

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549**

FORM 10-Q

- QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934.**

For the quarterly period ended June 30, 2004

or,

- TRANSITION REPORTS PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934.**

For the transition period from _____ to _____

Commission File Number: 0-23556

NEKTAR THERAPEUTICS

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

94-3134940
(IRS Employer Identification No.)

150 Industrial Road
San Carlos, California 94070
(Address of principal executive offices)

650-631-3100
(Registrant's telephone number, including area code)

(Former name, former address and former fiscal year, if changed since last report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Exchange Act). Yes No

Applicable Only to Corporate Issuers

The number of outstanding shares of the registrant's Common Stock, \$0.0001 par value, was 83,827,390 on July 30, 2004.

**NEKTAR THERAPEUTICS
INDEX**

PART I: FINANCIAL INFORMATION

- Item 1. [Condensed Consolidated Financial Statements – unaudited:](#)
[Condensed Consolidated Balance Sheets – June 30, 2004 and December 31, 2003](#)
[Condensed Consolidated Statements of Operations for the three-month and six-month periods ended June 30, 2004 and 2003](#)
[Consolidated Statements of Cash Flows for the three-month and six-month periods ended June 30, 2004 and 2003](#)
[Notes to Condensed Consolidated Financial Statements – unaudited](#)
- Item 2. [Management's Discussion and Analysis of Financial Condition and Results of Operations](#)
- Item 3. [Quantitative and Qualitative Disclosures About Market Risk](#)

[Item 4. Controls and Procedures](#)

PART II: OTHER INFORMATION

[Item 1. Legal Proceedings](#)

[Item 2. Changes in Securities and Use of Proceeds](#)

[Item 3. Defaults Upon Senior Securities](#)

[Item 4. Submission of Matters to a Vote of Security Holders](#)

[Item 5. Other Information](#)

[Item 6. Exhibits and Reports on Form 8-K](#)

[Signatures](#)

[Certifications](#)

Forward-Looking Statements

This report includes “forward-looking statements” within the meaning of Section 27A of the Securities Act of 1933, as amended (the “1933 Act”) and Section 21E of the Securities Exchange Act of 1934, as amended (the “1934 Act”). All statements other than statements of historical fact are “forward-looking statements” for purposes of this report, including any projections of earnings, revenues or other financial items, any statements of the plans and objectives of management for future operations, any statements concerning proposed new products or services, any statements regarding future economic conditions or performance and any statement of assumptions underlying any of the foregoing. In some cases, forward-looking statements can be identified by the use of terminology such as “may,” “will,” “expects,” “plans,” “anticipates,” “estimates,” “potential,” or “continue,” or the negative thereof or other comparable terminology. Although we believe that the expectations reflected in the forward-looking statements contained in this report are reasonable, there can be no assurance that such expectations or any of the forward-looking statements will prove to be correct and actual results could differ materially from those projected or assumed in the forward-looking statements. Our future financial position and results of operations, as well as any forward-looking statements, are subject to inherent risks and uncertainties, including but not limited to the cautionary factors set forth in this report and for the reasons described elsewhere in this report. All forward-looking statements and reasons why results may differ included in this report are made as of the date hereof and we do not intend to update any forward-looking statements except as required by law or applicable regulations.

PART I: FINANCIAL INFORMATION

Item 1. Condensed Consolidated Financial Statements – unaudited:

NEKTAR THERAPEUTICS
CONDENSED CONSOLIDATED BALANCE SHEETS
(In thousands, except per share information)

	<u>June 30, 2004</u>	<u>December 31, 2003</u>
	<u>(unaudited)</u>	<u>*</u>
ASSETS		
Current assets:		
Cash and cash equivalents	\$ 36,268	\$ 64,050
Short-term investments	389,003	221,917
Accounts receivable	18,944	6,153
Inventory, net	10,318	8,559
Other current assets	6,758	5,819
Total current assets	<u>461,291</u>	<u>306,498</u>
Restricted investments	—	12,442
Property and equipment, net	157,615	149,388
Goodwill	130,120	130,120
Other intangible assets, net	8,709	10,963
Deposits and other assets	3,184	7,377
Total assets	<u>\$ 760,919</u>	<u>\$ 616,788</u>
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	\$ 5,069	\$ 8,074
Accrued research and development	3,265	4,012
Accrued general and administrative	2,395	2,282
Accrued compensation	9,053	9,705
Other accrued liabilities	302	288
Interest payable	2,010	2,436
Capital lease obligations - current	1,469	1,341
Deferred revenue	21,679	18,719
Total current liabilities	<u>45,242</u>	<u>46,857</u>
Convertible subordinated notes and debentures	173,949	359,988
Capital lease obligations - noncurrent	30,472	31,686
Other long-term liabilities	11,747	11,956
Accrued rent	2,148	2,110

Commitments and contingencies

Stockholders' equity:

Preferred Stock, 10,000 shares authorized		
Series A, \$0.0001 par value: 3,100 shares designated; no shares issued or outstanding at June 30, 2004 and December 31, 2003.	—	—
Convertible Series B, \$0.0001 par value: 40 shares designated; 20 and 40 shares issued and outstanding at June 30, 2004 and December 31, 2003, respectively Liquidation preference of \$19,945 and \$40,000 at June 30, 2004 and December 31, 2003, respectively.	—	—
Common stock, \$0.0001 par value; 300,000 authorized; 83,738 shares and 56,197 shares issued and outstanding at June 30, 2004 and December 31, 2003, respectively.	8	6
Capital in excess of par value	1,179,131	778,500
Deferred compensation	(3,362)	(38)
Accumulated other comprehensive income	(1,017)	958
Accumulated deficit	(677,399)	(615,235)
Total stockholders' equity	<u>497,361</u>	<u>164,191</u>
Total liabilities and stockholders' equity	<u>\$ 760,919</u>	<u>\$ 616,788</u>

(*) The balance sheet at December 31, 2003 has been derived from the audited financial statements at that date, which are included in our Form 10-K, as amended, for the year ended December 31, 2003 as filed with the Securities and Exchange Commission. This balance sheet does not include all the information and footnotes required by accounting principles generally accepted in the United States for complete financial statements.

See accompanying notes.

NEKTAR THERAPEUTICS
CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS
(In thousands, except per share information)
(unaudited)

	<u>Three-Months Ended June 30,</u>		<u>Six-Months Ended June 30,</u>	
	<u>2004</u>	<u>2003</u>	<u>2004</u>	<u>2003</u>
Revenue:				
Contract research revenue	\$ 22,102	\$ 21,210	\$ 43,611	\$ 39,603
Product sales	6,425	6,538	10,747	13,673
Total revenue	<u>28,527</u>	<u>27,748</u>	<u>54,358</u>	<u>53,276</u>
Operating costs and expenses:				
Cost of goods sold	6,733	3,708	9,269	8,330
Research and development	36,451	32,380	70,471	64,521
General and administrative	5,479	5,136	9,901	10,314
Amortization of other intangible assets	981	1,127	1,962	2,254
Total operating costs and expenses	<u>49,644</u>	<u>42,351</u>	<u>91,603</u>	<u>85,419</u>
Loss from operations	(21,117)	(14,603)	(37,245)	(32,143)
Gain/(loss) on extinguishment of debt	—	4,320	(9,258)	4,320
Other income/(expense), net	124	132	431	251
Interest income	1,608	1,262	2,854	2,886
Interest expense	(2,779)	(4,150)	(18,814)	(8,302)
Net loss before provision for income taxes	(22,164)	(13,039)	(62,032)	(32,988)
Provision for income taxes	—	—	132	—
Net loss	<u>\$ (22,164)</u>	<u>\$ (13,039)</u>	<u>\$ (62,164)</u>	<u>\$ (32,988)</u>
Basic and diluted net loss per share	<u>\$ (0.27)</u>	<u>\$ (0.23)</u>	<u>\$ (0.85)</u>	<u>\$ (0.59)</u>
Shares used in computing basic and diluted net loss per share	<u>83,501</u>	<u>55,718</u>	<u>72,858</u>	<u>55,660</u>

See accompanying notes.

NEKTAR THERAPEUTICS
CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS
(In thousands)

	<u>Six-Months Ended June 30,</u>	
	<u>2004</u>	<u>2003</u>
Cash flows used in operating activities:		
Net loss	\$ (62,164)	\$ (32,988)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation	5,865	5,920
Amortization of other intangible assets	2,254	2,254
Amortization of debt issuance costs	530	1,028
Amortization of deferred compensation	578	168
Non-cash compensation for employee retirement plans	676	568
Non-cash compensation for employee severance	60	—
Stock-based compensation for services rendered	339	61
Gain related to sale of assets	—	(126)
Loss/(gain) on early extinguishment of debt	9,258	(4,320)
Changes in assets and liabilities:		
(Increase) in accounts receivable, other current assets, and other assets	(14,095)	(4,342)
(Decrease) in accounts payable and other accrued liabilities	(5,013)	(12,420)
(Decrease) in deferred revenue	3,478	(7,921)
Net cash used in operating activities	<u>(58,234)</u>	<u>(52,118)</u>
Cash flows from investing activities:		
Purchases of short-term investments	(320,779)	(102,298)
Sales of short-term investments	8,327	41,268
Maturities of investments	141,777	102,575
Purchase of long-term investments	(28)	—
Sales of long-term investments	12,470	—
Purchases of property and equipment	(14,028)	(6,085)
Disposal of property and equipment	42	—
Proceeds from sale of property and equipment	—	175
Net cash provided by/(used in) investing activities	<u>(172,219)</u>	<u>35,635</u>
Cash flows from financing activities:		
Proceeds from loan and capital lease financing	—	2,200
Payments of loan and capital lease obligations	(1,327)	(851)
Issuance of convertible subordinated notes, net	—	96,350
Repurchase of convertible subordinated notes	(461)	(16,180)
Issuance of common stock for, net of issuance costs	196,245	—
Issuance of common stock related to employee stock purchase plan	615	292
Issuance of common stock related to employee stock exercises	7,599	189
Net cash provided by financing activities	<u>202,671</u>	<u>81,800</u>
Net increase/(decrease) in cash and cash equivalents	(27,782)	65,317
Cash and cash equivalents at beginning of period	64,050	34,879
Cash and cash equivalents at end of period	<u>\$ 36,268</u>	<u>\$ 100,196</u>
Non-cash Investing and Financing Activities		
Conversion of debt into common stock	<u>\$ 7,750</u>	<u>\$ —</u>

See accompanying notes.

NEKTAR THERAPEUTICS
NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
June 30, 2004
(unaudited)

Note 1—Organization and Summary of Significant Accounting Policies

Organization and Basis of Presentation

Nektar Therapeutics was originally incorporated in California in July 1990 under the name Inhale Therapeutic Systems, Inc. We were reincorporated in Delaware in 1998. On January 15, 2003 we changed our name from Inhale Therapeutic Systems, Inc. to Nektar Therapeutics.

We are working to become one of the world's leading drug delivery products based companies by providing a portfolio of technologies and expertise that is intended to enable us and our pharmaceutical and biotechnology partners to improve drug performance throughout the drug development process. We

are focused on three main technologies: Nektar Advanced PEGylation Technology, Nektar Pulmonary Technology, and Nektar Supercritical Fluids Technology.

We prepared the condensed consolidated financial statements following the requirements of the Securities and Exchange Commission (“SEC”) for interim reporting. As permitted under those rules, certain footnotes or other financial information that are normally required by generally accepted accounting principles in United States of America (“GAAP”) can be condensed or omitted. In the opinion of management, the financial statements include all normal and recurring adjustments that are considered necessary for the fair presentation of our financial position and operating results. Certain reclassifications have been made to prior year amounts to conform to current period presentation.

Revenues, expenses, assets and liabilities can vary during each quarter of the year. Therefore, the results and trends in these interim financial statements may not be the same as those for the full year. The information included in this quarterly report on Form 10-Q should be read in conjunction with the consolidated financial statements and accompanying notes included in our Annual Report on Form 10-K, as amended, for the year ended December 31, 2003.

Use of Estimates

The preparation of financial statements in conformity with accounting principles generally accepted in the United States requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Principles of Consolidation

Our consolidated financial statements include the financial statements of our subsidiaries: Nektar Therapeutics AL, Corporation (“Nektar AL”), formerly Shearwater Corporation (“Shearwater”); Nektar Therapeutics UK, Ltd. (“Nektar UK”), formerly Bradford Particle Design Ltd. (“Bradford”); Inhale Therapeutic Systems Deutschland GmbH (“Inhale Germany”); Inhale 201 Industrial Road, L.P., a real estate partnership in San Carlos, and as of December 31, 2003, Shearwater Polymers, LLC, a real estate partnership in Alabama.

Our consolidated financial statements are denominated in U.S. dollars. Accordingly, changes in exchange rates between the applicable foreign currency and the U.S. dollar will affect the translation of each foreign subsidiary’s financial results into U.S. dollars for purposes of reporting our consolidated financial results. The process by which each foreign subsidiary’s financial results are translated into U.S. dollars is as follows: income statement accounts are translated at average exchange rates for the period; balance sheet asset and liability accounts are translated at end of period exchange rates; and equity accounts are translated at historical exchange rates. Translation of the balance sheet in this manner results in an accumulated other comprehensive gain/loss of the stockholders’ equity section. To date, such cumulative translation adjustments have not been material to our consolidated financial position.

Significant Concentrations

Cash equivalents and short-term investments are financial instruments that potentially subject us to concentration of risk to the extent of the amounts recorded in the consolidated balance sheet. We limit our concentration of risk by diversifying our investment amount among a variety of industries and issuers. Our professional portfolio managers adhere to this investment policy as approved by our Board of Directors.

Our customers are primarily pharmaceutical and biotechnology companies that are typically located in the U.S. and Europe. All of our accounts receivable are denominated in U.S. dollars. Our accounts receivable balance contains trade receivables from product sales and collaborative research agreements. At June 30, 2004, one customer represented approximately 67% of our accounts receivable, and at December 31, 2003, four customers represented approximately 81% of our accounts receivable. We have not experienced significant credit losses from our accounts receivable or collaborative research agreements, and none is currently expected. We perform a regular review of our customers’ payment history and credit risks and do not require collateral from our customers.

In addition, we are dependent on our partners, vendors and contract manufacturers to provide raw materials, drugs and devices of appropriate quality and reliability and to meet applicable regulatory requirements. Consequently, in the event that supplies are delayed or interrupted for any reason, our ability to develop our products could be impaired, which could have a material adverse effect on our business, financial condition and results of operation.

We are dependent on Pfizer Inc. as a significant source of our revenue. Contract research revenue from Pfizer represented 58% and 59% of our revenue for the three-month and six-month periods ended June 30, 2004, respectively, and 63% and 58% for the three-month and six-month periods ended June 30, 2003, respectively. The termination of our collaboration with Pfizer, under which we develop and manufacture Exubera® (inhaled insulin) for Pfizer, could have a material adverse effect on our financial position and results of operations.

Should the Pfizer collaboration be discontinued prior to any commercial launch of Exubera®, we would need to find alternative funding sources to replace the collaboration revenue and we would need to reassess the realizability of our capitalized assets. Additionally, we may have to reimburse our device contract manufacturers for their capital outlay to the extent that they cannot re-deploy their assets. At the present time, it is not possible to estimate the loss that could occur as a result of these obligations.

Recent Accounting Pronouncements

In March 2004 the Financial Accounting Standards Board’s (“FASB”) Emerging Issues Task Force (“EITF”) reached a consensus on EITF 03-01, *The Meaning of Other-Than-Temporary Impairment and Its Application to Certain Investments*. EITF 03-01 provides guidance regarding disclosures about unrealized losses on available-for-sale debt and equity securities accounted for under Statement of Financial Accounting Standard (“SFAS”) No. 115, *Accounting for Certain Investments in Debt and Equity Securities*. The guidance for evaluating whether an investment is other-than-temporarily impaired should be applied in other-than-temporary impairment evaluations made in reporting periods beginning after June 15, 2004. Our adoption of this EITF did not have a material effect on our financial position or results of operations.

Cash, Cash Equivalents and Investments

We consider all highly liquid investments with a maturity at the date of purchase of three months or less to be cash equivalents. Cash and cash equivalents include demand deposits held in banks, interest bearing money market funds and repurchase agreements. All other investments are classified as short-term investments. Short-term investments consist of federal and municipal government securities, corporate bonds and commercial paper with A1 or P1 short-term ratings and A+ or better long-term ratings with remaining maturities at date of purchase of greater than 90 days and less than two years.

At June 30, 2004, all short-term investments are designated as available-for-sale and are carried at fair value, with unrealized gains and losses reported in stockholders' equity as accumulated other comprehensive income/(loss). Short-term investments are adjusted for amortization of premiums and accretion of discounts to maturity. Such amortization is included in interest income. Realized gains and losses and declines in value judged to be other-than-temporary on available-for-sale securities, if any, are included in other income/(expense). The cost of securities sold is based on the specific identification method. Interest and dividends on securities classified as available-for-sale are included in interest income.

Inventories

Inventories are included in other current assets on the balance sheet and consist primarily of raw materials, work-in-process and finished goods of Nektar AL. Inventories are stated at the lower of cost (first-in, first-out method) or market. Cost is computed on a currently adjusted standard basis, which approximates actual costs on a first-in, first-out basis. Inventories include a reserve of \$3.1 million and \$1.6 million as of June 30, 2004 and December 31, 2003, respectively. Reserves are determined using specific identification plus an estimated reserve against finished goods for potential defective or excess inventory based on historical experience. Inventories consist of the following (in thousands):

7

	June 30, 2004	December 31, 2003
Raw material	\$ 5,198	\$ 4,552
Work-in-process	3,840	3,598
Finished goods	1,280	409
Total inventories	<u>\$ 10,318</u>	<u>\$ 8,559</u>

Property and Equipment

Property and equipment are stated at cost. Major improvements are capitalized, while maintenance and repairs are expensed when incurred. Laboratory and other equipment are depreciated using the straight-line method over estimated useful lives of three to seven years. Leasehold improvements and buildings, which are subject to the terms of a build-to-suit lease, are depreciated using the straight-line method over the shorter of the estimated useful life or the remaining term of the lease.

Goodwill

Goodwill is tested for impairment at least annually, or on an interim basis if an event occurs or circumstances change that would more-likely-than-not reduce the fair value below our carrying value. Goodwill is tested for impairment using a two-step approach. The first step is to compare our fair value to our carrying amount, including goodwill. If the fair value is greater than the carrying amount, goodwill is not considered impaired and the second step is not required. If the fair value is less than the carrying amount, the second step of the impairment test measures the amount of the impairment loss, if any. The second step of the impairment test is to compare the implied fair value of goodwill to its carrying amount. If the carrying amount of goodwill exceeds its implied fair value, an impairment loss is recognized equal to that excess. The implied fair value of goodwill is calculated in the same manner that goodwill is calculated in a business combination, whereby the fair value is allocated to all of the assets and liabilities (including any unrecognized intangible assets) as if they had been acquired in a business combination and the fair value was the purchase price. The excess "purchase price" over the amounts assigned to assets and liabilities would be the implied fair value of goodwill.

We perform our annual test as of October 1st of each year, which, to date, has not resulted in an impairment charge. We will perform this test annually or more frequently if indicators of potential impairment exist.

Other Intangible Assets

Acquired technology and other intangible assets with definite useful lives are amortized on a straight-line basis over a period of five to seven years. Acquired technology and other intangible assets are tested for impairment whenever events or changes in circumstances indicate the carrying amount of the assets may not be recoverable from future undiscounted cash flows. If impaired, asset values are adjusted to fair value. Acquired technology and other intangible assets include proprietary technology, intellectual property, and supplier and customer relationships acquired from third parties or in business combinations.

We periodically evaluate whether changes have occurred that would require revision of the remaining estimated useful lives of these assets or otherwise render the assets unrecoverable. If such an event occurred, we would determine whether the other intangibles are impaired. To date, no such impairment losses have been recorded.

Interest Rate Swap

As of June 30, 2004, we had approximately \$5.7 million outstanding on a bank loan. This loan is secured by our Nektar AL Discovery Drive facility in Alabama, which, as of June 30, 2004, had a net carrying value of approximately \$6.0 million. This loan originally had a variable rate of interest tied to the LIBOR index. In November 2003, we entered into an interest rate swap agreement to limit our exposure to fluctuations in U.S. interest rates. Our interest rate swap agreement effectively converts a portion of our debt to a fixed rate basis, thus reducing the impact of interest rate changes on future interest expense. The swap is designated a cash flow hedge. Under the terms of our swap arrangement, we pay an initial effective interest rate of 5.17%. This rate is variable on a monthly basis based on changes in the LIBOR index, but only to a maximum of 7.05%.

This swap has been accounted for as a derivative subject to SFAS No. 133, *Accounting for Derivatives and Hedging Activity*. Because there is still potential variability in our effective interest rate, this specific swap arrangement is not an effective hedge. Accordingly, we recorded the fair value of this derivative at December 31, 2003 by recording a liability and corresponding interest expense of \$0.2 million. The fair value is adjusted to market value on a

quarterly basis, with an increase in interest rates generally resulting in a reduction in the liability and a decrease to interest expense, and a decrease in interest rates generally resulting in an increase to the liability and an increase in interest expense. In connection with the interest rate swap, we recorded an expense of \$0.2 million

for the three-month period ended March 31, 2004, and we recorded a reduction to expense of \$0.2 million for the three-month period ended June 30, 2004. The derivative's market value was \$(0.2) million as of June 30, 2004 and as of December 31, 2003.

Comprehensive Loss

Comprehensive loss is comprised of net loss and other comprehensive gain/loss. Other comprehensive loss includes unrealized gains/losses on available-for-sale securities and translation adjustments. The comprehensive loss consists of the following components (in thousands):

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2004	2003	2004	2003
Net loss, as reported	\$ (22,164)	\$ (13,039)	\$ (62,164)	\$ (32,988)
Change in net unrealized gains/(losses) on available-for-sale securities	(2,291)	(308)	(2,250)	(317)
Net unrealized (gains)/losses reclassified into earnings	1	(19)	(22)	(37)
Translation adjustment	(81)	129	297	(34)
Total comprehensive loss	\$ (24,535)	\$ (13,237)	\$ (64,139)	\$ (33,376)

The components of accumulated other comprehensive income are as follows (in thousands):

	June 30, 2004	December 31, 2003
Unrealized gains/(losses) on available-for-sale securities	\$ (2,022)	\$ 250
Translation adjustment	1,005	708
Total accumulated other comprehensive income	\$ (1,017)	\$ 958

Stock-Based Compensation

We apply the recognition and measurement principles of APB Opinion No. 25, *Accounting for Stock Issued to Employees*, and related Interpretations in accounting for those plans. Under this opinion, no stock-based employee compensation expense is charged for options that were granted at an exercise price that was equal to the market value of the underlying common stock on the date of grant. Pro forma information regarding net income and earnings per share is required by SFAS No. 123, *Accounting for Stock Based Compensation*, as amended by SFAS No. 148, which also requires that the information be determined as if we had accounted for our employee stock options under the fair value method of that statement. The fair value for these options was estimated at the date of grant using a Black-Scholes option-pricing model with the following weighted-average assumptions:

	Three-Months Ended June 30,	
	2004	2003
Risk-free interest rate	3.78%	2.6%
Dividend yield	0.0%	0.0%
Volatility factor	0.68	0.81
Weighted average expected life	5 years	5 years

The Black-Scholes options valuation model was developed for use in estimating the fair value of traded options, which have no vesting restrictions and are fully transferable. In addition, option valuation models require the input of highly subjective assumptions including the expected stock price volatility. Because our employee stock options have characteristics significantly different from those of traded options, and because changes in the subjective input assumptions can materially affect the fair value estimate, in our opinion, the existing models do not necessarily provide a reliable single measure of the fair value of our employee, consultant, and director stock options. However, we have presented the pro forma net loss and pro forma basic and diluted net loss per common share using the assumptions noted above.

The following table illustrates the effect on net income and earnings per share if we had applied the fair value recognition provisions of SFAS Nos. 123 and 128 to stock-based employee compensation (in thousands, except per share information):

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2004	2003	2004	2003
Net loss, as reported	\$ (22,164)	\$ (13,039)	\$ (62,164)	\$ (32,988)
Add: stock-based employee compensation included in reported net loss	342	57	578	168
Deduct: total stock-based employee compensation expense determined under fair value methods for all awards	(7,238)	(9,838)	(14,716)	(20,598)
Net loss, pro forma	\$ (29,060)	\$ (22,820)	\$ (76,302)	\$ (53,418)
Net loss per share				
Basic and diluted, as reported	\$ (0.27)	\$ (0.23)	\$ (0.85)	\$ (0.59)
Basic and diluted, pro forma	\$ (0.35)	\$ (0.41)	\$ (1.05)	\$ (0.96)

Stock compensation expense for options granted to non-employees has been determined in accordance with SFAS No. 123 and EITF No. 96-18 as the fair value of the consideration received or the fair value of the equity instruments issued, whichever is more reliably measured. The fair value of options granted to non-employees is re-measured as the underlying options vest and are included in our reported net loss.

Revenue Recognition

Our research revenue is derived primarily from clients in the pharmaceutical and biotechnology industries and consists of reimbursement of development costs, reimbursement of certain expenses, payment for clinical supplies, and amortization of milestones. Payments received for milestones achieved are deferred and recorded as revenue ratably over the next period of continued development. Contract revenue from collaborative research agreements is recorded when earned based on the performance requirements of the contract. Advance payments for research and development revenue received in excess of amounts earned are classified as deferred revenue until earned. Revenue from grants and feasibility arrangements are recognized as the related costs are incurred. Costs of contract research revenue approximate such revenue and are included in research and development expenses.

Consideration received for revenue arrangements with multiple deliverables is allocated among these deliverables based on objective and reliable evidence of each deliverable's fair value using available internal or third party evidence. Revenue from non-refundable upfront license fees and certain guaranteed payments where we have continuing involvement through collaborative development efforts are deferred and recognized as revenue over the period of continuing involvement.

Revenue from product sales is recognized when there is persuasive evidence that an arrangement exists, delivery has occurred, the price is fixed and determinable, and collectability is reasonably assured. Allowances, if any, are established for uncollectible amounts, estimated product returns, and discounts.

Research and Development

Research and development expenses are associated with three general categories: (i) collaborative agreements under which spending is reimbursed by our partners; (ii) spending attributed to internally funded programs; and (iii) commercial readiness and infrastructure costs associated with commercial operations for our drug and third-party device manufacturing. Research and development costs are expensed as incurred and include salaries, benefits, and other operating costs.

Net Loss Per Share

Basic net loss per share is calculated based on the weighted-average number of common shares outstanding during the periods presented, less the weighted-average shares outstanding which are subject to our right of repurchase. Diluted earnings per share would give effect to the dilutive impact of common stock equivalents which consist of convertible preferred stock and convertible subordinated debt (using the as-if converted method), and stock options and warrants (using the treasury stock method). Potentially dilutive securities have been excluded from the diluted earnings per share computations in all years presented as such securities would have an anti-dilutive effect on net loss per share due to our net loss for all periods presented.

Accounting for Income Taxes

We account for income taxes under SFAS No. 109, *Accounting for Income Taxes*. Under SFAS No. 109, the liability method is used in accounting for income taxes. Under this method, deferred tax assets and liabilities are determined based on differences between financial reporting and tax reporting bases of assets and liabilities and are measured using enacted tax rates

and laws that are expected to be in effect when the differences are expected to reverse. Realization of deferred tax assets is dependent upon future earnings, if any, the timing and amount of which are uncertain. Because of our lack of earnings history, the net deferred tax assets have been fully offset by a valuation allowance.

Note 2 - Segment, Significant Customer and Geographic Information

We report segments in accordance with SFAS No. 131, *Disclosures About Segments of an Enterprise and Related Information*. SFAS No. 131 requires the use of a management approach in identifying segments of an enterprise. We have multiple technologies, all of which are marketed to a common customer base (pharmaceutical and biotechnology companies which are typically located in the U.S. and Europe), and as such, we are organized and operate as one operating segment.

Our research revenue is derived primarily from clients in the pharmaceutical and biotechnology industries. Contract research revenue from Pfizer represented 58% and 59% of our revenue for the three-month and six-month periods ended June 30, 2004, respectively, and 63% and 58% for the three-month and six-month periods ended June 30, 2003, respectively. Product sales relate to the sale of our manufactured Advanced PEGylation Technology products by Nektar AL.

Our accounts receivable balance contains trade receivables from product sales and collaborative research agreements. All of our accounts receivable are denominated in U.S. dollars. At June 30, 2004, one customer represented approximately 67% of our accounts receivable, and at December 31, 2003 four customers represented approximately 81% of our accounts receivable.

We primarily receive contract research revenue from, and provide product sales to, customers located within the United States and Europe. Revenues are from the following geographic areas (in thousands):

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2004	2003	2004	2003
Contract research revenue				
United States	\$ 21,780	\$ 21,067	\$ 43,174	\$ 39,201
All other countries	322	143	437	402
Total contract research revenue	\$ 22,102	\$ 21,210	\$ 43,611	\$ 39,603

Product sales						
United States	\$	3,297	\$	3,367	\$	6,465
European countries		2,400		2,630		2,971
All other countries		728		541		1,311
Total product sales	\$	<u>6,425</u>	\$	<u>6,538</u>	\$	<u>10,747</u>
					\$	<u>13,673</u>

Note 3 – Financial Instruments

As of June 30, 2004, we held a portfolio exclusively of debt securities. Certain of these securities have a fair value less than their amortized cost. In accordance with SFAS No. 115, *Accounting for Certain Investments in Debt and Equity Securities* and EITF 03-01, we have recorded the difference between the amortized cost and fair value as a component of accumulated other comprehensive income. Management has concluded that no impairment should be recognized related to these investments because the unrealized losses incurred to date are not considered other than temporary. Management has reached this conclusion based upon its intention to hold all debt investments to maturity at which point they are redeemed at full par value, a history of actually holding the vast majority of our investments to maturity, and our strategy of aligning of the maturity of our debt investments to meet our cash flow needs. Therefore, we will, in most cases, have the ability to hold all of our debt investments to maturity.

