

▶ **New 403(b) Regulations**  
**WHAT EMPLOYERS MUST DO**



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## PLAN DOCUMENT FOR 403(b) TAX-DEFERRED ANNUITY PLAN VOLUNTARY EMPLOYEE CONTRIBUTIONS ONLY

The enclosed plan document is being provided for use with TDA plans that include only elective deferrals of participants (i.e., employee contributions made pursuant to voluntary salary reduction agreements). It is intended to satisfy the requirements of new IRS regulations issued under Code Section 403(b), which become effective for most plan sponsors January 1, 2009.

The document may be used whether your TDA plan is subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), or is exempt from ERISA. It contains provisions intended to satisfy ERISA requirements, which only apply if your plan is subject to ERISA.

You should review the information on page 6 of this brochure, which provides discussion of the requirements for a TDA plan to be exempt from ERISA and some important implications of being subject to ERISA. Employers are encouraged to review this document with their own legal counsel.

### Effective and Adoption Dates

Generally, employers must adopt a written plan no later than December 31, 2008, to be effective January 1, 2009.

For a plan maintained pursuant to a collective bargaining agreement that was in effect on July 26, 2007, the plan document must be adopted by the earlier of (1) the date the collective bargaining agreement (without extensions) expires, or (2) July 26, 2010.

For a plan maintained by a church organization, a one year delay applies only if authority to amend the plan is held by a “convention of churches”; in that case, the plan document must be adopted by December 31, 2009.

The IRS regulations provide that failure to adopt a written plan on a timely basis disqualifies the entire plan. There are no exceptions. This plan document was prepared with a pre-printed effective date of January 1, 2009. Collectively bargained plans or plans of church conventions wishing to adopt a written plan as of a later effective date must change the pre-printed effective date.

### Items to be Completed

IRS regulations require that certain provisions must be included in the written plan. Most of those provisions are included in the enclosed plan document, but a few must be added by the employer:

**a) Administrator** – The plan must specify who has various administrative responsibilities. The document provides that unless the employer names a third-party administrator in the space provided, the employer is the administrator. For a plan of an employer (other than a public school or church organization) that is intended to be exempt from ERISA, the employer cannot be the administrator since the administrator’s authority (and responsibility) to decide certain questions and approve various participant requests such as loans and withdrawals is inconsistent with the DOL safe-harbor regulation for non-ERISA TDA status. (See the discussion of ERISA issues beginning on page 6.)

Neither Mutual of America nor any of its employees may be named as the administrator.

**b) Loans** – This document provides that loans are permitted unless a box is checked to indicate otherwise.

**c) Annuity Contract or Custodial Accounts** – The IRS regulations require that the plan document specifically identify all the “annuity contracts” (including Code Section 403(b)(7) custodial accounts treated as annuity contracts) under the plan and which annuity contract issuers are approved to accept new contributions under the plan, and/or exchanges or transfers. Employers must complete the Appendix to specify those annuity contracts and issuers.

***The IRS has provided two special rules that may permit certain contracts to be excluded from the plan, so called “orphaned” contracts and “grandfathered” contracts.***

**“Orphaned Contracts”** – It is Mutual of America’s understanding of this IRS guidance that only individual annuity contracts, i.e., not group annuity contracts, can be considered “orphaned” contracts and then only if the employer has not remitted any contributions for any participants under its plan to the company that issued such contracts since before 2008; further, if contributions were remitted after 2004 to that company, these contracts can only be considered “orphaned” contracts that do not have to be included in the plan if the employer makes a “reasonable good faith effort” to identify them and have them reconnected to the plan (e.g., contacting all participants and asking if they have any such contracts). Mutual of America does not issue individual contracts and therefore none of its contracts would qualify as “orphaned.” You should check with your legal counsel, tax adviser or other company that issued individual contracts for details concerning this exception.

