

# SAMPLE DOCUMENT

## ELECTIVE DEFERRED COMPENSATION PLAN – NONQUALIFIED DEFINED CONTRIBUTION PLAN WITH REDUCTION IN COMPENSATION

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### Background Information:

- *This nonqualified deferred compensation (“NQDC”) plan is a defined contribution, elective deferred compensation plan, where the employee/Executive elects to reduce a portion of current compensation and defer it to be paid at a later date.*
- *Because this is a compensation reduction plan (elective deferred compensation), the Executive is entitled to receive benefits regardless of how long he or she works for the Employer; that is, the Executive is immediately vested. If the Employer were paying for benefits (supplemental plan), it might be appropriate to have nothing vest until the Executive works until his or her Normal Retirement Age (a form of “cliff vesting”), or incorporate a vesting schedule over several years.*
- *Also, even though the Executive is immediately vested in this plan, monthly payments will not begin any earlier than age 65, even if he or she quits many years earlier. If the parties would like payments to begin sooner (e.g., shortly after quitting), they’d have to make amendments to this sample plan.*
- *If the Executive dies before reaching retirement, the Plan provides that monthly payments will begin shortly after death.*
- *This nonqualified deferred compensation plan generally would be considered to be a “pension plan” under the Employee Retirement Income Security Act of 1974 (ERISA). Nonetheless, because this plan is designed for Executives who qualify as select management or highly paid, and because the plan is unfunded and unsecured (a so-called Top Hat plan), the ERISA requirements are generally few:*
  - *The employer must send an alternative reporting and disclosure statement (a short letter) to the Department of Labor (DOL) within 120 days of creating the plan;*
  - *The plan must contain certain “fiduciary” and “claims procedure” provisions (they are included in Section 9 of this sample document).*
- *An NQDC plan is essentially just an agreement between the Employer and the Executive to defer a portion of the Executive’s compensation until some specified date in the future. However, because*

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*these benefits are not treated as separate from the Employer's general assets, the entire deferred benefit is exposed to the creditors of the Employer. The most that Executive can obtain in terms of security, without triggering constructive receipt and losing the deferral, is to bargain for the Employer to set aside money in a "rabbi trust." A "rabbi trust" (so-called because the first IRS ruling on such an arrangement related to a congregation's contributions to a trust for the benefit of their rabbi), may protect an Executive from a situation in which the Employer changes their mind about funding the benefit or undergoes a change of control. However, assets in a rabbi trust are still exposed to the creditors of an Employer.*

- *This deferred compensation plan also generally must comply with Internal Revenue Code (IRC) § 409A. Among other things, this generally requires an election to defer an amount to be made in a year before it is earned.*
- *If the Employer intends to own a life insurance policy to informally fund the benefits of this plan, the employer and employee generally should satisfy the "notice and consent" requirements of IRC § 101(j) before the policy is issued, in order to avoid income taxation of death benefit.*

### ELECTIVE DEFERRED COMPENSATION PLAN

*Nonqualified defined contribution plan with reduction in compensation*

#### 1. Establishment and Purpose of Plan

1.1 Establishment and Duration of Plan. The Board of Directors of [Name of Employer], a [State of Employer] corporation [or limited liability company or partnership, or however organized] ("Employer"), hereby establishes the Elective Deferred Compensation Plan of [Name of Employer] and its successors, effective as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. By executing a Participation Agreement, an Executive agrees to the terms of the Plan. The Plan shall continue until terminated by the Board of Directors of the Employer.

**Comment:** Nonqualified Deferred Compensation ("NDQC") plans may be adopted by a variety of entity types – such as S corporations, limited liability companies and other unincorporated business forms. However, "partners" (including greater than 2% shareholders of an S corporation) cannot avail themselves of the tax deferral benefits of NDQC plans. Accordingly, such plans are only beneficial for "owners" in the C corporation context.

1.2 Purpose of Plan. The purpose of this Elective Deferred Compensation Plan is to provide the Executive with benefits upon retirement, termination of employment, or death, as provided herein.