The following is a summary of operating cash and available-for-sale securities as of June 30, 2004 (in thousands):

11

	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
Cash and Available-for-Sale Securities				
Obligations of U.S. government agencies	\$ 139,484	\$ —	\$ (918)	\$ 138,566
Obligations of U.S. state agencies	70,850	—	—	70,850
U.S. corporate commercial paper	25,787	2	(14)	25,775
Obligations of U.S. corporations	154,966	7	(1,064)	153,909
Obligations of non U.S. corporations	4,085	—	(34)	4,051
Repurchase agreements	26,386	—	—	26,386
Cash	5,734	—	—	5,734
	<u>\$ 427,292</u>	<u>\$ 9</u>	<u>\$ (2,030)</u>	<u>\$ 425,271</u>
Amounts included in cash and cash equivalents	\$ 36,268	\$ —	\$ —	\$ 36,268
Amounts included in short-term investments (less than one year to maturity)	259,176	8	(736)	258,448
Amounts included in short-term investments (one to two years to maturity)	131,848	1	(1,294)	130,555
	<u>\$ 427,292</u>	<u>\$ 9</u>	<u>\$ (2,030)</u>	<u>\$ 425,271</u>

The following is a summary of operating cash, held-to-maturity, and available-for-sale securities as of December 31, 2003 (in thousands):

	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Fair Value
Held-to-Maturity Securities				
U.S. treasury securities	\$ 12,442	\$ —	\$ —	\$ 12,442
Cash and Available-for-Sale Securities				
Obligations of U.S. government agencies	\$ 138,404	\$ 231	\$ (74)	\$ 138,561
U.S. corporate commercial paper	115,010	118	(26)	115,102
Non U.S. corporate obligations	2,343	1	(1)	2,343
Repurchase agreements	9,083	—	—	9,083
Cash	20,878	—	—	20,878
	<u>\$ 285,718</u>	<u>\$ 350</u>	<u>\$ (101)</u>	<u>\$ 285,967</u>
Amounts included in cash and cash equivalents	\$ 64,049	\$ 1	\$ —	\$ 64,050
Amounts included in short-term investments (less than one year to maturity)	205,610	330	(89)	205,851
Amounts included in short-term investments (one to two years to maturity)	16,059	19	(12)	16,066
Amounts included in restricted investments	12,442	—	—	12,442
	<u>\$ 298,160</u>	<u>\$ 350</u>	<u>\$ (101)</u>	<u>\$ 298,409</u>

Note 4 - - Other Intangible Assets

The components of our other intangible assets at June 30, 2004, are as follows (in thousands, except for years):

	Useful Life in Years	Gross Carrying Amount	Accumulated Amortization	Net
Core technology	5	\$ 8,100	\$ (4,860)	\$ 3,240
Developed product technology	5	2,900	(1,740)	1,160
Intellectual property	5-7	7,301	(4,861)	2,440

Supplier and customer relations	5	5,140	(3,271)	1,869
Total		<u>\$ 23,441</u>	<u>\$ (14,732)</u>	<u>\$ 8,709</u>

12

Amortization expense related to other intangible assets totaled \$1.1 million for both of the three-month periods ended June 30, 2004 and 2003 and \$2.2 million for both the six-month periods ended June 30, 2004 and 2003. The following table presents expected future amortization expense for other intangible assets until they are fully amortized (in thousands):

<u>Years Ending December 31,</u>	
Remainder of 2004	\$ 2,253
2005	4,507
2006	1,949
Total	<u>\$ 8,709</u>

Note 5 – Convertible Subordinated Debentures

In April 2004, we called for redemption of all of our outstanding 6 ¾% convertible subordinated notes due October 2006. Holders of all but \$10,000 in principal amount converted their notes prior to the redemption date, resulting in the issuance of approximately 0.5 million shares of our common stock. We redeemed the \$10,000 in principal amount not converted into equity for cash in the amount of \$10,000. The aggregate amount of notes converted was approximately \$7.8 million.

Note 6 - - Commitments and Contingencies

From time to time, we may be involved in lawsuits, claims, investigations and proceedings, consisting of intellectual property, commercial, employment and other matters, which arise in the ordinary course of business. In accordance with the SFAS No. 5, *Accounting for Contingencies*, we make a provision for a liability when it is both probable that a liability has been incurred and the amount of the loss can be reasonably estimated. These provisions are reviewed at least quarterly and adjusted to reflect the impact of negotiations, settlements, ruling, advice of legal counsel, and other information and events pertaining to a particular case. Litigation is inherently unpredictable. However, we believe that we have valid defenses with respect to the legal matters pending against us, as well as adequate provisions for any probable and estimable losses. If any unfavorable ruling were to occur in any specific period, there exists the possibility of a material adverse impact on the results of operations of that period. We believe that, given our current liquidity and cash and investment balances, even if we receive an adverse judgment with respect to litigation that we are currently a party to, such judgment would not have a material impact on cash and investments or liquidity.

Note 7 – Guarantees and Indemnifications

The following is a summary of our agreements, which we have determined are within the scope of FASB Interpretation (“FIN”) No. 45. The guarantees presented below are not subject to the initial recognition and measurement provisions of FIN No. 45 and accordingly, we have not recorded any liability for these agreements as of June 30, 2004, except as noted below.

Guarantee of Loan on Nektar AL Facility

The Church Street facility leased by our Alabama subsidiary is owned by Shearwater Polymers, LLC. We paid \$0.1 million each during the three-month periods ended June 30, 2004 and 2003, and \$0.2 million each during each of the six-month periods ended June 30, 2004 and 2003, as rent to Shearwater Polymers, LLC, of which Dr. J. Milton Harris is a member. Prior to March 4, 2004, Dr. Harris was one of our executive officers. Shearwater Polymers, LLC is 4% owned by Nektar AL with the remaining 96% owned by Dr. Harris. Both Nektar AL and Dr. Harris have jointly guaranteed the lease on the Nektar AL facility. We have fully consolidated this entity in our consolidated financial statements since December 31, 2003, in accordance with FIN 46. As of June 31, 2004, principal remaining on this loan was \$1.7 million. The loan bears interest of 7.22% through May 2009, with a balloon payment of \$1.1 million in June 2009 and is secured by the Church Street facility, which as of June 30, 2004 had a net carrying value of \$2.3 million. Our maximum exposure to loss with respect to Shearwater Polymers, LLC, at June 30, 2004 is the outstanding capital lease obligation of \$1.7 million.

Indemnification of Directors, Executive Officers, Other Officers, Employees and Other Agents

As permitted under Delaware law, and as set forth in our Certificate of Incorporation and our Bylaws, we indemnify our directors, executive officers, other officers, employees, and other agents for certain events or occurrences that arose while in such capacity. The maximum potential amount of future payments we could be required to make under this indemnification is unlimited; however, we have insurance policies that may limit our exposure and may enable us to recover a portion of any future amounts paid. Assuming the applicability of coverage, the willingness of the insurer to assume coverage, and subject to certain retention, loss limits and other policy provisions, we believe any obligations under this indemnification are not material. However, no assurances can be given that the covering insurers will not attempt to dispute the validity, applicability, or amount of coverage without expensive litigation against these insurers, in which case we may incur substantial liabilities as a result of these indemnification obligations.

13

Lease Restoration

We have several operating leases for our facilities in multiple locations. In the event that we do not exercise our option to extend the term of these leases, we guarantee certain costs to restore the property to certain conditions in place at the time of each lease. We believe the estimated fair value of these guarantees is minimal.

Strategic Alliance—Enzon

In January 2002, we announced a broad strategic alliance with Enzon Pharmaceuticals, Inc. that included a collaboration to develop up to three products using our Pulmonary Technology and/or Supercritical Fluids Technology. Under the terms of the agreement, we are responsible for the development of drug formulations for the agreed upon pharmaceutical agents. We are required to self-fund a portion of these costs. As of June 30, 2004, we are required to fund up to an incremental \$7.9 million in the coming years without reimbursement for research and development expenses. To date these costs, amounting to \$9.1 million, have been included in our research and development expenses. After our funding requirement has been met, Enzon will provide research and development funding as well as milestone payments as the program progresses through clinical testing.

Manufacturing and Supply Agreement with Contract Manufacturers

In August 2000, we entered into a Manufacturing and Supply Agreement with our contract manufacturers to provide for the manufacturing of our pulmonary inhaler device for Exubera®. Under the terms of the Agreement, we may be obligated to reimburse the contract manufacturers for the actual unamortized and unrecovered portion of any equipment procured or facilities established and the interest accrued for their capital overlay in the event that Exubera® does not gain FDA approval to the extent that the contract manufacturers cannot re-deploy the assets. While such payments may be significant, at the present time, it is not possible to estimate the loss that will occur should Exubera® not be approved. We have also agreed to defend, indemnify and hold harmless the contract manufacturers from and against third party liability arising out of the agreement, including product liability and infringement of intellectual property. There is no limitation on the potential amount of future payments we could be required to make under these indemnification obligations. We have never incurred costs to defend lawsuits or settle claims related to these indemnification obligations. If any of our indemnification obligations is triggered, we may incur substantial liabilities.

Security Agreement with Pfizer Inc.

In connection with the Collaboration, Development, and License Agreement (“CDLA”) dated January 18, 1995 that we entered into with Pfizer Inc., for the development of Exubera®, we entered into a Security Agreement pursuant to which our obligations under the CDLA and certain Manufacturing and Supply Agreements related to the manufacture and supply of powdered insulin and pulmonary inhaler devices for the delivery of powdered insulin, are secured. Our default under any of these agreements triggers Pfizer’s rights with respect to property relating solely to, or property used or which will be used solely in connection with, the development, manufacture, use and sale of Exubera®, including proceeds from the sale or other disposition of the property.

Collaboration Agreements for Products Based on our Pulmonary Technology

As part of our collaboration agreements with our partners for the development, manufacture, and supply of products based on our Pulmonary Technology, we generally agree to defend, indemnify, and hold harmless our partners from and against third party liabilities arising out of the agreements, including product liability and infringement of intellectual property. The term of these indemnification obligations is generally perpetual any time after execution of the agreements. There is no limitation on the potential amount of future payments we could be required to make under these indemnification obligations. We have never incurred costs to defend lawsuits or settle claims related to these indemnification obligations. If any of our indemnification obligations is triggered, we may incur substantial liabilities.

License, Manufacturing and Supply Agreements for Products Based on our Advanced PEGylation Technology

As part of our license, manufacturing and supply agreements with our partners for the development and/or manufacture and supply of PEG reagents based on our Advanced PEGylation Technology, we generally agree to defend, indemnify and hold harmless our partners from and against third party liabilities arising out of the agreements, including product liability and infringement of intellectual property. The term of these indemnification obligations is generally perpetual any time after execution of the agreements. There is no limitation on the potential amount of future payments we could be required to make under these indemnification obligations. We have never incurred costs to defend lawsuits or settle claims related to these indemnification obligations. If any of our indemnification obligations is triggered, we may incur substantial liabilities.

Note 8 – Deferred Compensation

During the six-month period ended June 30, 2004, we issued restricted stock grants for 206,666 shares of our common stock to certain officers. The purchase price of these restricted shares is \$0.01 per share, whereas the fair market value of our common stock on the dates of grant ranged between \$18.46 per share and \$19.54 per share. The restricted shares become fully vested over a period of 35 months. In connection with these restricted stock grants, we recorded deferred compensation of \$3.9 million, which represents the difference between the fair market value of our stock on the day of grant and the purchase price of \$0.01 per share. We will ratably expense the deferred compensation on a monthly basis over the vesting term of 35 months. For the three-month and six-month periods ended June 30, 2004, we recognized expense related to these restricted stock grants of approximately \$0.3 million and \$0.6 million, respectively.

Note 9 – Redemption of Interest in Inhale 201 Partnership

Effective June 23, 2004, Nektar, SciMed Prop III, Inc. (the “General Partner”), Bernardo Property Advisors, Inc., and Inhale 201 Industrial Road Partnership (the “Partnership”) entered into a Redemption Agreement (the “Redemption Agreement”) with respect to Nektar’s limited partnership interest in the Partnership. In connection with a Contribution Agreement dated September 14, 2000 by and between Nektar and Bernardo Property Advisors, Inc., Nektar had contributed certain property located at 201 Industrial Road, San Carlos, CA to the Partnership in exchange for a limited partnership interest in the Partnership. In addition, Nektar entered into a Build-to-Suit Lease with the Partnership (the “Lease”) with respect to the property contributed to the Partnership and the building subsequently built on such property, now occupied by Nektar as its headquarters (the “Building”).

The Redemption Agreement provides for the redemption of Nektar’s limited partnership interest in the Partnership in exchange for a cash payment of \$19.5 million from Bernardo Property Advisors, Inc. to Nektar, the repayment from Bernardo Property Advisors, Inc., to Nektar of a \$3.0 million outstanding loan from Nektar to the Partnership, and a modification of the Lease. The redemption contemplated by the Redemption Agreement and related transactions are subject to certain closing conditions, including without limitation, the completion of an initial public offering by BioMed Realty Trust, Inc., a Maryland corporation, on or before October 31, 2004. There can be no assurance that such conditions will be satisfied or that the transactions contemplated by the Redemption Agreement will be completed.

Pursuant to the Redemption Agreement, Nektar and the Partnership have agreed that upon the closing of the Redemption, if it occurs, they will enter into an Amended and Restated Build-to-Suit Lease (the "Amended Lease"). The Amended Lease provides for, among other things, a decrease in the term of Nektar's obligations with respect to a portion of the Building not currently occupied by Nektar and the elimination of Nektar's rights to occupy certain other space in the Building.

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

The following discussion contains forward-looking statements that involve risks and uncertainties. Our actual results could differ materially from those discussed here. Factors that could cause or contribute to such differences include, but are not limited to, those discussed in this section as well as factors under the heading "Cautionary Factors that May Affect Future Results" at the end of this section.

Overview

We are working to become one of the world's leading drug delivery products based companies by providing a portfolio of technologies and expertise that will enable us and our pharmaceutical and biotechnology partners to improve drug performance throughout the drug development process. To date the revenues we have received from the sales of our products and in connection with our collaborative arrangements have been insufficient to meet our operating and other expenses and we believe this will continue to be the case for several years. To date, except for sales from certain products using Nektar Advanced PEGylation Technology, we have not sold any commercial products and do not anticipate receiving significant revenue from product sales or royalties in the near future. The development of a successful product is dependent upon several factors that are outside of our control. These include, among other things, the need to obtain regulatory approval to market these products and our dependence upon our collaborative partners. As a result of these or other risks, potential products for which we have invested substantial amounts in research and development may never produce revenues or income.

We have generally been compensated for research and development expenses during initial feasibility work performed under collaborative arrangements for all three of our technologies: Nektar Advanced PEGylation Technology, Nektar Pulmonary Technology, and Nektar Supercritical Fluid Technology. In a typical Advanced PEGylation Technology collaboration, we manufacture and supply the polyethylene glycol ("PEG") reagents and receive manufacturing revenues and possible royalties from sales of the commercial product that results from the chemical attachment of PEG reagents to an active pharmaceutical ingredient ("PEGylation"). Prior to commercialization of pulmonary delivery and advanced PEGylation products, we receive revenues from our partners for partial or full funding of research and development activities and progress payments upon achievement of certain developmental milestones. In a typical Pulmonary Technology collaboration, our partner will provide the active pharmaceutical ingredient (the majority of which are already approved by the U.S. Food and Drug Administration ("FDA") in another delivery form), fund clinical and formulation development, obtain regulatory approvals, and market the resulting commercial product. We may manufacture and supply the drug delivery approach or drug formulation, and may receive revenues from drug manufacturing, as well as royalties from sales of most commercial products. In addition, for products using our Pulmonary Technology, we may receive revenues from the supply of our device for the product along with revenues for any applicable drug processing or filling. In addition to our partner-funded programs, we are applying our technologies independently through internal early-stage proprietary product development efforts. To achieve and sustain profitable operations, we, alone or with others, must successfully develop, obtain regulatory approval for, manufacture, introduce, market, and sell products using our drug delivery and other drug delivery systems. There can be no assurance that we can generate sufficient product or contract research revenue to become profitable or to sustain profitability.

To fund the substantial expense related to our research and development activities, we have raised significant amounts of capital through the sale of equity and convertible debt. Our ability to meet the repayment obligations of our outstanding convertible debt, which as of June 30, 2004 totaled approximately \$173.9 million in outstanding principal, is dependent upon our ability to develop successful products without unexpected significant delay or expense. Even if we are successful in this regard, we may require additional capital to repay the debt obligations.

Because of the magnitude of the revenues and resulting gross margins we receive, we do not expect that sales of our currently marketed products will be sufficient for us to achieve profitability. Our ability to achieve profitability is dependent on the approval of and successful marketing of products with significant markets, and for which we realize relatively higher royalties.

Recent Developments

Exubera®

In June 2004, Pfizer and Aventis announced results of long-term studies showing sustained glycemic control and pulmonary function in patients with type 2 diabetes taking Exubera®. The data were presented at the 64th Annual Scientific Sessions of the American Diabetes conference. They included a pooled analysis of two one-year open-label studies involving 627 patients with type 2 diabetes showing that patients who added Exubera® to their treatment regimen experienced no clinically important effect on pulmonary function compared with patients treated with oral agents alone. Glycemic control was maintained in both arms. An additional analysis of 209 patients, 159 of whom were treated with Exubera® for up to four years, further supported these findings in type 1 and type 2 patients treated with Exubera®.

As reported in March 2004, the European Medicines Evaluation Agency (EMA) has accepted the filing of a marketing authorization application for Exubera® (inhaled human insulin powder).

Partner Pipeline

On June 17, 2004, Eyetech Pharmaceuticals and Pfizer announced that they have completed the filing of a New Drug Application ("NDA") with the U.S. Food and Drug Administration ("FDA") for Macugen as a treatment for wet age-related macular degeneration, the leading cause of severe vision loss in patients older than 50 years of age in the developed world. Macugen, which uses our Advanced PEGylation technology, has been fast-tracked by the FDA given the significant unmet medical need. Eyetech is also developing Macugen for diabetic macular edema, which is in Phase II clinical trials.

On August 2, 2004 we announced an agreement with Pfizer Inc. under which Pfizer will use Nektar Advanced PEGylation Technology for one of its products. The PEGylated version of this undisclosed product is in clinical testing.

Proprietary Products Group

Our Proprietary Products Group applies our technologies to create highly differentiated versions of already-approved drug molecules. Since January 2003, the Proprietary Products Group has advanced two products into the clinic.

Redemption of Interest in Inhale 201 Partnership

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Pursuant to the Redemption Agreement, Nektar and the Partnership have agreed that upon the closing of the Redemption, if it occurs, they will enter into an Amended and Restated Build-to-Suit Lease (the "Amended Lease"). The Amended Lease provides for, among other things, a decrease in the term of Nektar's obligations with respect to a portion of the Building not currently occupied by Nektar and the elimination Nektar's rights to occupy certain other space in the Building.

Recent Accounting Pronouncements

In March 2004 the Financial Accounting Standards Board's ("FASB") Emerging Issues Task Force ("EITF") reached a consensus on EITF 03-01, *The Meaning of Other-Than-Temporary Impairment and Its Application to Certain Investments*. EITF 03-01 provides guidance regarding disclosures about unrealized losses on available-for-sale debt and equity securities accounted for under Statement of Financial Accounting Standard ("SFAS") No. 115, *Accounting for Certain Investments in Debt and Equity Securities*. The guidance for evaluating whether an investment is other-than-temporarily impaired should be applied in other-than-temporary impairment evaluations made in reporting periods beginning after June 15, 2004. Our adoption of this EITF did not have a material effect on our financial position or results of operations.

Critical Accounting Estimates

On March 31, 2004, the Financial Accounting Standards Board ("FASB") issued an exposure draft of proposed statement titled *Share-Based Payment*, that addresses the accounting for share-based payment transactions in which an enterprise receives employee services in exchange for (a) equity instruments of the enterprise or (b) liabilities that are based on the fair value of the enterprise's equity instruments or that may be settled by the issuance of such equity instruments. The proposed statement would eliminate the ability to account for share-based compensation transactions using APB Opinion No. 25, *Accounting for Stock Issued to Employees*, and generally would require instead that such transactions be accounted for using a fair-value-based method. We currently apply the recognition and measurement principles of APB Opinion No. 25. Under this opinion, no stock-based employee compensation expense is charged for options that were granted at an exercise price that was equal to the market value of the underlying common stock on the date of grant. Pro forma information regarding net income and earnings per share is required to be disclosed in the footnotes to our financial statements by Statement of Financial Accounting Standards ("SFAS") No. 123, as

amended by SFAS No. 148, as if we had accounted for our employee stock options under the fair value method of that statement. The FASB will invite public comment regarding its proposed statement before issuing a final pronouncement, which is expected later this year. As the proposed statement currently stands, it would become effective with our fiscal quarter ended March 31, 2005. We monitor progress at the FASB and other developments with respect to the general issue of stock-based incentive compensation. In the future, should we expense the value of stock-based incentive compensation, either out of choice or due to new requirements issued by the FASB, and/or decide to alter our current employee compensation programs to provide other benefits in place of incentive stock options, we may have to recognize substantially more compensation expense. This could have a material adverse impact on our results of operations.

Results of Operations

Three-Months and Six-Months Ended June 30, 2004 and 2003

Revenue

Contract research revenue for the three-month period ended June 30, 2004 of approximately \$22.1 million was comparable to contract research revenue of approximately \$21.2 million for the three-month period ended June 30, 2003. Contract research revenue for the six-month period ended June 30, 2004, was approximately \$43.6 million compared to approximately \$39.6 million for the six-month period ended June 30, 2003, an increase of approximately 10%. This increase was primarily due to project termination fees totaling approximately \$2.1 million received and due to recognition of milestone revenue of approximately \$1.3 million with regard to the filing of a marketing authorization application for Exubera® with the European Medicines Evaluation Agency during the six-month period ended June, 30 2004. Contract research revenue includes reimbursed research and development expense as well as the amortization of deferred up-front signing and progress payments received from our collaborative partners. Contract revenues are expected to fluctuate from year to year, and future contract revenue cannot be predicted accurately. The level of contract revenues depends in part upon future success in obtaining timely completion of feasibility studies, the continuation of existing collaborations, and achievement of milestones under current and future agreements.

Product pricing is generally determined on a cost plus basis and is dependent on the manufacturing agreement specific to each partner. Product revenue for the three-month period ended June 30, 2004 of approximately \$6.4 million was comparable to product revenue of approximately \$6.5 million for the three-month period ended June 30, 2003. Product revenue for the six-month period ended June 30, 2004, was approximately \$10.7 million compared to approximately \$13.7 million for the six-month period ended June 30, 2003, a decrease of approximately 21%. The decrease in product revenue for both the three-month and six-month periods ended was primarily due to production delays, re-scheduling some Advanced PEGylation product sales from the first half of 2004 to the second half of 2004, as well as lower demand for certain products.

Cost of Goods Sold

Cost of goods sold is associated with product sales and was approximately \$6.7 million for the three-month period ended June 30, 2004 based on product sales of approximately \$6.4 million, representing a negative gross margin of approximately (5%). Cost of goods sold for the three-month period ended June 30, 2003 was approximately \$3.7 million based on product sales of approximately \$6.5 million, representing a gross margin of approximately 43%. Cost of goods sold was approximately \$9.3 million for the six-month period ended June 30, 2004 based on product sales of approximately \$10.7 million, representing a gross margin of approximately 14%. Cost of goods sold for the six-month period ended June 30, 2003 was approximately \$8.3 million based on product sales of approximately \$13.7 million, representing a gross margin of approximately 39%. The decrease in gross margin for both the three-month and six-month periods ended June 30, 2004 was primarily due to lower overhead absorption and inventory reserves resulting from production problems of our PEG products during the three-month period ended June 30, 2004, refinement of our methodology to allocate operating expenses to inventory production, and change in product mix. During the three-month period ended June 30, 2004, there was a production problem in one of our PEG-producing manufacturing lines which caused the line to be temporarily shut down due to impurities detected in some production batches. We shut down the line to analyze the source of the impurities and implemented improved in-process testing procedures. Because of the shutdown, inventory produced during the three-month period ended June 30, 2004 was lower than that produced during the three-month period ended June 30, 2003, resulting in lower than usual absorption. As of June 30, 2004 the line was operational and we are in the process of confirming that we have fixed the problem. There are plans to reprocess the impacted inventory, which we expect will result in saleable inventory. In the later part of the year we expect our product margins will be at about the same levels as last year.

Research and Development Expenses

Research and development expenses are associated with three general categories: (i) collaborative agreements under which spending is reimbursed by our partners; (ii) spending attributed to internally funded programs; and (iii) commercial readiness and infrastructure costs associated with commercial operations for our drug and third-party device manufacturing. Research and development expenses were approximately \$36.5 million and approximately \$32.4 million for the three-month periods ended June 30, 2004 and 2003, respectively. The approximate 13% increase in research and development expenses was primarily due to increased expenditures relating to commercial readiness of Exubera® as well as incremental spending on our proprietary products. Research and development expenses were approximately \$70.5 million and approximately \$64.5 million for

the six-month periods ended June 30, 2004 and 2003, respectively. The approximate 9% increase was due to increased expenditures relating to commercial readiness of Exubera® as well as incremental spending on our proprietary products.

General and Administrative Expenses

General and administrative expenses are associated with administrative staffing, business development, and marketing efforts. General and administrative expenses were approximately \$5.5 million and approximately \$5.1 million for the three-month periods ended June 30, 2004 and 2003, respectively. The approximate 7% increase in general and administrative expenses was due primarily to increased outside consulting services offset by an decrease in general and administrative expenses due to the refinement of our methodology to allocate general and administrative expenses to cost of goods sold. General and administrative expenses were approximately \$9.9 million for the six-month period ended June 30, 2004 and approximately \$10.3 million for the six-month period ended June 30, 2003. The approximate 4% decrease in general and administrative expenses was primarily due to the refinement of our methodology to allocate general and administrative expenses to cost of goods sold.

Loss on Debt Extinguishment

During the six-month period ended June 30, 2004, we recognized a loss on debt extinguishment in connection with two privately negotiated transactions to convert our outstanding convertible subordinated notes into shares of our common stock. In January 2004, certain holders of our outstanding 3.5% convertible subordinated notes due October 2007 completed an exchange and cancellation of \$9.0 million in aggregate principal amount of the notes for the issuance of 575,605 shares of our common stock in a privately negotiated transaction. In February 2004, certain holders of our outstanding 3% convertible subordinated notes due June 2010 converted approximately \$36.0 million in aggregate principal amount of such notes for approximately 3.2 million shares of our common stock and a cash payment of approximately \$3.1 million in the aggregate in privately negotiated transactions. As a result of these transactions, we recognized losses on debt extinguishment of approximately \$7.8 million and \$1.5 million, respectively, in accordance with SFAS No. 84, *Induced Conversions of Convertible Debt*.

During the six-month period ended June 30, 2003, we recognized a \$4.3 million gain on the debt extinguishment in connection with the cash payment of approximately \$16.2 million to repurchase \$20.5 million in aggregate principal amount of 3.5% convertible notes due in 2007 in privately negotiated transactions.

Interest Income

Interest income was approximately \$1.6 million for the three-month period ended June 30, 2004, as compared to approximately \$1.3 million for the three-month period ended June 30, 2003. The approximate \$0.3 million increase in interest income was due to higher cash, cash equivalent, and short-term investment balances during the three-month period ended June 30, 2004 as compared to the three-month period ended June 30, 2003. Interest income was approximately \$2.9 million for both six-month periods ended June 30, 2004 and June 30, 2003. Although the cash, cash equivalent, and short-term investment balances were higher during the six-month period ended June 30, 2004, interest income for the six-month period ended June 30, 2004 approximated that of the six-month period ended June 30, 2003 due to the offsetting impact of lower interest rates in 2004 as compared to 2003.

Interest Expense

Interest expense is related to our outstanding convertible subordinated notes and debentures, an obligation for our build-to suit lease transaction with our real estate partnership, other equipment loans and lines of credit, and the mark-to-market impact of our interest rate swap. Interest expense was approximately \$2.8 million and \$4.2 million for the three-month periods ended June 30, 2004 and 2003, respectively. The approximate \$1.4 million decrease in interest expense was due to the lower balance of convertible subordinated notes outstanding at June 30, 2004 as compared to June 30, 2003. Interest expense was approximately \$18.8 million and approximately \$8.3 million for the six-month periods ended June 30, 2004 and 2003, respectively. The approximate \$10.5 million increase in interest expense was due primarily to the payment of approximately \$12.7 million in “make-whole” payments made to certain holders of our outstanding 3.0% convertible subordinated notes due June 2010 in connection with the conversion of \$169.3 million in aggregate principal amount of the notes held by such holders for the issuance of approximately 14.9 million shares of our common stock following our call for the redemption of such notes during the three-month period ended March 31, 2004. This was partially offset by a decrease in interest expense due to the lower balance of convertible subordinated notes outstanding at June 30, 2004 as compared to June 30, 2003. We expect interest expense to decrease as a result of the decrease in the outstanding balance of our convertible subordinated notes during 2004.

Liquidity and Capital Resources

We have financed our operations primarily through public and private placements of our debt and equity securities, revenue from development contracts, product sales and short-term research and feasibility agreements, financing of equipment acquisitions and tenant improvements, and interest income earned on our investments of cash. At June 30, 2004 we had cash, cash equivalents and short-term investments of approximately \$425.3 million.

19

	As of June 30,	
	2004	2003
	(in millions, except current ratio)	
Cash, cash equivalents, and short-term investments	\$ 425.3	\$ 308.3
Current ratio	10.2:1	7.3:1

	Six Months Ended June 30,	
	2004	2003
	(in millions)	
Cash provided by/(used in)		
Operating activities	\$ (58.2)	\$ (52.1)
Investing activities	\$ (172.2)	\$ 35.6
Financing activities	\$ 202.7	\$ 81.8
Capital expenditures (included in investing activities above)	\$ (14.0)	\$ (6.1)

Our operations used cash of \$58.2 million for the six-month period ended June 30, 2004 as compared to \$52.1 million for the six-month period ended June 30, 2003. The \$6.3 million increase in cash used in operating activities was due primarily to the increased net loss of \$29.2 million, offset by the increase in non-cash loss on extinguishment of debt of \$13.6 million and the change in assets and liabilities \$9.1 million.

Cash used by investing activities was \$172.2 million for the six-month period ended June 30, 2004 as compared to cash provided by investing activities of \$35.6 million for the six-month period ended June 30, 2003. Cash related to investing activities for the six-month periods ended June 30, 2004 and 2003 were affected primarily by the purchase of short-term investments. The balance of short-term investments as of June 30, 2004 increased by \$180.9 million as compared to June 30, 2003 as a result of the investment of the majority of the proceeds from the sale of approximately 9.5 million shares of our common stock in March 2004. The sale and maturity of short-term investments increased by approximately \$6.3 million during the six-month period ended June 30, 2004 as compared to the sale and maturity of short-term investments during the six-month period ended June 30, 2003. We purchased property and equipment of approximately \$14.0 million and \$6.1 million during the six-month periods ended June 30, 2004 and 2003, respectively. The increase in purchased property and equipment of \$7.9 million was primarily due to the expansion of our manufacturing facility in Alabama.