**“Grandfathered Contracts”** – Mutual of America’s understanding of IRS guidance is that “grandfathered contracts” are contracts, including group annuity contracts, issued by companies to which the employer has not remitted any contributions for any participants under the plan after 2004. Such “grandfathered” contracts do not have to be included as part of the plan or identified in the plan document.

If you have a Mutual of America TDA contract to which you have not remitted any contributions after 2004, but you also have a Mutual of America 403(b) Thrift plan contract to which you did remit contributions after 2004, then the TDA contract would only be “grandfathered” if it were a separate plan from the Thrift plan. For example, if you had a TDA plan that was not subject to ERISA and a Thrift plan that was subject to ERISA, you may have treated them as two separate plans. (See discussion concerning ERISA requirements beginning on page 6.) If both contracts were considered by you to be under one plan, then the old TDA contract would not qualify as a “grandfathered” contract and must be included under the Thrift plan.

“Orphaned” or “grandfathered” contracts do not have to be specified in the plan document Appendix or considered part of your plan.

## **Eligible Employees**

The IRS regulations include a “universal availability” requirement for employee contributions. Essentially, all employees (with limited exceptions) must be permitted to make contributions if any employee is permitted to do so, and must be notified annually of their right to contribute. The only employees that may be excluded under the regulations and that are excluded by this plan document are (i) nonresident aliens with no U.S. source income and (ii) employees who are eligible to make employee contributions to another 403(b) plan, a 401(k) plan, or a governmental 457(b) eligible deferred compensation plan of the employer.

The IRS regulations may permit exclusion of certain employees who normally work fewer than 20 hours per week if certain conditions are satisfied, but this plan document does not exclude them for two reasons. First, plans subject to ERISA are not permitted to exclude employees on the basis of the “less than 20 hours per week” rule in the IRS regulations. Second, even for non-ERISA plans, the new IRS regulations permit exclusion of such employees only if the employer determines that they actually worked fewer than 1000 hours in the prior year (with a special rule for

the first year of employment). If an employer with a non-ERISA plan wants to exclude such employees and is willing to monitor the prior year 1000 hour rule, then the employer must modify this plan document to provide for that exclusion.

“Churches” (as narrowly defined in IRS regulations and not including church-controlled organizations) that maintain a 403(b) plan are not subject to this “universal availability” requirement or to ERISA and, therefore, could exclude other types or classes of employees (subject to applicable state laws and federal law prohibiting discrimination based on age or other prohibited bases). Mutual of America’s 403(b) tax-deferred annuity plan document does not do so, and if a church employer wants to exclude any other employees, the document must be modified. Church employers wishing to do so should consult their own legal counsel to determine if they can exclude other employees and for a modification.

## Employer and Employee Definitions

The document defines “employer” and “employee,” consistent with the IRS regulations, as all employers that are part of a “controlled group” and all employees of any employer in that “controlled group.”

If a plan includes multiple employers whether or not part of a “controlled group,” the document must be modified to name other participating employers in addition to the plan sponsor.

The new regulations provide rules for determination of controlled group status for tax-exempt entities. These rules do not apply to governmental entities or “churches” (under the narrow Social Security tax definition of churches). Tax-exempt entities that are part of a controlled group must generally satisfy all requirements as if they were a single employer with the other entities in the group. Tax-exempt entities will be part of a controlled group with another entity (tax-exempt or taxable) if at least 80% of the directors or board of trustees of one organization are either representatives of or are directly or indirectly controlled by the other organization. In addition, tax-exempt entities may elect to be treated as a controlled group with other tax-exempt entities if a single plan covers some (at least one) employees of the tax-exempt entities, and the organizations regularly coordinate their day-to-day exempt activities. The IRS is authorized to issue further guidance permitting additional permissive aggregation.



### Note:

- 1) Until further guidance for church entities and governmental entities is issued, such organizations can continue to rely on the prior guidance.
- 2) These new controlled group regulations apply for many other purposes, including other retirement and welfare benefit plan purposes, such as for defined benefit, 401(k), group life, health and accident plans.