#### 2. Definitions

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- 2.1 “Beneficiary” means the person or persons who are designated by an Executive, in his or her Participation Agreement, to receive payments under the Plan after the Executive’s death.
- 2.2 “Compensation” means, with respect to each Executive, all salary and bonuses required to be included in such Executive’s gross income for federal income tax purposes (before required withholdings) paid or payable by the Employer to an Executive for services rendered to the Employer during the Fiscal Year in question.
- 2.3 “Deferred Benefit Account” means the account being administered for the benefit of an Executive under Section 3 of the Plan. Such account shall consist of deferrals of an Executive’s Compensation made pursuant to the Plan, plus interest on such deferrals, less distributions made to an Executive or Executive’s Beneficiary under the Plan. Such account shall not actually be funded but shall be a bookkeeping account established on the Employer’s records.
- 2.4 “Deferred Compensation” means the amount of an Executive’s Compensation which he or she elects to defer under the Plan. The amount of compensation which an Executive will be permitted to defer will be designated by the Board of Directors [for other governing body or person] of the Employer and listed on such Executive’s Participation Agreement. All deferrals of Compensation under this Plan must be made on or before November 30 of the year immediately preceding the year in which the Executive earns such Compensation from the Employer and before performing the services for which such Compensation is payable. Once made, an election to defer the receipt of that amount of Compensation for the next year cannot be revoked. The Executive may terminate his or her election or change the amount deferred for each subsequent year, but must do so no later than November 30 of each calendar year preceding the year for which the election will be effective.

***Comment:*** *It is important to state whether an Executive can change his or her deferral election from year to year. Under some plans, deferrals will be made only for a limited number of years. If so, such limitations should be specified here, or it should state that a new deferral election amount will be made each year. Under § 409A of the Internal Revenue Code (IRC), elections normally must be made before the tax year in which the compensation is earned. The sample uses November 30 but the employer could require that the election be made earlier if it makes the administration of the plan more workable. Section 409A also provides that an employee can elect to defer compensation for the balance of a tax year if he or she makes the election within 30 days after first becoming eligible to participate in the plan.*

- 2.5 “Employer” means [Name of Employer], a [State of Employer] corporation [or limited liability company or partnership, or however organized], or any successor thereto and its subsidiaries.

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- 2.6 “Entry Date” means the effective date as of which an Executive first executes a Participation Agreement under the Plan.
- 2.7 “Executive” means [name of employee participating in this plan]. Executive is among the Employer’s management and highly paid employees within the meaning of the Employee Retirement Income and Security Act of 1974 (ERISA).
- 2.8 “Fiscal Year” shall mean the 12-month period beginning on January 1 of each year.
- 2.9 “Normal Retirement Benefit” means an amount, to be paid monthly, determined as follows:
- (a) Ascertain the amount of the Executive’s Deferred Benefit Account as of the date of such determination;
  - (b) Divide the amount determined in (a), above, by the number of years remaining in the period for which benefits are to be paid to the Executive or Executive’s Beneficiary;
  - (c) Divide the quotient determined in (b), above, by twelve (12).

The result obtained above shall be the Executive’s Normal Retirement Benefit for the first year for which such Benefit is payable. As of each anniversary of the date on which such benefit is first payable to an Executive or Executive’s Beneficiary, the Executive’s Normal Retirement Benefit shall be recalculated as provided above in this Section 2.9, and shall constitute the Executive’s Normal Retirement Benefit for the following one year period.

***Comment:*** *All nonqualified defined contribution plans should specify how account balances will be translated into monthly benefits (or on whatever periodic basis they’ll be paid). In the above example, account balances will continue to earn interest after retirement. Retirement benefits will be recalculated annually (on the anniversary of the date on which the Executive is first entitled to payment; if the plan has many participants, it generally is administratively easier to re-compute all benefits on the first day of each Fiscal Year). If desired, the monthly benefit could instead be computed by dividing the account balance as of retirement by the number of months for which benefits are to be paid (thereby depriving the Executive of post-retirement interest). Alternatively, the account balance as of retirement could be amortized at a fixed or specified interest rate (the lower the rate, the lower the benefit).*

- 2.10 “Normal Retirement Age” means, with respect to each Executive, the date on which he or she attains age sixty-five (65).

