)(B)(i) was $~~5,000~~ 5,500 for taxable years beginning in ~~2006~~2012. After ~~2006~~2012, the $5,~~000~~ 500 limit is adjusted by the Secretary of the Treasury, in multiples of $500, ~~-~~for cost-of-living increases under Code § 414(v)(2)(C). ~~Any such adjustments will be in multiples of $500.~~ Different limits apply to Catch-up Contributions under SIMPLE 401(k) plans. [INSERT A PERCENTAGE ABOVE, NOT LESS THAN 75%, OF THE PARTICIPANT'S COMPENSATION FOR THE TAXABLE YEAR FROM WHICH ELECTIVE DEFERRALS ARE PERMITTED.]

**[Note to reviewer: If a plan that permits catch-up contributions limits the amount of Elective Deferrals a participant is allowed to make, the limit may not be a percentage that is less than 75 percent of compensation. Reg. § 1.414(v)-1(e)(1)(ii)(B) provides that for purposes of complying with the universal availability requirement applicable to catch-up contributions, an employer plan can restrict elective deferrals of any employee (including a catch-up eligible participant) to amounts available after other withholding from the employee's pay (e.g., after deduction of all applicable income and employment taxes). For this purpose, an employer limit of 75% of compensation or higher will be treated as limiting employees to amounts available after other withholdings.]**

Catch-up Contributions are not subject to the limits on annual additions, are not counted in the ADP test and are not counted in determining the minimum allocation under Code § 416 (but Catch-up Contributions made in prior years are counted in determining whether the Plan is top-heavy).

~~Provisions in the Plan relating to Catch-up Contributions apply to Elective Deferrals made after 20~~

## (V) DISTRIBUTION OF EXCESS ELECTIVE DEFERRALS

**[Code §§ 401(a)(30), 402(g) and 402A; Reg. § 1.402(g)-1]**

**Statement of Requirement: A mechanism must be provided by which a participant may notify or be deemed to notify the Plan administrator of Excess Elective Deferrals and upon such notice, but no later than April 15th of the year following the year in which the deferrals were made, the Excess Elective Deferrals and any earnings thereon will be distributed. Deemed notification occurs if Excess Elective Deferrals arise solely from Elective Deferrals made under this Plan or any other plan, contract or arrangement of the Employer.**

**Sample Plan Language:**

A participant may assign to this Plan any Excess Elective Deferrals made during a taxable year of the participant by notifying the Plan administrator on or before the date specified in the adoption agreement of the amount of the Excess Elective Deferrals to be assigned to the Plan. A participant is deemed to notify the Plan administrator of any Excess Elective Deferrals that arise by taking into account only those Elective Deferrals made to this Plan and any other plan, contract or arrangement of the Employer.

Notwithstanding any other provision of the Plan, Excess Elective Deferrals, plus any income and minus any loss allocable thereto, shall be distributed no later than April 15 to any participant to whose account Excess Elective Deferrals were assigned for the preceding year and who claims Excess Elective Deferrals for such taxable year or calendar year. ~~For years beginning after 2005, d~~Distribution of Excess Elective Deferrals for a year shall be made first from the participant's Pre-tax Elective Deferral account, to the extent Pre-tax Elective Deferrals were made for the year, unless the participant specifies otherwise.

**[Note to reviewer: ~~For years beginning after 2005, if both Pre-tax Elective Deferrals and Roth Elective Deferrals were made for the year, t~~The Plan may ~~specify~~ provide that distribution of Excess Elective Deferrals will consist of a participant's Pre-tax Elective Deferrals, Roth Elective Deferrals or a combination of both, to the extent such type of Elective Deferrals was made for the year.]**

Determination of income or loss: Excess Elective Deferrals shall be adjusted for any income or loss. ~~For taxable years beginning after 2007, the i~~Income or loss allocable to Excess Elective Deferrals is the income or loss allocable to the participant's Elective Deferral account for the taxable year multiplied by a fraction, the numerator of which is such participant's Excess Elective Deferrals for the year and the denominator is the participant's account balance attributable to Elective Deferrals without regard to any income or loss occurring during such taxable year. ~~For taxable years beginning before 2008, income or loss allocable to Excess Elective Deferrals also includes 10 percent of the amount determined under the preceding sentence multiplied by the number of whole calendar months between the end of the participant's~~

~~taxable year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.~~

**[Note to reviewer: A plan may use any reasonable method for computing the income or loss allocable to Excess Elective Deferrals, provided such method is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income or loss to participants' accounts. ~~For taxable years beginning before January 1, 2006, i~~Income or loss allocable to the period between the end of the taxable year and the date of distribution (the "gap-period") ~~could be disregarded in determining income or loss on Excess Elective Deferrals for such years. Gap-period income or loss must be included in any distribution of Excess Elective Deferrals occurring in taxable years beginning in 2007, but must be~~ is excluded from any distribution of Excess Elective Deferrals ~~occurring in taxable years beginning after 2007~~.]**

Definitions:

1. "Elective Deferrals" shall mean any employer contributions made to the Plan at the election of the participant in lieu of cash compensation. With respect to any taxable year, a participant's Elective Deferrals is the sum of all employer contributions made on behalf of such participant pursuant to an election to defer under any qualified cash or deferred arrangement ("CODA") described in Code § 401(k), any salary reduction simplified employee pension described in § 408(k)(6), any SIMPLE IRA plan described in § 408(p) and any plan described under § 501(c)(18), and any employer contributions made on behalf of a participant for the purchase of an annuity contract under § 403(b) pursuant to a salary reduction agreement. ~~For years beginning after 2005, t~~The term "Elective Deferrals" includes Pre-tax Elective Deferrals and Roth Elective Deferrals. Pre-tax Elective Deferrals are a participant's Elective Deferrals that are not includible in the participant's gross income at the time deferred. Elective Deferrals shall not include any deferrals properly distributed as excess annual additions.

2. "Roth Elective Deferrals" are a participant's Elective Deferrals that are includible in the participant's gross income at the time deferred and have been irrevocably designated as Roth Elective Deferrals by the participant in his or her deferral election.

3. "Excess Elective Deferrals" shall mean those Elective Deferrals of a participant that either (1) are made during the participant's taxable year and exceed the dollar limitation under Code § 402(g) (including, if applicable, the dollar limitation on Catch-up Contributions defined in § 414(v)) for such year; or (2) are made during a calendar year and exceed the dollar limitation under Code § 402(g) (including, if applicable, the dollar limitation on Catch-up Contributions defined in § 414(v)) for the participant's taxable year beginning in such calendar year, counting only Elective Deferrals made under this Plan and any other plan, contract or arrangement maintained by the Employer.

**Sample Adoption Agreement Language:**

Participants who claim Excess Elective Deferrals for the preceding taxable year must submit their claims in writing to the Plan administrator by [ ] [SPECIFY A DATE NOT LATER THAN APRIL 15].

## (VI) ACTUAL DEFERRAL PERCENTAGE TEST

**[Code §§ 401(a)(4) and 401(k)(3); Reg. § 1.401(k)-2; Rev. Proc. 2017-41, sec 6.03(12)]**

**Statement of Requirement: Elective Deferrals must meet the nondiscrimination requirements of Code §§ 401(a)(4) and 401(k)(3).**

**[Note to reviewer: The following provisions must be included in the plan and cannot be incorporated by reference.]**

**Sample Plan Language:**

**Prior Year Testing**
The Actual Deferral Percentage ("ADP") for a Plan Year for participants who are Highly Compensated Employees for each Plan Year and the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year must satisfy one of the following tests:

1. The ADP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 1.25; or

2. The ADP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 2.0, provided that the ADP for participants who are Highly Compensated Employees does not exceed the ADP for participants who were Non-highly Compensated Employees in the prior Plan Year by more than 2 percentage points.

For the first Plan Year the Plan permits any participant to make Elective Deferrals (and this is not a successor plan), for purposes of the foregoing tests, the prior year's Non-highly Compensated Employees' ADP shall be 3 percent unless the Employer has elected in the adoption agreement to use the Plan Year's ADP for these participants.

**Current Year Testing**
If elected by the Employer in the adoption agreement, the ADP tests in 1 and 2, above, will be applied by comparing the current Plan Year's ADP for participants who are Highly Compensated Employees with the current Plan Year's ADP for participants who are Non-highly Compensated Employees. Once made, the Employer can elect Prior Year Testing for a Plan Year only if the Plan has used Current Year Testing for each of the preceding 5 Plan Years (or if lesser, the number of Plan Years the Plan has been in existence) or if, as a result of a merger or acquisition described in Code § 410(b)(6)(C)(i), the Employer maintains both a plan using Prior Year Testing and a plan using Current Year Testing and the change is made within the transition period described in § 410(b)(6)(C)(ii).

Special Rules:

1. A participant is a Highly Compensated Employee for a particular Plan Year if he or she meets the definition of a Highly Compensated Employee in effect for that Plan Year. Similarly, a participant is a Non-highly Compensated Employee for a particular Plan Year if he or she does not meet the definition of a Highly Compensated Employee in effect for that Plan Year.

2. The ADP for any participant who is a Highly Compensated Employee for the Plan Year and who is eligible to have Elective Deferrals (and Qualified Nonelective Contributions or Qualified Matching Contributions, or both, if treated as Elective Deferrals for purposes of the ADP test) allocated to his or her accounts under two or more arrangements described in Code § 401(k), that are maintained by the Employer, shall be determined as if such Elective Deferrals (and, if applicable, such Qualified Nonelective Contributions or Qualified Matching Contributions, or both) were made under a single arrangement. If a Highly Compensated Employee participates in two or more CODAs of the Employer that have different plan years, all Elective Deferrals made during the Plan Year under all such arrangements shall be aggregated. ~~For plan years beginning before 2006, all such CODAs ending with or within the same calendar year shall be treated as a single arrangement. Notwithstanding the foregoing, c~~Certain plans shall be treated as separate if mandatorily disaggregated under regulations under Code § 401(k).

3. In the event that this Plan satisfies the requirements of Code § 401(k), 401(a)(4), or 410(b) only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this Plan, then this section shall be applied by determining the ADP of employees as if all such plans were a single plan. If more than 10 percent of the Employer's Non-highly Compensated Employees are involved in a plan coverage change as defined in Regulations § 1.401(k)-2(c)(4), then any adjustments to the Non-highly Compensated Employees' ADP for the prior year will be made in accordance with such Regulations, unless the Employer has elected in the adoption agreement to use the Current Year Testing method. Plans may be aggregated in order to satisfy Code § 401(k) only if they have the same Plan Year and use the same ADP testing method.

4. For purposes of determining the ADP test, Elective Deferrals, Qualified Nonelective Contributions and Qualified Matching Contributions must be made before the end of the 12-month period immediately following the Plan Year to which the contributions relate.