The \$202.7 million in cash provided by financing activities for the six-month period ended June 30, 2004 was primarily due to the sale of 9.5 million shares of our common stock in March 2004 at a price of \$20.71 per common share for proceeds of approximately \$196.2 million, net of issuance costs. In addition, cash received from employee exercises of stock options totaled \$7.7 million for the six-month period ended June 30, 2004. The \$81.8 million in cash provided by financing activities for the six-month period ended June 30, 2003 resulted from the sale of \$100 million in aggregate principal amount of our 3% convertible subordinated notes due in 2010 for aggregate proceeds of \$96.4 million, net of issuance costs. This was offset by cash payments of \$16.2 million for the repurchase of \$20.5 million aggregate principal amount of our 3.5% convertible subordinated notes due in 2007 in privately negotiated transactions.

In April 2004, we called for redemption of all of our outstanding 6 ¾% convertible subordinated notes due October 2006. Holders of all but \$10,000 in principal amount converted their notes prior to the redemption date, resulting in the issuance of approximately 0.5 million shares of our common stock. We redeemed the \$10,000 in principal amount not converted into equity for cash in the amount of \$10,000. The aggregate amount of notes converted was approximately \$7.8 million.

In March 2004, we called for the full redemption of our outstanding 3% convertible subordinated notes due June 2010. The aggregate principal amount outstanding of the notes at the time of the call for redemption was \$133.3 million, all of which was converted into an aggregate approximately 11.7 million shares of common stock prior to the redemption date. In connection with the conversion, we agreed to pay \$75.00 per \$1,000 of the notes to be converted, for an aggregate payment of approximately \$10.0 million. This payment was recorded as interest expense.

In February 2004, certain holders of our outstanding 3% convertible subordinated notes due June 2010 converted approximately \$36.0 million in aggregate principal amount of such notes for approximately 3.2 million shares of our common stock and a cash payment of approximately \$3.1 million in the aggregate in privately negotiated transactions.

As a result of the transactions related to convertible subordinated debt during the six-month period ended June 30, 2004, our total contractual obligation with regard to convertible subordinated debt has decreased from \$360.0 million at December 31, 2003 to \$173.9 million at June 30, 2004. All of our outstanding convertible subordinated debt as of June 30, 2004 will mature in 2007.

Given our current cash requirements, we forecast that we will have sufficient cash to meet our net operating expense requirements for at least the next two years. We plan to continue to invest in our growth and the need for cash will be dependent upon the timing of these investments. Our capital needs will depend on many factors, including continued scientific progress in our research and development arrangements, progress with preclinical and clinical trials, the time and costs involved in obtaining regulatory approvals, the costs of developing and the rate of scaling up each manufacturing operation of our technologies, the timing and cost of our late stage clinical and early commercial production facility, the costs involved in preparing, filing, prosecuting, maintaining and enforcing patent claims, the need to acquire licenses to new technologies, and the status of competitive products. The entire outstanding balance of convertible subordinated debt as of June 30, 2004 of \$173.9 million will mature in 2007. We are not likely to be able to satisfy this entire obligation through cash flow generated by our operations. To satisfy our long-term needs, we intend to seek additional funding, as necessary, from corporate partners and from the sale of securities. Because we are an early stage biotechnology company, we do not qualify to issue investment grade debt or have access to certain credit facilities. As a result, any financing we undertake will likely involve the issuance of equity, convertible debt instruments or high-yield debt to fund our working capital. To date we have been primarily dependent upon equity and convertible debt financings for capital and have incurred substantial debt as a result of our issuances of subordinated notes and debentures that are convertible into our common stock. Our substantial debt, the market price of our securities and the general economic climate, among other factors, could have material consequences for our financial position and could affect our sources of short-term and long-term funding. There can be no assurance that additional funds, if and when required, will be available to us on favorable terms, if at all.

Issuer Purchases of Equity Securities

There were no purchases of any class of our equity securities by us or any affiliate pursuant to any publicly announced repurchase plan in the three-month or six-month periods ended June 30, 2004.

Approval of Non-Audit Services

During the three-month period ended June 30, 2004, the Audit Committee of the Board of Directors approved \$110,000 in tax-related consultation and tax returns preparation services to be provided by Ernst & Young LLP, our independent registered public accounting firm.

RISK FACTORS

The following section should be read carefully in connection with evaluating our business. Any of the following factors could materially and adversely affect our business, financial position or results of operations.

If our collaborative partners that we depend on to obtain regulatory approvals and commercialization of our products are not successful, or if such collaborations fail, then our product development or commercialization of our products may be delayed or unsuccessful.

Because we are in the business of developing technology for improving drug formulations and methods for drug delivery, and licensing these technologies to companies that make and sell drugs, we do not have the people and other resources to do the following things:

- synthesize active pharmaceutical ingredients to be used as medicines;
- design and conduct large scale clinical studies;
- prepare and file documents necessary to obtain government approval to sell a given drug product; or
- market and sell our products when and if they are approved.

When we sign a collaborative development agreement or license agreement to develop a product with a drug or biotechnology company, the drug or biotechnology company agrees to do some or all of the things described above.

Reliance on collaborative relationships poses a number of risks, including:

- the potential inability to control whether and the extent to which our collaborative partners will devote sufficient resources to our programs or products;
- disputes which may arise in the future with respect to the ownership of rights to technology and/or intellectual property developed with collaborative partners;
- disagreements with collaborative partners which could lead to delays in or termination of the research, development or commercialization of product candidates, or result in litigation or arbitration;
- the potential for contracts with our collaborative partners to fail to provide significant protection or to be effectively enforced if one of these partners fails to perform. Collaborative partners have considerable discretion in electing whether to pursue the development of any additional products and may pursue alternative technologies or products either on their own or in collaboration with our competitors;
- the potential for collaborative partners with marketing rights to choose to devote fewer resources to the marketing of our products than they do to products of their own development;

- risks related to the ability of our collaborative partners to pay us; and
- the potential for collaborative partners to terminate their agreements with us unilaterally for any or no reason.

Given these risks, there is a great deal of uncertainty regarding the success of our current and future collaborative efforts.

We have entered into collaborations in the past that have been subsequently terminated. If other collaborations are suspended or terminated, our ability to commercialize certain of our other proposed products could also be negatively impacted. If these efforts fail, our product development or commercialization of products could be delayed and our financial position and results of operations would be significantly harmed.

If Pfizer does not file an NDA for approval of Exubera® in the U.S., if the FDA does not timely approve any NDA for Exubera®, if the European Medicines Evaluation Agency (“EMEA”) does not timely approve a marketing authorization application for Exubera®, or if our collaboration with Pfizer is discontinued prior to the commercial launch of Exubera®, then our financial position and results of operations will be significantly harmed.

22

We are developing with Pfizer an inhaleable version of insulin, Exubera®, for the treatment of Type 1 and Type 2 diabetes that will be administered using our Pulmonary Technology. Exubera® is currently in extended Phase III clinical trials. We currently depend on Pfizer as the source of a significant portion of our revenues. For the six-month periods ended June, 2004 and 2003, revenue from Pfizer accounted for 59% and 58% of our revenue, respectively. In March 2004, Pfizer and Aventis announced that the EMEA has accepted the filing of a marketing authorization application for Exubera®. However, there can be no assurance that Exubera® will be approved for marketing and/or commercial use in the European Union (“E.U.”). Delays in the filing of an Exubera® NDA will result in a delay in marketing approval in the U.S., and there can be no assurance that even if the NDA submission is filed, Exubera® will be approved for marketing and commercial use in the U.S. Among the factors that may delay the filing or approval of the NDA, the approval by the EMEA to market Exubera® in the E.U., or the commercial launch of Exubera® in the U.S. or the E.U., or that may impact a decision to proceed at all with respect to any of the foregoing, are the following:

- Pfizer is currently conducting studies to generate controlled long-term safety data with respect to Exubera®, in particular its effect on lung function, and the results of the studies may impact the filing of regulatory submissions or regulatory approvals.
- Pfizer and its partner, Aventis, have been working with the FDA to determine the appropriate timing for submission of the Exubera® NDA in the U.S. The results of any discussions with the FDA with respect to the requirements for and timing of the submission of an NDA may impact the filing or approval of the NDA.
- We may experience difficulties with respect to the processing of the dry powder formulation of inhaleable insulin, and the filling and packaging of the inhaleable insulin powder for Exubera®. We may not be able to transfer the filling and packaging technology to Pfizer for the large-scale commercial production of Exubera®.
- We, with our contract manufacturers, may experience difficulties with respect to the production of the pulmonary inhaler device for Exubera®, including the design, scale up and automation of the commercial manufacture of the pulmonary inhaler device for Exubera®, and any such difficulties may delay the filing and approval of the NDA or the approval to market in the E.U. Our contract manufacturers may also experience difficulties with respect to manufacturing the device in high volumes for commercial use.
- Pfizer may elect for marketing or other reasons, to delay or not proceed with the filing of regulatory submissions for Exubera®, or if approved following any such filing, the commercial launch of Exubera®.

The determination as to whether or when an NDA is filed with respect to Exubera® will be made by Pfizer in its discretion. If the filing or approval of the NDA is substantially delayed beyond the internal estimates we have made for purposes of budgeting and resource allocation, we may not have the financial ability to continue supporting the Exubera® program or be able to meet our contractual obligations relating to the commercial launch of Exubera®. In the event of any such delay, we may also elect to divert resources away from Exubera® related activities or otherwise reduce our activities relating to the Exubera® program. Any material delay in the filing for regulatory approval or material delay in receiving regulatory approval (which in some countries includes pricing approval), or failure to receive regulatory approval for Exubera® at all, would affect our contract research revenue from Pfizer, may result in the payment by us of substantial reimbursements to the contract manufacturers of our proprietary inhaler device with respect to the capital they have deployed in support of such activity, and would significantly harm our financial position and results of operations. Furthermore, should the collaboration with Pfizer be discontinued, our financial position and results of operations will be significantly harmed.

If we fail to establish future successful collaborative relationships, then our financial results may suffer and our product development efforts may be delayed or unsuccessful.

We intend to seek future collaborative relationships with pharmaceutical and biotechnology partners to fund some of our research and development expenses and to develop and commercialize potential products. Further, we anticipate that the timing of drug development programs under existing collaborative agreements with our partners will continue to affect our revenues from such agreements. We may not be able to negotiate acceptable collaborative arrangements in the future, and any arrangements we do negotiate may not be successful. If we fail to establish additional collaborative relationships, we will be required to undertake research, development, marketing, and manufacturing of our proposed products at our own expense or discontinue or reduce these activities.

If we are unable to establish successful collaborative relationships for our early-stage proprietary product development, then our financial results may suffer and our product development efforts may be delayed or unsuccessful.

We intend to seek future collaborative relationships with pharmaceutical and biotechnology partners to fund some clinical trials and other development expenses associated with the development and commercialization of products developed through our Proprietary Products Group. We may not be able to negotiate acceptable collaborative arrangements in the future with respect to

23

these products, and any arrangements we do negotiate may not be successful. If we fail to establish these collaborative relationships, we will have expended significant funds of our own in developing these products, and not get a return on our investment. We may then be required to undertake further development, marketing, and manufacturing of these products at our own expense or discontinue or reduce these activities altogether. As a result, failure to establish successful collaborative relationships for these products with pharmaceutical and biotechnology partners will cause our financial results to suffer and could delay or terminate the development of such products.

If our drug delivery technologies are not commercially feasible, then our revenues and results of operations will be impacted negatively.

We are in an early stage of development with respect to many of our products. There is a risk that our technologies will not be commercially feasible. Even if our technologies are commercially feasible, they may not be commercially accepted across a range of large and small molecule drugs. We have tested 13 drug formulations based on our Pulmonary Technology in humans. None of the products using our Pulmonary Technology has been approved for marketing. Our Advanced PEGylation Technology has been incorporated in five products that the FDA has approved for marketing and one additional product approved in Europe, and 10 others are in clinical trials. Our Supercritical Fluid Technology is also primarily in an early stage of feasibility. Our potential products require extensive research, development and preclinical and clinical testing. Our potential products also may involve lengthy regulatory reviews and require regulatory approval before they can be sold. We do not know if, and cannot provide assurance that, any of our potential products will prove to be safe and effective, accomplish the objectives that we and our collaborative partners are seeking through the use of our technologies, meet regulatory standards or continue to meet such standards if already approved. There is a risk that we, and our collaborative partners, may not be able to produce any of our potential products in commercial quantities at acceptable costs, or market them successfully. Failure to achieve commercial feasibility, demonstrate safety, achieve clinical efficacy, obtain regulatory approval or, together with partners, successfully market products will negatively impact our revenues and results of operations.

If our research and development efforts are delayed or unsuccessful, then we will experience delay or be unsuccessful in having our products commercialized, and our business will suffer.

Except for products using our Advanced PEGylation Technology that have already been approved by the FDA or other regulatory agencies, our product candidates are still in research and development, including preclinical testing and clinical trials. Preclinical testing and clinical trials are long, expensive and uncertain processes. It may take us, or our collaborators several years to complete this testing, and failure can occur at any stage in the process. Success in preclinical testing and early clinical trials does not ensure that later clinical trials will be successful. A number of companies in the pharmaceutical and biotechnology industries have suffered significant setbacks in later stage clinical trials, even after promising results in earlier trials.

Any clinical trial may fail to produce results satisfactory to us, our collaborative partners, the FDA, or other regulatory authorities. Preclinical and clinical data can be interpreted in different ways, which could delay, limit or prevent regulatory approval or commercialization. Negative or inconclusive results or adverse medical events during a clinical trial could cause a clinical trial to be repeated or a program to be terminated. We typically rely on collaborative partners and third-party clinical investigators to conduct clinical trials of our products and, as a result, we may face additional delaying factors outside our control.

We do not know if any of our research and development efforts, including preclinical testing or clinical trials, will adhere to our planned schedules or be completed on a timely basis or at all. Typically, there is a high rate of attrition for product candidates in preclinical and clinical trials.

If our drug delivery technologies do not satisfy certain basic feasibility requirements such as total system efficiency, then our products may not be competitive.

We may not be able to achieve the total system efficiency for products based on our Pulmonary Technology that is needed to be competitive with alternative routes of delivery or formulation technologies. We determine total system efficiency by the amount of drug loss during manufacture, in the delivery system, and in reaching the ultimate site at which the drug exhibits its activity. We would not consider a drug to be a good candidate for development and commercialization using our Pulmonary Technology if drug loss is excessive at any one stage or cumulatively in the manufacturing and delivery process.

Our ability to efficiently attach PEG polymer chains to a drug molecule is the initial screen for determining whether drug formulations using our Advanced PEGylation Technology are commercially feasible. We would not consider a drug formulation to be a good candidate for development and commercialization using our Advanced PEGylation Technology if we could not efficiently attach a PEG polymer chain to such drug without destroying or impairing the drug's activity.

For our Supercritical Fluid Technology, solubility characteristics of a drug and the solvents, which may be incorporated in the manufacturing process, provide the initial screen for whether drug formulations using this technology are commercially feasible. We would not consider a drug to be a good candidate for this technology if its solubility characteristics were such that the application of our technology results in very low efficiency in manufacturing of drug powders.

If our drug formulations are not stable, then we will not be able to develop or commercialize products.

We may not be able to identify and produce powdered or other formulations of drugs that retain the physical and chemical properties needed to work effectively with our inhaler devices for deep lung delivery using our Pulmonary Technology, or through other methods of drug delivery using our Advanced PEGylation or Supercritical Fluid Technologies. Formulation stability is the physical and chemical stability of the drug over time and under various storage, shipping and usage conditions. Formulation stability will vary with each drug formulation and the type and amount of ingredients that are used in the formulation. Since our drug formulation technology is new and largely unproven, we do not know if our drug formulations will retain the needed physical and chemical properties and performance of the drugs. Problems with formulated drug powder stability in particular would negatively impact our ability to develop products based on our Pulmonary Technology or Supercritical Fluid Technology, or obtain regulatory approval for or market such products.

If our drug delivery technologies are not safe, then regulatory approval of our products may not be obtained, or our products may not be developed or marketed.

We, or our collaborative partners, may not be able to prove that potential products using our drug delivery technologies are safe. Our products require lengthy laboratory, animal and human testing. Many of our products are in preclinical testing or the early stage of human testing. Since many of our products are in an early stage of testing and have not completed clinical trials, we cannot be certain that these products, and our technology that developed these products, are safe or will not produce unacceptable adverse side effects. The safety of our formulations will vary with each drug and the ingredients used in our formulation. If any product is found not to be safe, the product will not be approved for marketing or commercialization.

If product liability lawsuits are brought against us, we may incur substantial liabilities.

The manufacture, testing, marketing and sale of medical products entail an inherent risk of product liability. If product liability costs exceed our liability insurance coverage, we may incur substantial liabilities. Whether or not we were ultimately successful in product liability litigation, such litigation would consume substantial amounts of our financial and managerial resources, and might result in adverse publicity, all of which would impair our business. We may not be able to maintain our clinical trial insurance or product liability insurance at an acceptable cost, if at all, and this insurance may not provide adequate coverage against potential claims or losses.

If the products using our Pulmonary Technology do not provide consistent doses of medicine, then we will not be able to develop, and our partners will not be able to obtain regulatory approval for and commercialize products.

We may not be able to provide reproducible dosing of stable formulations of drug compounds. Reproducible dosing is the ability to deliver a consistent and predictable amount of drug into the bloodstream over time both for a single patient and across patient groups. Reproducible dosing of drugs based on our Pulmonary Technology requires the development of:

- an inhalation or other device that consistently delivers predictable amounts of dry powder to the deep lung;
- accurate unit dose packaging of dry powder; and
- moisture resistant packaging.

Since our Pulmonary Technology is still in development and is yet to be used in commercialized products, we cannot be certain that we will be able to develop reproducible dosing of any potential product. The failure to do so would mean that we would not consider such a product a good candidate for development and commercialization.

If we or our partners do not obtain regulatory approval for our products on a timely basis, then our revenues and results of operations may be affected negatively.

There is a risk that we, or our partners, will not obtain regulatory approval (which in some countries includes pricing approval) for our unapproved products on a timely basis, or at all. Our unapproved products must undergo rigorous animal and human testing and an extensive FDA mandated or equivalent foreign authorities' review process. This process generally takes a number of years and requires the expenditure of substantial resources. The time required for completing such testing and obtaining such approvals is uncertain. The FDA and other U.S. and foreign regulatory agencies also have substantial discretion to terminate clinical trials, require additional testing, delay or withhold registration and marketing approval and mandate product withdrawals including recalls. The FDA has approved for marketing five products using our Advanced PEGylation Technology for specific uses in the United States. Further, another product using our Advanced PEGylation Technology has been approved in Europe. Even though our partners have obtained regulatory approval for some of our products, these products and our manufacturing processes are subject to continued review by the FDA and other regulatory authorities. Even if our partners receive regulatory approval of a product, the approval may limit the indicated uses for which our partners may market the product. In addition, our partners' marketed products, our manufacturing facilities and we, as the manufacturer in certain instances, will be subject to

continual review and periodic inspections. Later discovery from such review and inspection of previously unknown problems may result in restrictions on our partners' products or on us, including withdrawal of our partners' products from the market. The failure to obtain timely regulatory approval of our partners' products, any product marketing limitations or a product withdrawal would negatively impact our revenues and results of operations.

In addition, we may encounter delays or rejections based upon changes in FDA regulations or policies, including policies relating to current good manufacturing practice compliance, or "cGMP," during the period of product development. We may encounter similar delays in other countries.

If our technologies cannot be integrated successfully to bring products to market, then our ability to develop, and our partners' ability to obtain approval or market our products, may be delayed or unsuccessful.

We may not be able to integrate all of the relevant technologies to provide complete drug delivery and formulation systems. In particular, our development of drugs based on our Pulmonary Technology relies upon the following several different but related technologies:

- dry powder formulations;
- dry powder processing technology;
- dry powder packaging technology; and
- deep lung delivery devices.

Our other technologies may face similar challenges relating to the integration of drug formulation, processing, packaging and delivery device technologies. At the same time we must:

- establish collaborations with partners;

- perform laboratory and pre-clinical testing of potential products; and
- scale-up our manufacturing processes.

We must accomplish all of these steps without delaying any aspect of product development. Any delay in one component of product or business development could delay our ability to develop, and our partners' ability to obtain approval or market products using our delivery and formulation technologies.

If we are not able to manufacture our products in commercially feasible quantities or at commercially feasible costs, then our products will not be successfully commercialized.

Nektar Advanced PEGylation Technology and Supercritical Fluid Technology

Except for the five approved products and the one additional product approved in Europe incorporating our Advanced PEGylation Technology, all of the drug formulations which incorporate our Advanced PEGylation Technology and Supercritical Fluid Technology are in various stages of feasibility testing or human clinical trials. We are currently expanding our Advanced PEGylation Technology manufacturing capacity and anticipate having to add additional Supercritical Fluid Technology manufacturing capacity. If we are not able to scale-up to large clinical trials or commercial manufacturing for products incorporating either of these technologies in a timely manner or at a commercially reasonable cost, we risk not meeting our customers' supply requirements or our contractual obligations. Our failure to solve any of these problems could delay or prevent late stage clinical testing and commercialization of our products and could negatively impact our revenues and results of operations.

Nektar Pulmonary Technology

All of the drug formulations, which incorporate our Pulmonary Technology, are in various stages of human clinical trials or feasibility testing

Powder Processing. We have no experience manufacturing powder products for commercial purposes. With respect to drugs based on our Pulmonary Technology, we have only performed powder processing on the scale needed for testing formulations, and for early stage and larger clinical trials. We may encounter manufacturing and control problems as we attempt to scale-up powder processing facilities. We may not be able to achieve such scale-up in a timely manner or at a commercially reasonable cost, if at all, and the powder processing system we implement may not be applicable for other drugs. Our failure to

solve any of these problems could delay or prevent some late stage clinical testing and commercialization of our products and could negatively impact our revenues and results of operations.

To date, we rely primarily on two particular methods of powder processing. There is a risk that these technologies will not work with all drugs or that the cost of drug production with this processing will preclude the commercial viability of certain drugs. Additionally, there is a risk that any alternative powder processing methods we may pursue will not be commercially practical for aerosol drugs or that we will not have, or be able to acquire the rights to use, such alternative methods.

Powder Packaging. Our fine particle powders and small quantity packaging utilized for drugs based on our Pulmonary Technology require special handling. We have designed and qualified automated filling equipment for small and moderate quantity packaging of fine powders. We face significant technical challenges in scaling-up an automated filling system that can handle the small dose and particle sizes of our powders in commercial quantities. There is a risk that we will not be able to scale-up our automated filling equipment in a timely manner or at commercially reasonable costs. Any failure or delay in such scale-up would delay product development or bar commercialization of products based on our Pulmonary Technology and would negatively impact our revenues and results of operations.

There can be no assurance we will be able to manufacture products on our autofiller system in a timely manner or at a commercially reasonable cost; any delay or failure in further developing such technology would delay product development or inhibit commercialization of our products and would have a materially adverse effect on us.

Nektar Pulmonary Inhaler Device. We face many technical challenges in developing our pulmonary inhaler device to work with a broad range of drugs, to produce such devices in sufficient quantities, and to adapt the devices to different powder formulations. Our pulmonary inhaler device being used with Exubera® is still in clinical testing. Additional design and development work may be required to optimize the device for regulatory approval, field reliability, or other issues that may be important to its commercial success.

Additional design and development work may lead to a delay in regulatory approval and delay efforts to seek regulatory approval for any product that incorporates the device or the time the device could be ready for commercial launch. In addition, we are attempting to develop a smaller inhaler device, which presents particular technical challenges. There is a risk that we will not successfully achieve any of these challenges. Our failure to overcome any of these challenges would negatively impact our revenues and results of operations.

For late stage clinical trials and initial commercial production, we intend to use one or more contract manufacturers to produce our pulmonary inhaler devices. There is a risk that we will not be able to maintain arrangements with our contract manufacturers on commercially acceptable terms or at all, or effectively scale-up production of our pulmonary inhaler devices through contract manufacturers. Our failure to do so would negatively impact our revenues and results of operations. Dependence on third parties for the manufacture of our pulmonary inhaler devices and their supply chain may adversely affect our cost of goods and ability to develop and commercialize products on a timely or competitive basis. Because our manufacturing processes and those of our contract manufacturers are very complex and subject to lengthy governmental approval processes, alternative qualified production sources or capacity may not be available on a timely basis or at all. Disruptions or delays in our manufacturing processes or those of our contract manufacturers for existing or new products could result in increased costs, loss of revenues or market share, or damage to our reputation.

There is no assurance that devices designed by us and built by contract manufacturers will be approved or will meet approval requirements on a timely basis or at all, or that any of our device development will be successful or commercially viable.

If Pfizer is not able to fill the bulk drug powders for Exubera® in commercially feasible quantities, then Exubera® will not be successfully commercialized and would negatively impact our revenues and results of operations.

We have developed a high capacity automated filling unit capable of filling blisters on a production scale for moderate and large volume products using our Pulmonary Technology. The technology for the high capacity automated filling unit has been transferred to Pfizer who will have the responsibility of packaging and filling the bulk drug powders for Exubera®. There are significant technical challenges in scaling-up an automated filling system that can handle the small dose and particle sizes of our powders in commercial quantities. In addition, there is the additional risk that Pfizer has no backup manufacturing facility for this process. Any failure or delay in the manufacturing facility or process would delay product development or bar commercialization of Exubera® and would negatively impact our revenues and results of operations.

If we are not able to manufacture our dry powder inhaler device in commercially feasible quantities or at commercially feasible costs, then our Pulmonary Technology products may not be successfully commercialized.

In addition to our inhaler device being used with Exubera®, we are developing a breath actuated compact dry powder inhaler device (“DPI”). We are developing the DPI device to be appropriate for the delivery of either large or small molecules for short-term use. We face many unique technical challenges in developing the DPI device to work with a broad range of drugs, producing the DPI device in sufficient quantities and adapting the DPI device to different powder formulations. Our DPI device is

still in clinical testing and production scale-up work is ongoing. Further design and development will be required to obtain regulatory approval for the DPI device, enable commercial manufacturing, insure field reliability or manage other issues that may be important to its commercial success. Such additional design and development work may lead to a delay in efforts to seek regulatory approval for any product that incorporates the DPI device, or could delay the timeframe within which the device could be ready for commercial launch. There is a risk that we will not successfully achieve any of these challenges. Our failure to overcome any of these challenges would negatively impact our revenues and results of operations.

We depend on sole or exclusive suppliers for our pulmonary inhaler devices, bulk active pharmaceutical ingredients and PEG polymer chains and if such suppliers fail to supply when required, then our product development efforts may be delayed or unsuccessful and our commercial supply obligations may be compromised.

We agreed to subcontract the manufacture of our pulmonary inhaler devices used with Exubera® before commercial production. We have identified contract manufacturers that we believe have the technical capabilities and production capacity to manufacture such device and which can meet the requirements of cGMP. We are not certain that we will be able to maintain satisfactory contract manufacturing on commercially acceptable terms, if at all. Our failure to maintain ongoing commercial relationships with our existing contract manufacturers may subject us to significant reimbursement obligations upon termination of such relationships. Our dependence on third parties for the manufacture of our pulmonary inhaler devices may negatively impact our cost of goods and our ability to develop and commercialize products based on our Pulmonary Technology on a timely and competitive basis.

For the most part, we obtain the bulk active pharmaceutical ingredients we use to manufacture products using our technologies from sole or exclusive sources of supply. For example, with respect to our source of bulk insulin, we have entered into a collaborative agreement with Pfizer that has, in turn, entered into an agreement with Aventis to manufacture regular human insulin. Under the terms of their agreement, Pfizer and Aventis agreed to construct a jointly owned manufacturing plant in Frankfurt, Germany. Until needed, Pfizer will provide us with insulin from Aventis’s existing plant. We also have an agreement with one supplier, NOF Corporation, for the supply of PEG polymer chains we use in our products that incorporate our Advanced PEGylation Technology. If our sole or exclusive source suppliers fail to provide either active pharmaceutical ingredients or PEGylation materials in sufficient quantities when required, our revenues and results of operations may be negatively impacted.

If the market does not accept products using our drug delivery technologies, then our revenues and results of operations will be adversely affected.

The commercial success of our potential products depends upon market acceptance by health care providers, third-party payors like health insurance companies and Medicare and patients. Our products under development use new drug delivery technologies and there is a risk that the market will not accept our potential products. Market acceptance will depend on many factors, including:

- the safety and efficacy of products demonstrated in clinical trials;
- favorable regulatory approval and product labeling;
- the frequency of product use;
- the ease of product use;
- the availability of third-party reimbursement;
- the availability of alternative technologies; and
- the price of our products relative to alternative technologies.

There is a risk that health care providers, patients or third-party payors will not accept products using our drug delivery and formulation technologies. If the market does not accept our potential products, our revenues and results of operations would be significantly and negatively impacted.

If our products are not cost effective, then government and private insurance plans may not pay for them and our products may not be widely accepted, which will adversely affect our revenues and results of operations.

In both domestic and foreign markets, sales of our products under development will depend in part upon pricing approvals by government authorities and the availability of reimbursement from third-party payors, such as government health administration authorities, managed care providers, private health insurers and other organizations. In addition, such third-party payors are increasingly challenging the price and cost effectiveness of medical products and services. Significant uncertainty exists as to the pricing approvals for, and the reimbursement status of, newly approved health care products. Moreover, legislation and

regulations affecting the pricing of pharmaceuticals may change before regulatory agencies approve our proposed products for marketing. Adoption of such legislation and regulations could further limit pricing approvals for, and reimbursement of, medical products. A government or third-party payor decision not to approve pricing for, or provide adequate coverage and reimbursements of, our products would limit market acceptance of such products.

If our competitors develop and sell better drug delivery and formulation technologies, then our products or technologies may be uncompetitive or obsolete and our revenues and results of operations will be adversely affected.