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- 2.11 “Normal Retirement Date” means, with respect to each Executive, the later of the first day of the first month following which he or she attains Normal Retirement Age or the first day of the first month following the termination of Executive’s employment with the Employer.
- 2.12 “Participation Agreement” means the agreement executed by the Executive upon being admitted to the Plan. The Participation Agreement shall be an integral part of the Plan with respect to the Executive who executes such Participation Agreement.
- 2.13 “Plan” means this Elective Deferred Compensation Plan of the Employer and its successors as described herein as the same may hereafter from time to time be amended.

### 3. Administration of Accounts

- 3.1 Deferrals of Compensation by an Executive pursuant to the Plan shall be credited to such Executive’s Deferred Benefit Account as of the date on which such Compensation would have been paid to such Executive if the Executive had not agreed to defer the receipt of such Compensation. Any distribution made to an Executive or Executive’s Beneficiary pursuant to the Plan shall be deducted from such Executive’s Deferred Benefit Account as of the date on which such distribution is made.
- 3.2 During each Fiscal Year, each Executive’s Deferred Benefit Account shall be credited with interest as of the last day of such Fiscal Year. Interest shall be credited on the amount that was in the account as of the first day of such Fiscal Year.
- 3.3 The interest rate per annum which shall be credited to each Executive’s Deferred Benefit Account for each Fiscal Year shall be the rate or rates specified by the Board of Directors [or other governing body or person] of the Employer for such Year.

**Comment:** *The above provision contemplates an annual interest rate to be declared by the Employer (in this instance, through the Board of Directors).*

**Comment:** *In some cases, the parties instead might want the account balances to reflect the value of a hypothetical investment or asset (such as the cash value of a life insurance policy). When using this approach, remember that account balances under this agreement are only hypothetical bookkeeping entries. Consequently, the Employer might not actually buy the asset used to measure the account balance. Even if the Employer does buy such asset, it might later liquidate that asset, in whole or in part. Therefore, the account balance should be determined as if the Employer actually purchased, and continued to hold, such asset.*

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### 4. Payment of Benefits

- 4.1 If an Executive's employment with the Employer is terminated for any reason other than the death of such Executive, then the Employer will make a series of payments to such Executive, each such payment to be made monthly and to be equal to the Executive's Normal Retirement Benefit. The first such payment shall be made on the Executive's Normal Retirement Date and the remaining payments shall be made on the first day of each succeeding month until [ Total Number of Monthly Payments to be Provided ] payments have been made. If the Executive dies before all the payments due to him or her have been made, then any remaining payments shall be made to the Executive's Beneficiary. If the Executive's Beneficiary dies before receiving all the payments due to him or her, then the remaining payments shall be made to the personal representative of the Beneficiary's estate.

***Comment:*** *If the Employer is a publicly traded company and the Executive is a key employee as defined in IRC § 416(i), the plan document should provide that the payment of benefits must be postponed for six months after termination of employment to comply with rules under § 409A. See Treas. Reg. § 1.409A-1(c)(3)(v).*

- 4.2 If an Executive's employment with the Employer is terminated on account of his or her death, and neither such Executive nor Executive's Beneficiary is entitled to benefits under Section 4.1, above, then the Employer will make a series of payments to such Executive's Beneficiary, each such payment to be made monthly and to be equal to the Executive's Normal Retirement Benefit. The first such payment shall be made on the first day of the first month following the Executive's death and the remaining payments shall be made on the first day of each succeeding month until [Total Number of Monthly Payments] payments have been made. If the Executive's Beneficiary dies before all the payments due to him or her have been made, then any remaining payments shall be made to the personal representative of the Beneficiary's estate.