Definition:

"Actual Deferral Percentage" ("ADP") shall mean, for a specified group of participants (either Highly Compensated Employees or Non-highly Compensated Employees) for a Plan Year, the average of the ratios (calculated separately for each participant in such group) of (1) the amount of employer contributions actually paid over to the trust on behalf of such participant for the Plan Year to (2) the participant's Compensation for such Plan Year. Employer contributions on behalf of any participant shall include: (1) any Elective Deferrals (other than Catch-up Contributions) made pursuant to the participant's deferral election (including Excess Elective Deferrals of Highly Compensated Employees), but excluding (a) Excess Elective Deferrals of Non-highly Compensated Employees that arise solely from Elective Deferrals made under the Plan or plans

of this employer and (b) Elective Deferrals that are taken into account in the Actual Contribution Percentage test (provided the ADP test is satisfied both with and without exclusion of these Elective Deferrals); and (2) if elected by the Employer in the adoption agreement, Qualified Nonelective Contributions and Qualified Matching Contributions. For purposes of computing Actual Deferral Percentages, an employee who would be a participant but for the failure to make Elective Deferrals shall be treated as a participant on whose behalf no Elective Deferrals are made.

**Sample Adoption Agreement Language:**

~~Qualified Matching Contributions and Qualified Nonelective Contributions may be taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentages.~~ In determining Elective Deferrals for the purpose of the ADP test, the Employer shall include [ELECT, AS APPROPRIATE]:

[ ] a. Qualified Matching Contributions

[ ] b. Qualified Nonelective Contributions

under this Plan or any other plan of the Employer.

**[Note to reviewer: A Pre-approved Plan is not permitted to use QNECs and/or QMACs to correct a failed ADP test where prior year testing is being used.]**

The amount of Qualified Matching Contributions made under section [ ] of the Plan and taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentage shall be:

[ ] a. All such Qualified Matching Contributions.

[ ] b. Such Qualified Matching Contributions that are needed to meet the Actual Deferral Percentage test stated in section [ ] of the Plan. (Box b can only be checked if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

The amount of Qualified Nonelective Contributions made under section [ ] of the Plan and taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentages shall be:

[ ] a. All such Qualified Nonelective Contributions.

[ ] b. Such Qualified Nonelective Contributions that are needed to meet the Actual Deferral Percentage test stated in section [ ] of the Plan. (Box b can only be checked if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

If this is not a successor plan, then, if checked [ ], for the first Plan Year this Plan permits any participant to make Elective Deferrals, the ADP used in the ADP test for participants who are Non-highly Compensated Employees shall be such first Plan Year's ADP. (Do not check this

box if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

**[Note to reviewer: See LRM XII for Sample Adoption Agreement Language for current year/prior year testing option.]**

## (VII) DISTRIBUTION OF EXCESS CONTRIBUTIONS

**[Code §§ 401(k)(8) and 4979; Reg. § 1.401(k)-2(b)]**

**Statement of Requirement: Excess Contributions for a Plan Year, plus any income and minus any loss allocable thereto, must be distributed no later than 12 months after such Plan Year. ~~For plan years beginning after 2005, if~~If both Pre-tax Elective Deferrals and Roth Elective Deferrals were made for the year, the Plan may ~~specify~~ provide that distribution of Excess Contributions will consist of a participant's Pre-tax Elective Deferrals, Roth Elective Deferrals or a combination of both, to the extent such type of Elective Deferrals was made for the year. If such excess amounts are distributed more than 2½ months (6 months in the case of certain plans with an eligible automatic contribution arrangement) after the last day of the Plan Year in which such excess amounts arose, then Code § 4979 imposes a 10-percent excise tax on the Employer with respect to such amounts.**

**Sample Plan Language:**

Notwithstanding any other provision of the Plan, Excess Contributions, plus any income and minus any loss allocable thereto, shall be distributed no later than 12 months after a Plan Year to participants to whose accounts such Excess Contributions were allocated for such Plan Year, except to the extent such Excess Contributions are classified as Catch-up Contributions. Excess Contributions are allocated to the Highly Compensated Employees with the largest amounts of employer contributions taken into account in calculating the ADP test for the year in which the excess arose, beginning with the Highly Compensated Employee with the largest amount of such employer contributions and continuing in descending order until all the Excess Contributions have been allocated. To the extent a Highly Compensated Employee has not reached his or her Catch-up Contribution limit under the Plan, Excess Contributions allocated to such Highly Compensated Employee are Catch-up Contributions and will not be treated as Excess Contributions. If such excess amounts (other than Catch-up Contributions) are distributed more than 2½ months after the last day of the Plan Year in which such excess amounts arose, a 10-percent excise tax will be imposed on the employer maintaining the Plan with respect to such amounts.

Excess Contributions shall be treated as annual additions under the Plan even if distributed.

Determination of Income or Loss: Excess Contributions shall be adjusted for any income or loss. ~~For Plan Years beginning after 2007, t~~The income or loss allocable to Excess Contributions allocated to each participant is the income or loss allocable to the participant's Elective Deferral account (and, if applicable, the Qualified Nonelective Contribution account or the Qualified Matching Contribution account or both) for the Plan Year multiplied by a fraction, the numerator of which is such participant's Excess Contributions for the year and the denominator is the

participant's account balance attributable to Elective Deferrals (and Qualified Nonelective Contributions or Qualified Matching Contributions, or both, if any of such contributions are included in the ADP test) without regard to any income or loss occurring during such Plan Year.~~For Plan Years beginning before 2008, allocable income or loss also includes 10 percent of the amount determined under the preceding sentence multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.~~

**[Note to reviewer: A Plan may use any reasonable method for computing the income or loss allocable to Excess Contributions, provided such method is used consistently for all participants and for all corrective distributions under the Plan for the Plan Year, and is used by the Plan for allocating income or loss to participants' accounts. ~~For Plan Years beginning before 2006, income or loss allocable to the period between the end of the Plan Year and the date of distribution (the "gap-period") could be disregarded in determining income or loss on Excess Contributions for such years.~~ Gap-period income or loss ~~must be included in any distribution of Excess Contributions occurring in Plan Years beginning in 2006 and 2007, but~~ must be excluded from any distribution of Excess Contributions ~~occurring in Plan Years beginning after 2007~~.]**

Accounting for Excess Contributions: Excess Contributions allocated to a participant shall be distributed from the participant's Elective Deferral account and Qualified Matching Contribution account (if applicable) in proportion to the participant's Elective Deferrals and Qualified Matching Contributions (to the extent used in the ADP test) for the Plan Year. ~~For Plan Years beginning after 2005, d~~Distribution of Elective Deferrals that are Excess Contributions shall be made from the participant's Pre-tax Elective Deferral account before the participant's Roth Elective Deferral account, to the extent Pre-tax Elective Deferrals were made for the year, unless the participant specifies otherwise, in accordance with procedures established by the Plan Administrator. Excess Contributions shall be distributed from the participant's Qualified Nonelective Contribution account only to the extent that the Excess Contributions exceed the amount of Excess Contributions in the participant's Elective Deferral account and Qualified Matching Contribution account.

Definition:

"Excess Contributions" shall mean, with respect to any Plan Year, the excess of:

1. The aggregate amount of employer contributions actually taken into account in computing the ADP of Highly Compensated Employees for such Plan Year, over

2. The maximum amount of such contributions permitted by the ADP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of the ADPs, beginning with the highest of such percentages).

## (VIII) RECHARACTERIZATION

**[Code § 401(k)(8); Reg. § 1.401(k)-2(b)]**

**[Note to reviewer: A Plan may only permit recharacterization where all participants are eligible to make Employee Contributions. Recharacterized amounts may be used in the plan from which Excess Contributions arose or in another plan of the Employer with the same Plan Year. Excess Contributions may not be recharacterized by a Highly Compensated Employee to the extent that such amounts in combination with other Employee Contributions made by that employee would exceed any stated limit under the Plan on Employee Contributions. Recharacterized amounts will be treated as employer contributions for purposes of Code §§ 404, 409, 411, 412, 415, 416, and 417.]**

**Sample Plan Language:**

If elected by the Employer in the adoption agreement, Elective Deferrals allocated to a Highly Compensated Employee as Excess Contributions will be recharacterized. A participant must or may, as elected by the Employer in the adoption agreement, treat Excess Contributions allocated to him or her as an amount distributed to the participant and then contributed by the participant to the Plan. Recharacterized amounts will remain nonforfeitable. Amounts may not be recharacterized by a Highly Compensated Employee to the extent that such amount in combination with other Employee Contributions made by that employee would exceed any stated limit under the Plan on Employee Contributions.

Recharacterization must occur no later than 2½ months after the last day of the Plan Year in which such Excess Contributions arose and is deemed to occur no earlier than the date the last Highly Compensated Employee is informed in writing of the amount recharacterized and the consequences thereof.

**Sample Adoption Agreement Language:**

The Employer will [ELECT ONE]:

[ ] a. Distribute all Excess Contributions.

[ ] b. Recharacterize all Excess Contributions.

[ ] c. Distribute or Recharacterize, as chosen by the participant, Excess Contributions allocated to a participant.

## (IX) MATCHING CONTRIBUTIONS

**[Code § 401(m); Reg. § 1.401(m)-1]**

**Sample Plan Language:**

If elected by the Employer in the adoption agreement, the Employer will make Matching Contributions to the Plan.

**Sample Adoption Agreement Language:**

The Employer will make Matching Contributions to the Plan on behalf of [ELECT ONE]:

[ ] a. All participants

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

who make [ELECT ONE OR BOTH]:

[ ] a. Elective Deferrals

[ ] b. Employee Contributions

to the Plan.

The Employer shall contribute and allocate to each participant's Matching Contribution account an amount equal to:

[ ] a. [ ] [NOT MORE THAN 100] percent of the participant's Elective Deferrals.

[ ] b. [ ] [NOT MORE THAN 100] percent of the participant's Employee Contributions.

The Employer shall not match amounts provided above in excess of [$ ], or in excess of [ ] percent, of the participant's Compensation.

**[Note to reviewer: If a standardized plan includes a tiered matching formula, then the rate of Matching Contributions cannot increase as the rate of Elective Deferrals or Employee Contributions increases. ~~For Plan Years beginning after 2005, m~~Matching formulas, other than those above, such as flat-dollar formulas or ~~ones~~ formulas that target matches ~~at~~ to lower paid Non-highly Compensated Employees, must satisfy additional requirements specified in Regulations § 1.401(m)-2(a)(5).]**

## (X) FORFEITURES AND VESTING OF MATCHING CONTRIBUTIONS

**[Code § 411(a)(2)(B); Rev. Rul, 2007-43, 2007-28 I.R.B. 45]**

**(Required if Matching Contributions are made.)**

**Statement of Requirement: Matching Contributions are subject to the minimum vesting requirements of Code § 411. Section 411(a)(~~1~~2)(B) requires that Matching Contributions satisfy either a 3-year cliff vesting schedule, or a 2-to-6-year graded vesting schedule.**

**Sample Plan Language:**

Matching Contributions shall be vested in accordance with section [ ] of the adoption agreement. In any event, Matching Contributions shall be fully vested at normal retirement age, upon the ~~complete or partial~~termination of the ~~profit-sharing~~ Plan, or, for affected participants,

upon the partial termination ~~upon the~~or complete discontinuance of employer contributions to the Plan.