We are aware of other companies engaged in developing and commercializing drug delivery and formulation technologies similar to our technologies. Some of our competitors with regard to our Pulmonary Technology include AeroGen, Inc., Alkermes, Inc., Aradigm Corporation, and MannKind. AeroGen and Aradigm are each developing liquid drug delivery systems, and Alkermes is working on a dry powder delivery system. Our competitors with regard to our Advanced PEGylation Technology include Valentis, Inc., Mountain View Pharmaceuticals, Inc. and SunBio PEG-SHOP, as well as several pharmaceutical and biotechnology companies with in-house PEGylation expertise. Some of our competitors with regard to our Supercritical Fluid Technology include Alkermes, Battelle Memorial Institute, Ethypharm SA, Ferro Corp., Lavipharm SA and RxKinetics. Some of these companies license or provide the technology to other companies, while others are developing the technology for internal use. Many of these companies have greater research and development capabilities, experience, manufacturing, marketing, financial and managerial resources than we do and represent significant competition for us. Acquisitions of or collaborations with competing drug delivery companies by large pharmaceutical or biotechnology companies could enhance our competitors' financial, marketing and other resources. Accordingly, our competitors may succeed in developing competing technologies, obtaining regulatory approval for products or gaining market acceptance before us. Developments by others could make our products or technologies uncompetitive or obsolete. Our competitors may introduce products or processes competitive with or superior to our products or processes.

If any of our pending applications do not issue or following issuance are deemed invalid or if any of our patents are deemed invalid, we may lose valuable intellectual property protection. If any of our products infringe third-party intellectual property rights, we may suffer adverse effects to our ability to develop and commercialize products and to our revenues and results from operations.

We have filed patents applications (and we plan to file additional patent applications) covering, among other things, aspects of: (a) our pulmonary delivery technology (in general and as it relates to specific molecules) including, without limitation, our powder processing technology, our powder formulation technology, and our inhalation device technology; (b) our Advanced PEGylation technology; and (c) our Supercritical Fluid technology. As of June 30, 2004, we owned 777 issued U.S. and foreign patents that cover various aspects of our technologies, and we have a number of patent applications pending.

Access, or our partners' access, to drugs to be formulated using our various delivery technologies affects our ability to develop and commercialize our technologies. We intend generally to rely on the ability of our partners to provide access to drugs that we formulate for pulmonary and other forms of delivery. There is a risk that our partners will not be able to provide access to such drugs. This situation is complex, and as such, the ability of any one company, including us, to commercialize a particular drug is unpredictable.

In addition, formulations of drugs that are presently under development by us — as well as our drug formulation and delivery technologies — may be subject to issued U.S. and foreign patents (and may be subject in the future to patents that issue from pending patent applications) owned by competitors. Therefore, even if our partners provide access to drugs for the formulation of pulmonary and other forms of delivery, there is a risk that third parties will accuse, and possibly a court or a governmental agency will determine, that we and/or our partners infringe third party patent rights covering such drugs and/or the formulation or delivery technologies utilizing such drugs, and we will be prohibited from working with the drug or formulation or delivery technology, or we will be found liable for damages that may not be subject to indemnification, or we may elect to pay such third party royalties under a license to such patent rights if one is available. Any such restrictions on access to drugs, liability for damages, prohibition, or payment of royalties would negatively impact our revenues and results of operations.

We may incur material litigation costs, which may adversely affect our business and results of operations.

From time to time, we are party to various litigation matters, including several that relate to our patent and intellectual property rights. We cannot predict with certainty the eventual outcome of any pending litigation or potential future litigation, and we might have to incur substantial expense in defending these or future lawsuits or indemnifying third parties with respect to the results of such litigation.

If earthquakes, tornadoes, hurricanes and other catastrophic events strike, our business may be negatively affected.

Our corporate headquarters, including a substantial portion of our research and development operations, are located in the San Francisco Peninsula, a region known for seismic activity. A significant natural disaster such as an earthquake could have a material adverse impact on our business, operating results, and financial condition. There are no backup facilities for some of our manufacturing operations located in the San Francisco Peninsula. Certain of our other facilities, such as our facility in Huntsville,

Alabama and certain of our collaborative partners located elsewhere may also be subject to catastrophic events such as hurricanes and tornadoes, any of which could have a material adverse effect on our business, operating results, and financial condition.

Investors should be aware of industry-wide risks, which are applicable to us and may affect our revenues and results of operations.

In addition to the risks associated specifically with us described above, investors should also be aware of general risks associated with drug development and the pharmaceutical and biotechnology industries. These include, but are not limited to:

- changes in and compliance with government regulations;
- handling and disposal of hazardous materials;
- workplace health and safety requirements;
- hiring and retaining qualified people; and
- insuring against product liability claims.

If we do not generate sufficient cash flow through increased revenues or raising additional capital, then we may not be able to meet our substantial debt obligations.

As of June 30, 2004, we had approximately \$173.9 million in long-term convertible subordinated notes and debentures, \$30.5 million in non-current capital lease obligations and \$11.7 million in other long-term liabilities. Our substantial long-term indebtedness, which totaled \$216.1 million as of June 30, 2004, has and will continue to impact us by:

- making it more difficult to obtain additional financing; and
- constraining our ability to react quickly in an unfavorable economic climate.

Currently we are not generating positive cash flow. Delay in the approval of Exubera®, or other adverse occurrences related to our product development efforts will adversely impact our ability to meet our obligations to repay the principal amounts on our convertible subordinated notes and debentures when due. In addition, if the market price of our common stock is below the related conversion price, the holders of the related outstanding convertible subordinated notes and debentures will not likely convert such securities to equity in accordance with their existing terms. If we are unable to satisfy our debt service requirements, substantial liquidity problems could result. As of June 30, 2004 we had cash, cash equivalents and short-term investments valued at approximately \$425.3 million. We expect to use a substantial portion of these assets to fund our on-going operations over the next few years. As of June 30, 2004, we had approximately \$173.9 million outstanding convertible subordinated notes and debentures, all of which will mature in 2007. We may not generate sufficient cash from operations to repay our convertible subordinated notes and debentures or satisfy any other of these obligations when they become due and may have to raise additional funds from the sale of equity or debt securities or otherwise restructure our obligations in order to do so. There can be no assurance that any such financing or restructuring will be available to us on commercially acceptable terms, if at all.

If we cannot raise additional capital our financial condition may suffer.

Our capital needs may change as a result of numerous factors, and may result in additional funding requirements. In addition, we may choose to raise additional capital due to market conditions or strategic considerations. To the extent that additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities could result in dilution to our stockholders.

We have no material credit facility or other material committed sources of capital. To the extent operating and capital resources are insufficient to meet future requirements, we will have to raise additional funds to continue the development and commercialization of our technologies and products. Such funds may not be available on favorable terms, or at all. In particular, our substantial leverage may limit our ability to obtain additional financing. In addition, as an early stage biotechnology company, we do not qualify to issue investment grade debt and therefore any financing we do undertake will likely involve the issuance of equity, convertible debt instruments and/or high-yield debt. These sources of capital may not be available to us in the event we require additional financing. If adequate funds are not available on reasonable terms, we may be required to curtail operations significantly or obtain funds by entering into financing, supply or collaboration agreements on unattractive terms. Our inability to raise capital could negatively impact our business.

If we fail to manage our growth effectively, our business may suffer.

Our ability to offer commercially viable products, achieve our expansion objectives, manage our growth effectively and satisfy our commitments under our collaboration agreements depends on a variety of factors, all of which must be successfully managed. Key factors include our ability to develop products internally, enter into strategic partnerships with collaborators, attract and retain skilled employees and effectively expand our internal organization to accommodate anticipated growth including integration of any potential businesses that we may acquire. If we are unable to manage some or all of these factors effectively, our business could grow too slowly or too quickly to be successfully sustained, thereby resulting in material adverse effects on our business, financial condition and results of operations.

If we acquire additional companies, products or technologies, we may not be able to effectively integrate personnel and operations and such failure may disrupt our business and results of operations.

We have acquired companies, products and/or technologies in the past, and may continue to acquire or make investments in complementary companies, products or technologies in the future. We may not receive the anticipated benefits of these acquisitions or investments. We may face risks relating to difficult integrations of personnel, technology and operations, uncertainty whether any integration will be successful and whether earnings will be negatively affected, and potential distractions to our management with respect to these acquisitions. In addition, our earnings may suffer because of acquisition-related costs.

We expect to continue to lose money for the next few years and may not reach profitability if our products do not generate sufficient revenue.

We have never had a profitable year and, through June 30, 2004, we have an accumulated deficit of approximately \$677.4 million. We expect to continue to incur substantial and potentially increasing losses over at least the next few years as we expand our research and development efforts, testing

activities and manufacturing operations, and as we further expand our late stage clinical and early commercial production facilities. Most of our potential products are in the early stages of development. Except for the approved products incorporating our Advanced PEGylation Technology, we have generated no revenues from product sales. Our revenues to date have consisted primarily of payments under short-term research and feasibility agreements and development contracts.

To achieve and sustain profitable operations, we must, alone or with others, successfully develop, obtain regulatory approval for, manufacture, introduce, market and sell products using our drug delivery technologies. There is risk that we will not generate sufficient product or contract research revenue to become profitable or to sustain profitability.

Anti-takeover provisions in our charter documents and under Delaware law may make it more difficult to acquire us, even though such acquisitions may be beneficial to our stockholders.

Provisions of our certificate of incorporation and bylaws, as well as provisions of Delaware law, could make it more difficult for a third party to acquire us, even though such acquisitions may be beneficial to our stockholders. These anti-takeover provisions include:

- establishment of a classified board of directors such that not all members of the board may be elected at one time;
- lack of a provision for cumulative voting in the election of directors, which would otherwise allow less than a majority of stockholders to elect director candidates;
- the ability of our board to authorize the issuance of “blank check” preferred stock to increase the number of outstanding shares and thwart a takeover attempt;
- prohibition on stockholder action by written consent, thereby requiring all stockholder actions to be taken at a meeting of stockholders;
- establishment of advance notice requirements for nominations for election to the board of directors or for proposing matters that can be acted upon by stockholders at stockholder meetings; and
- limitations on who may call a special meeting of stockholders.

Further, we have in place a preferred share purchase rights plan, commonly known as a “poison pill.” The provisions described above, our “poison pill” and provisions of Delaware law relating to business combinations with interested stockholders may discourage, delay or prevent a third party from acquiring us. These provisions may also discourage, delay or prevent a third

party from acquiring a large portion of our securities, or initiating a tender offer or proxy contest, even if our stockholders might receive a premium for their shares in the acquisition over the then current market prices.

We expect our stock price to remain volatile.

Our stock price is volatile. In the last twelve-month period ending June 30, 2004, based on closing bid prices on The NASDAQ National Market, our stock price ranged from \$6.87 to \$23.24. We expect our stock price to remain volatile. A variety of factors may have a significant effect on the market price of our common stock, including:

- clinical trial results or product development delays or delays in product approval or launch;
- announcements by collaboration partners as to their plan or expectations related to products using our technologies;
- announcement or termination of collaborative relationships by us or our competitors;
- fluctuations in our operating results;
- developments in patent or other proprietary rights;
- announcements of technological innovations or new therapeutic products;
- governmental regulation;
- public concern as to the safety of drug formulations developed by us or others; and
- general market conditions.

Any litigation brought against us as a result of this volatility could result in substantial costs and a diversion of our management’s attention and resources, which could negatively impact our financial condition, revenues, results of operations, and the price of our common stock.

Item 4. Controls and Procedures

Evaluation of Disclosure Controls and Procedures. Under the supervision and with the participation of management, including our Chief Executive Officer and our Chief Financial Officer, we have evaluated the effectiveness of the design and operation of our disclosure controls and procedures (as defined in Exchange Act Rule 13a-15 and 15(d)-15). Disclosure controls and procedures are controls and procedures that are designed to ensure that information required to be disclosed in our reports filed or submitted under the 1934 Act is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms. Based on this evaluation, our Chief Executive Officer and Chief Financial Officer have concluded that our disclosure controls and procedures were effective as of the end of the period covered by this quarterly report.

Changes in Internal Controls. During the three-month and six-month periods ended June 30, 2004, there were no changes to internal control over financial reporting that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

Limitations on the Effectiveness of Controls. Our management, including the Chief Executive Officer and Chief Financial Officer, does not expect that our disclosure controls and procedures or our internal controls will prevent all error and all fraud. A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the control system are met. Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues and instances of fraud, if any, within the company have been detected. These inherent limitations include the realities that judgments in decision-making can be faulty, and that breakdowns can occur because of simple error or mistake. Additionally, controls can be circumvented by the individual acts of some persons, by collusion of two or more people, or by management override of the control. The design of any system of controls also is based in part upon certain assumptions about the likelihood of future events, and there can be no assurance that any design will succeed in achieving its stated goals under all potential future conditions. Over time, control may become inadequate because of changes in conditions, or the degree of compliance with the policies or procedures may deteriorate. Because of the inherent limitations in a cost-effective control system, misstatements due to error or fraud may occur and not be detected.

PART II: OTHER INFORMATION

Item 1. Legal Proceedings

From time to time, we may be involved in lawsuits, claims, investigations and proceedings, consisting of intellectual property, commercial, employment and other matters, which arise in the ordinary course of business. In accordance with SFAS No. 5, *Accounting for Contingencies*, we make a provision for a liability when it is both probable that a liability has been incurred and the amount of the loss can reasonable estimate. These provisions are reviewed at least quarterly and adjusted to reflect the impact of negotiations, settlements, ruling, advice of legal counsel, and other information and events pertaining to a particular case. Litigation is inherently unpredictable. However, we believe that we have valid defenses with respect to the legal matters pending against us, as well as adequate provisions for any probable and estimable losses. If any unfavorable ruling were to occur in any specific period, there exists the possibility of a material adverse impact on the results of operations of that period. We believe that, given our current liquidity and cash, cash equivalents, and short-term investment balances, even if we receive an adverse judgment with respect to litigation that we are currently a party to, such judgment would not have a material impact on cash and investments or liquidity.

Item 2. Changes in Securities and Use of Proceeds

In April 2004, we called for redemption of all of our outstanding 6 ¾% convertible subordinated notes due October 2006. Holders of all but \$10,000 in principal amount converted their notes prior to the redemption date, resulting in the issuance of approximately 0.5 million shares of our common stock. We redeemed the \$10,000 in principal amount not converted into equity for cash in the amount of \$10,000. The aggregate amount of notes converted was approximately \$7.8 million.

Item 3. Defaults Upon Senior Securities

None.

Item 4. Submission of Matters to a Vote of Security Holders

- A. The annual meeting of the stockholders was held on June 17, 2004.
- B. The following matters were voted upon at the annual meeting:
 1. To elect the following directors to hold office until the 2007 annual meeting of stockholders:

Nominee	In Favor	Withheld
Christopher A. Kuebler	55,304,858	8,662,965
Irwin Lerner	52,134,031	11,833,792
John S. Patton, Ph.D.	55,257,408	8,710,415

Michael A. Brown, Ajit S. Gill, Melvin Perelman, Ph.D., Robert B. Chess, Susan Wang, and Roy A. Whitfield continued to serve as directors after the annual meeting.

2. To approve an amendment to our 2000 Equity Incentive Plan to increase the aggregate number of shares of common stock authorized for issuance under the plan by 900,000 shares.

For	Against	Abstain	Broker Non-Vote
38,012,786	10,469,593	286,200	15,199,244

3. To ratify the selection by the audit committee of the board of directors of Ernst & Young LLP as our independent auditors for the fiscal year ending December 31, 2004.

For	Against	Abstain
63,407,088	523,833	36,902

Item 5. Other Information

We file electronically with the Securities and Exchange Commission (“SEC”) our annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K, and amendments to those reports, pursuant to Section 13(a) or 15(d) of the 1934 Act. The public may read or copy any materials we file with the SEC at the SEC’s Public Reference Room at 450 Fifth Street, NW, Washington, DC 20549. The public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. The SEC maintains an Internet site that contains reports, proxy and information statements, and other information

34

statements, and other information regarding issuers that file electronically with the SEC. The address of that site is [http:// www.sec.gov](http://www.sec.gov).

You may obtain a free copy of our annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K and amendments to those reports on the day of filing with the SEC on our website at <http://www.nektar.com>, by contacting the Investor Relations Department at our corporate offices by calling (650) 631-3100 or by sending an e-mail message to investors@nektar.com.

Disclosure regarding the operations of our board of director nominating committees and the means by which security holders may communicate with directors is incorporated by reference from the definitive proxy statement for our 2004 Annual Meeting of Stockholders to be filed with the SEC pursuant to Regulation 14A not later than 120 days after the end of our fiscal year ended December 31, 2003 (the “Proxy Statement”) under the heading Nominating and Corporate Governance Committee.

As permitted by SEC Rule 10b5-1, certain of our executive officers, directors and other employees have set up a predefined, structured stock trading program with his/her broker to sell our stock. The stock trading program allows a broker acting on behalf of the executive officer, director or other employee to trade our stock during blackout periods or while such executive officer, director or other employee may be aware of material, nonpublic information, if the trade is performed according to a pre-existing contract, instruction or plan that was established with the broker during a non-blackout period and when such executive officer, director or employee was not aware of any material, nonpublic information. Our executive officers, directors and other employees may also trade our stock outside of the stock trading programs set up under Rule 10b5-1 subject to our blackout periods and insider trading rules.

35

Item 6. Exhibits and Reports on Form 8-K

(a) Exhibits

Except as so indicated in Exhibit 32.1, the following exhibits are filed as part of, or incorporated by reference into, this Form 10-Q.

Exhibit Number	Description of Documents
2.1 (1)	Agreement and Plan of Merger, dated June 4, 1998, by and between Inhale Therapeutic Systems, a California corporation, and Inhale Therapeutic Systems (Delaware), Inc., a Delaware corporation.
2.2 (11)	Recommended Offer, dated December 21, 2000, by Cazenove & Co. on behalf of Nektar Therapeutics for Bradford Particle Design plc.
2.3 (14)	Agreement and Plan of Merger and Reorganization, dated May 22, 2001, by and among Nektar Therapeutics, Square Acquisition Corp., Shearwater Corporation, Certain Shareholders of Shearwater Corporation and J. Milton Harris as Shareholders’ Agent.
2.4 (14)	Amendment to Agreement and Plan of Merger and Reorganization, dated June 21, 2001, by and among Nektar Therapeutics, Square Acquisition Corp., Shearwater Corporation, J. Milton Harris, as Shareholders’ Agent and a Designated Shareholder, and Puffinus, L.P.
3.1 (1)	Certificate of Incorporation of Inhale Therapeutic Systems (Delaware), Inc.
3.2 (1)	Bylaws of Nektar Therapeutics.
3.3 (9)	Certificate of Amendment of the Amended Certificate of Incorporation of Nektar Therapeutics.
3.4 (13)	Certificate of Designation of Series A Junior Participating Preferred Stock of Nektar Therapeutics.
3.5 (15)	Certificate of Designation of Series B Convertible Preferred Stock of Nektar Therapeutics.
3.6 (18)	Certificate of Ownership and Merger of Nektar Therapeutics.
4.1	Reference is made to Exhibits 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6.
4.2 (2)	Restated Investor Rights Agreement, dated April 29, 1993, as amended October 29, 1993, by and among Nektar Therapeutics and certain other persons named therein.
4.3 (3)	Stock Purchase Agreement, dated January 18, 1995, by and between Nektar Therapeutics and Pfizer Inc.
4.4 (4)	Form of Purchase Agreement, dated January 28, 1997, by and among Nektar Therapeutics and the individual Purchasers.
4.5 (5)	Stock Purchase Agreement, dated December 8, 1998, by and between Nektar Therapeutics and Capital Research and Management Company.
4.6 (7)	Purchase Agreement, dated October 6, 1999, by and among Nektar Therapeutics, Lehman Brothers Inc., Deutsche Bank Securities Inc. and U.S. Bancorp Piper Jaffray Inc.
4.7 (7)	Resale Registration Rights Agreement, dated October 13, 1999, by and among Nektar Therapeutics, Lehman Brothers Inc., Deutsche Bank Securities Inc. and U.S. Bancorp Piper Jaffray Inc.

- 4.8 (7) Indenture, dated October 13, 1999, by and between Nektar Therapeutics, as Issuer, and Chase Manhattan Bank and Trust Company, National Association, as Trustee.
- 4.9 (7) Form of Registration Rights Agreement by and between Nektar Therapeutics and Alliance Pharmaceutical Corp.
- 4.10 (8) Purchase Agreement, dated February 2, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
- 4.11 (8) Resale Registration Rights Agreement, dated February 8, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
- 4.12 (8) Indenture, dated February 8, 2000, by and between Nektar Therapeutics, as Issuer, and Chase Manhattan Bank and Trust Company, National Association, as Trustee.
- 4.13 (18) Specimen Common Stock certificate.
- 4.14 (10) Specimen warrants to purchase shares of Common Stock.
- 4.15 (12) Purchase Agreement, dated October 11, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
- 4.16 (12) Resale Registration Rights Agreement, dated October 17, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities, Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
- 4.17 (12) Indenture, dated October 17, 2000, by and between Nektar Therapeutics, as Issuer, and Chase Manhattan Bank and Trust Company, National Association, as Trustee.
- 4.18 (13) Rights Agreement, dated as of June 1, 2001, by and between Nektar Therapeutics and Mellon Investor Services LLC., as Rights Agent.
- 4.19 (13) Form of Right Certificate.

36

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 - 4.23 (16) Common Stock Purchase Agreement, dated December 6, 2002, by and between Nektar Therapeutics and AFAC Equity L.P.
 - 4.24 (19) Purchase Agreement, dated June 25, 2003, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc., Friedman, Billings, Ramsey & Co. Inc. and SG Cowen Securities Corporation
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 - 4.28 (21) Resale Registration Rights Agreement, dated October 9, 2003, by and among Nektar Therapeutics and the entities named therein
 - 4.29 (20) Form of Convertible Subordinated Note due 2010
 - 4.30 (22) First Supplemental Indenture, dated October 17, 2003, by and between Nektar Therapeutics and J.P. Morgan Trust Company, National Association, as trustee
 - 10.1 (23) Redemption Agreement, dated June 23, 2004 by and between Nektar Therapeutics, SciMed Prop III, Inc., 201 Industrial Partnership and Inhale 201 Industrial Road, L.P.
 - 10.2 (24) 2000 Non-Officer Equity Incentive Plan, as amended.
 - 10.3 (24) 2000 Equity Incentive Plan, as amended
 - 10.4 (24) Nektar Therapeutics 401 (k) Retirement Plan, as amended
 - 10.5 (24) Amendment to Non-Standardized Adoption Agreement No. 001 for use with Nektar Therapeutics 401 (k) Retirement Plan, as amended
 - 31.1 (24) Certification of Nektar Therapeutics' principal executive officer required by Rule 13a-14(a) or Rule 15d-14(a).
 - 31.2 (24) Certification of Nektar Therapeutics' principal executive officer required by Rule 13a-14(a) or Rule 15d-14(a).
 - 32.1 (24) Section 1350 Certifications.

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 - (3) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Registration Statement on Form S-1 (No. 33-89502), as amended.
 - (4) Incorporated by reference to Nektar Therapeutics' Registration Statement on Form S-3 (No. 333-20787).
 - (5) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Registration Statement on Form S-3 (No. 333-68897), as amended.
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- (12) Incorporated by reference to Nektar Therapeutics' Registration Statement on Form S-3 (No. 333-53678), filed on January 12, 2001.
- (13) Incorporated by reference to Nektar Therapeutics' Current Report on Form 8-K, filed on June 4, 2001.
- (14) Incorporated by reference to Nektar Therapeutics' Current Report on Form 8-K, filed on July 10, 2001.
- (15) Incorporated by reference to Nektar Therapeutics' Current Report on Form 8-K, filed on January 8, 2002.
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- (19) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Current Report on Form 8-K, filed on July 2, 2003.
- (20) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Current Report on Form 8-K, filed on October 10, 2003.
- (21) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Current Report on Form 8-K, filed on November 3, 2003.
- (22) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Current Report on Form 8-K, filed on October 20, 2003.
- (23) Incorporated by reference to the indicated exhibit in Nektar Therapeutics' Current Report on Form 8K, filed on June 29, 2004.
- (24) Filed herewith.

(b) Reports on Form 8-K for the three-month period ending June 30, 2004:

Current Report on Form 8-K, filed April 1, 2004, announcing that Nektar Therapeutics issued a press release announcing details of redemption of 6 3/4 % convertible subordinated notes due October 2006.

Current Report on Form 8-K filed April 13, 2004, announcing that Nektar Therapeutics had revised its accounting for certain convertible note exchange transactions completed in October 2003 and restated its financial statements for the year ended December 31, 2003.

Current Report on Form 8-K, filed May 5, 2004, announcing that Nektar Therapeutics issued a press release announcing results of the quarter ended March 31, 2004. The information in that report, including the exhibit thereto, shall not be deemed "filed" for purposes of Section 18 of the 1934 Act, or otherwise subject to the liabilities of that Section or Sections 11 and 12(a)(2) of the 1933 Act. The information contained therein and in the accompanying exhibit thereto shall not be incorporated by reference into any filing with the SEC made by Nektar Therapeutics, whether made before or after the date thereof, regardless of any general incorporation language in such filing.

Current Report on Form 8-K filed June 29, 2004, announcing that Nektar Therapeutics, SciMed Prop III, Inc., 201 Industrial Partnership, and Inhale 201 Industrial Road Partnership (the "Partnership") entered into a Redemption Agreement with respect to Nektar's limited partnership interest in the Partnership.

Current Report on Form 8-K, filed August 2, 2004, announcing that Nektar Therapeutics issued a press release announcing results of the quarter ended June 30, 2004. The information in that report, including the exhibit thereto, shall not be

38

deemed "filed" for purposes of Section 18 of the 1934 Act, or otherwise subject to the liabilities of that Section or Sections 11 and 12(a)(2) of the 1933 Act. The information contained therein and in the accompanying exhibit thereto shall not be incorporated by reference into any filing with the SEC made by Nektar Therapeutics, whether made before or after the date thereof, regardless of any general incorporation language in such filing.

39

SIGNATURES

Pursuant to the requirement of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

By: /s/ AJIT S. GILL
Ajit S. Gill
Chief Executive Officer,
President and Director

Date: August 5, 2004

By: /s/ AJAY BANSAL
Ajay Bansal
Chief Financial Officer and Vice
President, Finance and Administration

Date: August 5, 2004

40

EXHIBIT INDEX

Except as so indicated in Exhibit 32.1, the following exhibits are filed as part of, or incorporated by reference into, this Form 10-Q.

Exhibit Number	Description of Documents
2.1 (1)	Agreement and Plan of Merger, dated June 4, 1998, by and between Inhale Therapeutic Systems, a California corporation, and Inhale Therapeutic Systems (Delaware), Inc., a Delaware corporation.
2.2 (11)	Recommended Offer, dated December 21, 2000, by Cazenove & Co. on behalf of Nektar Therapeutics for Bradford Particle Design plc.
2.3 (14)	Agreement and Plan of Merger and Reorganization, dated May 22, 2001, by and among Nektar Therapeutics, Square Acquisition Corp., Shearwater Corporation, Certain Shareholders of Shearwater Corporation and J. Milton Harris as Shareholders' Agent.
2.4 (14)	Amendment to Agreement and Plan of Merger and Reorganization, dated June 21, 2001, by and among Nektar Therapeutics, Square Acquisition Corp., Shearwater Corporation, J. Milton Harris, as Shareholders' Agent and a Designated Shareholder, and Puffinus, L.P.
3.1 (1)	Certificate of Incorporation of Inhale Therapeutic Systems (Delaware), Inc.
3.2 (1)	Bylaws of Nektar Therapeutics.
3.3 (9)	Certificate of Amendment of the Amended Certificate of Incorporation of Nektar Therapeutics.
3.4 (13)	Certificate of Designation of Series A Junior Participating Preferred Stock of Nektar Therapeutics.
3.5 (15)	Certificate of Designation of Series B Convertible Preferred Stock of Nektar Therapeutics.
3.6 (18)	Certificate of Ownership and Merger of Nektar Therapeutics.
4.1	Reference is made to Exhibits 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6.
4.2 (2)	Restated Investor Rights Agreement, dated April 29, 1993, as amended October 29, 1993, by and among Nektar Therapeutics and certain other persons named therein.
4.3 (3)	Stock Purchase Agreement, dated January 18, 1995, by and between Nektar Therapeutics and Pfizer Inc.
4.4 (4)	Form of Purchase Agreement, dated January 28, 1997, by and among Nektar Therapeutics and the individual Purchasers.
4.5 (5)	Stock Purchase Agreement, dated December 8, 1998, by and between Nektar Therapeutics and Capital Research and Management Company.
4.6 (7)	Purchase Agreement, dated October 6, 1999, by and among Nektar Therapeutics, Lehman Brothers Inc., Deutsche Bank Securities Inc. and U.S. Bancorp Piper Jaffray Inc.
4.7 (7)	Resale Registration Rights Agreement, dated October 13, 1999, by and among Nektar Therapeutics, Lehman Brothers Inc., Deutsche Bank Securities Inc. and U.S. Bancorp Piper Jaffray Inc.
4.8 (7)	Indenture, dated October 13, 1999, by and between Nektar Therapeutics, as Issuer, and Chase Manhattan Bank and Trust Company, National Association, as Trustee.
4.9 (7)	Form of Registration Rights Agreement by and between Nektar Therapeutics and Alliance Pharmaceutical Corp.
4.10 (8)	Purchase Agreement, dated February 2, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
4.11 (8)	Resale Registration Rights Agreement, dated February 8, 2000, by and among Nektar Therapeutics, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., Lehman Brothers Inc. and U.S. Bancorp Piper Jaffray Inc.
4.12 (8)	Indenture, dated February 8, 2000, by and between Nektar Therapeutics, as Issuer, and Chase Manhattan Bank and Trust Company, National Association, as Trustee.
4.13 (18)	Specimen Common Stock certificate.
4.14 (10)	Specimen warrants to purchase shares of Common Stock.
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41

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NEKTAR THERAPEUTICS
(formerly known as Inhale Therapeutic Systems, Inc.)

2000 NON-OFFICER EQUITY INCENTIVE PLAN

Adopted August 18, 1998
Amended February 23, 1999
Amended December 14, 1999
Amended and Restated June 6, 2000
Adjusted for 2-for-1 Stock Split on August 22, 2000
Amended August 22, 2000
Amended January 16, 2001
Amended April 25, 2001
Amended June 28, 2001
Amended September 6, 2001
Amended November 12, 2002
Amended April 23, 2004
Stockholder Approval Not Required
Termination Date: None

1. PURPOSES.

(a) Amendment and Restatement. The 1998 Non-Officer Equity Incentive Plan initially was adopted on August 18, 1998 (the “1998 Plan”). The 1998 Plan hereby is amended and restated in its entirety, effective upon adoption by the Board, and renamed the “2000 Non-Officer Equity Incentive Plan.” The terms of the Plan shall apply to all Stock Awards granted pursuant to the Initial Plan.