***Comment:*** *When the benefit is triggered by death, the "Normal Retirement Benefit" paid to the Executive's Beneficiary refers to the Executive's Deferred Benefit Account on the date of death, divided into monthly payments. The payments begin soon after death; they are not delayed until the Executive would have reached Normal Retirement Age.*

***Comment:*** *If the employer also provides a separate split dollar plan to the Executive through an Employer-owned life insurance policy, this deferred compensation plan might want to provide a smaller amount, or no amount, payable at death. This is particularly true if the life insurance policy is meant to informally fund the death benefit under this deferred compensation plan, as the Employer likely will not want to be obligated to pay total benefits under the two plans that exceed the total death benefit provided by the life insurance policy. The Employer should generally also make sure, however, that it's not the*

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*case that any taxable benefit owed under this deferred compensation plan is being reduced in exchange for the providing of a welfare benefit – which generally includes a split dollar plan – as Treasury Regulation § 1.409A-2(b)(2) states that doing so would be treated as a taxable payment under the deferred compensation plan anyway.*

**Comment:** *The above provisions also state that, if a Beneficiary dies before receiving all payments, the remaining payments will be made to the Beneficiary’s estate. Usually, a married Executive names his or her spouse as Beneficiary. The value of the benefits paid to the spouse/Beneficiary generally will qualify for the estate tax marital deduction (for the Executive’s estate) if payments due after the later death of the surviving spouse are payable to this spouse’s estate. There are other alternatives for qualifying the benefits for the marital deduction such as providing the surviving spouse a general power of appointment or electing to treat the benefit as qualified terminal interest property (QTIP).*

- 4.3 If, at the death of the Executive, there is no properly designated living Beneficiary, or, if the Beneficiary is an entity (e.g., a trust) and such entity is not then in existence, then any payments due under this Plan shall be made to the Executive’s estate.
- 4.4 Sections 4.1, 4.2, and 4.3, above, constitute the only conditions under which benefits are payable under the Plan.

**Comment:** *Internal Revenue Code § 409A also allows for payments to be made upon disability, change of ownership or control of the Employer, at a specified time, or upon the occurrence of an unforeseeable emergency. If a plan includes any of these allowable distribution triggers, the plan document should incorporate the specifications set forth in the Internal Revenue Code § 409A and its corresponding regulations.*

**Comment:** *In the event that a NQDC plan fails to satisfy the requirements of § 409A, the Executive sustains a number of adverse consequences, namely: (i) inclusion of the deferred compensation is accelerated into the earliest open year, (ii) a 20% penalty tax is payable, and (iii) penalty interest (an additional 1% over the underpayment rate) is payable. Against this background, a sophisticated Executive is likely to negotiate for some sort of indemnification—especially where the Employer retains broad power to amend the Plan in a manner that could cause a failure. Below is a sample tax indemnity provision.*

[4.5. **Special Tax Indemnity.** *The Employer shall pay over to Executive an additional amount such that, when such additional amount is taken into account, the net amount retained by the from the payments under this Agreement, after taking into account the Executive’s obligation to pay all taxes attributable thereto under section 4999 of the Code or 409A(a)(1)(B) of the Internal Revenue Code (the “Special Taxes”) and the additional federal and state income taxes attributable to the inclusion of the additional*

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*amount itself (together with interest and penalties thereon), shall be equal to what such net amount retained would have been if none of the Special Taxes had been applicable. In calculation the additional amount payable under this subsection (g), the Executive shall be deemed to pay federal and state income taxes at the highest marginal rates.]*

**Comment:** *While the consequences of a § 409A problem appear to fall almost entirely on the Executive, there are some consequences for the practice that are less obvious, but still very important. Specifically: If and when there is acceleration of the compensation into the earliest open year, the Employer would be regarded as having had a withholding obligation on the entire present value of the stream of payments for that year. Since this withholding would not have occurred, the Service would look to collect this amount —plus interest (and, perhaps, penalties)—from the Employer. The Employer would then be left to its remedies to recover the later year withholding that it did pay by filing a Form 941X. However, there are other subtleties having to do with FICA and possible use of IRC § 3121(v)(2) which may also help.*