**[Note to reviewer: See Rev. Rul. 2007-43 regarding a partial termination of a plan.]**

Forfeitures of Matching Contributions, other than Excess Aggregate Contributions, shall be made in accordance with section [ ].

**[Note to reviewer: The blank space in the preceding paragraph should refer to the Plan's forfeiture provisions applicable to employer contributions other than Elective Deferrals and Qualified Nonelective Contributions. In the alternative, a ~~sponsor~~ Provider may provide for specific forfeiture language applicable only to Matching Contributions. Except as otherwise provided in LRMs XI and XIV and discussed in the Notes to Reviewer in those sections regarding application of the January 18, 2017, proposed regulations, forfeitures cannot be applied to fund Qualified Nonelective Contributions, Qualified Matching Contributions or Elective Deferrals.~~Note that forfeitures cannot be used as Qualified Nonelective Contributions, Qualified Matching Contributions or Elective Deferrals.~~]**

**Sample Adoption Agreement Language:**

Matching Contributions will be vested in accordance with the following schedule [ELECT ONE]:

[ ] a. Nonforfeitable when made.

[ ] b. The Plan's general vesting schedule, other than that for Elective Deferrals.

[ ] c. [The ~~sponsor~~ Provider may add elections for one or more of the vesting schedules that comply with Code § 411(a)(2)(B).]

## (XI) QUALIFIED MATCHING CONTRIBUTIONS

**[Code § 401(m); Reg. § 1.401(k)-6; Proposed Reg. §§ 1.401(k)-1(g)(5), 1.401(k)-6, 1.401(m)-1(d)(4) and 1.401(m)(5)]**

**[Note: If the Employer provides that all Matching Contributions will satisfy the conditions applicable to Qualified Matching Contributions, then separate accounting for Matching Contributions and Qualified Matching Contributions is not necessary.]**

**Sample Plan Language:**

If elected by the Employer in the adoption agreement, the Employer will make Qualified Matching Contributions to the Plan.

Definition:

"Qualified Matching Contributions" shall mean Matching Contributions that are nonforfeitable when made to the Plan and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

**Sample Adoption Agreement Language:**

The Employer will make Qualified Matching Contributions to the Plan on behalf of [ELECT ONE]:

[ ] a. All participants

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

who make [ELECT ONE OR BOTH]:

[ ] a. Elective Deferrals

[ ] b. Employee Contributions

to the Plan.

The Employer shall contribute and allocate to each participant's Qualified Matching Contribution account an amount equal to:

[ ] a. [ ] [NOT MORE THAN 100] percent of the participant's Elective Deferrals

[ ] b. [ ] [NOT MORE THAN 100] percent of the participant's Employee Contributions

The Employer shall not match amounts provided above in excess of [$ ], or in excess of [ ] percent, of the participant's Compensation.

**[Note to reviewer: If a standardized plan includes a tiered matching formula, then the rate of Qualified Matching Contributions cannot increase as the rate of Elective Deferrals or Employee Contributions increases. ~~For Plan Years beginning after 2005, m~~Matching formulas, other than those above, such as flat-dollar or ones that target matches at lower paid Non-highly Compensated Employees, must satisfy additional requirements specified in Regulation § 1.401(m)-2(a)(5).]**

**[Note to reviewer: On January 18, 2017, proposed regulations were issued that change the definition of qualified matching contributions in Regulation §§ 1.401(k)-6 and 1.401(m)-5. Under the current regulations, employer contributions that qualify as Qualified Matching Contributions must be nonforfeitable when they are contributed to the plan. Under the proposed regulations, employer contributions to a plan will qualify as Qualified Matching Contributions if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. The proposed regulations apply to taxable years beginning on or after they are finalized. Taxpayers, may however, rely on the proposed**

**regulations for periods prior to the effective date, but no earlier than January 18, 2017. Therefore, a plan that chooses to follow the proposed regulations for the period beginning on or after January 18, 2017, may revise the definition of Qualified Matching Contribution above to read as follows:**

**"'Qualified Matching Contributions' shall mean Matching Contributions that are nonforfeitable when allocated to Participants' accounts in the Plan and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals."]**

## (XII) LIMITATIONS ON EMPLOYEE AND MATCHING CONTRIBUTIONS

**[Code §§ 401(a)(4) and 401(m); Reg. § 1.401(m)-2; Rev. Proc. 2017-41, sec. 6.03(12)]**

**(Generally required in all plans where Matching Contributions are provided for -- unless the matching contributions are made under a 401(k) SIMPLE plan, a Safe Harbor CODA or a qualified automatic contribution arrangement and are deemed to pass the § 401(m) nondiscrimination test -- or if Employee Contributions are permitted under the Plan.)**

**Statement of Requirement: Employee Contributions and Matching Contributions must meet the nondiscrimination requirements of Code § 401(a)(4), and the Actual Contribution Percentage ("ACP") test of § 401(m). If Employee Contributions (including any Elective Deferrals recharacterized as Employee Contributions) or Matching Contributions are made in conjunction with a CODA, then the ACP test is in addition to the ADP test under § 401(k). Qualified Matching Contributions and Qualified Nonelective Contributions used to satisfy the ADP test may not be used to satisfy the ACP test.**

**[Note to reviewer: The following provisions must be included in the plan and cannot be incorporated by reference.]**

**Sample Plan Language:**

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

1. The ACP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 1.25; or

2. The ACP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied

by 2, provided that the ACP for participants who are Highly Compensated Employees does not exceed the ACP for participants who were Non-highly Compensated Employees in the prior Plan Year by more than 2 percentage points.

For the first Plan Year this Plan permits any participant to make Employee Contributions, provides for Matching Contributions or both, and this is not a successor plan, for purposes of the foregoing tests, the prior year's Non-highly Compensated Employees' ACP shall be 3 percent unless the Employer has elected in the adoption agreement to use the Plan Year's ACP for these participants.

**Current Year Testing**
If elected by the Employer in the adoption agreement, the ACP tests in 1 and 2, above, will be applied by comparing the current Plan Year's ACP for participants who are Highly Compensated Employees for each Plan Year with the current Plan Year's ACP for participants who are Non-highly Compensated Employees. Once made, the Employer can elect Prior Year Testing for a Plan Year only if the Plan has used Current Year Testing for each of the preceding 5 Plan Years (or if lesser, the number of Plan Years the Plan has been in existence) or if, as a result of a merger or acquisition described in Code § 410(b)(6)(C)(i), the Employer maintains both a plan using Prior Year Testing and a plan using Current Year Testing and the change is made within the transition period described in § 410(b)(6)(C)(ii).

Special Rules:

1. A participant is a Highly Compensated Employee for a particular Plan Year if he or she meets the definition of a Highly Compensated Employee in effect for that Plan Year.

Similarly, a participant is a Non-highly Compensated Employee for a particular Plan Year if he or she does not meet the definition of a Highly Compensated Employee in effect for that Plan Year.

2. For purposes of this section, the Contribution Percentage for any participant who is a Highly Compensated Employee and who is eligible to have Contribution Percentage Amounts allocated to his or her account under two or more plans described in Code § 401(a), or arrangements described in Code § 401(k) that are maintained by the Employer, shall be determined as if the total of such Contribution Percentage Amounts was made under each plan and arrangement. If a Highly Compensated Employee participates in two or more such plans or arrangements that have different plan years, all Contribution Percentage Amounts made during the Plan Year under all such plans and arrangements shall be aggregated. ~~For plan years beginning before 2006, all such plans and arrangements ending with or within the same calendar year shall be treated as a single plan or arrangement.~~ Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under Code § 401(m).

3. In the event that this Plan satisfies the requirements of Code §§ 401(m), 401(a)(4) or 410(b) only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this Plan, then this section shall be applied by determining the ACP of employees as if all such plans were a single plan. If more than 10 percent of the Employer's Non-highly Compensated Employees are involved in a

plan coverage change as defined in Regulations § 1.401(m)-2(c)(4), then any adjustments to the Non-highly Compensated Employees' ACP for the prior year will be made in accordance with such Regulations, unless the Employer has elected in the adoption agreement to use the Current Year Testing method. Plans may be aggregated in order to satisfy Code § 401(m) only if they have the same Plan Year and use the same ACP testing method.

4. For purposes of the ACP test, Employee Contributions are considered to have been made in the Plan Year in which contributed to the trust. Matching Contributions and Qualified Nonelective Contributions will be considered made for a Plan Year if made no later than the end of the 12-month period beginning on the day after the close of the Plan Year.

Definitions:

1. "Actual Contribution Percentage" ("ACP") shall mean, for a specified group of participants (either Highly Compensated Employees or Non-highly Compensated Employees) for a Plan Year, the average of the Contribution Percentages of the Eligible Participants in the group.

2. "Contribution Percentage" shall mean the ratio (expressed as a percentage) of the participant's Contribution Percentage Amounts to the participant's Compensation for the Plan Year.

3. "Contribution Percentage Amounts" shall mean the sum of the Employee Contributions, Matching Contributions, and Qualified Matching Contributions (to the extent not taken into account for purposes of the ADP test) made under the Plan on behalf of the participant for the Plan Year. Such Contribution Percentage Amounts shall not include Matching Contributions that are forfeited either to correct Excess Aggregate Contributions or because the contributions to which they relate are Excess Deferrals, Excess Contributions, or Excess Aggregate Contributions. If so elected in the adoption agreement the Employer may include Qualified Nonelective Contributions in the Contribution Percentage Amounts. The Employer also may elect to use Elective Deferrals in the Contribution Percentage Amounts so long as the ADP test is met before the Elective Deferrals are used in the ACP test and continues to be met following the exclusion of those Elective Deferrals that are used to meet the ACP test.

4. "Eligible Participant" shall mean any employee who is eligible to make an Employee Contribution, or an Elective Deferral (if the Employer takes such contributions into account in the calculation of the Contribution Percentage), or to receive a Matching Contribution (including forfeitures) or a Qualified Matching Contribution. If an Employee Contribution is required as a condition of participation in the Plan, any employee who would be a participant in the Plan if such employee made such a contribution shall be treated as an eligible participant on behalf of whom no Employee Contributions are made.