## You Should Review the Plan Document and Other Material in this Package Carefully

Mutual of America has provided these materials to assist you in complying with the new IRS regulations. This material and document was prepared based on Mutual of America’s understanding of the regulations. However, Mutual of America and its employees are not permitted to offer legal or tax advice; you should consult your organization’s legal counsel or professional tax adviser for such advice, and we encourage you to review this material with them.

## EXPLANATION OF INFORMATION SHARING AGREEMENT FOR 403(b) PLAN

The new IRS regulations require that an employer sponsoring a 403(b) plan must enter into a written “information sharing agreement” with certain companies that issue 403(b) annuity contracts to participants under the plan (sometimes called a 403(b) provider).

Certain custodial accounts are treated under Code Section 403(b)(7) as “annuity contracts,” and companies issuing 403(b)(7) custodial accounts are treated for this purpose as “annuity contract issuers.” As explained in our letter of September 17, 2007, under the IRS regulations, effective September 25, 2007, an exchange by a participant of one annuity contract (or the participant’s account under a group annuity contract such as that issued by Mutual of America) is only permitted to:

- a) An employer-approved annuity contract issuer under the employer’s plan, i.e., a provider approved to receive ongoing contributions, or
- b) A 403(b) annuity contract issuer that has entered into a written agreement with the employer to share information necessary to satisfy applicable 403(b) plan requirements, such as distribution rules, including for hardship, and participant loan rules and limits.

The regulation technically does not require the employer to have a formal Information Sharing Agreement with approved providers since it is presumed that the ongoing relationship with such providers will include information sharing. However, the enclosed Information Sharing Agreement between an employer and Mutual of America is designed for use whether Mutual of America is the current or former provider and should be completed by identifying all annuity contract issuers (except for “orphaned” and “grandfathered” annuity contracts as explained below) under the plan including current providers.

### **Date by which Agreement Must be Signed**

The Information Sharing Agreement must be entered into by the employer and Mutual of America by December 31, 2008.

An Information Sharing Agreement must be entered into by the employer and the annuity contract issuer no later than December 31, 2008, for any annuity contract issuer that issued a contract as part of an exchange made on or after September 25, 2007. Failure to have an agreement in place on January 1, 2009, with such an annuity contract issuer could disqualify the annuity contracts of the participant who made such an exchange and result in adverse tax consequences to that participant. However, if the participant re-exchanges the annuity contract that was issued as part of such an exchange back to a provider approved by the employer under the plan before July 1, 2009, the participant can avoid disqualification of that contract and the adverse tax consequences.

If an employer also wants to use this Information Sharing Agreement with one or more annuity contract issuers other than Mutual of America, it should be modified as discussed below under Completion of the Agreement.

## Completion of the Agreement

As explained above, this Information Sharing Agreement is for use with all of the annuity contract providers under your plan including current providers since we believe it is good practice to have an agreement even if one is not technically required by the IRS regulations. The agreement requires completion of certain identification information on the first page, signature by the employer and Mutual of America as the “provider,” and an Appendix. If you will use this Information Sharing Agreement with other annuity contract issuers, you should modify the reference to Mutual of America on page one under “Purpose of Agreement” and on the signature page. List the name, in both places, of the other annuity contract issuer (the “provider”) that will sign this agreement. You must also complete the Appendix.

## Appendix

The Appendix requires that, after entering the employer name and plan name, you identify specifically each 403(b) provider that has issued an annuity contract (or 403(b)(7) custodial account) that is part of the plan and must be named in your plan document. The Appendix provides three sections to specify which of those providers can accept new contributions, exchanges (or transfers of participant accounts), or neither.

In **Section I**, identify only providers that you approve to accept ongoing contributions under the Plan, to accept exchanges or transfers from other issuers, and for exchanges or transfers to other approved issuers.

In **Section II**, identify only providers that you approve to accept exchanges or transfers, and for exchanges or transfers to other approved issuers.

In **Section III**, identify only providers that were once permitted to issue contracts and accept contributions and/or exchanges but that you no longer approve to accept ongoing contributions or exchanges.