### 5. **Rights and Duties of Executives and Beneficiaries**

- 5.1 No Executive or any other person shall have any interest in any fund or in any specific asset or assets of the Employer by reason of this Plan, or for any other reason, or have any right to receive any distributions under the Plan except as and to the extent expressly provided under the Plan. Any person entitled to a payment under the Plan is a general unsecured creditor of the Employer.
- 5.2 Each Executive shall receive an updated copy of the Plan and shall receive copies of any amendments to the Plan within ten (10) days after their adoption.
- 5.3 No right of any Executive or any Beneficiary or any other person to receive payment hereunder shall be subject to alienation, transfer, sale, assignment, pledge, attachment, garnishment, or encumbrance of any kind. Any attempt to alienate, transfer, sell, assign, pledge, attach, or otherwise encumber any such payments whether presently or hereafter payable shall be void. No payment under this Plan shall be subject to debts or liabilities of any Executive or Beneficiary.
- 5.4 Every person receiving or claiming payments under the Plan shall be presumed to be mentally competent until the date on which the Employer receives a written notice in a form and manner acceptable to the Employer that such person is incompetent and that a guardian, conservator or other person legally vested with the interest of his or her estate has been appointed. If guardian or conservator of the estate or any person receiving or claiming payments under the Plan is appointed, payments under this Plan may be made to such

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guardian or conservator provided that the proper proof of appointment and continuing qualification is furnished in a form and manner acceptable to the Employer. Any payments so made shall be a discharge of any liability of the Employer for such payments.

- 5.5 Each person entitled to receive a payment under this Plan, whether an Executive, Beneficiary, a guardian or otherwise, shall provide the Employer with such information it may from time to time deem necessary or in its best interest in administering the Plan. Any such person shall also furnish the Employer with such documents, evidence, data or other information as the Employer may from time to time deem necessary or advisable.

### 6. Duties of the Plan Administrator

- 6.1 The Plan shall be administered by the Plan Administrator.
- 6.2 The Plan Administrator may from time to time establish rules and regulations for the administration of the Plan and adopt standard forms for such matters as elections, beneficiary designations and applications for benefits, provided such rules and forms are not inconsistent with the provisions of the Plan.
- 6.3 All determinations of the Plan Administrator shall be binding on all parties. In construing or applying the provisions of the Plan, the Employer shall have the right to rely upon a written opinion of legal counsel, which may be independent legal counsel or legal counsel regularly employed by the Employer, whether or not any question or dispute has arisen as to any distribution from the Plan.
- 6.4 The Plan Administrator shall be responsible for maintaining books and records for the Plan. Each Executive or Executive's Beneficiary shall be notified annually of the amount of his or her Deferred Benefit Account.

### 7. Amendment

- 7.1 The Employer reserves the right to amend the Plan at any time and for any reason, provided that such amendment will not cause the Plan to violate Section 409A of the Internal Revenue Code or its corresponding regulations.
- 7.2 However, no such amendment shall have the effect of reducing the Deferred Benefit Account, computed as of the date of such amendment.

***Comment:*** Internal Revenue Code § 409A generally prohibits payments to occur earlier than originally called for in the plan, and permits the postponement of payments only if certain requirements are met (generally, any amendment or election to delay payment

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*must occur at least 1 year before the first payment is scheduled to be made, and the new payment date must be at least 5 years later than that which was originally scheduled). There are exceptions to the rules against accelerating payments, including those under the “termination and liquidation” exception, or in the event of an unforeseen financial hardship suffered by the Employee, but only if several technical requirements are met. Interested readers should particularly consult IRC § 409A(a)(2) and (4); Treas. Reg. §§ 1.409A-1(c)(3)(iii), -2(b)(1), and -3(j)(4)(ix)(C).*

**Comment:** *What’s more, the Executive might not agree to this provision giving the Employer the unilateral right to amend the plan as long as it complies with IRC § 409A. Another reasonable alternative is to state that the Employer can make only those amendments that it determines are necessary to comply with IRC § 409A, or that no amendments are permitted unless agreed to by the Executive as well. In such a case, this Amendment section could read as follows: “The Employer may not amend, modify, terminate, or discontinue the Plan at any time without the written consent of the Executive.”*

### **8. Not a Contract of Employment**

8.1 This Plan is not a contract of employment between the Executive and the Employer. No provision of this Plan restricts the right of the Employer to discharge an Executive or restricts the right of an Executive to terminate his or her employment.