5. "Employee Contribution" shall mean any contribution (other than Roth Elective Deferrals) made to the Plan by or on behalf of a participant that is included in the participant's gross income in the year in which made and that is maintained under a separate account to which earnings and losses are allocated.

6. "Matching Contribution" shall mean an employer contribution made to this or any other defined contribution plan on behalf of a participant on account of an Employee Contribution

made by such participant, or on account of a participant's Elective Deferral, under a plan maintained by the Employer.

**Sample Adoption Agreement Language:**

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

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

**[Note to reviewer: A ~~n M&P~~Pre-approved P ~~p~~lan may use different testing methods for the ADP and ACP tests provided the Plan doesn't permit (1) recharacterization of Excess Contributions, (2) Elective Deferrals to be used in the ACP test or (3) Qualified Matching Contributions to be used in the ADP test.]**

## (XIII) DISTRIBUTION OF EXCESS AGGREGATE CONTRIBUTIONS

**[Code §§ 401(m)(6) and 4979; Reg. § 1.401(m)-2(b)]**

**Statement of Requirement: Excess Aggregate Contributions for a Plan Year must be distributed no later than 12 months after such Plan Year. However, any excess amounts distributed more than 2½ months (6 months in the case of certain plans with an eligible automatic contribution arrangement) after the last day of the Plan Year in which such excess amounts arose will be subject to a 10-percent excise tax under Code § 4979. This tax is imposed on the Employer with respect to such amounts.**

**Sample Plan Language:**

Notwithstanding any other provision of the Plan, Excess Aggregate Contributions, plus any income and minus any loss allocable thereto, shall be forfeited, if forfeitable, or if not forfeitable, distributed no later than 12 months after a Plan Year to participants to whose accounts such Excess Aggregate Contributions were allocated for such Plan Year. Excess Aggregate Contributions are allocated to the Highly Compensated Employees with the largest Contribution Percentage Amounts taken into account in calculating the ACP test for the year in which the excess arose, beginning with the Highly Compensated Employee with the largest amount of such Contribution Percentage Amounts and continuing in descending order until all the Excess Aggregate Contributions have been allocated. If such Excess Aggregate Contributions are distributed more than 2½ months after the last day of the Plan Year in which such excess

amounts arose, a 10-percent excise tax will be imposed on the employer maintaining the Plan with respect to those amounts. Excess Aggregate Contributions shall be treated as annual additions under the Plan even if distributed.

Determination of Income or Loss: Excess Aggregate Contributions shall be adjusted for any income or loss. ~~For Plan Years beginning after 2007, t~~The income or loss allocable to Excess Aggregate Contributions allocated to each participant is the income or loss allocable to the participant's Employee Contribution account, Matching Contribution account, Qualified Matching Contribution Account (if any, and if all amounts therein are not used in the ADP test) and, if applicable, Qualified Nonelective Contribution account and Elective Deferral account for the Plan Year multiplied by a fraction, the numerator of which is such participant's Excess Aggregate Contributions for the year and the denominator is the participant's account balance(s) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan Year. ~~For Plan Years beginning before 2008, allocable income or loss also includes 10 percent of the amount determined under the preceding sentence multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.~~

**[Note to reviewer: The Plan may use any reasonable method for computing the income or loss allocable to Excess Aggregate Contributions, provided that such method is used consistently for all participants and for all corrective distributions under the Plan for the Plan Year, and is used by the Plan for allocating income or loss to participants' accounts. ~~For Plan Years beginning before 2006, income or loss allocable to the period between the end of the Plan Year and the date of distribution (the "gap-period") could be disregarded in determining income or loss on Excess Aggregate Contributions for such years.~~ Gap-period income or loss ~~must be included in any distribution of Excess Aggregate Contributions occurring in Plan Years beginning in 2006 and 2007, but~~ must be excluded from any distribution of Excess Aggregate Contributions ~~occurring in Plan Years beginning after 2007~~.]**

Forfeitures of Excess Aggregate Contributions: Forfeitures of Excess Aggregate Contributions may either be reallocated to the accounts of Non-highly Compensated Employees or applied to reduce employer contributions, as elected by the Employer in section [ ] of the adoption agreement.

Accounting for Excess Aggregate Contributions: Excess Aggregate Contributions allocated to a participant shall be forfeited, if forfeitable or distributed on a pro-rata basis from the participant's Employee Contribution account, Matching Contribution account, and Qualified Matching Contribution account (and, if applicable, the participant's Qualified Nonelective Contribution account or Elective Deferral account, or both). ~~For Plan Years beginning after 2005, d~~Distribution of Elective Deferrals that are Excess Aggregate Contributions shall be made from the participant's Pre-tax Elective Deferral account before the participant's Roth Elective Deferral account, to the extent Pre-tax Elective Deferrals were made for the year, unless the participant specifies otherwise.

Definitions:

1. "Excess Aggregate Contributions" shall mean, with respect to any Plan Year, the excess of:

a. The aggregate Contribution Percentage Amounts taken into account in computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over

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

Such determination shall be made after first determining Excess Elective Deferrals pursuant to section [ ] of the Plan and then determining Excess Contributions pursuant to section [ ] of the Plan.

**Sample Adoption Agreement Language:**

**[Note to reviewer: A Pre-approved Plan is not permitted to use QNECs and/or QMACs to correct a failed ADP test where prior year testing is being used.]**

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

[ ] a. Elective Deferrals

[ ] b. Qualified Nonelective Contributions

under the Plan or any other plan of the Employer.

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

[ ] a. All such Qualified Nonelective Contributions.

[ ] b. Such Qualified Nonelective Contributions that are needed to meet the Actual Contribution Percentage test stated in section [ ] of the Plan. (Box b can only be checked if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

The amount of Elective Deferrals made under section [ ] of the Plan and taken into account as Contribution Percentage Amounts for purposes of calculating the Actual Contribution Percentage shall be:

[ ] a. All such Elective Deferrals.

[ ] b. Such Elective Deferrals that are needed to meet the Actual Contribution Percentage test stated in section [ ] of the Plan. (Box b can only be checked if the Employer has elected in the adoption agreement to use the Current Year Testing method.)

Forfeitures of Excess Aggregate Contributions shall be:

[ ] a. Applied to reduce employer contributions for the Plan Year in which the excess arose, but allocated as in b, below, to the extent the excess exceeds employer contributions or the Employer has already contributed for such Plan Year.

[ ] b. Allocated, after all other forfeitures under the Plan, to the Matching Contribution account of each Non-highly Compensated Employee who made Elective Deferrals ~~or Employee Contributions in the ratio that each such employee's Compensation for the Plan Year bears to the total Compensation of all such employees for such Plan Year. For Plan Years Beginning after 2005, such forfeitures shall be allocated to each Non-highly Compensated Employee~~ in the ratio that each such employee's Elective Deferrals for the Plan Year bears to the total Elective Deferrals of all such employees for such Plan Year.

**[Note to reviewer: Except as provided in LRMs XI and XIV and discussed in the Notes to Reviewer in those sections regarding application of the January 18, 2017, proposed regulations, forfeitures cannot be used as Qualified Nonelective Contributions, Qualified Matching Contributions or Elective Deferrals.]~~Forfeitures cannot be used as Qualified Nonelective Contributions, Qualified Matching Contributions or Elective Deferrals. For Plan Years beginning after 2005, m~~**

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

## (XIV) QUALIFIED NONELECTIVE CONTRIBUTIONS

**[Regs. §§ 1.401(k)-2(a)(6), 1.401(k)-6 and 1.401(m)-2(a)(6); Proposed Reg. §§ 1.401(k)-1(g)(5), 1.401(k)-6, 1.401(m)-1(d)(4) and 1.401(m)-5.]**

**Sample Plan Language:**

The Employer may elect to make Qualified Nonelective Contributions under the Plan on behalf of employees as provided in the adoption agreement.

In addition, if the Employer has elected in the adoption agreement to use the Current Year Testing method, in lieu of distributing Excess Contributions as provided in section [ ] of the Plan, or Excess Aggregate Contributions as provided in section [ ] of the Plan, and to the extent elected by the Employer in the adoption agreement, the Employer will make Qualified Nonelective Contributions on behalf of participants that are sufficient to satisfy the Actual Deferral Percentage test and the Actual Contribution Percentage test. Qualified Nonelective Contributions will be allocated either to all participants or only to participants who are Non-highly Compensated Employees, as elected by the Employer in the adoption agreement, in the ratio which each such participant's Compensation for the Plan Year bears to the total Compensation of all such participants for such Plan Year.

Definition:

"Qualified Nonelective Contributions" shall mean contributions (other than Matching Contributions or Qualified Matching Contributions) made by the Employer and allocated to participants' accounts that the participants may not elect to receive in cash until distributed from the Plan; that are nonforfeitable when made to the Plan; and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

**Sample Adoption Agreement Language:**

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

[ ] a. [ ] percent of the Compensation of all participants eligible to share in the allocation.

[ ] b. [ ] percent of the net profits, but in no event more than [$ ] for any Plan Year.

[ ] c. An amount determined by the Employer.

If the Employer is using Current Year Testing, in lieu of distributing Excess Contributions or Excess Aggregate Contributions, the Employer [ELECT ONE]

[ ] will

[ ] will not

make Qualified Nonelective Contributions to the Plan in an amount necessary to satisfy the ADP test and the ACP test.

Allocation of Qualified Nonelective Contributions shall be made to the accounts of [ELECT ONE]:

[ ] a. All participants.

[ ] b. Only participants who are Non-highly Compensated Employees.