(b) Eligible Stock Award Recipients. The persons eligible to receive Stock Awards are the Employees and Consultants of the Company and its Affiliates who are neither Officers nor Directors.

(c) Available Stock Awards. The purpose of the Plan is to provide a means by which eligible recipients of Stock Awards may be given an opportunity to benefit from increases in value of the Common Stock through the granting of the following Stock Awards: (i) Nonstatutory Stock Options, (ii) stock bonuses and (iii) rights to acquire restricted stock.

(d) General Purpose. The Company, by means of the Plan, seeks to retain the services of the group of persons eligible to receive Stock Awards, to secure and retain the services of new members of this group and to provide incentives for such persons to exert maximum efforts for the success of the Company and its Affiliates.

2. DEFINITIONS.

(a) “Affiliate” means any parent corporation or subsidiary corporation of the Company, whether now or hereafter existing, as those terms are defined in Sections 424(e) and (f), respectively, of the Code.

(b) “Board” means the Board of Directors of the Company.

(c) “Code” means the Internal Revenue Code of 1986, as amended.

(d) “Committee” means a Committee appointed by the Board in accordance with subsection 3(c).

(e) “Common Stock” means the common stock of the Company.

(f) “Company” means Nektar Therapeutics, a Delaware corporation.

(g) “Consultant” means any person, including an advisor, (i) engaged by the Company or an Affiliate to render consulting or advisory services and who is compensated for such services or (ii) who is a member of the Board of Directors of an Affiliate. However, the term “Consultant” shall not include Directors of the Company

(h) “Continuous Service” means that the Participant’s service with the Company or an Affiliate, whether as an Employee or Consultant, is not interrupted or terminated. The Participant’s Continuous Service shall not be deemed to have terminated merely because of a change in the capacity in which the Participant renders service to the Company or an Affiliate as an Employee, Consultant or Director or a change in the entity for which the Participant renders such service, provided that there is no interruption or termination of the Participant’s Continuous Service. For example, a change in status from an Employee of the Company to a Consultant of an Affiliate or a Director of the Company will not constitute an interruption of Continuous Service. The Board or the chief executive officer of the Company, in that party’s sole discretion, may determine whether Continuous Service shall be considered interrupted in the case of any leave of absence approved by that party, including sick leave, military leave or any other personal leave.

(i) “Director” means a member of the Board of Directors of the Company.

(j) “Disability” means the permanent and total disability of a person within the meaning of Section 22(e)(3) of the Code.

(k) “Employee” means any person employed by the Company or an Affiliate. Mere service as a Director or payment of a director’s fee by the Company or an Affiliate shall not be sufficient to constitute “employment” by the Company or an Affiliate.

(l) “*Exchange Act*” means the Securities Exchange Act of 1934, as amended.

2

(m) “*Fair Market Value*” means, as of any date, the value of the Common Stock determined as follows:

(i) If the Common Stock is listed on any established stock exchange or traded on the Nasdaq National Market System or the Nasdaq SmallCap Market, the Fair Market Value of a share of Common Stock shall be the closing sales price for such stock (or the closing bid, if no sales were reported) as quoted on such exchange or market (or the exchange or market with the greatest volume of trading in the Common Stock) on the last market trading day prior to the day of determination, as reported in *The Wall Street Journal* or such other source as the Board deems reliable.

(ii) In the absence of such markets for the Common Stock, the Fair Market Value shall be determined in good faith by the Board.

(n) “*Nonstatutory Stock Option*” means an option not intended to qualify as an Incentive Stock Option within the meaning of Section 422 of the Code and the regulations promulgated thereunder.

(o) “*Officer*” means (i) a person who is an officer of the Company within the meaning of Section 16 of the Exchange Act and the rules and regulations promulgated thereunder and (ii) any other person designated by the Company as an officer.

(p) “*Option*” means a Nonstatutory Stock Option granted pursuant to the Plan.

(q) “*Option Agreement*” means a written agreement between the Company and an Optionholder evidencing the terms and conditions of an individual Option grant. Each Option Agreement shall be subject to the terms and conditions of the Plan.

(r) “*Optionholder*” means a person to whom an Option is granted pursuant to the Plan or, if applicable, such other person who holds an outstanding Option.

(s) “*Participant*” means a person to whom a Stock Award is granted pursuant to the Plan or, if applicable, such other person who holds an outstanding Stock Award.

(t) “*Plan*” means this Nektar Therapeutics 2000 Non-Officer Equity Incentive Plan.

(u) “*Rule 16b-3*” means Rule 16b-3 promulgated under the Exchange Act or any successor to Rule 16b-3, as in effect from time to time.

(v) “*Securities Act*” means the Securities Act of 1933, as amended.

(w) “*Stock Award*” means any right granted under the Plan, including an Option, a stock bonus and a right to acquire restricted stock.

(x) “*Stock Award Agreement*” means a written agreement between the Company and a holder of a Stock Award evidencing the terms and conditions of an individual Stock Award grant. Each Stock Award Agreement shall be subject to the terms and conditions of the Plan.

3

3. ADMINISTRATION.

(a) **Administration by Board.** The Board will administer the Plan unless and until the Board delegates administration to a Committee, as provided in subsection 3(c).

(b) **Powers of Board.** The Board shall have the power, subject to, and within the limitations of, the express provisions of the Plan:

(i) To determine from time to time which of the persons eligible under the Plan shall be granted Stock Awards; when and how each Stock Award shall be granted; what type or combination of types of Stock Award shall be granted; the provisions of each Stock Award granted (which need not be identical), including the time or times when a person shall be permitted to receive stock pursuant to a Stock Award; and the number of shares with respect to which a Stock Award shall be granted to each such person.

(ii) To construe and interpret the Plan and Stock Awards granted under it, and to establish, amend and revoke rules and regulations for its administration. The Board, in the exercise of this power, may correct any defect, omission or inconsistency in the Plan or in any Stock Award Agreement, in a manner and to the extent it shall deem necessary or expedient to make the Plan fully effective.

(iii) To amend the Plan or a Stock Award as provided in Section 12.

(iv) Generally, to exercise such powers and to perform such acts as the Board deems necessary or expedient to promote the best interests of the Company that are not in conflict with the provisions of the Plan.

(c) **Delegation to Committee.** The Board may delegate administration of the Plan to a Committee or Committees of one (1) or more members of the Board, and the term “Committee” shall apply to any person or persons to whom such authority has been delegated. If administration is delegated to a Committee, the Committee shall have, in connection with the administration of the Plan, the powers theretofore possessed by the Board, including the power to delegate to a subcommittee any of the administrative powers the Committee is authorized to exercise (and references in this Plan to the Board shall thereafter be to the Committee or subcommittee), subject, however, to such resolutions, not inconsistent with the provisions of the Plan, as may be adopted from time to time by the Board. The Board may abolish the Committee at any time and revert in the Board the administration of the Plan.

(d) Effect of Board's Decision. All determinations, interpretations and constructions made by the Board in good faith shall not be subject to review by any person and shall be final, binding and conclusive on all persons.

4. SHARES SUBJECT TO THE PLAN.

(a) Share Reserve. Subject to the provisions of Section 11 relating to adjustments upon changes in stock, the stock that may be issued pursuant to Stock Awards shall not exceed in the

4

aggregate twelve million seven hundred fifty thousand (12,750,000)⁽¹⁾ shares of Common Stock. Subject to Section 4(b), the number of shares available for issuance under the Plan shall be reduced by (i) one (1) share for each share of stock issued pursuant to an Option granted under Section 6, and (ii) one and one-half (1.5) shares for each share that is issued pursuant to a stock bonus award or restricted stock award under Section 7.

(b) Reversion of Shares to the Share Reserve. If any Stock Award shall for any reason expire or otherwise terminate, in whole or in part, without having been exercised in full or if any shares of Common Stock issued to a Participant pursuant to a Stock Award are forfeited to or reacquired or repurchased by the Company, including, but not limited to, any forfeiture, reacquisition or repurchase caused by the failure to meet a contingency or condition required for the vesting of such shares, the stock not acquired under such Stock Award shall revert to and again become available for issuance under the Plan at the rate of (i) one (1) share for each share of stock that had been issued pursuant to an Option granted under Section 6, and (ii) one and one-half (1.5) shares for each share that had been issued pursuant to a stock bonus award or restricted stock award under Section 7.

(c) Source of Shares. The stock subject to the Plan may be unissued shares or reacquired shares, bought on the market or otherwise.

5. ELIGIBILITY.

(a) Eligibility. Stock Awards may be granted only to Employees and Consultants who are neither Officers nor Directors.

(b) Consultants. A Consultant shall not be eligible for the grant of a Stock Award if, at the time of grant, a Form S-8 Registration Statement under the Securities Act ("Form S-8") is not available to register either the offer or the sale of the Company's securities to such Consultant because of the nature of the services that the Consultant is providing to the Company, or because the Consultant is not a natural person, or as otherwise provided by the rules governing the use of Form S-8, unless the Company determines both (i) that such grant (A) shall be registered in another manner under the Securities Act (e.g., on a Form S-3 Registration Statement) or (B) does not require registration under the Securities Act in order to comply with the requirements of the Securities Act, if applicable, and (ii) that such grant complies with the securities laws of all other relevant jurisdictions.⁽²⁾

(1) The 3,525,000 shares in the share reserve automatically were adjusted to 7,050,000 shares pursuant to the 2-for-1 stock split on August 22, 2000. The Board of Directors amended the Plan on August 22, 2000 and increased this number by 1,500,000 shares (post stock split) to a total of 8,550,000 shares. The Board of Directors amended the Plan on January 16, 2001 and increased this number by 800,000 shares to a total of 9,350,000 shares. The Board of Directors amended the Plan on June 28, 2001 and increased this number by 900,000 to a total of 10,250,000 shares. The Board of Directors amended the Plan on September 6, 2001 and increased this number by 1,000,000 to a total of 11,250,000 shares. The Board of Directors amended the Plan on November 12, 2002 and increased this number by 1,500,000 to a total of 12,750,000 shares.

(2) Form S-8 generally is available to consultants and advisors only if (i) they are natural persons; (ii) they provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and (iii) the services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

5

6. OPTION PROVISIONS.

Each Option shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. The provisions of separate Options need not be identical, but each Option shall include (through incorporation of provisions hereof by reference in the Option or otherwise) the substance of each of the following provisions:

(a) Exercise Price. The Board shall determine the exercise price of each Option, *provided, however*, that the exercise price of each Option shall be not less than one hundred percent (100%) of the Fair Market Value of the stock subject to the Option on the date the Option is granted.

(b) Consideration.

(i) The purchase price of stock acquired pursuant to an Option shall be paid, to the extent permitted by applicable statutes and regulations, either (A) in cash at the time the Option is exercised or (B) at the discretion of the Board at the time of the grant of the Option (or subsequently) by delivery to the Company of other Common Stock, according to a deferred payment or other similar arrangement (which may include, without limiting the generality of the foregoing, the use of other Common Stock) with the Participant or in any other form of legal consideration that may be acceptable to the Board; provided, however, that at any time that the Company is incorporated in Delaware, payment of the Common Stock's "par value," as defined in the Delaware General Corporation Law, shall not be made by deferred payment.

(ii) Unless otherwise specifically provided in the Option, the purchase price of Common Stock acquired pursuant to an Option that is paid by delivery to the Company of other Common Stock acquired, directly or indirectly from the Company, shall be paid only by shares of the Common Stock of the Company that have been held for more than six (6) months (or such longer or shorter period of time required to avoid a charge to earnings for financial accounting purposes).

(iii) In the case of any deferred payment arrangement, interest shall be compounded at least annually and shall be charged at the minimum rate of interest necessary to avoid the treatment as interest, under any applicable provisions of the Code, of any amounts other than amounts stated to be

interest under the deferred payment arrangement.

(c) Transferability. An Option shall be transferable to the extent provided in the Option Agreement. If the Option does not provide for transferability, then the Option shall not be transferable except by will or by the laws of descent and distribution and shall be exercisable during the lifetime of the Optionholder only by the Optionholder. Notwithstanding the foregoing provisions of this subsection 6(c), the Optionholder may, by delivering written notice to the Company, in a form satisfactory to the Company, designate a third party who, in the event of the death of the Optionholder, shall thereafter be entitled to exercise the Option.

6

(d) Vesting Generally. The total number of shares of Common Stock subject to an Option may, but need not, vest and therefore become exercisable in periodic installments that may, but need not, be equal. The Option may be subject to such other terms and conditions on the time or times when it may be exercised (which may be based on performance or other criteria) as the Board may deem appropriate. The vesting provisions of individual Options may vary. The provisions of this subsection 6(d) are subject to any Option provisions governing the minimum number of shares as to which an Option may be exercised.

(e) Termination of Continuous Service. In the event an Optionholder's Continuous Service terminates (other than upon the Optionholder's death or Disability), the Optionholder may exercise his or her Option (to the extent that the Optionholder was entitled to exercise it as of the date of termination) but only within such period of time ending on the earlier of (i) the date three (3) months following the termination of the Optionholder's Continuous Service (or such longer or shorter period specified in the Option Agreement), or (ii) the expiration of the term of the Option as set forth in the Option Agreement. If, after termination, the Optionholder does not exercise his or her Option within the time specified in the Option Agreement, the Option shall terminate.

(f) Extension of Termination Date. An Optionholder's Option Agreement may also provide that if the exercise of the Option following the termination of the Optionholder's Continuous Service (other than upon the Optionholder's death or Disability) would be prohibited at any time solely because the issuance of shares would violate the registration requirements under the Securities Act, then the Option shall terminate on the earlier of (i) the expiration of the term of the Option set forth in subsection 6(a) or (ii) the expiration of three months (or such longer or shorter period specified in the Option Agreement) after the termination of the Optionholder's Continuous Service during which the exercise of the Option would not be in violation of such registration requirements.

(g) Disability of Optionholder. In the event an Optionholder's Continuous Service terminates as a result of the Optionholder's Disability, the Optionholder may exercise his or her Option (to the extent that the Optionholder was entitled to exercise it as of the date of termination), but only within such period of time ending on the earlier of (i) the date twelve (12) months following such termination (or such longer or shorter period specified in the Option Agreement) or (ii) the expiration of the term of the Option as set forth in the Option Agreement. If, after termination, the Optionholder does not exercise his or her Option within the time specified herein, the Option shall terminate.

(h) Death of Optionholder. In the event an Optionholder's Continuous Service terminates as a result of the Optionholder's death, then, subject to any restrictions in the Option Agreement, the Option shall become fully vested and exercisable as of the date of termination. In the event (i) an Optionholder's Continuous Service terminates as a result of the Optionholder's death or (ii) the Optionholder dies within the period (if any) specified in the Option Agreement after the termination of the Optionholder's Continuous Service for a reason other than death, then the Option may be exercised (to the extent the Optionholder was entitled to exercise the Option as of the date of death) by the Optionholder's estate, by a person who acquired the right to exercise the Option by bequest or inheritance or by a person designated to

7

exercise the Option upon the Optionholder's death pursuant to subsection 6(c), but only within the period ending on the earlier of (1) the date eighteen (18) months following the date of death (or such longer or shorter period specified in the Option Agreement) or (2) the expiration of the term of such Option as set forth in the Option Agreement. If, after death, the Option is not exercised within the time specified herein, the Option shall terminate.

(i) Early Exercise. The Option may, but need not, include a provision whereby the Optionholder may elect at any time before the Optionholder's Continuous Service terminates to exercise the Option as to any part or all of the shares subject to the Option prior to the full vesting of the Option. Any unvested shares so purchased may be subject to an unvested share repurchase option in favor of the Company or to any other restriction the Board determines to be appropriate.

(j) Term. No Option shall be exercisable after the expiration of eight (8) years from the date it was granted.

7. PROVISIONS OF STOCK AWARDS OTHER THAN OPTIONS.

(a) Stock Bonus Awards. Each stock bonus agreement shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. The terms and conditions of stock bonus agreements may change from time to time, and the terms and conditions of separate stock bonus agreements need not be identical, but each stock bonus agreement shall include (through incorporation of provisions hereof by reference in the agreement or otherwise) the substance of each of the following provisions:

(i) Consideration. A stock bonus shall be awarded in consideration for past services actually rendered to the Company or an Affiliate for its benefit.

(ii) Vesting. Shares of Common Stock awarded under the stock bonus agreement may, but need not, be subject to a share repurchase option in favor of the Company in accordance with a vesting schedule to be determined by the Board.

(iii) Termination of Participant's Continuous Service. In the event a Participant's Continuous Service terminates, the Company may reacquire any or all of the shares of Common Stock held by the Participant that have not vested as of the date of termination under the terms of the stock bonus agreement; provided, however, that in the event a Participant's Continuous Service terminates as a result of the Participant's death, then, subject to any restrictions in the stock bonus agreement, the shares acquired pursuant to the stock bonus agreement shall become fully vested as of the date of termination.

(iv) Transferability. Rights to acquire shares under the stock bonus agreement shall be transferable by the Participant only upon such terms and conditions as are set forth in the stock bonus agreement, as the Board shall determine in its discretion, so long as stock awarded under the stock bonus agreement remains subject to the terms of the stock bonus agreement.

(b) Restricted Stock Awards. Each restricted stock purchase agreement shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. The

8

terms and conditions of the restricted stock purchase agreements may change from time to time, and the terms and conditions of separate restricted stock purchase agreements need not be identical, but each restricted stock purchase agreement shall include (through incorporation of provisions hereof by reference in the agreement or otherwise) the substance of each of the following provisions:

(i) Purchase Price. The purchase price under each restricted stock purchase agreement shall be such amount as the Board shall determine and designate in such restricted stock purchase agreement.

(ii) Consideration. The purchase price of stock acquired pursuant to the restricted stock purchase agreement shall be paid either: (1) in cash at the time of purchase; (2) at the discretion of the Board, according to a deferred payment or other similar arrangement with the Participant; or (3) in any other form of legal consideration that may be acceptable to the Board in its discretion; provided, however, that at any time that the Company is incorporated in Delaware, payment of the Common Stock's "par value," as defined in the Delaware General Corporation Law, shall not be made by deferred payment.

(iii) Vesting. Shares of Common Stock acquired under the restricted stock purchase agreement may, but need not, be subject to a share repurchase option in favor of the Company in accordance with a vesting schedule to be determined by the Board.

(iv) Termination of Participant's Continuous Service. In the event a Participant's Continuous Service terminates, the Company may repurchase or otherwise reacquire any or all of the shares of Common Stock held by the Participant that have not vested as of the date of termination under the terms of the restricted stock purchase agreement; provided, however, that in the event a Participant's Continuous Service terminates as a result of the Participant's death, then, subject to any restrictions in the restricted stock purchase agreement, the shares acquired pursuant to the restricted stock purchase agreement shall become fully vested as of the date of termination.

(v) Transferability. Rights to acquire shares under the restricted stock purchase agreement shall be transferable by the Participant only upon such terms and conditions as are set forth in the restricted stock purchase agreement, as the Board shall determine in its discretion, so long as stock awarded under the restricted stock purchase agreement remains subject to the terms of the restricted stock purchase agreement.

8. COVENANTS OF THE COMPANY.

(a) Availability of Shares. During the terms of the Stock Awards, the Company shall keep available at all times the number of shares of Common Stock required to satisfy such Stock Awards.

(b) Securities Law Compliance. The Company shall seek to obtain from each regulatory commission or agency having jurisdiction over the Plan such authority as may be required to grant Stock Awards and to issue and sell shares of Common Stock upon exercise of

9

the Stock Awards; provided, however, that this undertaking shall not require the Company to register under the Securities Act the Plan, any Stock Award or any stock issued or issuable pursuant to any such Stock Award. If, after reasonable efforts, the Company is unable to obtain from any such regulatory commission or agency the authority that counsel for the Company deems necessary for the lawful issuance and sale of stock under the Plan, the Company shall be relieved from any liability for failure to issue and sell stock upon exercise of such Stock Awards unless and until such authority is obtained.

9. USE OF PROCEEDS FROM STOCK.

Proceeds from the sale of stock pursuant to Stock Awards shall constitute general funds of the Company.

10. MISCELLANEOUS.

(a) Acceleration of Exercisability and Vesting. The Board shall have the power to accelerate the time at which a Stock Award may first be exercised or the time during which a Stock Award or any part thereof will vest in accordance with the Plan, notwithstanding the provisions in the Stock Award stating the time at which it may first be exercised or the time during which it will vest.

(b) Stockholder Rights. No Participant shall be deemed to be the holder of, or to have any of the rights of a holder with respect to, any shares subject to such Stock Award unless and until such Participant has satisfied all requirements for exercise of the Stock Award pursuant to its terms.

(c) No Employment or other Service Rights. Nothing in the Plan or any instrument executed or Stock Award granted pursuant thereto shall confer upon any Participant or other holder of Stock Awards any right to continue to serve the Company or an Affiliate in the capacity in effect at the time the Stock Award was granted or shall affect the right of the Company or an Affiliate to terminate (i) the employment of an Employee with or without notice and with or without cause or (ii) the service of a Consultant pursuant to the terms of such Consultant's agreement with the Company or an Affiliate.

(d) Investment Assurances. The Company may require a Participant, as a condition of exercising or acquiring stock under any Stock Award, (i) to give written assurances satisfactory to the Company as to the Participant's knowledge and experience in financial and business matters and/or to employ a purchaser representative reasonably satisfactory to the Company who is knowledgeable and experienced in financial and business matters and that he or she is capable of evaluating, alone or together with the purchaser representative, the merits and risks of exercising the Stock Award; and (ii) to give written

assurances satisfactory to the Company stating that the Participant is acquiring the stock subject to the Stock Award for the Participant's own account and not with any present intention of selling or otherwise distributing the stock. The foregoing requirements, and any assurances given pursuant to such requirements, shall be inoperative if (1) the issuance of the shares upon the exercise or acquisition of stock under the Stock Award has been registered under a then currently effective registration statement under the

Securities Act or (2) as to any particular requirement, a determination is made by counsel for the Company that such requirement need not be met in the circumstances under the then applicable securities laws. The Company may, upon advice of counsel to the Company, place legends on stock certificates issued under the Plan as such counsel deems necessary or appropriate in order to comply with applicable securities laws, including, but not limited to, legends restricting the transfer of the stock.

(e) Withholding Obligations. To the extent provided by the terms of a Stock Award Agreement, the Participant may satisfy any federal, state or local tax withholding obligation relating to the exercise or acquisition of stock under a Stock Award by any of the following means (in addition to the Company's right to withhold from any compensation paid to the Participant by the Company) or by a combination of such means: (i) tendering a cash payment; (ii) authorizing the Company to withhold shares from the shares of the Common Stock otherwise issuable to the Participant as a result of the exercise or acquisition of stock under the Stock Award, provided, however, that no shares of Common Stock are withheld with a value exceeding the minimum amount of tax required to be withheld by law; or (iii) delivering to the Company owned and unencumbered shares of the Common Stock.

11. ADJUSTMENTS UPON CHANGES IN STOCK.

(a) Capitalization Adjustments. If any change is made in the stock subject to the Plan, or subject to any Stock Award, without the receipt of consideration by the Company (through merger, consolidation, reorganization, recapitalization, reincorporation, stock dividend, dividend in property other than cash, stock split, liquidating dividend, combination of shares, exchange of shares, change in corporate structure or other transaction not involving the receipt of consideration by the Company), the Plan will be appropriately adjusted in the class(es) and maximum number of securities subject to the Plan pursuant to subsection 4(a), and the outstanding Stock Awards will be appropriately adjusted in the class(es) and number of securities and price per share of stock subject to such outstanding Stock Awards. Such adjustments shall be made by the Board, the determination of which shall be final, binding and conclusive. (The conversion of any convertible securities of the Company shall not be treated as a transaction "without receipt of consideration" by the Company.)

(b) Dissolution or Liquidation. In the event of a dissolution or liquidation of the Company, then such Stock Awards shall be terminated if not exercised (if applicable) prior to such event.

(c) Corporate Transaction. In the event of (1) a sale, lease or other disposition of all or substantially all of the assets of the Company, (2) a merger or consolidation in which the Company is not the surviving corporation or (3) a reverse merger in which the Company is the surviving corporation but the shares of Common Stock outstanding immediately preceding the merger are converted by virtue of the merger into other property, whether in the form of securities, cash or otherwise (a "Corporate Transaction"), then any surviving corporation or acquiring corporation shall assume any Stock Awards outstanding under the Plan or shall substitute similar stock awards (including an award to acquire the same consideration paid to the stockholders in the Corporate Transaction) for those outstanding under the Plan. In the event any

surviving corporation or acquiring corporation refuses to assume such Stock Awards or to substitute similar stock awards for those outstanding under the Plan, then with respect to Stock Awards held by Participants whose Continuous Service has not terminated, the vesting of such Stock Awards (and, if applicable, the time during which such Stock Awards may be exercised) shall be accelerated in full, and the Stock Awards shall terminate if not exercised (if applicable) at or prior to such Corporate Transaction. With respect to any other Stock Awards outstanding under the Plan, such Stock Awards shall terminate if not exercised (if applicable) prior to such Corporate Transaction.

(d) Securities Acquisition. In the event of an acquisition by any person, entity or group within the meaning of Section 13(d) or 14(d) of the Exchange Act, or any comparable successor provisions (excluding any employee benefit plan, or related trust, sponsored or maintained by the Company or an Affiliate) of the beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act, or comparable successor rule) of securities of the Company representing at least fifty percent (50%) of the combined voting power entitled to vote in the election of Directors and provided that such acquisition is not a result of, and does not constitute, a Corporate Transaction described in subsection 11(c) hereof, then with respect to Stock Awards held by Participants whose Continuous Service has not terminated, the vesting of such Stock Awards (and, if applicable, the time during which such Stock Awards may be exercised) shall be accelerated in full.

12. AMENDMENT OF THE PLAN AND STOCK AWARDS.

(a) Amendment of Plan. The Board at any time, and from time to time, may amend the Plan; provided however, that the rights under any Stock Award shall not be impaired by any amendment of the Plan unless (i) the Company requests the consent of the Participant and (ii) the Participant consents in writing.

(b) Amendment of Stock Awards. The Board at any time, and from time to time, may amend the terms of any one or more Stock Awards; provided, however, that the rights under any Stock Award shall not be impaired by any such amendment unless (i) the Company requests the consent of the Participant and (ii) the Participant consents in writing.

13. TERMINATION OR SUSPENSION OF THE PLAN.

(a) Plan Term. The Board may suspend or terminate the Plan at any time. No Stock Awards may be granted under the Plan while the Plan is suspended or after it is terminated.

(b) **No Impairment of Rights.** Rights and obligations under any Stock Award granted while the Plan is in effect shall not be impaired by suspension or termination of the Plan, except with the written consent of the Participant.

14. EFFECTIVE DATE OF PLAN.

The Plan shall become effective upon adoption by the Board.

12

15. CHOICE OF LAW.

The law of the State of Delaware shall govern all questions concerning the construction, validity and interpretation of this Plan, without regard to such state's conflict of laws rules.

13

Nektar Therapeutics 2000 Non-Officer Equity Incentive Plan (“the Plan”)

This section of the Plan will be known as the Approved Section of the Nektar Therapeutics 2000 Non-Officer Equity Incentive Plan (the “Approved Section”). The Approved Section has been adopted by way of amendment to the Plan for the sole purpose of providing for the grant of options to United Kingdom-based employees of Nektar Therapeutics and its Subsidiaries and to directors of the Subsidiaries under Section 6 of the Plan where the Committee wishes to grant the employees of Nektar Therapeutics and its Subsidiaries and to directors of the Subsidiaries options under a plan approved by the Board of the Inland Revenue under Schedule 9 of the Income and Corporation Taxes Act 1988 in addition to or as an alternative to the grant of Options and other Stock Awards under the Plan. The Approved Section shall only be used in connection with option grants to United Kingdom-based employees of Nektar Therapeutics and its Subsidiaries and United Kingdom-based directors of the Subsidiaries. All other Stock Awards made under the Plan shall be governed by the Plan without reference to the Approved Section.

For the purposes of the Approved Section, the Sections set forth in the Plan shall apply subject to the amendments provided for below and any provision in the Plan that is inconsistent with the following provisions shall not form part of the Approved Section shall be governed by the Plan subject to the amendments provided for below:

1. DEFINITIONS AND INTERPRETATION

1.1 The following words and expressions shall have the following meanings for the purposes of the Approved Section, unless the context otherwise requires:

“the **Adoption Date**” means the date on which the Approved Section is approved by the Inland Revenue;

“the **Appropriate Period**” has the same meaning as in paragraph 15(2) of Schedule 9 to the Taxes Act;

“**Approved Option**” means an Option to acquire Section Shares which is granted under Section 6 and satisfies the conditions of the Approved section;

“**Approved Section**” means the Approved Section of the Nektar Therapeutics 200 Non-Officer Equity Incentive Plan constituted and governed by the Plan subject to the amendments set out herein;

“**Associated Company**” has the same meaning as in Section 187(2) of the Taxes Act;

“the **Company**” means Nektar Therapeutics, a Delaware corporation with business address 150 Industrial Road, San Carlos, California 94070-6256;

“**Control**” has the same meaning as in section 840 of the Taxes Act and “controlled” shall be construed accordingly;

14

“**Date of Grant**” means the date on which an Approved Option is, was, or is to be granted under the Approved Section;

“**Eligible Employee**” means a person who is at the relevant Date of Grant:

- (A) a Full-time Director or a qualifying Employee selected by the Committee to participate in the Approved Section; and
- (B) not precluded by paragraph 8 of Schedule 9 (material interest I close company) to the Taxes act from participating in the Approved Section;

“**Full-Time Director**” means a director of a Subsidiary whose terms of office or employment require such director to work for at least twenty-five hours per week (excluding meal breaks);

“**Qualifying Employee**” means an employee of the Company or a Subsidiary who is not a director of the Company or Subsidiary;

“**Qualifying Employment**” means office or employment either as a Full-Time Director or as a Qualifying Employee as the case may be;

“**Section Shares**” means Shares which satisfy the conditions specified in Paragraphs 10 to 14 of Schedule 9 to the Taxes Act (fully paid up, unrestricted, ordinary share capital) to be acquired by a Participant on the exercise by such participant of an Approved Option which Shares shall as to voting, dividend, transfer and other rights including those arising in the liquidation of the Company rank pari passu in all respects and as to one class with the Shares of the Company in issue at that time;

“**Subsidiary**” means a body corporate of which the Company is for the time being to be taken to have Control and which is a subsidiary of the Company within section 736 of the Companies Act 1985;

“**Subsisting Option**” means an Approved Option which has neither lapsed nor been exercised;

“**Taxes Act**” means the Income and Corporation Taxes Act 1988;

Where the context so permits the singular shall include the plural and vice versa and the masculine shall include the feminine.