### **9. Claims Procedure**

9.1 If for any reason a claim for benefits under this Plan is denied by the Employer, the Plan Administrator shall deliver to the Claimant a written explanation setting forth the specific reasons for the adverse benefit determination; specific references to the Plan section on which the adverse benefit determination is based; a description of any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary; and a description of the Plan’s review procedure including a statement of the Claimant’s rights to bring a civil action under Section 502 of ERISA following an adverse determination on review, all written in a manner calculated to be understood by the Claimant. For this purpose:

- (a) The Claimant’s claim shall be deemed filed when presented orally or in writing to the Plan Administrator.
- (b) The Plan Administrator’s explanation shall be in writing delivered to the Claimant within 90 days of the date the claim is filed unless the Plan Administrator determines that special circumstances require an extension of time for processing the claim. If such an

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extension of time for processing is required, written notice of the extension shall be furnished to the Claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the Plan Administrator expects to render the benefit determination. If the period of time is extended because the Claimant has failed to provide necessary information to decide the claim, the period for making the benefit determination shall be tolled from the date on which the notification of the extension is sent to the Claimant, until the date on which the Claimant provides the information. Failure to provide notice of decision in the time specified is the same as denial of the claim and the Claimant is entitled to require a review of the denial under the review procedures.

- 9.2 The Claimant (or his or her duly authorized representative) shall have 60 days following the receipt of the denial of the claim to file with the Plan Administrator a written request for review of the denial. For such review, Claimant shall have the opportunity to submit written comments, documents, records, and other information relating to the claim for benefits. Claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claim for benefits. The review of the claim shall take into account all comments, documents, records, and other information submitted by the Claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination.
- 9.3 In the case of a request for review of an adverse benefit determination, the Plan Administrator is designated, solely for purposes of this claims procedure, as the appropriately Named Fiduciary for a full and fair review. On review, the Plan Administrator shall notify the Claimant not later than 60 days after the Company's receipt of the request for review, unless the Plan Administrator determines that special circumstances require an extension of time for processing the claim, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of the request for review. If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the Claimant prior to the termination of the initial 60-day period. In no event shall any such extension exceed a period of 60 days from the end of the initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the Plan expects to render the determination on review. If the period of time is extended because the Claimant has failed to provide necessary information to decide the claim, the period for making the benefit determination shall be tolled from the date on which the notification of the extension is sent to the Claimant, until the date on which the Claimant provides the information. The decision on review shall be in writing and in the case of an adverse benefit determination shall include: (i) the specific reason or reasons for the decision; (ii) references to the specific Plan provisions on which the benefit determination is

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based; (iii) a statement that the Claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records and other information relevant to the Claimant's claim for benefits; and (iv) a statement of the Claimant's right to bring an action under Section 502(a) of ERISA, all written in a manner calculated to be understood by the Claimant. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

9.4 The Secretary of the Employer is hereby designated as the Named Fiduciary and Plan Administrator of this Plan.

### 10. Miscellaneous

10.1 **Notices.** Any and all notices required or permitted hereunder shall be in writing and shall be delivered to the individual designated below for the recipient thereof or for such individual's attention during normal business hours to a receptionist or other person available to receive incoming deliveries at the address designated below for such recipient or sent to such recipient via facsimile or electronic mail to the facsimile number/e-mail address designated below for such recipient or by registered or certified mail, return receipt requested and postage prepaid, to the address designated below for such recipient:

To Employer: \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_

Facsimile: (\_\_\_\_) \_\_\_\_\_  
Electronic Mail: \_\_\_\_\_

To Executive: \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_

Facsimile: (\_\_\_\_) \_\_\_\_\_  
Electronic Mail: \_\_\_\_\_

Notices delivered as provided above shall be deemed given upon such delivery. Notices sent via facsimile or electronic mail as provided above shall be deemed given upon their successful transmission. Notices mailed as provided above shall be deemed given on the date of their deposit in the United States mail. Any party hereto may change the individual, facsimile number, e-mail address and/or street address to which notices thereto should be given hereunder by giving notice of such change to the other party hereto in accordance with the provisions of this Section.