**[Note to reviewer: Targeting Qualified Nonelective Contributions to the lowest paid Non-highly Compensated Employees (a practice sometimes referred to as "bottom-up leveling") is not permitted ~~for Plan Years beginning after 2005~~. Plans may not consider "disproportionate Qualified Nonelective Contributions," as defined in Regulation §§ 1.401(k)-2(a)(6)(iv) and 1.401(m)-2(a)(6)(v), for purposes of ADP or ACP testing. Thus, any allocation formula other than those in this LRM #XIV must satisfy additional requirements specified in Regulations §§ 1.401(k)-(a)(6) and 1.401(m)-2(a)(6). In general, these requirements limit the degree to which targeted Qualified Nonelective Contributions may be made to lowest paid employees.]**

**[Note to reviewer: On January 18, 2017, proposed regulations were issued that change the definition of Qualified Nonelective Contributions in Regulation §§ 1.401(k)-6 and 1.401(m)-5. Under the current regulations, employer contributions that qualify as Qualified Nonelective Contributions must be nonforfeitable when they are contributed to the plan. Under the proposed regulations, employer contributions to a plan will qualify as Qualified Nonelective Contributions if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. The proposed regulations apply to taxable years beginning on or after they are finalized. Taxpayers, may however, rely on the proposed regulations for periods prior to the effective date, but no earlier than January 18, 2017. Therefore, a plan that chooses to follow the proposed regulations for the period beginning on or after January 18, 2017, may revise the definition of Qualified Nonelective Contributions to read as follows:**

**"'Qualified Nonelective Contributions' shall mean contributions (other than Matching Contributions or Qualified Matching Contributions) made by the Employer and allocated to participants' accounts that the participants may not elect to receive in cash until distributed from the Plan; that are nonforfeitable when allocated to Participants' accounts in the Plan; and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals."]**

## (XV) NONFORFEITABILITY AND VESTING

**[Code §§ 401(k)(2)(C), 401(m)(4)(C)(ii), 411(a)(1) and 411(a)(3)(G)]**

**Statement of Requirement: An employee's right to his or her accrued benefit derived from Employee Contributions and Elective Deferrals made pursuant to his or her election must be nonforfeitable. Except as provided in LRMs XI and XIV and discussed in the Note to Reviewers in those sections, Qualified Nonelective Contributions and Qualified Matching Contributions must be nonforfeitable when made to the plan.**

**Sample Plan Language:**

The participant's accrued benefit derived from Elective Deferrals, Qualified Nonelective Contributions, Employee Contributions, and Qualified Matching Contributions is nonforfeitable. Separate accounts for Elective Deferrals other than Roth Elective Deferrals, Roth Elective Deferrals, Qualified Nonelective Contributions, Employee Contributions, Matching Contributions, and Qualified Matching Contributions will be maintained for each participant. Each account will be credited with the applicable contributions and earnings thereon.

Matching Contributions (including Qualified Matching Contributions) must be forfeited if the contributions to which they relate are Excess Deferrals (unless the Excess Deferrals are for nonhighly compensated employees), Excess Contributions, or Excess Aggregate Contributions.

**[Note to reviewer: On January 18, 2017, proposed regulations were issued that change the definitions of Qualified Matching Contributions and Qualified Nonelective Contributions in Regulation §§ 1.401(k)-(6) and 1.401(m)-(5). Under the current regulations, employer**

**contributions that qualify as Qualified Matching Contributions and Qualified Nonelective Contributions must be nonforfeitable when they are contributed to the plan. Under the proposed regulations, employer contributions to a plan will qualify as Qualified Matching Contributions and Qualified Nonelective Contributions if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. The proposed regulations apply to taxable years beginning on or after they are finalized. Taxpayers may however, rely on the proposed regulations for periods prior to the effective date, but not earlier than January 18, 2017. Therefore, a plan that chooses to follow the proposed regulations for the period beginning on or after January 18, 2017, may revise the definitions of Qualified Matching Contribution and Qualified Nonelective Contribution as provided in LRMs XI and XIV.**

## (XVI) DISTRIBUTION LIMITATIONS

**[Code §§ 401(k)(2)(B) and 414(u)(12)(B); Reg. § 1.401(k)-1(d); Notice 2010-15, 2010-6 I.R.B. 390]**

**Statement of Requirement: Elective Deferrals, Qualified Nonelective Contributions, and Qualified Matching Contributions, and income allocable to each, must comply with the distribution limitations under Code § 401(k)(2)(B) and Regulation § 1.401(k)-1(d).**

**Sample Plan Language:**

A participant's Elective Deferrals, Qualified Nonelective Contributions, and Qualified Matching Contributions, and income allocable to each are not distributable earlier than upon the participant's severance from employment, death, or disability.

**[Note to reviewer: The following distributable events may be included in either the basic plan document or as elective provisions in the adoption agreement.]**

Such amounts may also be distributed upon:

1. Termination of the Plan without the Employer maintaining another defined contribution plan (other than an employee stock ownership plan as defined in Code § 4975(e)(7) or 409(a), a simplified employee pension plan as defined in § 408(k), a SIMPLE IRA plan as defined in § 408(p), a plan or contract described in § 403(b) or a plan described in § 457(b) or (f)) at any time during the period beginning on the date of plan termination and ending 12 months after all assets have been distributed from the Plan. Such a distribution must be made in a lump sum.

2. The attainment of age 59½ in the case of a profit-sharing plan.

3. The hardship of the participant as described in section [ ].

**[Note to reviewer: The blank should contain the section of the Plan that corresponds to LRM XVII.]**

4. The participant's call to active duty after September 11, 2001, (because of the participant's status as a member of a reserve component) for a period of at least 180 days or for an indefinite period. (A "qualified reservist distribution.")

5. The participant's service in the uniformed services while on active duty for a period of at least 30 days. If a participant receives a distribution ~~under this provision~~as a result of a deemed severance of employment under this provision, the participant's Elective Deferrals (and Employee Contributions) will be suspended for 6 months after receipt of the distribution. However, a distribution under this provision that is also a qualified reservist distribution within the meaning of Code § 72(t)(2)(G)(iii) is not subject to the 6-month suspension of Elective Deferrals.

**[Note to reviewer: If an individual receives a distribution that meets the definition of a qualified reservist distribution, the distribution will be treated as a qualified reservist distribution, even if the distribution would also have been permitted as a result of a deemed severance of employment under Code § 414(u)(12)(B). Therefore, the 6-month suspension of Eelective dDeferrals and employee contributions otherwise required will not apply. For example, if a plan provides for qualified reservist distributions and for distributions on account of a deemed severance under Code § 414(u)(12)(B), a distribution to an individual that could be either type of distribution will be treated as a qualified reservist distribution, and thus not subject to the 6-month suspension of Elective Deferrals. See Notice 2010-15, Q&A-15.]**

6. A federally declared disaster, where resulting legislation or guidance authorizes such a distribution.

All distributions that may be made pursuant to one or more of the foregoing distributable events are subject to the spousal and participant consent requirements (if applicable) contained in Code §§ 401(a)(11) and 417.

**[Note to reviewer: ~~Roth Elective Deferral accounts are permitted for years beginning after 2005, and distributions~~ Distributions from Roth Elective Deferral accounts ~~such accounts~~ (other than corrective distributions) are not includible in the participant's gross income if made after 5 years and after the participant's death, disability, or age 59½. Earnings on corrective distributions of Roth Elective Deferrals are includible in gross income the same as earnings on corrective distributions of Pre-tax Elective Deferrals.]**

## (XVII) HARDSHIP DISTRIBUTIONS

**[Code § 401(k)(2)(B); Reg. § 1.401(k)-1(d)(3); Rev. Proc. ~~2011-49~~2017-41, sec. 6.03~~(14)~~(13 and (14))]**

**[Note to reviewer: A profit-sharing plan may permit distribution of Elective Deferrals (but not earnings thereon, nor of Qualified Nonelective Contributions and Qualified Matching Contributions) on account of financial hardship. ~~only under the deeming rules contained in the regulations under Code § 401(k). However, the Plan may provide that amounts eligible for such distribution include earnings on Elective Deferrals and the amount credited to the~~**

~~participant's Qualified Matching Contributions and Qualified Nonelective Contributions accounts as of December 31, 1988, or, if later, the end of the last Plan Year ending before July 1, 1989.]~~

**A standardized plan providing for hardship distributions must satisfy the safe harbor standards at Reg. § 1.401(k)-1(d)(3). The following sample plan language is intended to satisfy the standards in Reg § 1.401(k)-1(d)(3). A nonstandardized plan may include hardship distribution provisions which do not meet this standard provided that the distributions are subject to nondiscriminatory and objective criteria contained in the plan. No sample language is provided for such provisions. ]**

**Sample Plan Language:**

Distribution of Elective Deferrals (and any earnings credited to a participant's Elective Deferral and Qualified Matching and Qualified Nonelective accounts as of the later of December 31, 1988, ~~and~~ or the end of the last Plan Year ending before July 1, 1989) may be made to a participant in the event of hardship. A hardship distribution may only be made on account of an immediate and heavy financial need of the employee and where the distribution is necessary to satisfy the immediate and heavy financial need. Hardship distributions are subject to the spousal consent requirements contained in Code §§ 401(a)(11) and 417, if applicable.

Special Rules:

1. The following are the only financial needs considered immediate and heavy: expenses incurred or necessary for medical care, described in Code § 213(d), of the employee, the employee's spouse, dependents or primary beneficiary under the Plan; the purchase (excluding mortgage payments) of a principal residence for the employee; payment of tuition and related educational fees for up to the next 12 months of post-secondary education for the employee, the employee's spouse, children, dependents or primary beneficiary under the Plan; payments necessary to prevent the eviction of the employee from, or a foreclosure on the mortgage of, the employee's principal residence; payments for funeral or burial expenses for the employee's deceased parent, spouse, child, dependent or primary beneficiary under the Plan; and expenses to repair damage to the employee's principal residence that would qualify for a casualty loss deduction under Code § 165 (determined without regard to whether the loss exceeds 10 percent of adjusted gross income). An employee's "primary beneficiary under the Plan" is an individual named as a beneficiary under the plan who has an unconditional right to all or a portion of the employee's account balance under the Plan upon the employee's death.

2. A distribution will be considered as necessary to satisfy an immediate and heavy financial need of the employee only if:

a. The distribution is not in excess of the amount of the immediate and heavy financial need (including amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution);

b. The employee has obtained all distributions, other than hardship distributions, and all nontaxable loans under all plans maintained by the Employer; and

c. All plans maintained by the Employer provide that the employee's Elective Deferrals (and Employee Contributions) will be suspended for 6 months after the receipt of the hardship distribution.

**(XVIII) TOP-HEAVY REQUIREMENTS**

**[Code §§ 401(k)(4)(C), 416(c)(2)(A) and 416(g)(4)(G) and (H)]**

**Statement of Requirement: Elective Deferrals ~~(and, for Plan Years beginning before 2002, Matching Contributions)~~may not be taken into account for the purpose of satisfying the minimum top-heavy contribution requirement. SIMPLE 401(k) plans and certain Safe Harbor CODAs and qualified automatic contribution arrangements are not subject to the top-heavy requirements. See LRMs XIX and XX.**

**(XIX) 401(k) SIMPLE PROVISIONS**

**[Code §§ 401(k)(11), 401(m)(10) and 408(p); Reg. § 1.401(k)-4]**

**(Required only in plans offering the application of the 401(k) SIMPLE Provisions.)**

**Sample Plan Language:**

Article [ ] 401(k) SIMPLE Provisions

Section 1. Rules of Application

1.1 If the Employer has elected in the adoption agreement to have the 401(k) SIMPLE Provisions apply, then the provisions of this article shall apply for a Year only if (a) the Employer is an Eligible Employer and (b) no contributions are made, or benefits accrued for services during the Year, on behalf of any Eligible Employee under any other plan, contract, pension, or trust described in § 219(g)(5)(A) or (B), maintained by the Employer.