Reference to any Act shall include any statutory modification, amendment or re-enactment thereof;

2. ELIGIBILITY

2.1 Notwithstanding Section 5 of the Plan, Approved Options shall only be granted to Eligible Employees.

15

3. OPTION PROVISIONS

Section 6 of the Plan shall apply provided that the grant of each Approved Option shall comply with the following conditions:

3.1 An Approved Option may not be exercised later than the day before the tenth anniversary of the Date of Grant on which day the same (if it has not already ceased to be exercisable) shall lapse.

The exercise price payable for each Section Share in the event of an Approved Option being exercised shall be:

(A) Where Approved Options are granted when the Shares are not quoted on the New York Stock Exchange, the greater of:

(1) the par value of a Share; and

(2) the amount determined to be the market value of a share on the Date of grant in accordance with the provisions of part VIII of the Taxation of Chargeable Gains Act of 1992 and agreed for the purposes of the Approved Section with the Inland Revenue Share Valuation Division prior to the date on which an Approved Option is granted to a Participant;

(B) where Approved options are granted when the Shares are quoted on the New York Stock Exchange, the greater of:

(1) the par value of a Share; and

(2) on any Date of Grant, the closing sales price for a Share on the New York Stock Exchange on the immediately preceding day on which Shares were traded on the New York Stock Exchange as published in the Wall Street Journal;

3.2 The form of grant of an Approved Option shall be executed by the Company as a deed, and shall state the exercise price, the number of Shares, the Date of Grant and any performance conditions applicable to the exercise of the approved Option.

3.3 Any Approved Option granted to an Eligible Employee shall be limited and take effect so that at the Date of Grant of such Approved Option the aggregate of:

(A) the market value of shares comprised in such Approved Option; and

(B) the market value of shares comprised in any Subsisting Options which have been granted to that Eligible Employee; and

16

(C) the market value of any Shares the Eligible Employee may acquire in pursuance of options granted to such Eligible Employee (and not exercised) under any other scheme approved under Schedule 9 to the Taxes Act and established by the Company or any Associated Company of the Company providing for the grant of options to acquire Shares (other than a savings related share option scheme)

shall not exceed £30,000 (or such other amount as may be prescribed by Paragraph 28 of Schedule 9 to the Taxes Act from time to time).

For the purposes of this paragraph “market value” shall be calculated in accordance with Paragraph 28 of Schedule 9 to the Taxes Act at the respective Dates of Grant.

3.4 The type of consideration in which the exercise price of an Approved Option is to be paid shall be in monetary form.

3.5 An Approved Option shall be personal to the Eligible Employee to whom it is granted and shall not be capable of assignment. Any purported sale, pledge, assignment, hypothecation, transfer or disposal of or dealing with an Approved Option shall cause the Approved Option to lapse forthwith.

- 3.6 No Approved Option may be exercised at any time when the Shares which may be thereby acquired are not Section Shares.
- 3.7 Upon the exercise of an Approved Option in accordance with the Plan, the Company shall promptly and in any event not later than 30 days after the exercise of an Approved Option issue or cause to be issued a stock certificate to the Participant or a book-entry crediting the Participant's account with the appropriate number of Section Shares.
- 3.8 No Approved Option may be exercised when the Participant to whom it was granted is precluded from participating in the Approved Section by virtue of paragraph 8 of Schedule 9 to the Taxes Act (material interest in close company).

4. TERMINATION OF EMPLOYMENT

- 4.1 Except as provided in Section 6 paragraph (e) (Termination of continuous Service), Section paragraph (g) (Disability of the Optionholder) and Section 6 paragraph (h) (Death of the Optionholder) of the Plan no Approved Option may be exercised unless the Participant shall have been in Qualifying Employment since the date of the grant of such Approved Option.
- 4.2 Section 6 paragraph (h) (Death of the Optionholder) of the Plan shall apply for the purposes of the Approved Section provided that no Approved Option may be exercised more than one year after the death of a Participant and following the death of a Participant an Approved Option may only be exercised by the personal representatives of that Participant.

17

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- 4.3 A female Participant whose employment has been terminated in circumstances such that, pursuant to the Employment Rights Act 1996, she has a right to return to work shall be deemed for the purposes of the Approved Section not to have ceased to be in Qualifying Employment until such time as she is no longer capable, pursuant to the said Act, of exercising a right to return to work and has not exercised such right.

5. PROVISIONS OF THE PLAN NOT TO APPLY TO APPROVED OPTIONS

- 5.1 Section 6 paragraphs 6 (b)(I)(B), (ii) and (iii) Consideration) and (i) (Early Exercise), 7 (Provisions of Stock Awards other than Options) and 10 paragraphs 9a) (Acceleration of Exercisability and Vesting) and (d) (Investment Assurances) of the Plan shall not apply for the purposes of the Approved Section.

6. NO OBLIGATION TO EMPLOY

Section 10 paragraph © (No Employment or other Service Rights) of the Plan shall apply subject to the following further condition for the purposes of the Approved Section:

- 6.1 Participation in the Approved Section by a participant is a matter entirely separate from, and shall not affect, the Participant's pension rights and terms of employment and, in particular (but without prejudice to the foregoing), if a Participant shall cease for any reason (including wrongful dismissal) to be employed by or hold office with the Company or a Subsidiary the Participant shall not be entitled by way of compensation for loss or otherwise howsoever, of any sum or benefit to compensate the Participant for the loss of any right or benefit under the Approved Section.

7. WITHHOLDING OBLIGATIONS

The following provision shall be substituted for Section 10 paragraph (e) (Withholding Obligations) of the Plan for the purposes of the Approved Section:

- 7.1 If a Participant is liable to tax, duties and social security contributions on the exercise of an Approved Option and the Company or the Participant's employing company or former employing company is liable to make payment to appropriate authorities on account of that liability, then the Participant will enter into such arrangements as necessary for ensuring that that company is put in sufficient funds to enable it to discharge its liability to make the payment to the appropriate authority, or is reimbursed for any payment made.

8. ADJUSTMENT UPON CHANGES IN STOCK

- 8.1 The provisions of Section 11 paragraphs (c) (Corporate Transaction) and (d) (Securities Acquisition) of the Plan shall be modified for the purposes of the Approved Section so that they apply only where a company ("the Acquiring Company")

18

(A) obtains Control of the Company as a result of:

- (1) a general offer to acquire the whole of the issued share capital of the Company (other than that which is already owned by it) made on a condition such that if satisfied the Acquiring Company will have Control of the Company; or
- (2) a general offer to acquire all the Ordinary Shares (or such Ordinary Shares as are not already owned by the Acquiring Company); or

(B) obtains Control of the Company in pursuance of a compromise or arrangement sanctioned by the Court under Section 425 of the Companies Act 1985;

(C) becomes bound or entitled to acquire Ordinary Shares under sections 428 to 430 of the Companies Act 1985.

- 8.2** Where Rule 8.1 applies any Option subsisting at the date of the Corporate Transaction or Securities Acquisition (as defined in the Plan) may be released by the Participant at any time during the Appropriate period, at the option of the Committee and with the agreement of the Acquiring Company, for an equivalent option over shares of the Acquiring Company which satisfies the conditions that it:
- (A)** is over shares in the acquiring company or a company which has Control of the acquiring company which satisfy the conditions specified in paragraphs 10 to 14 of Schedule 9 to the Taxes Act (and the terms “Ordinary Shares” and “Scheme Shares” in this Scheme shall thereafter be construed accordingly);
 - (B)** is the right to acquire such number of Scheme Shares as has on acquisition of the new Option as aggregate market value equal to the aggregate market value of the Scheme Shares subject to the old Option immediately before its release;
 - (C)** has an Option Price per Scheme Share such that the total amount payable on exercise is equal to the total amount payable on exercise of the old Option; and
 - (D)** is otherwise in identical terms to the old Option and for this purpose references to “the Company” in the Plan other than Section 6) shall, unless the context otherwise requires, be deemed to refer to the acquiring company or, as the case may be, to the other company over whose shares the new Option is granted.

The new Option shall for all other purposes of the Scheme be treated as having been acquired at the same time as the old Option in respect of which it is granted.

8.3 Every alteration or variation made pursuant to Section 11 for the purposes of the Approved Section shall be subject to the prior approval of the Board of Inland Revenue.

8.4 Following the adjustment, the Shares continue to be Section Shares.

9. AMENDMENT OF THE PLAN AND STOCK AWARDS

Section 12 of the Plan shall operate for the purposes of the Approved Section of the Plan subject to the following condition:

9.1 Following the approval of the Approved Section under Schedule 9 to the Taxes Act, no alteration of the Approved Section shall have effect until approved by the Board of Inland Revenue.

10. CHOICE OF LAW

10.1 Notwithstanding Section 15 of the Plan, the Approved Section shall be governed by and construed in accordance with the laws of England, except that any matters relating to the internal governance of the Company shall be governed by Delaware law.

NEKTAR THERAPEUTICS
(formerly known as Inhale Therapeutic Systems, Inc.)

2000 EQUITY INCENTIVE PLAN

Adopted February 10, 1994
Approved By Shareholders February 18, 1994
Amended March 27, 1996
Amended and Restated by Board April 24, 1998
Approved By Shareholders June 23, 1998
Amended and Restated by Board April 19, 2000
Approved By Shareholders June 6, 2000
Adjusted for 2-for-1 Stock Split on August 22, 2000
Amended and Restated by Board April 23, 2004
Approved By Shareholders June 17, 2004
Termination Date: February 9, 2010

1. PURPOSES.

(a) **Amendment and Restatement.** The 1994 Equity Incentive Plan initially was adopted on February 10, 1994 and amended and restated on April 24, 1998 (the "1994 Plan"). The 1994 Plan hereby is amended and restated in its entirety, effective upon adoption by the Board, and renamed the "2000 Equity Incentive Plan." The terms of the Plan shall apply to all Stock Awards granted pursuant to the Initial Plan.

(b) **Eligible Stock Award Recipients.** The persons eligible to receive Stock Awards are the Employees, Directors and Consultants of the Company and its Affiliates.

(c) **Available Stock Awards.** The purpose of the Plan is to provide a means by which eligible recipients of Stock Awards may be given an opportunity to benefit from increases in value of the Common Stock through the granting of the following Stock Awards: (i) Incentive Stock Options, (ii) Nonstatutory Stock Options, (iii) stock bonuses and (iv) rights to acquire restricted stock.

(d) **General Purpose.** The Company, by means of the Plan, seeks to retain the services of the group of persons eligible to receive Stock Awards, to secure and retain the services of new members of this group and to provide incentives for such persons to exert maximum efforts for the success of the Company and its Affiliates.

1

2. DEFINITIONS.

(a) **"Affiliate"** means any parent corporation or subsidiary corporation of the Company, whether now or hereafter existing, as those terms are defined in Sections 424(e) and (f), respectively, of the Code.

(b) **"Board"** means the Board of Directors of the Company.

(c) **"Code"** means the Internal Revenue Code of 1986, as amended.

(d) **"Committee"** means a Committee appointed by the Board in accordance with subsection 3(c).

(e) **"Common Stock"** means the common stock of the Company.

(f) **"Company"** means Nektar Therapeutics, a Delaware corporation.

(g) **"Consultant"** means any person, including an advisor, (1) engaged by the Company or an Affiliate to render consulting or advisory services and who is compensated for such services or (2) who is a member of the Board of Directors of an Affiliate. However, the term "Consultant" shall not include either Directors of the Company who are not compensated by the Company for their services as Directors or Directors of the Company who are merely paid a director's fee by the Company for their services as Directors.

(h) **"Continuous Service"** means that the Participant's service with the Company or an Affiliate, whether as an Employee, Director or Consultant, is not interrupted or terminated. The Participant's Continuous Service shall not be deemed to have terminated merely because of a change in the capacity in which the Participant renders service to the Company or an Affiliate as an Employee, Consultant or Director or a change in the entity for which the Participant renders such service, provided that there is no interruption or termination of the Participant's Continuous Service. For example, a change in status from an Employee of the Company to a Consultant of an Affiliate or a Director of the Company will not constitute an interruption of Continuous Service. The Board or the chief executive officer of the Company, in that party's sole discretion, may determine whether Continuous Service shall be considered interrupted in the case of any leave of absence approved by that party, including sick leave, military leave or any other personal leave.

(i) **"Covered Employee"** means the chief executive officer and the four (4) other highest compensated officers of the Company for whom total compensation is required to be reported to stockholders under the Exchange Act, as determined for purposes of Section 162(m) of the Code.

(j) **"Director"** means a member of the Board of Directors of the Company.

(k) **"Disability"** means the permanent and total disability of a person within the meaning of Section 22(e)(3) of the Code.

2

(l) **“Employee”** means any person employed by the Company or an Affiliate. Mere service as a Director or payment of a director’s fee by the Company or an Affiliate shall not be sufficient to constitute “employment” by the Company or an Affiliate.

(m) **“Exchange Act”** means the Securities Exchange Act of 1934, as amended.

(n) **“Fair Market Value”** means, as of any date, the value of the Common Stock determined as follows:

(i) If the Common Stock is listed on any established stock exchange or traded on the Nasdaq National Market System or the Nasdaq SmallCap Market, the Fair Market Value of a share of Common Stock shall be the closing sales price for such stock (or the closing bid, if no sales were reported) as quoted on such exchange or market (or the exchange or market with the greatest volume of trading in the Common Stock) on the last market trading day prior to the day of determination, as reported in The Wall Street Journal or such other source as the Board deems reliable.

(ii) In the absence of such markets for the Common Stock, the Fair Market Value shall be determined in good faith by the Board.

(o) **“Incentive Stock Option”** means an Option intended to qualify as an incentive stock option within the meaning of Section 422 of the Code and the regulations promulgated thereunder.

(p) **“Non-Employee Director”** means a Director of the Company who either (i) is not a current Employee or Officer of the Company or its parent or a subsidiary, does not receive compensation (directly or indirectly) from the Company or its parent or a subsidiary for services rendered as a consultant or in any capacity other than as a Director (except for an amount as to which disclosure would not be required under Item 404(a) of Regulation S-K promulgated pursuant to the Securities Act (“Regulation S-K”)), does not possess an interest in any other transaction as to which disclosure would be required under Item 404(a) of Regulation S-K and is not engaged in a business relationship as to which disclosure would be required under Item 404(b) of Regulation S-K; or (ii) is otherwise considered a “non-employee director” for purposes of Rule 16b-3.

(q) **“Nonstatutory Stock Option”** means an Option not intended to qualify as an Incentive Stock Option.

(r) **“Officer”** means a person who is an officer of the Company within the meaning of Section 16 of the Exchange Act and the rules and regulations promulgated thereunder.

(s) **“Option”** means an Incentive Stock Option or a Nonstatutory Stock Option granted pursuant to the Plan.

3

(t) **“Option Agreement”** means a written agreement between the Company and an Optionholder evidencing the terms and conditions of an individual Option grant. Each Option Agreement shall be subject to the terms and conditions of the Plan.

(u) **“Optionholder” or “Optionee”** means a person to whom an Option is granted pursuant to the Plan or, if applicable, such other person who holds an outstanding Option.

(v) **“Outside Director”** means a Director of the Company who either (i) is not a current employee of the Company or an “affiliated corporation” (within the meaning of Treasury Regulations promulgated under Section 162(m) of the Code), is not a former employee of the Company or an “affiliated corporation” receiving compensation for prior services (other than benefits under a tax qualified pension plan), was not an officer of the Company or an “affiliated corporation” at any time and is not currently receiving direct or indirect remuneration from the Company or an “affiliated corporation” for services in any capacity other than as a Director or (ii) is otherwise considered an “outside director” for purposes of Section 162(m) of the Code.

(w) **“Participant”** means a person to whom a Stock Award is granted pursuant to the Plan or, if applicable, such other person who holds an outstanding Stock Award.

(x) **“Plan”** means this Nektar Therapeutics 2000 Equity Incentive Plan.

(y) **“Rule 16b-3”** means Rule 16b-3 promulgated under the Exchange Act or any successor to Rule 16b-3, as in effect from time to time.

(z) **“Securities Act”** means the Securities Act of 1933, as amended.

(aa) **“Stock Award”** means any right granted under the Plan, including an Option, a stock bonus and a right to acquire restricted stock.

(bb) **“Stock Award Agreement”** means a written agreement between the Company and a holder of a Stock Award evidencing the terms and conditions of an individual Stock Award grant. Each Stock Award Agreement shall be subject to the terms and conditions of the Plan.

(cc) **“Ten Percent Stockholder”** means a person who owns (or is deemed to own pursuant to Section 424(d) of the Code) stock possessing more than ten percent (10%) of the total combined voting power of all classes of stock of the Company or of any of its Affiliates.

3. ADMINISTRATION.

(a) **Administration by Board.** The Board will administer the Plan unless and until the Board delegates administration to a Committee, as provided in subsection 3(c).

(b) **Powers of Board.** The Board shall have the power, subject to, and within the limitations of, the express provisions of the Plan:

(i) To determine from time to time which of the persons eligible under the Plan shall be granted Stock Awards; when and how each Stock Award shall be granted; what

type or combination of types of Stock Award shall be granted; the provisions of each Stock Award granted (which need not be identical), including the time or times when a person shall be permitted to receive stock pursuant to a Stock Award; and the number of shares with respect to which a Stock Award shall be granted to each such person.

(ii) To construe and interpret the Plan and Stock Awards granted under it, and to establish, amend and revoke rules and regulations for its administration. The Board, in the exercise of this power, may correct any defect, omission or inconsistency in the Plan or in any Stock Award Agreement, in a manner and to the extent it shall deem necessary or expedient to make the Plan fully effective.

(iii) To amend the Plan or a Stock Award as provided in Section 12.

(iv) Generally, to exercise such powers and to perform such acts as the Board deems necessary or expedient to promote the best interests of the Company which are not in conflict with the provisions of the Plan.

(c) **Delegation to Committee.**

(i) **General.** The Board may delegate administration of the Plan to a Committee or Committees of one (1) or more members of the Board, and the term "Committee" shall apply to any person or persons to whom such authority has been delegated. If administration is delegated to a Committee, the Committee shall have, in connection with the administration of the Plan, the powers theretofore possessed by the Board, including the power to delegate to a subcommittee any of the administrative powers the Committee is authorized to exercise (and references in this Plan to the Board shall thereafter be to the Committee or subcommittee), subject, however, to such resolutions, not inconsistent with the provisions of the Plan, as may be adopted from time to time by the Board. The Board may abolish the Committee at any time and revert to the Board the administration of the Plan.

(ii) **Committee Composition when Common Stock is Publicly Traded.** At such time as the Common Stock is publicly traded, in the discretion of the Board, a Committee may consist solely of two or more Outside Directors, in accordance with Section 162(m) of the Code, and/or solely of two or more Non-Employee Directors, in accordance with Rule 16b-3. Within the scope of such authority, the Board or the Committee may (i) delegate to a committee of one or more members of the Board who are not Outside Directors, the authority to grant Stock Awards to eligible persons who are either (a) not then Covered Employees and are not expected to be Covered Employees at the time of recognition of income resulting from such Stock Award or (b) not persons with respect to whom the Company wishes to comply with Section 162(m) of the Code and/or (ii) delegate to a committee of one or more members of the Board who are not Non-Employee Directors the authority to grant Stock Awards to eligible persons who are not then subject to Section 16 of the Exchange Act.

(d) **Effect of Board's Decision.** All determinations, interpretations and constructions made by the Board in good faith shall not be subject to review by any person and shall be final, binding and conclusive on all persons.

4. SHARES SUBJECT TO THE PLAN.

(a) **Share Reserve.** Subject to the provisions of Section 11 relating to adjustments upon changes in stock, the stock that may be issued pursuant to Stock Awards shall not exceed in the aggregate Eleven Million Two Hundred Fifty Thousand (11,250,000)(1) shares of Common Stock. Subject to Section 4(b), the number of shares available for issuance under the Plan shall be reduced by (i) one (1) share for each share of stock issued pursuant to an Option granted under Section 6, and (ii) one and one-half (1.5) shares for each share that is issued pursuant to a stock bonus award or restricted stock award under Section 7.

(b) **Reversion of Shares to the Share Reserve.** If any Stock Award shall for any reason expire or otherwise terminate, in whole or in part, without having been exercised in full or if any shares of Common Stock issued to a Participant pursuant to a Stock Award are forfeited to or reacquired or repurchased by the Company, including, but not limited to, any forfeiture, reacquisition or repurchase caused by the failure to meet a contingency or condition required for the vesting of such shares, the stock not acquired under such Stock Award shall revert to and again become available for issuance under the Plan at the rate of (i) one (1) share for each share of stock that had been issued pursuant to an Option granted under Section 6, and (ii) one and one-half (1.5) shares for each share that had been issued pursuant to a stock bonus award or restricted stock award under Section 7; *provided, however*, that if any unvested Common Stock acquired pursuant to a Stock Award is forfeited to or reacquired or repurchased by the Company, the unvested stock forfeited to or reacquired or repurchased by the Company shall revert to and again become available for issuance under the Plan for all Stock Awards other than Incentive Stock Options.

(c) **Source of Shares.** The stock subject to the Plan may be unissued shares or reacquired shares, bought on the market or otherwise.

5. ELIGIBILITY.

(a) **Eligibility for Specific Stock Awards.** Incentive Stock Options may be granted only to Employees. Stock Awards other than Incentive Stock Options may be granted to Employees, Directors and Consultants.

(b) **Ten Percent Stockholders.** No Ten Percent Stockholder shall be eligible for the grant of an Incentive Stock Option unless the exercise price of such Option is at least one hundred ten percent (110%) of the Fair Market Value of the Common Stock at the date of grant and the Option is not exercisable after the expiration of five (5) years from the date of grant.

(c) **Section 162(m) Limitation.** Subject to the provisions of Section 11 relating to adjustments upon changes in stock, no employee shall be eligible to be granted Options covering

(1) The 5,175,000 shares in the share reserve automatically were adjusted to 10,350,000 shares pursuant to the 2-for-1 stock split on August 22, 2000.

more than eight hundred thousand (800,000)(2) shares of the Common Stock during any calendar year.

(d) Consultants. A Consultant shall not be eligible for the grant of a Stock Award if, at the time of grant, a Form S-8 Registration Statement under the Securities Act ("Form S-8") is not available to register either the offer or the sale of the Company's securities to such Consultant because of the nature of the services that the Consultant is providing to the Company, or because the Consultant is not a natural person, or as otherwise provided by the rules governing the use of Form S-8, unless the Company determines both (i) that such grant (A) shall be registered in another manner under the Securities Act (e.g., on a Form S-3 Registration Statement) or (B) does not require registration under the Securities Act in order to comply with the requirements of the Securities Act, if applicable, and (ii) that such grant complies with the securities laws of all other relevant jurisdictions.(3)

6. OPTION PROVISIONS.

Each Option shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. All Options shall be separately designated Incentive Stock Options or Nonstatutory Stock Options at the time of grant, and a separate certificate or certificates will be issued for shares purchased on exercise of each type of Option. The provisions of separate Options need not be identical, but each Option shall include (through incorporation of provisions hereof by reference in the Option or otherwise) the substance of each of the following provisions:

(a) Term. Subject to the provisions of subsection 5(b) regarding Ten Percent Stockholders, no Incentive Stock Option shall be exercisable after the expiration of eight (8) years from the date it was granted. No Nonstatutory Stock Option shall be exercisable after the expiration of eight (8) years from the date it was granted.

(b) Exercise Price of an Incentive Stock Option. Subject to the provisions of subsection 5(b) regarding Ten Percent Stockholders, the exercise price of each Incentive Stock Option shall be not less than one hundred percent (100%) of the Fair Market Value of the stock subject to the Option on the date the Option is granted. Notwithstanding the foregoing, an Incentive Stock Option may be granted with an exercise price lower than that set forth in the preceding sentence if such Option is granted pursuant to an assumption or substitution for another option in a manner satisfying the provisions of Section 424(a) of the Code.

(c) Exercise Price of a Nonstatutory Stock Option. The exercise price of each Nonstatutory Stock Option shall be not less than one hundred percent (100%) of the Fair Market

(2) The 400,000 share limitation automatically was adjusted to 800,000 shares pursuant to the 2-for-1 stock split on August 22, 2000.

(3) Form S-8 generally is available to consultants and advisors only if (i) they are natural persons; (ii) they provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and (iii) the services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

Value of the stock subject to the Option on the date the Option is granted. Notwithstanding the foregoing, a Nonstatutory Stock Option may be granted with an exercise price lower than that set forth in the preceding sentence if such Option is granted pursuant to an assumption or substitution for another option in a manner satisfying the provisions of Section 424(a) of the Code.

(d) Consideration.

(i) The purchase price of stock acquired pursuant to an Option shall be paid, to the extent permitted by applicable statutes and regulations, either (A) in cash at the time the Option is exercised or (B) at the discretion of the Board at the time of the grant of the Option (or subsequently in the case of a Nonstatutory Stock Option) by delivery to the Company of other Common Stock, according to a deferred payment or other similar arrangement (which may include, without limiting the generality of the foregoing, the use of other Common Stock) with the Participant or in any other form of legal consideration that may be acceptable to the Board; provided, however, that at any time that the Company is incorporated in Delaware, payment of the Common Stock's "par value," as defined in the Delaware General Corporation Law, shall not be made by deferred payment.

(ii) Unless otherwise specifically provided in the Option, the purchase price of Common Stock acquired pursuant to an Option that is paid by delivery to the Company of other Common Stock acquired, directly or indirectly from the Company, shall be paid only by shares of the Common Stock of the Company that have been held for more than six (6) months (or such longer or shorter period of time required to avoid a charge to earnings for financial accounting purposes).

(iii) In the case of any deferred payment arrangement, interest shall be compounded at least annually and shall be charged at the minimum rate of interest necessary to avoid the treatment as interest, under any applicable provisions of the Code, of any amounts other than amounts stated to be interest under the deferred payment arrangement.

(e) Transferability of an Incentive Stock Option. An Incentive Stock Option shall not be transferable except by will or by the laws of descent and distribution and shall be exercisable during the lifetime of the Optionholder only by the Optionholder. Notwithstanding the foregoing provisions of this subsection 6(e), the Optionholder may, by delivering written notice to the Company, in a form satisfactory to the Company, designate a third party who, in the event of the death of the Optionholder, shall thereafter be entitled to exercise the Option.

(f) Transferability of a Nonstatutory Stock Option. A Nonstatutory Stock Option shall be transferable to the extent provided in the Option Agreement. If the Nonstatutory Stock Option does not provide for transferability, then the Nonstatutory Stock Option shall not be transferable except by will or by the laws of descent and distribution and shall be exercisable during the lifetime of the Optionholder only by the Optionholder. Notwithstanding the

foregoing provisions of this subsection 6(f), the Optionholder may, by delivering written notice to the Company, in a form satisfactory to the Company, designate a third party who, in the event of the death of the Optionholder, shall thereafter be entitled to exercise the Option.

8

(g) Vesting Generally. The total number of shares of Common Stock subject to an Option may, but need not, vest and therefore become exercisable in periodic installments which may, but need not, be equal. The Option may be subject to such other terms and conditions on the time or times when it may be exercised (which may be based on performance or other criteria) as the Board may deem appropriate. The vesting provisions of individual Options may vary. The provisions of this subsection 6(g) are subject to any Option provisions governing the minimum number of shares as to which an Option may be exercised.

(h) Termination of Continuous Service. In the event an Optionholder's Continuous Service terminates (other than upon the Optionholder's death or Disability), the Optionholder may exercise his or her Option (to the extent that the Optionholder was entitled to exercise it as of the date of termination) but only within such period of time ending on the earlier of (i) the date three (3) months following the termination of the Optionholder's Continuous Service (or such longer or shorter period specified in the Option Agreement), or (ii) the expiration of the term of the Option as set forth in the Option Agreement. If, after termination, the Optionholder does not exercise his or her Option within the time specified in the Option Agreement, the Option shall terminate.

(i) Extension of Termination Date. An Optionholder's Option Agreement may also provide that if the exercise of the Option following the termination of the Optionholder's Continuous Service (other than upon the Optionholder's death or Disability) would be prohibited at any time solely because the issuance of shares would violate the registration requirements under the Securities Act, then the Option shall terminate on the earlier of (i) the expiration of the term of the Option set forth in subsection 6(a) or (ii) the expiration of a period of three (3) months (or such longer or shorter period specified in the Option Agreement) after the termination of the Optionholder's Continuous Service during which the exercise of the Option would not be in violation of such registration requirements.

(j) Disability of Optionholder. In the event an Optionholder's Continuous Service terminates as a result of the Optionholder's Disability, the Optionholder may exercise his or her Option (to the extent that the Optionholder was entitled to exercise it as of the date of termination), but only within such period of time ending on the earlier of (i) the date twelve (12) months following such termination (or such longer or shorter period specified in the Option Agreement) or (ii) the expiration of the term of the Option as set forth in the Option Agreement. If, after termination, the Optionholder does not exercise his or her Option within the time specified herein, the Option shall terminate.

(k) Death of Optionholder. In the event an Optionholder's Continuous Service terminates as a result of the Optionholder's death, then, subject to any restrictions in the Option Agreement, the Option shall become fully vested and exercisable as of the date of termination. In the event (i) an Optionholder's Continuous Service terminates as a result of the Optionholder's death or (ii) the Optionholder dies within the period (if any) specified in the Option Agreement after the termination of the Optionholder's Continuous Service for a reason other than death, then the Option may be exercised (to the extent the Optionholder was entitled to exercise the Option as of the date of death) by the Optionholder's estate, by a person who

9

acquired the right to exercise the Option by bequest or inheritance or by a person designated to exercise the Option upon the Optionholder's death pursuant to subsection 6(e) or 6(f), but only within the period ending on the earlier of (1) the date eighteen (18) months following the date of death (or such longer or shorter period specified in the Option Agreement) or (2) the expiration of the term of such Option as set forth in the Option Agreement. If, after death, the Option is not exercised within the time specified herein, the Option shall terminate.

(l) Early Exercise. The Option may, but need not, include a provision whereby the Optionholder may elect at any time before the Optionholder's Continuous Service terminates to exercise the Option as to any part or all of the shares subject to the Option prior to the full vesting of the Option. Any unvested shares so purchased may be subject to an unvested share repurchase option in favor of the Company or to any other restriction the Board determines to be appropriate.

