

SAMPLE DOCUMENT

SERP (SUPPLEMENTAL EXECUTIVE RETIREMENT PLAN) INFORMALLY FUNDED WITH INVESTMENT ACCOUNT

Nonqualified defined contribution plan with no reduction in compensation; contributions from employer only

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Background Information:

- *This nonqualified deferred compensation (“SERP”) plan is a defined contribution, supplemental income plan, where the employee/Executive does not reduce current compensation, but the Employer provides supplemental benefits to be paid at a future date.*
- *This Plan calls for the Executive to become vested in the retirement benefits after a certain number of years, as well as ratable vesting in the case of a separation from service due to death or disability and accelerated vesting in the event of a change of control or Plan termination. There is optional language providing for the Executive to remain completely unvested and receive no benefits unless he or she remains employed by the Employer until age 65 (this is a form of “cliff vesting,” and here the vest date is the traditional retirement age of 65). The drafting attorney can amend this if the parties so prefer (it could vest earlier but still pay at retirement, or vest and pay earlier, or vest over several years, etc.)*
- *If the Executive works to retirement, this sample Plan calls for monthly payments to begin shortly after retirement.*
- *If the Executive dies before retirement, this sample Plan calls for monthly payments to 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).*
- *A SERP 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. Any informal funding must be part of Employer’s general assets, and therefore the entire deferred benefit is exposed to the*

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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 SERP also generally must comply with Internal Revenue Code (IRC) § 409A.*
- *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.*

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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 Supplemental Income 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: *A nonqualified deferred compensation plan such as this SERP may be adopted by a variety of entity types – such as S corporations, limited liability companies and other unincorporated business forms. Such arrangements can benefit business owners of any entity type in facilitating buyouts. However, “partners” (including greater than 2% shareholders of an S corporation deemed to be “partners”) cannot avail themselves of the same tax deferral benefits that a SERP provides to shareholders of a corporation.*

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

2. Definitions

- 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 “Cause” shall mean the occurrence of any of the following events with respect to the separated Executive: (i) a willful attempt to cause injury to the Employer or any of its affiliates; (ii) being convicted of, or pleading guilty or *nolo contendere* to, a felony or any other crime of moral turpitude, other than a vehicular violation not involving loss of life; (iii) engaging in any grossly negligent or willful act or omission to act that is materially detrimental to the reputation, character or standing of the Employer or any of its affiliates or any of their respective customers or clients; (iv) breaching any confidentiality obligation or other restrictive covenant entered into between the Employer and the Executive excluding for this purpose an isolated and inadvertent breach that is promptly remedied; (v) failing or refusing to comply in any respect with the policies, standards or regulations applicable to the Employer, excluding for this purpose an isolated and inadvertent act or failure to act that is promptly remedied; or (vi) habitual neglect, misconduct, negligence or failure by the Executive that interferes with the performance of the Executive’s duties.

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2.3 “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.

2.4 “Death Benefit” means, with respect to any Executive, an amount to be paid monthly and designated as a Death Benefit by the Board of Directors [or other governing body or person] of the Employer and listed as such on the Executive’s Participation Agreement. Nevertheless, if an Executive dies as a result of suicide within [one (1) year] of his or her Entry Date, the amount of such Executive’s Death Benefit shall be zero (0).

Comment: *This definition contemplates a fixed sum monthly death benefit. If the death benefit instead will be computed in accordance with a formula, then that formula can be specified here.*

Comment: *The Death Benefit is zero if the Executive commits suicide within 1 year of entering into the Plan because, to the extent the Employer purchases a life insurance policy to informally fund the benefits provided by this Plan, the policy’s “suicide clause” will likely prevent it from paying its Death Benefit if the insured commits suicide within 1 year of policy issuance. The practitioner should make sure that this provision is coordinated with the insurance policy.*

Comment: *If the employer also provides a separate split plan to the Executive through an Employer-owned life insurance policy, the parties should eliminate the Death Benefit provisions. This is particularly true if the life insurance policy is meant to informally fund the Death Benefit under this supplemental income plan, as the Employer likely will not want to be obligated to pay total benefits that exceed the total Death Benefit to be provided by the life insurance policy. The Employer should also make sure that any taxable benefit owed under this supplemental income plan is not 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)(i) states that doing so would be treated as a payment under the supplemental income plan anyway.*

2.5 “Deferred Benefit Account” means the account being administered for the benefit of an Executive under Section 3 of this Plan. Such account shall consist of amounts credited to such account pursuant to the Plan, plus interest on such amounts, 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.

2.6 “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.

- 2.7 “Entry Date” means the effective date as of which an Executive first executes a Participation Agreement under the Plan.
- 2.8 “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).
- 2.9 “Fiscal Year” shall mean the 12-month period beginning on January 1 of each year.
- 2.10 “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) Multiply the amount determined in (a) by a fraction, the numerator of which is the amount of the Executive’s Deferred Benefit Account in which the Executive is vested under Section 4.1, below, and the denominator of which is the total amount of the Executive’s Deferred Benefit Account;
 - (c) Divide the product determined in (b), above, by the number of years remaining in the period for which benefits are to be paid to the Executive or Executive’s Beneficiary; and
 - (d) Divide the quotient determined in (c), 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).

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

[2.12 “Normal Retirement Date” means, with respect to each Executive, the later of the first day of the month following which he or she attains Normal Retirement Age or the 1st day of the month following the termination of Executive’s employment with the Employer.]

Comment: *The terms Normal Retirement Age and Normal Retirement Date would be used if Employer opts to use a “cliff vesting” approach, in which Executive would only be entitled to the Deferred Benefit Account if he or she remains employed from the Date of Entry until Normal Retirement Age. The default provisions of this SERP call for vesting over a discrete period of years, as well as ratable vesting in the case of a separation from service due to death or disability.*

2.13 “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.