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

Section 2. Definitions

2.1 "Compensation" means, for purposes of Sections 2.2, 3.1 and 3.2 of this article, the sum of the wages, tips, and other compensation from the Employer subject to federal income tax withholding (as described in § 6051(a)(3)) and the employee's salary reduction contributions made under this or any other § 401(k) plan, and, if applicable, elective deferrals under a § 408(p) SIMPLE IRA Plan, a SARSEP, or a § 403(b) annuity contract and compensation deferred under a § 457 plan, required to be reported by the Employer on Form W-2 (as described in § 6051(a)(8)). Compensation also includes amounts paid for domestic service (as described in § 3401(a)(3)). For self-employed individuals, compensation means net earnings from self-employment determined under § 1402(a) prior to subtracting any contributions made under this

Plan on behalf of the individual. The provisions of the Plan implementing the limit on compensation under § 401(a)(17) apply to the compensation under Section 3 of this article.

2.2 An Eligible Employer means, with respect to any Year, an employer that had no more than 100 employees who received at least $5,000 of compensation from the Employer for the preceding Year. In applying the preceding sentence, all employees of controlled groups of corporations under § 414(b), all employees of trades or businesses (whether incorporated or not) under common control under § 414(c), all employees of affiliated service groups under § 414(m), and leased employees required to be treated as the Employer's employees under § 414(n), are taken into account.

An Eligible Employer that elects to have the 401(k) SIMPLE Provisions apply to the Plan and that fails to be an Eligible Employer for any subsequent Year, is treated as an Eligible Employer for the 2 Years following the last Year the Employer was an Eligible Employer. If the failure is due to any acquisition, disposition, or similar transaction involving an Eligible Employer, the preceding sentence applies only if the provisions of § 410(b)(6)(C)(i) are satisfied.

2.3 "Eligible Employee" means, for purposes of the 401(k) SIMPLE Provisions, any employee who is entitled to make Elective Deferrals under the terms of the Plan.

2.4 "Year" means the calendar year.

Section 3. Contributions

3.1 Salary Reduction Contributions

(a) Each Eligible Employee may make a salary reduction election to have his or her Compensation reduced for the Year in any amount selected by the employee subject to the limitation in Section 3.1(b) of this article. The Employer will make a salary reduction contribution to the Plan, as an Elective Deferral, in the amount by which the employee's Compensation has been reduced.

**(**b) The total salary reduction contribution for any employee cannot exceed the limitation on salary reduction contributions in effect for the year. The limitation on salary reduction contributions was $~~10~~11,~~05~~00 for ~~2005~~2012. After 20~~05~~12, the $1~~10~~,~~05~~00 limit will be is adjusted by the Secretary of the Treasury, in multiples of $500, for cost-of-living increases under Code § 408(p)(2)(E). ~~Any such adjustments will be in multiples of $5~~The amount of an employee's salary reduction contributions permitted for a Year is increased for employees aged 50 or over by the end of the Year by the amount of allowable Catch-up Contributions. Allowable Catch-up Contributions were $2,500 for ~~2006~~2012. After ~~2006~~2012, the $2,500 limit will be is adjusted by the Secretary of the Treasury, in multiples of $500, for cost-of-living increases under Code § 414(v)(2)(C). ~~Any such adjustments will be in multiples of $500.~~ Catch-up Contributions are otherwise treated the same as other salary reduction contributions.

3.2 Other Contributions

(a) Matching Contributions - Each Year, the Employer will contribute a Matching Contribution to the Plan on behalf of each employee who makes a salary reduction election under Section 3.1. The amount of the Matching Contribution will be equal to the employee's salary reduction contribution up to a limit of 3 percent of the employee's Compensation for the full Year.

(b) Nonelective Contribution - For any Year, instead of a Matching Contribution, the Employer may elect to contribute a nonelective contribution of 2 percent of Compensation for the full Year for each Eligible Employee who received at least $5,000 of Compensation (or such lesser amount as elected by the Employer in the adoption agreement) for the Year.

3.3 Limitation on Other Contributions

No employer or employee contributions may be made to this Plan for the Year other than salary reduction contributions described in Section 3.1, Matching or nonelective contributions described in Section 3.2 and rollover contributions described in Regulations § 1.402(c)-2, Q&A-1(a).

3.4 The provisions of the Plan implementing the limitations of § 415 apply to contributions made pursuant to Sections 3.1 (other than Catch-up Contributions) and 3.2.

Section 4. Election and Notice Requirements

4.1 Election Period

(a) In addition to any other election periods provided under the Plan, each Eligible Employee may make or modify a salary reduction election during the 60-day period immediately preceding each January 1.

(b) For the Year an employee becomes eligible to make salary reduction contributions under the 401(k) SIMPLE Provisions, the 60-day election period requirement of Section 4.1(a) is deemed satisfied if the employee may make or modify a salary reduction election during a 60-day period that includes either the date the employee becomes eligible or the day before.

(c) Each employee may terminate a salary reduction election at any time during the Year.

4.2 Notice Requirements

(a) The Employer will notify each Eligible Employee prior to the 60-day election period described in Section 4.1 that he or she can make a salary reduction election or modify a prior election during that period.

(b) The notification described in Section 4.2(a) will indicate whether the Employer will provide a 3-percent Matching Contribution described in Section 3.2(a) or a 2-percent nonelective contribution described in Section 3.2(b).

Section 5. Vesting Requirements

All benefits attributable to contributions described in Section 3.1 and 3.2 are nonforfeitable at all times, and all previous contributions made under the Plan are nonforfeitable as of the beginning of the Year the 401(k) SIMPLE Provisions apply.

Section 6. Top-Heavy Rules

The Plan is not treated as a top-heavy plan under § 416 for any Year for which this article applies.

Section 7. Nondiscrimination Tests

The ADP and ACP tests described in sections [ ] and [ ] of the Plan are treated as satisfied for any Year for which this article applies.

**Sample Adoption Agreement Language:**

**401(k) SIMPLE Provisions**

[ ] By checking this box the Employer elects to have the 401(k) SIMPLE Provisions described in Article [ ] apply to the Plan. (This box may only be checked if the Plan uses a calendar-year plan year and the Employer is an Eligible Employer as defined in Section 2.2 of Article [ ].) An amendment to have the 401(k) SIMPLE Provisions no longer apply is effective the next January 1.

The nonelective contribution described in Section 3.2(b) of the Plan will be allocated to all Eligible Employees who received at least [$ ] [INSERT AN AMOUNT LESS THAN $5,000] Compensation for the Year.

**(XX) SAFE HARBOR METHOD CODA (INCLUDING QUALIFIED AUTOMATIC CONTRIBUTION ARRANGEMENT (QACA))**

**[Code §§ 401(k)(12) and), 401(k)(13), 401(m)(11) and 401(m)(12); Reg. §§ 1.401(k)-3 and 1.401(m)-3; Proposed Reg. §§ 1.401(k)-1(g)(5), 1.401((k)-6, 1.401(m)-1(d)(4) and 1.401(m)-5; Notice 2016-16, 2016-7 I.R.B. 318]**

**(Required only in Plans offering a Safe Harbor CODA, including a QACA feature.)**

**Statement of Requirement: LRM XX is required only in a Planplan offering the design-based safe harbor methods for satisfying the ADP test or the ADP and ACP tests (a "Safe Harbor CODA"). A Planplan that satisfies the ADP/ACP test safe harbors must satisfy all the other applicable requirements of the Code, (other than § 416 in the case of certain Safe Harbor CODAs), including the other requirements of § 401(k), the nondiscriminatory availability of benefits, rights, and features under § 401(a)(4), and the limitations of §§ 401(a)(17), 401(a)(30), and 415. A plan that consists solely of a Safe Harbor CODA and Matching Contributions that satisfy the ACP Test Safe Harbor is not subject to the top-heavy requirements of § 416, provided contributionsthat Matching Contributions under the Plan goare allocated to all employees eligible to make Elective Deferrals.**

**The ADP test safe harbor requires that a plan meet certain contribution requirements (matching or nonelective) and a notice requirement. The ACP test safe harbor requires that a plan meet the contribution and notice requirements of the ADP test safe harbor and, in addition, satisfy a special limit on Matching Contributions.**

**A plan providing for Employee Contributions, or Matching Contributions that fail to satisfy the ACP test safe harbor, must satisfy the regular ACP test under § 401(m)(2). See ~~Regulations~~ Reg. §§ 1.401(m)-2(a)(5)(iv) and 1.401(m)-3 for details.**

**A Safe Harbor CODA that includes a Qualified Automatic Contribution Arrangement (a "QACA") must meet the requirements of Code § 401(k)(13). See Regulations 1.401(k)-3(j) and (k). Matching contributions made under a plan with a QACA feature must meet the requirements of Code § 401(m)(12). See Reg. § 1.401(m)-3.**

**[Note to reviewer: The ~~language~~ provisions in this LRM XX ~~is~~ are for plans intending to satisfy the Safe Harbor CODA requirements of §§ 401(k)(12) and 401(m)(11), ~~often referred to as "safe harbor CODAs," or something similar. Sample language is provided for a plan intending to satisfy §§ 401(k)(13) and 401(m)(12) (a "qualified automatic contribution arrangement," or "QACA").~~ and/or the QACA provisions of §§ 401(k)(13) and 401(m)(12) A plan that includes a QACA must contain ~~language satisfying §§ 401(k)(13) and 401(m)(12) as well as the~~plan provisions which comply with these Code sections and relevant portions of Regulations §§ 1.401(k)-3 and 1.401(m)-3. This LRM XX may be used ~~without the CODA LRMs or~~in place of those portions of the CODA LRMs that ~~do~~are not ~~apply~~applicable when the Plan is using the safe harbors to satisfy the ADP and ACP tests~~; for~~. For ~~example~~, LRMs VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, and XIX can be omitted in their entirety if only safe harbor contributions can be made under the Plan. A Safe Harbor CODA must satisfy the requirements of CODA LRMs I, II (first sentence only), III, IV, V, XVI (only for Elective Deferrals and only for the enumerated distributable events permitted under the Plan), XVII (if the Plan permits hardship distributions of Elective Deferrals) and XVIII. However, if pursuant to Regulations § 1.401(k)-3(f) the Plan provides an option whereby the Plan can be amended by the Employer during a Plan Year to become a Safe Harbor CODA for that Plan Year using Safe Harbor Nonelective Contributions, the Plan must contain the CODA LRMs appropriate for a CODA that is not using the safe harbors, as well as this LRM XX, both as modified to meet the requirements of such Regulations~~.~~, each applicable to that respective portion of the Plan Year. Also, if pursuant to Regulations §§ 1.401(k)-3(g) and 1.401(m)-3(h) the Plan provides an option whereby a Safe Harbor CODA can be amended by the Employer during a Plan Year to prospectively eliminate the Safe Harbor Matching or Nonelective Contributions and become a regular CODA using the current year ADP/ACP testing method for the entire Plan Year, then the Plan must contain the CODA LRMs appropriate for a CODA that is not using the safe harbors, as well as this LRM XX, both as modified to meet the requirements of such Regulations~~.~~], each applicable to that respective portion of the Plan Year. ]**

Sample Plan Language:

Article [ ] Safe Harbor CODA

Section 1. Rules of Application

1.1 If the Employer has elected the Safe Harbor CODA option in the adoption agreement, the provisions of this article shall apply for the Plan Year and any provisions relating to the ADP test described in Code § 401(k)(3) or the ACP test described in Code § 401(m)(2) do not apply.