7. PROVISIONS OF STOCK AWARDS OTHER THAN OPTIONS.

(a) Stock Bonus Awards. Each stock bonus agreement shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. The terms and conditions of stock bonus agreements may change from time to time, and the terms and conditions of separate stock bonus agreements need not be identical, but each stock bonus agreement shall include (through incorporation of provisions hereof by reference in the agreement or otherwise) the substance of each of the following provisions:

(b) Consideration. A stock bonus shall be awarded in consideration for past services actually rendered to the Company for its benefit.

(c) Vesting. Shares of Common Stock awarded under the stock bonus agreement may, but need not, be subject to a share repurchase option in favor of the Company in accordance with a vesting schedule to be determined by the Board.

(d) Termination of Participant's Continuous Service. In the event a Participant's Continuous Service terminates, the Company may reacquire any or all of the shares of Common Stock held by the Participant that have not vested as of the date of termination under the terms of the stock bonus agreement; provided, however, that in the event a Participant's Continuous Service terminates as a result of the Participant's death, then, subject to any restrictions in the stock bonus agreement, the shares acquired pursuant to the stock bonus agreement shall become fully vested as of the date of termination.

(e) Transferability. Rights to acquire shares under the stock bonus agreement shall be transferable by the Participant only upon such terms and conditions as are set forth in the stock bonus agreement, as the Board shall determine in its discretion, so long as stock awarded under the stock bonus agreement remains subject to the terms of the stock bonus agreement.

(f) Restricted Stock Awards. Each restricted stock purchase agreement shall be in such form and shall contain such terms and conditions as the Board shall deem appropriate. The terms and conditions of the restricted stock purchase agreements may change from time to time,

and the terms and conditions of separate restricted stock purchase agreements need not be identical, but each restricted stock purchase agreement shall include (through incorporation of provisions hereof by reference in the agreement or otherwise) the substance of each of the following provisions:

(g) Purchase Price. The purchase price under each restricted stock purchase agreement shall be such amount as the Board shall determine and designate in such restricted stock purchase agreement. The purchase price shall not be less than eighty-five percent (85%) of the stock's Fair Market Value on the date such award is made or at the time the purchase is consummated.

(h) Consideration. The purchase price of stock acquired pursuant to the restricted stock purchase agreement shall be paid either: (i) in cash at the time of purchase; (ii) at the discretion of the Board, according to a deferred payment or other similar arrangement with the Participant; or (iii) in any other form of legal consideration that may be acceptable to the Board in its discretion; provided, however, that at any time that the Company is incorporated in Delaware, payment of the Common Stock's "par value," as defined in the Delaware General Corporation Law, shall not be made by deferred payment.

(i) Vesting. Shares of Common Stock acquired under the restricted stock purchase agreement may, but need not, be subject to a share repurchase option in favor of the Company in accordance with a vesting schedule to be determined by the Board.

(j) Termination of Participant's Continuous Service. In the event a Participant's Continuous Service terminates, the Company may repurchase or otherwise reacquire any or all of the shares of Common Stock held by the Participant that have not vested as of the date of termination under the terms of the restricted stock purchase agreement; provided, however, that in the event a Participant's Continuous Service terminates as a result of the Participant's death, then, subject to any restrictions in the restricted stock purchase agreement, the shares acquired pursuant to the restricted stock purchase agreement shall become fully vested as of the date of termination.

(k) Transferability. Rights to acquire shares under the restricted stock purchase agreement shall be transferable by the Participant only upon such terms and conditions as are set forth in the restricted stock purchase agreement, as the Board shall determine in its discretion, so long as stock awarded under the restricted stock purchase agreement remains subject to the terms of the restricted stock purchase agreement.

8. COVENANTS OF THE COMPANY.

(a) Availability of Shares. During the terms of the Stock Awards, the Company shall keep available at all times the number of shares of Common Stock required to satisfy such Stock Awards.

(b) Securities Law Compliance. The Company shall seek to obtain from each regulatory commission or agency having jurisdiction over the Plan such authority as may be

required to grant Stock Awards and to issue and sell shares of Common Stock upon exercise of the Stock Awards; provided, however, that this undertaking shall not require the Company to register under the Securities Act the Plan, any Stock Award or any stock issued or issuable pursuant to any such Stock Award. If, after reasonable efforts, the Company is unable to obtain from any such regulatory commission or agency the authority which counsel for the Company deems necessary for the lawful issuance and sale of stock under the Plan, the Company shall be relieved from any liability for failure to issue and sell stock upon exercise of such Stock Awards unless and until such authority is obtained.

9. USE OF PROCEEDS FROM STOCK.

Proceeds from the sale of stock pursuant to Stock Awards shall constitute general funds of the Company.

10. MISCELLANEOUS.

(a) Acceleration of Exercisability and Vesting. The Board shall have the power to accelerate the time at which a Stock Award may first be exercised or the time during which a Stock Award or any part thereof will vest in accordance with the Plan, notwithstanding the provisions in the Stock Award stating the time at which it may first be exercised or the time during which it will vest.

(b) Stockholder Rights. No Participant shall be deemed to be the holder of, or to have any of the rights of a holder with respect to, any shares subject to such Stock Award unless and until such Participant has satisfied all requirements for exercise of the Stock Award pursuant to its terms.

(c) No Employment or other Service Rights. Nothing in the Plan or any instrument executed or Stock Award granted pursuant thereto shall confer upon any Participant or other holder of Stock Awards any right to continue to serve the Company or an Affiliate in the capacity in effect at the time the Stock Award was granted or shall affect the right of the Company or an Affiliate to terminate (i) the employment of an Employee with or without notice and with or without cause, (ii) the service of a Consultant pursuant to the terms of such Consultant's agreement with the Company or an Affiliate or (iii) the service of a Director pursuant to the Bylaws of the Company or an Affiliate, and any applicable provisions of the corporate law of the state in which the Company or the Affiliate is incorporated, as the case may be.

(d) Incentive Stock Option \$100,000 Limitation. To the extent that the aggregate Fair Market Value (determined at the time of grant) of stock with respect to which Incentive Stock Options are exercisable for the first time by any Optionholder during any calendar year (under all plans of the Company and its Affiliates) exceeds one hundred thousand dollars (\$100,000), the Options or portions thereof which exceed such limit (according to the order in which they were granted) shall be treated as Nonstatutory Stock Options.

(e) **Investment Assurances.** The Company may require a Participant, as a condition of exercising or acquiring stock under any Stock Award, (i) to give written assurances satisfactory to the Company as to the Participant's knowledge and experience in financial and business matters and/or to employ a purchaser representative reasonably satisfactory to the Company who is knowledgeable and experienced in financial and business matters and that he or she is capable of evaluating, alone or together with the purchaser representative, the merits and risks of exercising the Stock Award; and (ii) to give written assurances satisfactory to the Company stating that the Participant is acquiring the stock subject to the Stock Award for the Participant's own account and not with any present intention of selling or otherwise distributing the stock. The foregoing requirements, and any assurances given pursuant to such requirements, shall be inoperative if (iii) the issuance of the shares upon the exercise or acquisition of stock under the Stock Award has been registered under a then currently effective registration statement under the Securities Act or (iv) as to any particular requirement, a determination is made by counsel for the Company that such requirement need not be met in the circumstances under the then applicable securities laws. The Company may, upon advice of counsel to the Company, place legends on stock certificates issued under the Plan as such counsel deems necessary or appropriate in order to comply with applicable securities laws, including, but not limited to, legends restricting the transfer of the stock.

(f) **Withholding Obligations.** To the extent provided by the terms of a Stock Award Agreement, the Participant may satisfy any federal, state or local tax withholding obligation relating to the exercise or acquisition of stock under a Stock Award by any of the following means (in addition to the Company's right to withhold from any compensation paid to the Participant by the Company) or by a combination of such means: (i) tendering a cash payment; (ii) authorizing the Company to withhold shares from the shares of the Common Stock otherwise issuable to the Participant as a result of the exercise or acquisition of stock under the Stock Award, provided, however, that no shares of Common Stock are withheld with a value exceeding the minimum amount of tax required to be withheld by law; or (iii) delivering to the Company owned and unencumbered shares of the Common Stock.

11. ADJUSTMENTS UPON CHANGES IN STOCK.

(a) **Capitalization Adjustments.** If any change is made in the stock subject to the Plan, or subject to any Stock Award, without the receipt of consideration by the Company (through merger, consolidation, reorganization, recapitalization, reincorporation, stock dividend, dividend in property other than cash, stock split, liquidating dividend, combination of shares, exchange of shares, change in corporate structure or other transaction not involving the receipt of consideration by the Company), the Plan will be appropriately adjusted in the class(es) and maximum number of securities subject to the Plan pursuant to subsection 4(a) and the maximum number of securities subject to award to any person pursuant to subsection 5(c), and the outstanding Stock Awards will be appropriately adjusted in the class(es) and number of securities and price per share of stock subject to such outstanding Stock Awards. Such adjustments shall be made by the Board, the determination of which shall be final, binding and conclusive. (The conversion of any convertible securities of the Company shall not be treated as a transaction "without receipt of consideration" by the Company.)

13

(b) **Dissolution or Liquidation.** In the event of a dissolution or liquidation of the Company, then such Stock Awards shall be terminated if not exercised (if applicable) prior to such event.

(c) **Corporate Transaction.** In the event of (1) a sale, lease or other disposition of all or substantially all of the assets of the Company, (2) a merger or consolidation in which the Company is not the surviving corporation or (3) a reverse merger in which the Company is the surviving corporation but the shares of Common Stock outstanding immediately preceding the merger are converted by virtue of the merger into other property, whether in the form of securities, cash or otherwise (a "Corporate Transaction"), then any surviving corporation or acquiring corporation shall assume any Stock Awards outstanding under the Plan or shall substitute similar stock awards (including an award to acquire the same consideration paid to the stockholders in the Corporate Transaction) for those outstanding under the Plan. In the event any surviving corporation or acquiring corporation refuses to assume such Stock Awards or to substitute similar stock awards for those outstanding under the Plan, then with respect to Stock Awards held by Participants whose Continuous Service has not terminated, the vesting of such Stock Awards (and, if applicable, the time during which such Stock Awards may be exercised) shall be accelerated in full, and the Stock Awards shall terminate if not exercised (if applicable) at or prior to such Corporate Transaction. With respect to any other Stock Awards outstanding under the Plan, such Stock Awards shall terminate if not exercised (if applicable) prior to such Corporate Transaction.

(d) **Securities Acquisition.** In the event of an acquisition by any person, entity or group within the meaning of Section 13(d) or 14(d) of the Exchange Act, or any comparable successor provisions (excluding any employee benefit plan, or related trust, sponsored or maintained by the Company or an Affiliate) of the beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act, or comparable successor rule) of securities of the Company representing at least fifty percent (50%) of the combined voting power entitled to vote in the election of Directors and provided that such acquisition is not a result of, and does not constitute, a Corporate Transaction described in subsection 11(c) hereof, then with respect to Stock Awards held by Participants whose Continuous Service has not terminated, the vesting of such Stock Awards (and, if applicable, the time during which such Stock Awards may be exercised) shall be accelerated in full.

12. AMENDMENT OF THE PLAN AND STOCK AWARDS.

(a) **Amendment of Plan.** The Board at any time, and from time to time, may amend the Plan. However, except as provided in Section 11 relating to adjustments upon changes in stock, no amendment shall be effective unless approved by the stockholders of the Company to the extent stockholder approval is necessary to satisfy the requirements of Section 422 of the Code, Rule 16b-3 or any Nasdaq or securities exchange listing requirements.

(b) **Stockholder Approval.** The Board may, in its sole discretion, submit any other amendment to the Plan for stockholder approval, including, but not limited to, amendments to the Plan intended to satisfy the requirements of Section 162(m) of the Code and the regulations

14

thereunder regarding the exclusion of performance-based compensation from the limit on corporate deductibility of compensation paid to certain executive officers.

(c) **Contemplated Amendments.** It is expressly contemplated that the Board may amend the Plan in any respect the Board deems necessary or advisable to provide eligible Employees with the maximum benefits provided or to be provided under the provisions of the Code and the regulations

promulgated thereunder relating to Incentive Stock Options and/or to bring the Plan and/or Incentive Stock Options granted under it into compliance therewith.

(d) No Impairment of Rights. Rights under any Stock Award granted before amendment of the Plan shall not be impaired by any amendment of the Plan unless (i) the Company requests the consent of the Participant and (ii) the Participant consents in writing.

(e) Amendment of Stock Awards. The Board at any time, and from time to time, may amend the terms of any one or more Stock Awards; provided, however, that the rights under any Stock Award shall not be impaired by any such amendment unless (i) the Company requests the consent of the Participant and (ii) the Participant consents in writing.

13. TERMINATION OR SUSPENSION OF THE PLAN.

(a) Plan Term. The Board may suspend or terminate the Plan at any time. Unless sooner terminated, the Plan shall terminate on February 9, 2010. No Stock Awards may be granted under the Plan while the Plan is suspended or after it is terminated.

(b) No Impairment of Rights. Rights and obligations under any Stock Award granted while the Plan is in effect shall not be impaired by suspension or termination of the Plan, except with the written consent of the Participant.

14. EFFECTIVE DATE OF PLAN.

The Plan shall become effective upon adoption by the Board, but no Stock Award shall be exercised (or, in the case of a stock bonus, shall be granted) unless and until the Plan has been approved by the stockholders of the Company, which approval shall be within twelve (12) months before or after the date the Plan is adopted by the Board.

15. CHOICE OF LAW.

The law of the State of Delaware shall govern all questions concerning the construction, validity and interpretation of this Plan, without regard to such state's conflict of laws rules.

THE CORPORATE PLAN
FOR RETIREMENTSM
FIDELITY BASIC PLAN DOCUMENT NO. 02

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THE CORPORATE PLAN
FOR RETIREMENTSM

Preamble.
Article 1. Adoption Agreement.
Article 2. Definitions.

- 2.01. Definitions
2.02. Pronouns
2.03. Special Effective Dates

Article 3. Service.

- 3.01. Crediting of Eligibility Service
3.02. Re-Crediting of Eligibility Service Following Termination of Employment
3.03. Crediting of Vesting Service
3.04. Application of Vesting Service to a Participant's Account Following a Break in Vesting Service
3.05. Service with Predecessor Employer
3.06. Change in Service Crediting

Article 4. Participation.

- 4.01. Date of Participation
4.02. Transfers Out of Covered Employment
4.03. Transfers Into Covered Employment
4.04. Resumption of Participation Following Reemployment

Article 5. Contributions.

- 5.01. Contributions Subject to Limitations
5.02. Compensation Taken into Account in Determining Contributions
5.03. Deferral Contributions
5.04. Employee Contributions
5.05. No Deductible Employee Contributions
5.06. Rollover Contributions
5.07. Qualified Nonelective Employer Contributions
5.08. Matching Employer Contributions
5.09. Qualified Matching Employer Contributions
5.10. Nonelective Employer Contributions
5.11. Vested Interest in Contributions
5.12. Time for Making Contributions
5.13. Return of Employer Contributions

Article 6. Limitations on Contributions.

- 6.01. Special Definitions
6.02. Code Section 402(g) Limit on Deferral Contributions
6.03. Additional Limit on Deferral Contributions
6.04. Allocation and Distribution of "Excess Contributions"
6.05. Reductions in Deferral Contributions to Meet Code Requirements
6.06. Limit on Matching Employer Contributions and Employee Contributions
6.07. Allocation, Distribution, and Forfeiture of "Excess Aggregate Contributions"
6.08. Aggregate Limit on "Contribution Percentage Amounts" and "Includable Contributions"
6.09. Income or Loss on Distributable Contributions
6.10. Deemed Satisfaction of "ADP" Test

- 6.11. Deemed Satisfaction of "ACP" Test With Respect to Matching Employer Contributions
6.12. Code Section 415 Limitations

Article 7. Participants' Accounts.

- 7.01. Individual Accounts
7.02. Valuation of Accounts

Article 8. Investment of Contributions.

- 8.01. Manner of Investment
8.02. Investment Decisions
8.03. Participant Directions to Trustee

Article 9. Participant Loans.

- 9.01. Special Definitions
- 9.02. Participant Loans
- 9.03. Separate Loan Procedures
- 9.04. Availability of Loans
- 9.05. Limitation on Loan Amount
- 9.06. Interest Rate
- 9.07. Level Amortization
- 9.08. Security
- 9.09. Transfer and Distribution of Loan Amounts from Permissible Investments
- 9.10. Default
- 9.11. Effect of Termination Where Participant has Outstanding Loan Balance
- 9.12. Deemed Distributions Under Code Section 72(p)
- 9.13. Determination of Account Value Upon Distribution Where Plan Loan is Outstanding

Article 10. In-Service Withdrawals.

- 10.01. Availability of In-Service Withdrawals
- 10.02. Withdrawal of Employee Contributions
- 10.03. Withdrawal of Rollover Contributions
- 10.04. Age 59 1/2 Withdrawals
- 10.05. Hardship Withdrawals
- 10.06. Preservation of Prior Plan In-Service Withdrawal Rules
- 10.07. Restrictions on In-Service Withdrawals
- 10.08. Distribution of Withdrawal Amounts

Article 11. Right to Benefits.

- 11.01. Normal or Early Retirement
- 11.02. Late Retirement
- 11.03. Disability Retirement
- 11.04. Death
- 11.05. Other Termination of Employment
- 11.06. Application for Distribution
- 11.07. Application of Vesting Schedule Following Partial Distribution
- 11.08. Forfeitures
- 11.09. Application of Forfeitures
- 11.10. Reinstatement of Forfeitures
- 11.11. Adjustment for Investment Experience

Article 12. Distributions.

- 12.01. Restrictions on Distributions
- 12.02. Timing of Distribution Following Retirement or Termination of Employment

ii

- 12.03. Participant Consent to Distribution
- 12.04. Required Commencement of Distribution to Participants
- 12.05. Required Commencement of Distribution to Beneficiaries
- 12.06. Whereabouts of Participants and Beneficiaries

Article 13. Form of Distribution.

- 13.01. Normal Form of Distribution Under Profit Sharing Plan
- 13.02. Cash Out Of Small Accounts
- 13.03. Minimum Distributions
- 13.04. Direct Rollovers
- 13.05. Notice Regarding Timing and Form of Distribution
- 13.06. Determination of Method of Distribution
- 13.07. Notice to Trustee

Article 14. Superseding Annuity Distribution Provisions.

- 14.01. Special Definitions
- 14.02. Applicability
- 14.03. Annuity Form of Payment
- 14.04. “Qualified Joint and Survivor Annuity” and “Qualified Preretirement Survivor Annuity Requirements”
- 14.05. Waiver of the “Qualified Joint and Survivor Annuity” and/or “Qualified Preretirement Survivor Annuity Rights”
- 14.06. Spouse’s Consent to Waiver
- 14.07. Notice Regarding “Qualified Joint and Survivor Annuity”
- 14.08. Notice Regarding “Qualified Preretirement Survivor Annuity”
- 14.09. Former Spouse

Article 15. Top-Heavy Provisions.

- 15.01. Definitions
- 15.02. Application
- 15.03. Minimum Contribution
- 15.04. Modification of Allocation Provisions to Meet Minimum Contribution Requirements
- 15.05. Adjustment to the Limitation on Contributions and Benefits
- 15.06. Accelerated Vesting
- 15.07. Exclusion of Collectively-Bargained Employees

Article 16. Amendment and Termination.

- 16.01. Amendments by the Employer that do Not Affect Prototype Status
- 16.02. Amendments by the Employer that Affect Prototype Status

<u>16.03.</u>	<u>Amendment by the Mass Submitter Sponsor and the Prototype Sponsor</u>
<u>16.04.</u>	<u>Amendments Affecting Vested and/or Accrued Benefits</u>
<u>16.05.</u>	<u>Retroactive Amendments</u>
<u>16.06.</u>	<u>Termination</u>
<u>16.07.</u>	<u>Distribution upon Termination of the Plan</u>
<u>16.08.</u>	<u>Merger or Consolidation of Plan; Transfer of Plan Assets</u>
	<u>Article 17. Amendment and Continuation of Prior Plan; Transfer of Funds to or from Other Qualified Plans.</u>
<u>17.01.</u>	<u>Amendment and Continuation of Prior Plan</u>
<u>17.02.</u>	<u>Transfer of Funds from an Existing Plan</u>
<u>17.03.</u>	<u>Acceptance of Assets by Trustee</u>
<u>17.04.</u>	<u>Transfer of Assets from Trust</u>
	<u>Article 18. Miscellaneous.</u>
<u>18.01.</u>	<u>Communication to Participants</u>
<u>18.02.</u>	<u>Limitation of Rights</u>
<u>18.03.</u>	<u>Nonalienability of Benefits</u>

<u>18.04.</u>	<u>Qualified Domestic Relations Orders Procedures</u>
<u>18.05.</u>	<u>Additional Rules for Paired Plans</u>
<u>18.06.</u>	<u>Application of Plan Provisions in Multiple Employer Plans</u>
<u>18.07.</u>	<u>Veterans Reemployment Rights</u>
<u>18.08.</u>	<u>Facility of Payment</u>
<u>18.09.</u>	<u>Information between Employer and Trustee</u>
<u>18.10.</u>	<u>Effect of Failure to Qualify Under Code</u>
<u>18.11.</u>	<u>Directions, Notices and Disclosure</u>
<u>18.12.</u>	<u>Governing Law</u>
	<u>Article 19. Plan Administration.</u>
<u>19.01.</u>	<u>Powers and Responsibilities of the Administrator</u>
<u>19.02.</u>	<u>Nondiscriminatory Exercise of Authority</u>
<u>19.03.</u>	<u>Claims and Review Procedures</u>
<u>19.04.</u>	<u>Named Fiduciary</u>
<u>19.05.</u>	<u>Costs of Administration</u>
	<u>Article 20. Trust Agreement.</u>
<u>20.01.</u>	<u>Acceptance of Trust Responsibilities</u>
<u>20.02.</u>	<u>Establishment of Trust Fund</u>
<u>20.03.</u>	<u>Exclusive Benefit</u>
<u>20.04.</u>	<u>Powers of Trustee</u>
<u>20.05.</u>	<u>Accounts</u>
<u>20.06.</u>	<u>Approval of Accounts</u>
<u>20.07.</u>	<u>Distribution from Trust Fund</u>
<u>20.08.</u>	<u>Transfer of Amounts from Qualified Plan</u>
<u>20.09.</u>	<u>Transfer of Assets from Trust</u>
<u>20.10.</u>	<u>Separate Trust or Fund for Existing Plan Assets</u>
<u>20.11.</u>	<u>Self-Directed Brokerage Option</u>
<u>20.12.</u>	<u>Employer Stock Investment Option</u>
<u>20.13.</u>	<u>Voting; Delivery of Information</u>
<u>20.14.</u>	<u>Compensation and Expenses of Trustee</u>
<u>20.15.</u>	<u>Reliance by Trustee on Other Persons</u>
<u>20.16.</u>	<u>Indemnification by Employer</u>
<u>20.17.</u>	<u>Consultation by Trustee with Counsel</u>
<u>20.18.</u>	<u>Persons Dealing with the Trustee</u>
<u>20.19.</u>	<u>Resignation or Removal of Trustee</u>
<u>20.20.</u>	<u>Fiscal Year of the Trust</u>
<u>20.21.</u>	<u>Discharge of Duties by Fiduciaries</u>
<u>20.22.</u>	<u>Amendment</u>
<u>20.23.</u>	<u>Plan Termination</u>
<u>20.24.</u>	<u>Permitted Reversion of Funds to Employer</u>
<u>20.25.</u>	<u>Governing Law</u>

Preamble.

This prototype plan consists of three parts: (1) an Adoption Agreement that is a separate document incorporated by reference into this Basic Plan Document; (2) this Basic Plan Document; and (3) a Trust Agreement that is a part of this Basic Plan Document and is found in Article 20. Each part of the prototype plan contains substantive provisions that are integral to the operation of the plan. The Adoption Agreement is the means by which an adopting Employer elects the optional provisions that shall apply under its plan. The Basic Plan Document describes the standard provisions elected in the Adoption Agreement. The Trust Agreement describes the powers and duties of the Trustee with respect to plan assets.

The prototype plan is intended to qualify under Code Section 401(a). Depending upon the Adoption Agreement completed by an adopting Employer, the prototype plan may be used to implement a money purchase pension plan, a profit sharing plan, or a profit sharing plan with a cash or deferred arrangement

intended to qualify under Code Section 401(k).

Article 1. Adoption Agreement.

Article 2. Definitions.

2.01. Definitions. Wherever used herein, the following terms have the meanings set forth below, unless a different meaning is clearly required by the context:

- (a) “**Account**” means an account established for the purpose of recording any contributions made on behalf of a Participant and any income, expenses, gains, or losses incurred thereon. The Administrator shall establish and maintain sub-accounts within a Participant’s Account as necessary to depict accurately a Participant’s interest under the Plan.
- (b) “**Active Participant**” means any Eligible Employee who has met the requirements of Article 4 to participate in the Plan and who may be entitled to receive allocations under the Plan.
- (c) “**Administrator**” means the Employer adopting this Plan, as listed in Subsection 1.02(a) of the Adoption Agreement, or any other person designated by the Employer in Subsection 1.01(c) of the Adoption Agreement.
- (d) “**Adoption Agreement**” means Article 1, under which the Employer establishes and adopts, or amends the Plan and Trust and designates the optional provisions selected by the Employer, and the Trustee accepts its responsibilities under Article 20. The provisions of the Adoption Agreement shall be an integral part of the Plan.
- (e) “**Annuity Starting Date**” means the first day of the first period for which an amount is payable as an annuity or in any other form permitted under the Plan.
- (f) “**Basic Plan Document**” means this Fidelity prototype plan document, qualified with the National Office of the Internal Revenue Service as Basic Plan Document No. 02.
- (g) “**Beneficiary**” means the person or persons (including a trust) entitled under Section 11.04 or 14.04 to receive benefits under the Plan upon the

death of a Participant; provided, however, that for purposes of Section 13.03 such term shall be applied in accordance with Code Section 401(a)(9) and the regulations thereunder.

(h) “**Break in Vesting Service**” means a 12-consecutive-month period beginning on an Employee’s Severance Date or any anniversary thereof in which the Employee is not credited with an Hour of Service.

Notwithstanding the foregoing, the following special rules apply in determining whether an Employee who is on leave has incurred a Break in Vesting Service:

- (1) If an individual is absent from work because of “maternity/paternity leave” beyond the first anniversary of his Severance Date, the 12-consecutive-month period beginning on the individual’s Severance Date shall not constitute a Break in Vesting Service. For purposes of this paragraph, “maternity/paternity leave” means a leave of absence (A) by reason of the pregnancy of the individual, (B) by reason of the birth of a child of the individual, (C) by reason of the placement of a child with the individual in connection with the adoption of such child by the individual, or (D) for purposes of caring for a child for the period beginning immediately following such birth or placement.
 - (2) If an individual is absent from work because of “FMLA leave” and returns to employment with the Employer or a Related Employer following such “FMLA leave”, he shall not incur a Break in Vesting Service during any 12-consecutive-month period beginning on his Severance Date or anniversaries thereof in which he is absent because of such “FMLA leave”. For purposes of this paragraph, “FMLA leave” means an approved leave of absence pursuant to the Family and Medical Leave Act of 1993.
- (i) “**Code**” means the Internal Revenue Code of 1986, as amended from time to time.
 - (j) “**Compensation**” means wages as defined in Code Section 3401(a) and all other payments of compensation to an Eligible Employee by the Employer (in the course of the Employer’s trade or business) for services to the Employer while employed as an Eligible Employee for which the Employer is required to furnish the Eligible Employee a written statement under Code Sections 6041(d) and 6051(a)(3). Compensation must be determined without regard to any rules under Code Section 3401(a) that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in Code Section 3401(a)(2)).

For any Self-Employed Individual, Compensation means Earned Income; provided, however, that if the Employer elects to exclude specified items from Compensation, such Earned Income shall be adjusted in a similar manner so that it is equivalent under regulations issued under Code Section 414(s) to Compensation for Participants who are not Self-Employed Individuals.

Compensation shall generally be based on the amount actually paid to the Eligible Employee during the Plan Year or, for purposes of Articles 5 (and, for Plan Years beginning prior to January 1, 2003, Article 15) so elected by the Employer in Subsection 1.05(c) of the Adoption Agreement, during that portion of the Plan Year during which the Eligible Employee is an Active Participant. Notwithstanding the preceding sentence, Compensation for purposes of Section 6.12 (Code Section 415 Limitations) shall be based on the

amount actually paid or made available to the Participant during the Limitation Year.

If the initial Plan Year of a new plan consists of fewer than 12 months, calculated from the Effective Date listed in Subsection 1.01(g)(1) of the Adoption Agreement through the end of such initial Plan Year, Compensation for such initial Plan Year shall be determined as follows:

- (1) If the Plan is a profit sharing plan, for purposes of allocating Nonelective Employer Contributions under Section 1.11 of the Adoption Agreement (other than Nonelective Employer Contributions made in accordance with the Safe Harbor Nonelective Employer Contributions Addendum to the Adoption Agreement) and determining Highly Compensated Employees under Subsection 2.01(z), the initial Plan Year shall be the 12-month period ending on the last day of the Plan Year.
- (2) For purposes of Section 6.12 (Code Section 415 Limitations) where the Limitation Year is based on the Plan Year, the Limitation Year shall be the 12-month period ending on the last day of the Plan Year.
- (3) For all other purposes, the initial Plan Year shall be the period from the Effective Date listed in Subsection 1.01(g)(1) of the Adoption Agreement through the end of the initial Plan Year.

The annual Compensation of each Active Participant taken into account for determining benefits provided under the Plan for any determination period shall not exceed the annual Compensation limit under Code Section 401(a)(17) as in effect on the first day of the determination period. This limit shall be adjusted by the Secretary to reflect increases in the cost of living, as provided in Code Section 401(a)(17)(B); provided, however, that the dollar increase in effect on January 1 of any calendar year is effective for determination periods beginning in such calendar year. If a Plan determines Compensation over a determination period that contains fewer than 12 calendar months (a "short determination period"), then the Compensation limit for such "short determination period" is equal to the Compensation limit for the calendar year in which the "short determination period" begins multiplied by the ratio obtained by dividing the number of full months in the "short determination period" by 12; provided, however, that such proration shall not apply if there is a "short determination period" because (i) the Employer elected in Subsection 1.05(c) of the Adoption Agreement to determine contributions based only on Compensation paid during the portion of the Plan Year during which an individual was an Active Participant, (ii) an Employee is covered under the Plan less than a full Plan Year, or (iii) Deferral Contributions and/or Matching Employer Contributions are contributed for each pay period during the Plan Year and are based on Compensation for that pay period.