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- 10.2 **Further Assurance.** Each of the parties hereby agrees to execute and deliver such documents and to take such other actions at any time and from time to time hereafter as may be reasonably requested by the other party to carry out the provisions or purposes of this Plan.
- 10.3 **Governing Law.** This Plan is being delivered and is intended to be performed in [*Name of State*] and shall be construed and enforced in accordance with the laws of [*Name of State*].
- 10.4 **Interpretation.** The headings in this Plan are intended for convenience only and shall not affect the meaning or interpretation hereof. In interpreting this Plan, whenever the context so permits, (a) the singular shall include the plural and the plural shall include the singular, (b) any gender shall include all genders and (c) the term "including" shall mean "including, without limitation." The word "including" shall mean "including, without limitation," and any exhibit, schedule or other document referred to herein is incorporated in this Plan and made a part hereof.
- 10.5 **Counterparts.** This Plan may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument, or with multiple signature pages which may be delivered electronically.
- 10.6 **Expenses.** All expenses of administering the Plan shall be paid by the Employer unless the Plan provides to the contrary.
- 10.7 **Integration.** This Plan constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes any and all oral, written or other negotiations, warranties, representations, agreements or other understandings in regard thereto.

[SIGNATURE PAGE FOLLOWS]

## SAMPLE DOCUMENT

IN WITNESS WHEREOF, this Plan has been signed, entered into, and executed as of \_\_\_\_\_,  
20\_\_\_\_.

**EMPLOYER:** [NAME OF EMPLOYER]

By: \_\_\_\_\_  
[Print Name]

Title: \_\_\_\_\_

**EXECUTIVE:** \_\_\_\_\_  
[Print Name of Executive/Participant]

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## SAMPLE DOCUMENT

### **PARTICIPATION AGREEMENT** **ELECTIVE DEFERRED COMPENSATION PLAN**

As provided in the above referenced Plan dated \_\_\_\_\_, 20\_\_\_\_, you, [Name of Executive/Participant], are hereby invited to participate. By accepting this invitation, you acknowledge that you have read the Plan, understand its terms, understand that benefits will be paid pursuant to the Plan only under the specific circumstances described therein, understand that you are a general unsecured creditor of [Name of Employer], and that you have no interest in specific assets owned by [Name of Employer].

The annual amount of Compensation you hereby elect to defer is \$\_\_\_\_\_. Such amount will be deducted from your pay beginning January 1 of the next taxable year in accordance with the Employer's normal payroll practices. Once made, you may not revoke your election to defer the receipt of that amount of Compensation for the next year. For each following year, you may terminate your election or change the amount deferred, but must do so no later than November 30 of each calendar year preceding the year for which the election will be effective.

The interest rate per annum to be credited to your Deferred Benefit Account for the first Fiscal Year during which you participate in the Plan shall be \_\_\_\_\_%. Thereafter such rate shall be the rate specified by the Board of Directors [or other governing body or person] of the Employer as being applicable to your Deferred Benefit Account for such Fiscal Year.

Today's date is \_\_\_\_\_, 20\_\_\_\_\_.

[NAME OF EMPLOYER]

By: \_\_\_\_\_  
[Signature Above; Print Name Here]

Title: \_\_\_\_\_

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## SAMPLE DOCUMENT

I hereby accept the invitation of *[Name of Employer]* to participate in its Elective Deferred Compensation Plan upon the terms and conditions set forth therein and in this Participation Agreement.

\_\_\_\_\_  
[Signature of Executive/Participant Above; Print Name Here]

For purposes of the plan, I hereby designate the following Beneficiary or Beneficiaries (if none named, the beneficiary will be the personal representative of my estate):

\_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(Beneficiary)

If the above-named beneficiary is not alive when payments are first due to be made under the Plan, I hereby designate the following Beneficiary or Beneficiaries:

\_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(Contingent Beneficiary)

— For the Use of Legal Counsel Only. Not for use by Financial Representatives with the public. —

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