For example, if Mutual of America is the only provider to which you currently remit contributions or permit exchanges, but you have a prior contract with “ABC Insurance Company,” then you should list Mutual of America in Section I; Section II should be left blank; in Section III, list “ABC Insurance Company.”

## “Orphaned” and “Grandfathered” Contracts

Certain contracts do not have to be included in your plan and identified in your plan document. These contracts, called either “orphaned” contracts or “grandfathered” contracts, are described in detail on page 2 of this brochure. For an annuity contract issuer that issued only contracts that are “orphaned” or “grandfathered,” the employer does not have to have an Information Sharing Agreement, nor should those companies be listed in the Appendix.

## ERISA CONSIDERATIONS 403(b) TAX-DEFERRED ANNUITY PLAN VOLUNTARY EMPLOYEE CONTRIBUTIONS ONLY

The new IRS regulations require all 403(b) plan sponsors to have a written plan that specifies, among other things, who has responsibility for various administrative functions including making certain determinations and approving certain participant requested transactions including withdrawals and participant loans.

There was concern that compliance with the IRS regulations might subject a TDA plan with voluntary employee contributions only, sponsored by an employer other than a public school or one with a church plan, to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), when such TDA plans had previously been considered exempt from ERISA. Among other things, if a TDA is not an ERISA plan, there is no requirement to file an Annual Return/Report (Form 5500), prepare and distribute a Summary Plan Description (SPD), or have an independent audit of the plan. The U.S Department of Labor (“DOL”) issued some guidance to address this concern.

This summary discusses the long-standing DOL regulations that provide a safe-harbor for exemption of a TDA from ERISA, the new DOL guidance explaining the impact of the new IRS regulations, and some other ERISA-related considerations that an employer (other than a public school or those with a church plan) should carefully review. We encourage employers to review this issue and this material with their own legal counsel.

### Governmental and Church TDAs

Governmental and church plans, as defined in ERISA, are automatically exempt from ERISA. Therefore, a governmental employer (public school) or a sponsor of a church plan (church or church related organization) can serve as administrator of its TDA plan while still being exempt from ERISA.

### DOL Guidance for Other Tax-Exempt Employers

In order for another eligible employer exempt from tax under Code Section 501(c)(3) to have a TDA plan that is exempt from ERISA, the DOL regulation provides that the plan must meet all of the following requirements:

- (a) Participation of employees in the plan must be completely voluntary.
- (b) The plan must be funded solely by employee contributions under salary reduction agreements, and the employer must not make any other contributions under the plan.
- (c) All rights under the annuity contract must be enforceable solely by employees, their beneficiaries, or their authorized representatives.
- (d) The employer’s involvement must be limited, and the employer must receive no consideration other than reasonable reimbursement for services rendered. Limited involvement generally means that an employer, without endorsing or recommending a provider, may only permit annuity contract issuers to publicize their products to employees, request information about those products and issuers and distribute it to employees for

their consideration, collect and remit salary reduction contributions, and hold one or more group annuity contracts in its name covering its employees.

(e) Competing Tax-Deferred Annuity products must be made available to employees in a number that will afford to such employees a reasonable choice in the light of all relevant circumstances.

The DOL has made clear in recent guidance that an employer with a non-ERISA TDA can comply with the new IRS regulations without losing its ERISA exemption. Adoption of a plan document to satisfy the requirement to have a written plan will not result in loss of the ERISA exemption. However, to continue to be considered a non-ERISA plan, the employer must continue to have limited involvement in the plan.

Therefore, the employer cannot have the discretionary authority and responsibility to approve various participant requested transactions or to make discretionary determinations. For example, the employer cannot have the authority and responsibility to approve loans, approve hardship or other withdrawals, approve “qualified domestic relations orders” dividing a participant’s benefits on divorce or separation, approve “disability” or other criteria for hardships, and so forth. Therefore, the employer must appoint a third party administrator for that purpose to make those determinations and approvals.