**[Note to reviewer: This LRM XX provides sample plan language for Plans using the safe harbor methods to satisfy the ADP and ACP tests. If Matching Contributions that do not satisfy the ACP Test Safe Harbor or Employee Contributions can be made under the Plan, then this language, including that in Section 1.1 above, will have to be modified to satisfy the relevant portions of LRMs XII and XIII using the Current Year Testing method and specifying which contributions will be used in the ACP test. See Regulations §§ 1.401(m)-2(a)(5)(iv) and 1.401(m)-3.]**

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

Section 2. Definitions

2.1 "ACP Test Safe Harbor" is the method described in Section 4 of this article for satisfying the ACP test of § Code 401(m)(2).

2.2 "ACP Test Safe Harbor Matching Contributions" are Matching Contributions described in Section 4.1 of this article.

2.3 "ADP Test Safe Harbor" is the method described in Section 3 of this article for satisfying the ADP test of Code § 401(k)(3).

2.4 "ADP Test Safe Harbor Contributions" are Matching Contributions and nonelective contributions described in Section 3.1 of this article.

2.5 "Compensation" is defined in _____ of the Plan, except, for purposes of this article, no dollar limit, other than the limit imposed by Code § 401(a)(17), applies to the compensation of a Non-highly Compensated Employee.

**[Note to reviewer: The blank should contain the location of the Plan's definition of compensation that corresponds to DC LRM 6. However, solely for purposes of determining the compensation subject to a participant's deferral election, the Plan may use an alternative definition to the one described above, provided such alternative definition is a reasonable definition within the meaning of Regulations § 1.414(s)-1(d)(2~~) of the Regulations),~~ and permits each participant to elect sufficient Elective Deferrals to receive the maximum amount of Matching Contributions (determined using the definition of compensation described above) available to the participant under the Plan.]**

2.6 "Eligible Employee" means an employee eligible to make Elective Deferrals under the Plan for any part of the Plan Year or who would be eligible to make Elective Deferrals but for a suspension due to a hardship distribution described in _____ of the Plan or to statutory limitations, such as Code §§ 402(g) and 415.

**[Note to reviewer: The blank should contain the location of the Plan's distribution provisions that correspond to LRM XVI, items 3 and 5, and any suspension periods may not exceed 6 months. The Plan may not condition an Eligible Employee's receipt of ADP Test Safe Harbor Contributions or ACP Test Safe Harbor Matching Contributions on completion of a certain number of hours during the Plan Year or on employment on a certain day during the Plan Year.]**

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

Section 3. ADP Test Safe Harbor

3.1 ADP Test Safe Harbor Contributions

(a) Unless the Employer elects in the adoption agreement to make Enhanced Matching Contributions or Safe Harbor Nonelective Contributions, the Employer will contribute for the Plan Year ~~a~~an ADP Test Safe Harbor Matching Contribution to the Plan on behalf of each Eligible Employee equal to (i) 100 percent of the amount of the employee's Elective Deferrals that do not exceed 3 percent of the employee's Compensation for the Plan Year, plus (ii) 50 percent of the amount of the employee's Elective Deferrals that exceed 3 percent of the employee's Compensation but that do not exceed 5 percent of the employee's Compensation ("Basic Matching Contributions").

(b) Notwithstanding the requirement in (a) above that the Employer make the ADP Test Safe Harbor Contributions to this Plan, if the Employer so provides in the adoption agreement, the ADP Test Safe Harbor Contributions will be made to the defined contribution plan indicated in the adoption agreement. However, such contributions will be made to this Plan unless (i) each ~~employee eligible~~Eligible Employee under this Plan is also eligible under the other plan and (ii) the other plan has the same Plan Year as this Plan.

**[Note to reviewer: The option to make ADP Test Safe Harbor Contributions to another defined contribution plan is permitted only if this Plan is a nonstandardized plan.]**

(c) The participant's accrued benefit derived from ADP Test Safe Harbor Contributions is nonforfeitable and is subject to the same distribution restrictions as apply to Elective Deferrals, except that no distribution can be made on account of hardship. In addition, such contributions must satisfy the ADP Test Safe Harbor without regard to permitted disparity under § 401(l).

3.2 Notice Requirement

At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Eligible Employee a comprehensive notice of the employee's rights and

obligations under the Plan, written in a manner sufficiently accurate and comprehensive to apprise the employee of such rights and obligations and calculated to be understood by the average Eligible Employee. If an employee becomes eligible after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice must be provided no more than 90 days before the employee becomes eligible but not later than the date the employee becomes eligible.

3.3 Election Periods

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

**[Note to reviewer: Notice will be provided to all Eligible Employees if at any time the Safe Harbor CODA is amended by the Employer during a Plan Year to prospectively reduce or suspend Safe Harbor Nonelective Contributions, or, for amendments adopted on or after January 1, 2015, for Safe Harbor Matching Contributions. The notice will provide that the reduction or suspension must apply no earlier than the later of the date the plan amendment reducing or suspending contributions is adopted or 30 days after the supplemental notice is provided to Eligible Employees. Additionally, for mid-year changes made on and after January 29, 2016, notice will be provided to all Eligible Employees of any other permissible mid-year change to a plan's required safe harbor notice content, at least 30 days (and not more than 90 days) before the effective date of the change.]**

**[Note to reviewer: See Regulations §§ 1.401(k)-3 and 1.401(m)-3(f) for safe harbor plan rules requiring certain provisions to remain in effect for an entire 12-month year. See also Notice 2016-16, 2016-7 I.R.B. 318, for permissible and impermissible mid-year safe harbor plan amendments.]**

**[Note to reviewer: Refer to the section below on qualified automatic contribution arrangements for additional notice requirements applicable to plans using the QACA rules of Code § 401(k)(13) for purposes of meeting the ADP Test Safe Harbor.]**

Section 4. ACP Test Safe Harbor

4.1 ACP Test Safe Harbor Matching Contributions

(a) In addition to the ADP Test Safe Harbor Contributions described in Section 3.1 of this article, the Employer will make the ACP Test Safe Harbor Matching Contributions, if any, indicated in the adoption agreement for the Plan Year.

(b) ACP Test Safe Harbor Matching Contributions will be vested as indicated in the adoption agreement, but, in any event, such contributions shall be fully vested at normal retirement age, upon the complete or partial termination of the Plan, or upon the complete discontinuance of employer contributions. Forfeitures of ~~nonvested~~non-vested ACP Test Safe Harbor Matching Contributions will be used to reduce the Employer's contribution of such ACP Test Safe Harbor Matching Contributions.

**[Note to reviewer: Other language specifying the use of such forfeitures may also be acceptable. ~~However~~Except as stated below, forfeitures may not be used as ADP Test Safe Harbor Contributions~~, and if~~. If forfeitures are used as anything other than ACP Test Safe Harbor Contributions, the ~~Plan~~plan will not be exempt from Code § 416. Beginning January 18, 2017, a plan may provide that forfeitures may be applied toward Qualified Nonelective Contributions and / or Qualified Matching Contributions, including ADP Test Safe Harbor Contributions and ACP Test Safe Harbor Contributions. See LRMs XI and XIV. See Proposed Regulations §§ 1.401(k)-(1)(g), 1.401(k)-(6), 1.401(m)-1(d)(4) and 1.401(m)-5.]**

Section 5. Qualified Automatic Contribution Arrangement

**[Note to reviewer: The provisions in Section 5 are required only in a plan offering a QACA. If a plan includes a QACA, the plan must include the definitions in section 5.1(a). The Employer must contribute Default Elective QACA Deferrals pursuant to section 5.1(b). The Basic Matching Contribution is set forth in section 5.1(c) instead of section 3.1(a), above. The minimum vesting schedule for the ADP Test Safe Harbor Contributions is set forth in section 5.1(d) instead of section 3.1(c), above. The Notice requirement in section 3.2 is modified by the addition of the requirements set forth in Section 5.1(e).]**

If elected by the Employer in the Adoption Agreement, the provisions of this Section 5 regarding Qualified Automatic Contribution Arrangements (QACAs) will apply.

5.1(a) Required Definitions for a QACA.

A "QACA" is a Safe Harbor CODA with an automatic contribution arrangement that satisfies Sections 1 to 4 of this Article, as modified by Section 5 of this Article.

An "automatic contribution arrangement" is an arrangement under which, in the absence of affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the QACA.

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

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

5.1(b) Default Elective QACA Deferrals

Default Elective QACA Deferrals shall be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. Default Elective QACA

Deferrals shall cease when a Covered Employee makes an affirmative election regarding Elective Deferrals. The amount of the Default Elective QACA Deferral made for a Covered Employee each pay period is equal to the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's Compensation for the pay period. The Default Percentage must be (1) uniform for all Covered Employees, (2) cannot exceed 10% of a Covered Employee's compensation, and (3) at least:

i. 3 percent during the period that begins on the date the Covered Employee first receives a Default Elective QACA Deferral under the Plan and ends on the last day of the next plan year ("initial period"),

ii. 4 percent during the first plan year following the initial period,

iii. 5 percent during the second plan year following the initial period, and

iv. 6 percent during all subsequent plan years.

5.1(c) Basic Matching Contributions

The Basic Matching Contribution is equal to (i) 100 percent of the amount of the employee's Elective Deferrals that do not exceed 1 percent of the employee's Compensation for the Plan Year, plus (ii) 50 percent of the amount of the employee's Elective Deferrals that exceed 1 percent of the employee's Compensation but that do not exceed 6 percent of the employee's Compensation.

5.1(d) ADP Test Safe Harbor Vesting

The ADP Test Safe Harbor Contributions must be nonforfeitable for any employee who completes two years of service creditable for vesting purposes. The vesting percentage applicable to the first year of service will be as elected by the Employer in the adoption agreement.