2.14 “Plan” means this Supplemental Income 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 With respect to each Executive, for the first Fiscal Year in which an Executive begins participation in the Plan, the Employer shall credit _____ % of such Executive’s Compensation earned during such Fiscal Year, but after such Executive’s Entry Date, to such Executive’s Deferred Benefit Account (if such Executive is continuously employed by the Employer on a full-time basis from his or her Entry Date until the end of the Fiscal Year which includes such Executive’s Entry Date). For each subsequent Fiscal Year (i.e., after the year that contains the Executive’s Entry Date) during which an Executive is continuously employed by the Employer on a full-time basis, the Employer shall credit _____ % of such Executive’s Compensation for such Fiscal year to such Executive’s Deferred Benefit Account. Any amounts credited to an Executive’s Deferred Benefit Account shall be credited on the first day of the Fiscal Year following the Fiscal Year for which such credit is to be made. 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.

Comment: *See Section 2.2 for the definition of Compensation. Pursuant to the above clause, a percentage of an Executive’s Compensation is credited to his or her account each year. Alternatively, the Employer (e.g., through the Board of Directors) could each year declare the dollar amount to be credited to an Executive’s account (similar to a*

profit sharing plan) or this agreement could state that a fixed dollar amount is to be credited each year.

- 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, in whole or in part, that asset. Therefore, the account balance should be determined as if the Employer actually purchased, and continued to hold, such asset.*

4. **Vesting and Payment of Benefits**

- 4.1 The entire Deferred Benefit Account shall vest on the _____ (____th) anniversary of the Executive's Entry Date; *provided, however*, that in the event of the occurrence of any of the following events:
- (a) death of the Executive;
 - (b) disability of the Executive;
 - (c) a change of control event (as defined in Treas. Reg. §1.409A-3(i)(5)); or
 - (d) termination of the Plan

the Deferred Benefit Account, if not otherwise fully vested, shall vest as follows: (i) in the event of a change of control event (as defined below) or termination of the Plan, the entire Defined Benefit Account will immediately be fully vested; and (ii) in the event of the death or disability of the Executive, a portion of the Deferred Benefit Account shall be deemed to have vested in increments of _____ percent (____%) per year for each anniversary date elapsed prior to the Executive's disability and any unvested portion as of that time shall be

forfeited. However, any vested interest in the Defined Benefit Account shall only be payable at the time and in the manner described in Section 4.2, below. In the event of the separation from service for any reason of an Executive other than on account of the death or disability of Executive or a change of control event, any portion of the Deferred Benefit Account which is not yet vested shall be forfeited. However, any such separation from service shall not affect the Executive's rights with respect to any portion of the Deferred Benefit Account vested on the date of such separation from service unless such separation from service is involuntary by the Employer for Cause, in which event any interest in the Deferred Benefit Account which is vested on the date of such separation from service shall be forfeited.

Optional "Cliff Vesting": *"If an Executive is actively and continuously employed by the Employer on a full-time basis from his or her Entry Date until he or she attains Normal Retirement Age, then the Employer will make a series of payments to the 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 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] total payments have been made. If the Executive dies before all the payments due to him or her have been made, the 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: *Under to the above optional provision, an Executive remains completely unvested and receives no benefits unless he or she remains employed by the Employer until age 65, and then monthly payments begin shortly afterwards.*

Comment: *If the Employer is a publicly traded company and the Executive is a key employee as defined in § 416(i) of the Internal Revenue Code, 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.*

- 4.2 Upon an Executive's separation from service with the Employer, other than by the Employer for Cause, then the Employer will make a series of payments to the 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 first day of the of the sixth (6th) full calendar month after the date of Executive's separation from service, and the remaining payments shall be made on the first day of each succeeding month until [Total Number of Monthly Payments to be Provided] total payments have been made. If the Executive dies before all the payments due to him or her have been made, the 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.

- 4.3 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 4.2 that are equal to or greater than the Death Benefit, then in lieu of any benefits under Section 4.2 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 Death Benefit. The first such payment shall be made on the first day of the 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 to be Provided] 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: *The monthly Death Benefit amount payable here is chosen by the parties and put forth on the Participation Agreement and doesn't necessarily have to be related to the amount of the Normal Retirement Benefit.*

Comment: *If the employer also provides a separate split dollar plan to the Executive through an Employer-owned life insurance policy, this supplemental income 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 supplemental income 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 case that any taxable benefit owed under this supplemental income 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).*

- 4.4 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.

- 4.5 The foregoing provisions of this Section 4 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 SERP 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.

- [4.6 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 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 calculating 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.

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

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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 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 Executive's Deferred Benefit Account.

7. **Amendment**

- 7.1 The Employer may not amend, modify, terminate, or discontinue the Plan at any time without the written consent of the Executive.
- 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 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: Another alternative would be to give the Employer the unilateral right to amend the plan as long as such amendment complies with IRC § 409A. In such a case, this Amendment section could read as follows: "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."

8. **Not a Contract of Employment**

- 8.1 This Plan is not a contract of employment between an 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

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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 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 Employer'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

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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 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. Construction and Expense

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: _____

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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.

- 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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PARTICIPATION AGREEMENT
DEFINED CONTRIBUTION SUPPLEMENTAL INCOME 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].

For purposes of the Plan, your monthly Death Benefit is \$_____. [*Insert dollar amount to be paid monthly*]

Comment: Delete reference to Death Benefit if Employer maintains a separate split dollar plan.

Today's date is _____, 20_____.

[NAME OF EMPLOYER]

By: _____
[Signature Above; Print Name Here]

Title: _____

I hereby accept the invitation of [Name of Employer] to participate in its Supplemental Income 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)

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SAMPLE DOCUMENT

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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