To satisfy the DOL regulation to be exempt from ERISA, the employer must offer multiple annuity contract issuers. Therefore, no one provider will have all the information necessary to make those determinations or approval decisions. And since the employer cannot retain responsibility to coordinate activity and determinations under the plan, the administrator appointed by the employer will have to do so. This arrangement may involve additional cost to the employer or plan participants.








## **ERISA Plan Annual Return/Report Form 5500 and Audit**

Although not part of the new IRS regulations, the DOL has revised its regulations governing annual reporting requirements for ERISA TDA plans. Previously, such TDA plans were covered by a special rule requiring only a simplified report, and they were exempt from the requirement to have the plan audited by an independent auditor even if there were 100 or more eligible employees and participants. The DOL revoked that simplified reporting rule effective for plan years beginning on or after January 1, 2009. As a result, if an employer’s TDA plan is not exempt from ERISA, the plan administrator will have to file a full Annual Return/Report (Form 5500 and all applicable schedules). In addition, if the plan has 100 or more total participants (counting all employees who are eligible to contribute whether they do or not), the plan must also have an independent audit in connection with those Annual Form 5500s. This requirement can add a significant expense that the employer or participants must pay.

## **Review Your TDA Plan Carefully**

Employers (other than public schools or those with church plans that are automatically exempt from ERISA) should review their TDA programs carefully if they intend to satisfy the requirements for exemption from ERISA. They must also make arrangements for a third-party administrator. Alternatively, employers deciding to maintain their TDAs as ERISA plans may want to limit the number of annuity contract issuers under their plans. They should also make arrangements to comply with the Annual Form 5500 reporting and, if applicable, independent audit requirements. We encourage employers to consider which approach is better for their TDA and organization and to discuss this issue with their legal counsel.

## ACTIONS REQUIRED: SUMMARY CHECKLIST & STEP-BY-STEP INSTRUCTIONS

-  **Review Plan Document**  
Review the enclosed 403(b) Plan Document with your legal or professional tax adviser. If you have any questions, please contact your Mutual of America representative.
-  **Complete Plan Document**  
Insert your Employer name in Section 1.2 of the Plan Document and, if applicable, the name and address of the Administrator in Section 1.3 of the Plan Document if you will not be the Administrator for the plan. Also, complete Appendix A, parts I, II or III as applicable, by providing the types of Contract Issuers for the plan as described in the respective sections.
-  **Approve Plan Document**  
The adoption of the 403(b) Plan Document must be approved by a Resolution of your Board of Directors or similar governing Board. The enclosed sample Board of Directors Resolution is intended to assist you in preparing the necessary Resolution. Be sure that two original copies of the final Board of Directors Resolution are properly signed by the President or Secretary of the Board. Your Board must approve the adoption of the 403(b) Plan Document no later than December 31, 2008, so that the Plan Document can be adopted within the compliance deadline.
-  **Adopt Plan Document**  
After your Board approves the adoption of the 403(b) Plan Document, an authorized officer of your organization must sign the 403(b) Plan Document on behalf of your organization, along with the Certification Form. Two original copies of the 403(b) Plan Document and Certification Form must be signed no later than December 31, 2008.
-  **Complete Information Sharing Agreement**  
The new regulations also require that employers enter into an “information sharing agreement” (“ISA”) with certain 403(b) annuity contract and custodial account issuers. Please complete the attached ISA and have it signed by an authorized officer of your organization. Two original copies of the ISA must be signed no later than December 31, 2008.
-  **Return Documents**  
Return one signed and dated original copy of the Plan Document, certified Board of Directors Resolution, Certification Form and ISA to Mutual of America in the postage-paid envelope provided.
-  **Maintain Documents**  
Keep one signed and dated original copy of the Plan Document, certified Board of Directors Resolution, Certification Form and ISA in your permanent plan records.

**If you have questions and you need the address or telephone number of your local office, please visit *mutualofamerica.com* or call 1-800-468-3785 and select option 4**

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