5.1(e) Notice

In addition to the requirements set forth in section 3.2, above, the Notice must be provided sufficiently early so that an Eligible Employee has a reasonable period of time after receipt to make an affirmative election including, if applicable, how Elective Deferrals will be invested. Notwithstanding the foregoing, however, Default Elective QACA Deferrals may not begin later than (i) the pay date for the second payroll period that begins after the date the Notice is provided; and (ii) the first pay date that occurs at least 30 days after the Notice is provided. The Notice must advise Participants of the amount of Default Elective QACA Deferrals, and their right under the arrangement to elect not to have Elective Contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage), that an Eligible Employee can elect not to have Elective Contributions made (or elect an alternate Elective Contributions rate), and if applicable, determine how Elective Contributions will be invested in the absence of any affirmative election by the Employee.

Sample Adoption Agreement Language:

Article [ ] Safe Harbor CODA Provisions

[ ] If checked, the Safe Harbor CODA provisions of Article [ ] apply.

Section 3. ADP Test Safe Harbor Contributions

[ ] Basic Matching Contributions

In lieu of Basic Matching Contributions, the Employer will make the following contributions for the Plan Year [SELECT EITHER OR BOTH]:

[ ] Enhanced Matching Contributions

The Employer will make Matching Contributions to the account of each Eligible Employee in an amount equal to the sum of:

(i) the employee's Elective Deferrals that do not exceed ____ percent of the employee's Compensation for the Plan Year plus

(ii) ____ percent of the employee's Elective Deferrals that exceed ____ percent of the employee's Compensation for the Plan Year and that do not exceed ____ percent of the employee's Compensation for the Plan Year.

[IN THE BLANK IN (i) AND THE SECOND BLANK IN (ii), INSERT A NUMBER THAT IS 3 OR GREATER BUT NOT GREATER THAN 6. THE FIRST AND LAST BLANKS IN (ii) MUST BE COMPLETED SO THAT, AT ANY RATE OF ELECTIVE DEFERRALS, THE MATCHING CONTRIBUTION IS AT LEAST EQUAL TO THE MATCHING CONTRIBUTION RECEIVABLE IF THE EMPLOYER WERE MAKING BASIC MATCHING CONTRIBUTIONS, BUT THE RATE OF MATCH CANNOT INCREASE AS DEFERRALS INCREASE. FOR EXAMPLE, IN A SAFE HARBOR PLAN THAT DOES NOT INCLUDE A QACA, IF "4" IS INSERTED IN THE BLANK IN (i), (ii) NEED NOT BE COMPLETED. SIMILARLY, IN A SAFE HARBOR PLAN THAT INCLUDES A QACA, IF "3.5" IS INSERTED IN THE BLANK IN (i), (ii) NEED NOT BE COMPLETED.]

[ ] The Employer will make a Safe Harbor Nonelective Contribution to the account of each Eligible Employee in an amount equal to 3 percent of the employee's Compensation for the Plan Year, unless the Employer inserts a greater percentage here _____.

[ ] If checked, the ADP Test Safe Harbor Contributions will be made to _____ . [INSERT NAME OF DEFINED CONTRIBUTION PLAN OF EMPLOYER]

**[Note to reviewer: The option to make ADP Test Safe Harbor Contributions to another defined contribution plan is permitted only if this Plan is a nonstandardized plan.]**

Section 4. ACP Test Safe Harbor Matching Contributions

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

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

[ ] a. ____ percent of the employee's Elective Deferrals that do not exceed 6 percent of the employee's Compensation for the Plan Year.

[ ] b. ____ percent of the employee's Elective Deferrals that do not exceed ____ percent of the employee's Compensation for the Plan Year plus ____ percent of the employee's Elective Deferrals thereafter, but no Matching Contributions will be made on Elective Deferrals that exceed 6 percent of Compensation. [THE NUMBER INSERTED IN THE THIRD BLANK CANNOT EXCEED THE NUMBER INSERTED IN THE FIRST BLANK.]

[ ] c. the employee's Elective Deferrals that do not exceed a percentage of the employee's Compensation for the Plan Year. Such percentage is determined by the Employer for the year but in no event can exceed 4 percent of the employee's Compensation.

**[Note to reviewer: Other formulas for ACP Test Safe Harbor Matching Contributions are permissible, provided (i) Matching Contributions are not made on Elective Deferrals in excess of 6 percent of Compensation (ii) the amount of Matching Contributions subject to the Employer's discretion cannot exceed 4 percent of Compensation, (iii) no HCE can receive a greater rate of Matching Contributions than an NHCE at the same rate of Elective Deferrals, and (iv) the rate of Matching Contributions cannot increase as a participant's Elective Deferrals increase.**

**Matching contributions do not satisfy the ADP test safe harbor requirements or the ACP test safe harbor requirements if they are conditioned on an Employee's completion of a minimum number of ~~hours~~Hours of Service during the year or employment on a particular day.]**

Vesting of ACP Test Safe Harbor Matching Contributions

ACP Test Safe Harbor Matching Contributions will be vested in accordance with the following schedule:

[INSERT SCHEDULE OR REFER TO SECTION IN ADOPTION AGREEMENT CONTAINING VESTING REQUIREMENTS.]

**[Note to reviewer: Vesting schedules must comply with Code § 411(a)(2)(B).]**

[COMPLETE THE FOLLOWING SECTION ONLY IF THE PLAN UTILIZES A QACA FOR PURPOSES OF MEETING THE SAFE HARBOR]

Article [ ] Qualified Automatic Contribution Arrangement (QACA)

[ ] If checked, the QACA provisions of Section 5 apply

Section 5.1(a) Covered Employee

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

[ ] All Plan participants.

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

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

Section 5.1(b) Default Percentage [CHECK ONE OF THE OPTIONS BELOW AND INSERT A PERCENTAGE OR PERCENTAGES AND, IF APPLICABLE, A DATE]

[ ] The initial Default Percentage is 3%, and will increase by one percentage point as described in Section 5.b. of Article [ ] of the Plan until the Default Percentage is 6%. Each increase will be effective at the beginning of the Plan Year, or the first payroll period in which this default percentage is put in effect, and will apply for the entire Plan Year.

[ ] The initial Default Percentage is [ ] and will increase by [ ] percentage point(s) as described in Section 5.b. of Article [ ] of the Plan until the Default Percentage is [ ]%. Each increase will be effective at the beginning of the Plan Year, or the first payroll period in which this default percentage is put in effect, and will apply for the entire Plan Year. [INSERT AN INITIAL DEFAULT CONTRIBUTION PERCENTAGE THAT IS NOT LESS THAN 3% AND NOT GREATER THAN 10%. THE DEFAULT PERCENTAGE MUST BE NO LESS THAN 6% AFTER THE END OF THE THIRD PLAN YEAR AFTER THE INITIAL DEFAULT PERCENTAGE. IT MAY NOT BE NECESSARY TO INSERT A NUMBER IN THE SECOND AND FOURTH BLANKS. FOR EXAMPLE, IF "6" IS INSERTED IN THE FIRST BLANK, THE SECOND AND FOURTH BLANKS DO NOT NEED TO BE COMPLETED.]

{5.1(c) Non-electable provision}

5.1(d) Vesting of ADP Test Safe Harbor Contributions under QACA:

ADP Test Safe Harbor Contributions will be nonforfeitable pursuant to the following schedule:

End of Year 1 _____

End of Year 2 100%

[INSERT ANY PERCENTAGE FOR THE END OF YEAR ONE VESTING. ADP SAFE HARBOR CONTRIBUTIONS MUST BE 100% VESTED AFTER THE COMPLETION OF TWO YEARS OF SERVICE.

~~Vesting of ACP Test Safe Harbor Matching Contributions~~

~~ACP Test Safe Harbor Matching Contributions will be vested in accordance with the following schedule:~~

~~[Note to Reviewer: Vesting schedules must comply with Code § 411(a)(2)(B).~~

{5.1(e) Non-electable provision}

**(XXI) ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENT (EACA)**

**[Code §§ 401(k)(8)(E), 414(w) and 4979(f)(1); Reg. §§ 1.414(w)-1 and 54.4979-1(c)]**

**Statement of Requirement: LRM XXI is required only in plans offering EACAs. Under an EACA, an employee can request a distribution of Default Elective Deferrals within 90 days of the first contribution of Default Elective Deferrals, notwithstanding any limitations on distributions contained in LRM XVI. An EACA may not be added to a CODA for any Plan Year unless notice of the EACA is provided to employees prior to the beginning of such Plan Year.**

**Sample Plan Language:**

Article [ ] Eligible Automatic Contribution Arrangement (EACA)

Section 1. Rules of Application

1.1 If the Employer has elected the EACA option in the adoption agreement, the provisions of this Article shall apply for the Plan Year and, to the extent that any other provision of the Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Default Elective Deferrals will be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. The amount of Default Elective Deferrals made for a Covered Employee each pay period is equal to the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's compensation for that pay period. If the Employer has so elected in the adoption agreement, a Covered Employee's Default Percentage will increase by one percentage point each Plan Year, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the adoption agreement, the first pay period in such Plan Year that begins on or after the date specified in the adoption agreement.

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

Section 2. Definitions

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

2.2 An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

2.3 A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the EACA.

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

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

Section 3. Uniformity Requirement

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

3.2 Default Elective Deferrals will be reduced or stopped to meet the limitations under Code §§ 401(a)(17), 402(g), and 415 and to satisfy any suspension period required after a distribution.

Section 4. Notice Requirement

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

4.2 The notice must accurately describe:

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

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

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

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

Section 5. Withdrawal of Default Elective Deferrals

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

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

5.3 Unless the Covered Employee affirmatively elects otherwise, any withdrawal request will be treated as an affirmative election to stop having Elective Deferrals made on the Covered Employee's behalf as of the date specified in Section 5.2 above.

5.4 Default Elective Deferrals distributed pursuant to this Section 5 are not counted towards the dollar limitation on Elective Deferrals contained in Code § 402(g) nor for the ADP test. Matching Contributions that might otherwise be allocated to a Covered Employee's account on behalf of Default Elective Deferrals will not be allocated to the extent the Covered Employee withdraws such Elective Deferrals pursuant to this Section 5 and any Matching Contributions already made on account of Default Elective Deferrals that are later withdrawn pursuant to this Section 5 will be forfeited.

Section 6. Special Rule for Distribution of Excess Contributions and Excess Aggregate Contributions

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

**Sample Adoption Agreement Language:**

Article [ ] Eligible Automatic Contribution Arrangement (EACA)

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

Section 1. Covered Employee

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

[ ] All Plan participants.

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

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

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

[ ] The Default Percentage is [ ]%.

[ ] The initial Default Percentage is [ ]% and will increase by one percentage point as described in Section 1.2 of Article [ ] of the Plan until the Default Percentage is [ ]%. [INSERT THE HIGHEST DEFAULT PERCENTAGE THAT WILL APPLY] Each increase will be effective at the beginning of the Plan Year unless a different date is inserted here: _____. [INSERT THE DATE OF EACH INCREASE]