(k) "**Contribution Period**" means the period for which Matching Employer and Nonelective Employer Contributions are made and calculated. The Contribution Period for additional Matching Employer Contributions, as described in Subsection 1.10(b) of the Adoption Agreement and Nonelective Employer Contributions is the Plan Year. The Contribution Period for basic Matching Employer Contributions, as described in Subsection 1.10(a) of the Adoption Agreement, is the period specified by the Employer in Subsection 1.10(c) of the Adoption Agreement.

3

(l) "**Deferral Contribution**" means any contribution made to the Plan by the Employer in accordance with the provisions of Section 5.03.

(m) "**Early Retirement Age**" means the early retirement age specified in Subsection 1.13(b) of the Adoption Agreement, if any.

(n) "**Earned Income**" means the net earnings of a Self-Employed Individual derived from the trade or business with respect to which the Plan is established and for which the personal services of such individual are a material income-providing factor, excluding any items not included in gross income and the deductions allocated to such items, except that net earnings shall be determined with regard to the deduction allowed under Code Section 164(f), to the extent applicable to the Employer. Net earnings shall be reduced by contributions of the Employer to any qualified plan, to the extent a deduction is allowed to the Employer for such contributions under Code Section 404.

(o) "**Effective Date**" means the effective date specified by the Employer in Subsection 1.01(g)(1) or (2) of the Adoption Agreement with respect to the Plan, if this is a new plan, or with respect to the amendment and restatement, if this is an amendment and restatement of the Plan. The Employer may select special Effective Dates with respect to specified Plan provisions, as set forth in Section (a) of the Special Effective Dates Addendum to the Adoption Agreement. In the event that another plan is merged into and made a part of the Plan, the effective date of the merger shall be reflected in Section (b) of the Special Effective Dates Addendum to the Adoption Agreement.

If this is an amendment and restatement of the Plan, and the Plan was not amended prior to the effective date specified by the Employer in Subsection 1.01(g)(2) of the Adoption Agreement to comply with the requirements of the Acts specified in the Snap Off Addendum to the Adoption Agreement, the effective dates specified in such Snap Off Addendum shall apply with respect to those provisions specified therein. Such effective dates may be earlier than the date specified in Subsection 1.01(g)(2) of the Adoption Agreement.

(p) "**Eligibility Computation Period**" means each 12-consecutive-month period beginning with an Employee's Employment Commencement Date and each anniversary thereof.

(q) "**Eligibility Service**" means an Employee's service that is taken into account in determining his eligibility to participate in the Plan as may be required under Subsection 1.04(b) of the Adoption Agreement. Eligibility Service shall be credited in accordance with Article 3.

(r) "**Eligible Employee**" means any Employee of the Employer who is in the class of Employees eligible to participate in the Plan. The Employer must specify in Subsection 1.04(c) of the Adoption Agreement any Employee or class of Employees not eligible to participate in the Plan. If Article 1 of the Employer's Plan is a Non-Standardized Adoption Agreement, regardless of the Employer's selection in Subsection 1.04(c) of the Adoption Agreement, the following Employees are automatically excluded from eligibility to participate in the Plan:

- (1) any individual who is a signatory to a contract, letter of agreement, or other document that acknowledges his status as an

4

independent contractor not entitled to benefits under the Plan or who is not otherwise classified by the Employer as a common law employee and with respect to whom the Employer does not withhold income taxes and file Form W-2 (or any replacement Form), with the Internal Revenue Service and does not remit Social Security payments to the Federal government, even if such individual is later adjudicated to be a common law employee; and

(2) any Employee who is a resident of Puerto Rico.

If the Employer elects to exclude collective bargaining employees from the eligible class, the exclusion applies to any Employee of the Employer included in a unit of Employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, unless the collective bargaining agreement requires the Employee to be covered under the Plan. The term “employee representatives” does not include any organization more than half the members of which are owners, officers, or executives of the Employer.

If the Employer does not elect to exclude Leased Employees from the eligible class, contributions or benefits provided by the leasing organization which are attributable to services performed for the Employer shall be treated as provided by the Employer and there shall be no duplication of benefits under this Plan.

(s) “**Employee**” means any common law employee of the Employer or a Related Employer, any Self-Employed Individual, and any Leased Employee. Notwithstanding the foregoing, a Leased Employee shall not be considered an Employee if Leased Employees do not constitute more than 20 percent of the Employer’s non-highly compensated work-force (taking into account all Related Employers) and the Leased Employee is covered by a money purchase pension plan maintained by the leasing organization and providing (1) a nonintegrated employer contribution rate of at least 10 percent of compensation, as defined for purposes of Code Section 415(c)(3), but including amounts contributed pursuant to a salary reduction agreement which are excludable from gross income under Code Section 125, 132(f)(4), 402(e)(3), 402(h) or 403(b), (2) full and immediate vesting, and (3) immediate participation by each employee of the leasing organization.

(t) “**Employee Contribution**” means any after-tax contribution made by an Active Participant to the Plan.

(u) “**Employer**” means the employer named in Subsection 1.02(a) of the Adoption Agreement and any Related Employer included as an Employer under this Subsection 2.01(u). If Article 1 of the Employer’s Plan is a Standardized Adoption Agreement, the term “Employer” includes all Related Employers; provided, however, that if an employer becomes a Related Employer as a result of an asset or stock acquisition, merger or other similar transaction, the term “Employer” shall not include such employer for periods prior to the earlier of (1) the date as of which Subsection 1.02(b) of the Adoption Agreement is amended to name such employer or (2) the first day of the second Plan Year beginning after the date of such transaction. If Article 1 of the Employer’s Plan is a Non-Standardized Adoption Agreement, the term “Employer” includes only those Related Employers designated in Subsection 1.02(b) of the Adoption Agreement.

5

If the organization or other entity named in the Adoption Agreement is a sole proprietor or a professional corporation and the sole proprietor of such proprietorship or the sole shareholder of the professional corporation dies, then the legal representative of such sole proprietor or shareholder shall be deemed to be the Employer until such time as, through the disposition of such sole proprietor’s or sole shareholder’s estate or otherwise, any organization or other entity succeeds to the interests of the sole proprietor in the proprietorship or the sole shareholder in the professional corporation. The legal representative of a sole proprietor or shareholder shall be (1) the person appointed as such by the sole proprietor or shareholder prior to his death under a legally enforceable power of attorney, or, if none, (2) the executor or administrator of the sole proprietor’s or shareholder’s estate.

If one of the Employers designated in Subsection 1.02(b) of the Adoption Agreement is not a Related Employer, the term “Employer” includes such unRelated Employer and the provisions of Section 18.06 shall apply.

(v) “**Employment Commencement Date**” means the date on which an Employee first performs an Hour of Service.

(w) “**Entry Date**” means the date specified by the Employer in Subsection 1.04(d) or (e) of the Adoption Agreement as of which an Eligible Employee who has met the applicable eligibility requirements begins to participate in the Plan. The Employer may specify different Entry Dates for purposes of eligibility to participate in the Plan by (1) making Deferral Contributions and (2) receiving allocations of Matching and/or Nonelective Employer Contributions.

(x) “**ERISA**” means the Employee Retirement Income Security Act of 1974, as from time to time amended.

(y) “**Fund Share**” means the share, unit, or other evidence of ownership in a Permissible Investment.

(z) “**Highly Compensated Employee**” means both highly compensated active Employees and highly compensated former Employees.

A highly compensated active Employee includes any Employee who performs service for the Employer during the “determination year” and who (1) at any time during the “determination year” or the “look-back year” was a five percent owner or (2) received Compensation from the Employer during the “look-back year” in excess of \$80,000 (as adjusted pursuant to Code Section 415(d)) and, if elected by the Employer in Section 1.06 of the Adoption Agreement, was a member of the top-paid group for such year.

For this purpose, the “determination year” shall be the Plan Year. The “look-back year” shall be the twelve-month period immediately preceding the “determination year”, unless the Employer has elected in Section 1.06 of the Adoption Agreement to make the “look-back year” the calendar year beginning within the preceding Plan Year.

A highly compensated former Employee includes any Employee who separated from service (or was deemed to have separated) prior to the “determination year”, performs no service for the Employer during the “determination year”, and was a highly compensated active Employee for either the separation year or any “determination year” ending on or after the Employee’s 55th birthday,

6

as determined under the rules in effect for determining Highly Compensated Employees for such separation year or “determination year”.

The determination of who is a Highly Compensated Employee, including the determinations of the number and identity of Employees in the top-paid group, shall be made in accordance with Code Section 414(q) and the Treasury Regulations issued thereunder.

For purposes of this Subsection 2.01(z), Compensation shall include amounts that are not includable in the gross income of an Employee under a salary reduction agreement by reason of the application of Code Section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b).

(aa) “**Hour of Service**”, with respect to any individual, means:

(1) Each hour for which the individual is directly or indirectly paid, or entitled to payment, for the performance of duties for the Employer or a Related Employer, each such hour to be credited to the individual for the Eligibility Computation Period in which the duties were performed;

(2) Each hour for which the individual is directly or indirectly paid, or entitled to payment, by the Employer or a Related Employer (including payments made or due from a trust fund or insurer to which the Employer contributes or pays premiums) on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity, disability, layoff, jury duty, military duty, or leave of absence, each such hour to be credited to the individual for the Eligibility Computation Period in which such period of time occurs, subject to the following rules:

(A) No more than 501 Hours of Service shall be credited under this paragraph (2) on account of any single continuous period during which the individual performs no duties, unless the individual performs no duties because of military duty, the individual’s employment rights are protected by law, and the individual returns to employment with the Employer or a Related Employer during the period that his employment rights are protected under Federal law;

(B) Hours of Service shall not be credited under this paragraph (2) for a payment which solely reimburses the individual for medically-related expenses, or which is made or due under a plan maintained solely for the purpose of complying with applicable worker’s compensation, unemployment compensation or disability insurance laws; and

(C) If the period during which the individual performs no duties falls within two or more Eligibility Computation Periods and if the payment made on account of such period is not calculated on the basis of units of time, the Hours of Service credited with respect to such period shall be allocated between not more than the first two such Eligibility Computation Periods on any reasonable basis consistently applied with respect to similarly situated individuals;

(3) Each hour not counted under paragraph (1) or (2) for which he would have been scheduled to work for the Employer or a Related Employer during the period that he is absent from work because of military duty, provided

7

the individual’s employment rights are protected under Federal law and the individual returns to work with the Employer or a Related Company during the period that his employment rights are protected, each such hour to be credited to the individual for the Eligibility Computation Period for which he would have been scheduled to work; and

(4) Each hour not counted under paragraph (1), (2), or (3) for which back pay, irrespective of mitigation of damages, has been either awarded or agreed to be paid by the Employer or a Related Employer, shall be credited to the individual for the Eligibility Computation Period to which the award or agreement pertains rather than the Eligibility Computation Period in which the award, agreement, or payment is made.

For purposes of paragraphs (2) and (4) above, Hours of Service shall be calculated in accordance with the provisions of Section 2530.200b-2(b) of the Department of Labor regulations, which are incorporated herein by reference.

Notwithstanding any other provision of this Subsection to the contrary, the Employer may elect to credit Hours of Service in accordance with any of the equivalencies set forth in paragraphs (d), (e), or (f) of Department of Labor Regulations Section 2530.200b-3.

(bb) “**Inactive Participant**” means any individual who was an Active Participant, but is no longer an Eligible Employee and who has an Account under the Plan.

(cc) “**Leased Employee**” means any individual who provides services to the Employer or a Related Employer (the “recipient”) but is not otherwise an employee of the recipient if (1) such services are provided pursuant to an agreement between the recipient and any other person (the “leasing organization”), (2) such individual has performed services for the recipient (or for the recipient and any related persons within the meaning of Code Section 414(n)(6)) on a substantially full-time basis for at least one year, and (3) such services are performed under primary direction of or control by the recipient. The determination of who is a Leased Employee shall be made in accordance with any rules and regulations issued by the Secretary of the Treasury or his delegate.

(dd) “**Limitation Year**” means the 12-consecutive-month period designated by the Employer in Subsection 1.01(f) of the Adoption Agreement. If no other Limitation Year is designated by the Employer, the Limitation Year shall be the calendar year. All qualified plans of the Employer and any Related Employer must use the same Limitation Year. If the Limitation Year is amended to a different 12-consecutive-month period, the new Limitation Year must begin on a date within the Limitation Year in which the amendment is made.

(ee) “**Matching Employer Contribution**” means any contribution made by the Employer to the Plan in accordance with Section 5.08 or 5.09 on account of an Active Participant’s Deferral Contributions.

(ff) “**Mass Submitter Sponsor**” means Fidelity Management & Research Company or its successor.

(gg) “**Nonelective Employer Contribution**” means any contribution made by the Employer to the Plan in accordance with Section 5.10.

8

(hh) “**Non-Highly Compensated Employee**” means any Employee who is not a Highly Compensated Employee.

(ii) “**Normal Retirement Age**” means the normal retirement age specified in Subsection 1.13(a) of the Adoption Agreement. If the Employer enforces a mandatory retirement age in accordance with Federal law, the Normal Retirement Age is the lesser of that mandatory age or the age specified in Subsection 1.13(a) of the Adoption Agreement.

(jj) “**Participant**” means any individual who is either an Active Participant or an Inactive Participant.

(kk) “**Permissible Investment**” means the investments specified by the Employer as available for investment of assets of the Trust and agreed to by the Trustee and the Prototype Sponsor. The Permissible Investments under the Plan shall be listed in the Service Agreement.

(ll) “**Plan**” means the plan established by the Employer in the form of the prototype plan, as set forth herein as a new plan or as an amendment to an existing plan, by executing the Adoption Agreement, together with any and all amendments hereto.

(mm) “**Plan Year**” means the 12-consecutive-month period ending on the date designated by the Employer in Subsection 1.01(d) of the Adoption Agreement, except that the initial Plan Year of a new Plan may consist of fewer than 12 months, calculated from the Effective Date listed in Subsection 1.01(g)(1) of the Adoption Agreement through the end of such initial Plan Year, in which event Compensation for such initial Plan Year shall be treated as provided in Subsection 2.01(j).

(nn) “**Prototype Sponsor**” means Fidelity Management & Research Company or its successor.

(oo) “**Qualified Matching Employer Contribution**” means any contribution made by the Employer to the Plan on account of Deferral Contributions or Employee Contributions made by or on behalf of Active Participants in accordance with Section 5.09, that may be included in determining whether the Plan meets the “ADP” test described in Section 6.03.

(pp) “**Qualified Nonelective Employer Contribution**” means any contribution made by the Employer to the Plan on behalf of Non-Highly Compensated Employees in accordance with Section 5.07, that may be included in determining whether the Plan meets the “ADP” test described in Section 6.03 or the “ACP” test described in Section 6.06.

(qq) “**Reemployment Commencement Date**” means the date on which an Employee who terminates employment with the Employer and all Related Employers first performs an Hour of Service following such termination of employment.

(rr) “**Related Employer**” means any employer other than the Employer named in Subsection 1.02(a) of the Adoption Agreement if the Employer and such other employer are members of a controlled group of corporations (as defined in Code Section 414(b)) or an affiliated service group (as defined in Code Section 414(m)), or are trades or businesses (whether or not incorporated) which are under common control (as defined in Code Section 414(c)), or such other employer is required to be aggregated with the Employer pursuant to

9

regulations issued under Code Section 414(o); provided, however, that if Article 1 of the Employer’s Plan is a Standardized Adoption Agreement, for purposes of Subsection 1.02(b) of the Adoption Agreement, the term “Related Employer” shall not include any employer that becomes a Related Employer as a result of an asset or stock acquisition, merger or other similar transaction with respect to any period prior to the earlier of (1) the date as of which Subsection 1.02(b) of the Adoption Agreement is amended to name such employer or (2) the first day of the second Plan Year beginning after the date of such transaction.

(ss) “**Required Beginning Date**” means:

(1) for a Participant who is not a five percent owner, April 1 of the calendar year following the calendar year in which occurs the later of (i) the Participant’s retirement or (ii) the Participant’s attainment of age 70 1/2; provided, however, that a Participant may elect to have his Required Beginning Date determined without regard to the provisions of clause (i).

(2) for a Participant who is a five percent owner, April 1 of the calendar year following the calendar year in which the Participant attains age 70 1/2.

Once the Required Beginning Date of a five percent owner or a Participant who has elected to have his Required Beginning Date determined in accordance with the provisions of Section 2.01(ss)(1)(ii) has occurred, such Required Beginning Date shall not be re-determined, even if the Participant ceases to be a five percent owner in a subsequent year or continues in employment with the Employer or a Related Employer.

For purposes of this Subsection 2.01(ss), a Participant is treated as a five percent owner if such Participant is a five percent owner as defined in Code Section 416(i) (determined in accordance with Code Section 416 but without regard to whether the Plan is top-heavy) at any time during the Plan Year ending with or within the calendar year in which such owner attains age 70 1/2.

(tt) “**Rollover Contribution**” means any distribution from a qualified plan (or an individual retirement account holding only assets allocable to a distribution from a qualified plan) that an Employee elects to contribute to the Plan in accordance with the provisions of Section 5.06.

(uu) “**Self-Employed Individual**” means an individual who has Earned Income for the taxable year from the Employer or who would have had Earned Income but for the fact that the trade or business had no net profits for the taxable year, including, but not limited to, a partner in a partnership, a sole proprietor, a member in a limited liability company or a shareholder in a subchapter S corporation.

(vv) “**Service Agreement**” means the agreement between the Employer and the Prototype Sponsor (or an agent or affiliate of the Prototype Sponsor) relating to the provision of investment and other services to the Plan and shall include any addendum to the agreement and any other separate written agreement between the Employer and the Prototype Sponsor (or an agent or affiliate of the Prototype Sponsor) relating to the provision of services to the Plan.

(ww) “**Severance Date**” means the earlier of (i) the date an Employee retires, dies, quits, or is discharged from employment with the Employer and all Related Employers or (ii) the 12-month anniversary of the date on which the Employee was otherwise first absent from employment; provided, however, that if an individual terminates or is absent from employment with the Employer and all Related Employers because of military duty, such individual shall not incur a Severance Date if his employment rights are protected under Federal law and he returns to employment with the Employer or a Related Employer within the period during which he retains such employment rights, but, if he does not return to such employment within such period, his Severance Date shall be the earlier of (1) the anniversary of the date his absence commenced or (2) the last day of the period during which he retains such employment rights.

(xx) “**Trust**” means the trust created by the Employer in accordance with the provisions of Section 20.01.

(yy) “**Trust Agreement**” means the agreement between the Employer and the Trustee, as set forth in Article 20, under which the assets of the Plan are held, administered, and managed.

(zz) “**Trustee**” means Fidelity Management Trust Company or its successor. The term Trustee shall include any delegate of the Trustee as may be provided in the Trust Agreement.

(aaa) “**Trust Fund**” means the property held in Trust by the Trustee for the Accounts of Participants and their Beneficiaries.

(bbb) “**Vesting Service**” means an Employee’s service that is taken into account in determining his vested interest in his Matching Employer and Nonelective Employer Contributions Accounts as may be required under Section 1.15 of the Adoption Agreement. Vesting Service shall be credited in accordance with Article 3.

2.02. Pronouns. Pronouns used in the Plan are in the masculine gender but include the feminine gender unless the context clearly indicates otherwise.

2.03. Special Effective Dates. Some provisions of the Plan are only effective beginning as of a specified date or until a specified date. Any such special effective dates are specified within Plan text where applicable and are exceptions to the general Plan Effective Date as defined in Section 2.01(o).

Article 3. Service.

3.01. Crediting of Eligibility Service. If the Employer has selected an Eligibility Service requirement in Subsection 1.04(b) of the Adoption Agreement for an Eligible Employee to become an Active Participant, Eligibility Service shall be credited to an Employee as follows:

(a) If the Employer has selected the one or two year(s) of Eligibility Service requirement described in Subsection 1.04(b)(1)(C) or (D) of the Adoption Agreement, an Employee shall be credited with a year of Eligibility Service for each Eligibility Computation Period during which the Employee has been credited with at least 1,000 Hours of Service.

(b) If the Employer has selected the months of Eligibility Service requirement described in Subsection 1.04(b)(1)(B) of the Adoption Agreement, an Employee shall be credited with Eligibility Service for the aggregate of the periods beginning with the Employee’s Employment Commencement Date (or Reemployment Commencement Date) and ending on his subsequent Severance Date; provided, however, that an Employee who has a Reemployment Date within the 12-consecutive-month period following the earlier of the first date of his absence or his Severance Date shall be credited with Eligibility Service for the period between his Severance Date and his Reemployment Date. Months of Eligibility Service shall be measured from the Employee’s Employment Commencement Date or Reemployment Commencement Date to the coinciding date in the applicable following month.

3.02. Re-Crediting of Eligibility Service Following Termination of Employment. An Employee whose employment with the Employer and all Related Employers terminates and who is subsequently reemployed by the Employer or a Related Employer shall be re-credited upon reemployment with his Eligibility Service earned prior to his termination of employment.

3.03. Crediting of Vesting Service. If the Plan provides for Matching Employer and/or Nonelective Employer Contributions that are not 100 percent vested when made, Vesting Service shall be credited to an Employee for the aggregate of the periods beginning with the Employee’s Employment Commencement Date (or Reemployment Commencement Date) and ending on his subsequent Severance Date; provided, however, that an Employee who has a Reemployment Date within the 12-consecutive-month period following the earlier of the first date of his absence or his Severance Date shall be credited with Vesting Service for the period between his Severance Date and his Reemployment Date. Fractional periods of a year shall be expressed in terms of days.

3.04. Application of Vesting Service to a Participant’s Account Following a Break in Vesting Service. The following rules describe how Vesting Service earned before and after a Break in Vesting Service shall be applied for purposes of determining a Participant’s vested interest in his Matching Employer and Nonelective Employer Contributions Accounts.

(a) If a Participant incurs five-consecutive Breaks in Vesting Service, all years of Vesting Service earned by the Employee after such Breaks in Service shall be disregarded in determining the Participant’s vested interest in his Matching Employer and Nonelective Employer Contributions Account balances attributable to employment before such Breaks in Vesting Service. However, Vesting Service earned both before and after such Breaks in Vesting Service shall be included in determining the Participant’s vested interest in his Matching Employer and Nonelective Employer Contributions Account balances attributable to employment after such Breaks in Vesting Service.

(b) If a Participant incurs fewer than five-consecutive Breaks in Vesting Service, Vesting Service earned both before and after such Breaks in Vesting Service shall be included in determining the Participant's vested interest in his Matching Employer and Nonelective Employer Contributions Account balances attributable to employment both before and after such Breaks in Vesting Service.

3.05. Service with Predecessor Employer. If the Plan is the plan of a predecessor employer, an Employee's Eligibility and Vesting Service shall include

12

years of service with such predecessor employer. In any case in which the Plan is not the plan maintained by a predecessor employer, service for such predecessor employer shall be treated as Eligibility and Vesting Service if so specified in Section 1.16 of the Adoption Agreement.

3.06. Change in Service Crediting. If an amendment to the Plan or a transfer from employment as an Employee covered under another qualified plan maintained by the Employer or a Related Employer results in a change in the method of crediting Eligibility and/or Vesting Service with respect to a Participant between the Hours of Service crediting method set forth in Section 2530.200b-2 of the Department of Labor Regulations and the elapsed-time crediting method set forth in Section 1.410(a)-7 of the Treasury Regulations, each Participant with respect to whom the method of crediting Eligibility and/or Vesting Service is changed shall be treated in the manner set forth in Section 1.410(a)-7(f)(1) of the Treasury Regulations which are incorporated herein by reference.

Article 4. Participation.

4.01. Date of Participation. If the Plan is an amendment and restatement of a prior plan, all Eligible Employees who were active participants in the Plan immediately prior to the Effective Date shall continue as Active Participants on the Effective Date. All Eligible Employees who are in the service of the Employer on the Effective Date (and, if this is an amendment and restatement of a prior plan, were not active participants in the prior plan immediately prior to the Effective Date) shall become Active Participants on the date elected by the Employer in Subsection 1.04(f) of the Adoption Agreement. Any other Eligible Employee shall become an Active Participant in the Plan on the Entry Date coinciding with or immediately following the date on which he first satisfies the eligibility requirements set forth in Subsections 1.04(a) and 1.04(b) of the Adoption Agreement.

The Employer may elect different Eligibility Service requirements for purposes of eligibility (a) to make Deferral Contributions and (b) to receive Nonelective and/or Matching Employer Contributions. Any Eligibility Service requirement that the Employer elects to apply in determining an Eligible Employee's eligibility to make Deferral Contributions shall also apply in determining an Eligible Employee's eligibility to make Employee Contributions, if Employee Contributions are permitted under the Plan, and to receive Qualified Nonelective Employer Contributions. If an Employer elects to have different Eligibility Service requirements apply, an Eligible Employee who has met the eligibility requirements with respect to certain contributions, but who has not met the eligibility requirements with respect to other contributions, shall become an Active Participant in accordance with the provisions of the preceding paragraph, but only with respect to the contributions for which he has met the eligibility requirements.

4.02. Transfers Out of Covered Employment. If any Active Participant ceases to be an Eligible Employee, but continues in the employ of the Employer or a Related Employer, such Employee shall cease to be an Active Participant, but shall continue as an Inactive Participant until his entire Account balance is forfeited or distributed. An Inactive Participant shall not be entitled to receive an allocation of contributions or forfeitures under the Plan for the period that he is not an Eligible Employee and wages and other payments made to him by the Employer or a Related Employer for services other than as an Eligible Employee shall not be included in Compensation for purposes of determining the amount and

13

allocation of any contributions to the Account of such Inactive Participant. Such Inactive Participant shall continue to receive credit for Vesting Service completed during the period that he continues in the employ of the Employer or a Related Employer.

4.03. Transfers Into Covered Employment. If an Employee who is not an Eligible Employee becomes an Eligible Employee, such Eligible Employee shall become an Active Participant immediately as of his transfer date if such Eligible Employee has already satisfied the eligibility requirements and would have otherwise previously become an Active Participant in accordance with Section 4.01. Otherwise, such Eligible Employee shall become an Active Participant in accordance with Section 4.01.

Wages and other payments made to an Employee prior to his becoming an Eligible Employee by the Employer or a Related Employer for services other than as an Eligible Employee shall not be included in Compensation for purposes of determining the amount and allocation of any contributions to the Account of such Eligible Employee.

4.04. Resumption of Participation Following Reemployment. If a Participant who terminates employment with the Employer and all Related Employers is reemployed as an Eligible Employee, he shall again become an Active Participant on his Reemployment Date. Any other Employee who terminates employment with the Employer and all Related Employers and is reemployed by the Employer or a Related Employer shall become an Active Participant as provided in Section 4.01 or 4.03. Any distribution which a Participant is receiving under the Plan at the time he is reemployed by the Employer or a Related Employer shall cease except as otherwise required under Section 12.04.

Article 5. Contributions.

5.01. Contributions Subject to Limitations. All contributions made to the Plan under this Article 5 shall be subject to the limitations contained in Article 6.

5.02. Compensation Taken into Account in Determining Contributions. In determining the amount or allocation of any contribution that is based on a percentage of Compensation, only Compensation paid to a Participant for services rendered to the Employer while employed as an Eligible Employee shall be taken into account. Except as otherwise specifically provided in this Article 5, for purposes of determining the amount and allocation of contributions under this Article 5, Compensation shall not include reimbursements or other expense allowances, fringe benefits (cash and non-cash), moving expenses, deferred compensation, welfare benefits, and any items elected by the Employer with respect to such contributions in Subsection 1.05(a) or (b), as applicable, of the Adoption Agreement, but shall include amounts that are not includable in the gross income of the Participant under a salary reduction agreement by reason of the application of Code Section 125, 132(f)(4), 402(e)(3), 402(h), 403(b), or 457(b).

If the initial Plan Year of a new plan consists of fewer than 12 months, calculated from the Effective Date listed in Subsection 1.01(g)(1) of the Adoption Agreement through the end of such initial Plan Year, except as otherwise provided in this paragraph, Compensation for purposes of determining the amount and allocation of contributions under this Article 5 for such initial Plan Year shall include only Compensation for services during the period beginning on the Effective Date listed in Subsection 1.01(g)(1) of the Adoption Agreement and

ending on the last day of the initial Plan Year. Notwithstanding the foregoing, if the Plan is a profit sharing plan, Compensation for purposes of determining the amount and allocation of non-safe harbor Nonelective Employer Contributions under this Article 5 for such initial Plan Year shall include Compensation for the full 12-consecutive-month period ending on the last day of the initial Plan Year.

5.03. Deferral Contributions. If so provided by the Employer in Subsection 1.07(a) of the Adoption Agreement, each Active Participant may elect to execute a salary reduction agreement with the Employer to reduce his Compensation by a specified percentage or dollar amount, not exceeding the percentage specified by the Employer in Subsection 1.07(a)(1) of the Adoption Agreement, per payroll period, subject to any exceptions elected by the Employer in Subsections 1.07(a)(2) and (3) of the Adoption Agreement, and equal to a whole number multiple of one percent. If elected by the Employer in Subsection 1.07(a)(1)(A) of the Adoption Agreement, in lieu of specifying a percentage of Compensation reduction, an Active Participant may elect to reduce his Compensation by a specified dollar amount per payroll period, provided that such dollar amount may not exceed the percentage of Compensation specified by the Employer in Subsection 1.07(a)(1) of the Adoption Agreement, subject to any exceptions elected by the Employer in Subsections 1.07(a)(2) and (3) of the Adoption Agreement.

An Active Participant's salary reduction agreement shall become effective on the first day of the first payroll period for which the Employer can reasonably process the request, but not earlier than the later of (a) the effective date of the provisions permitting Deferral Contributions or (b) the date the Employer adopts such provisions. The Employer shall make a Deferral Contribution on behalf of the Participant corresponding to the amount of said reduction. Under no circumstances may a salary reduction agreement be adopted retroactively.

An Active Participant may elect to change or discontinue the percentage or dollar amount by which his Compensation is reduced by notice to the Employer as provided in Subsection 1.07(a)(1)(B) or (C) of the Adoption Agreement. Notwithstanding the Employer's election in Subsection 1.07(a)(1)(B) or (C) of the Adoption Agreement, if the Employer has elected one of the safe harbor contributions in Subsection 1.10(a)(3) or 1.11(a)(3) of the Adoption Agreement, an Active Participant may elect to change or discontinue the percentage or dollar amount by which his Compensation is reduced by notice to the Employer within a reasonable period, as specified by the Employer (but not less than 30 days), of receiving the notice described in Section 6.10.

5.04. Employee Contributions. If the Employer elected to permit Deferral Contributions in Subsection 1.07(a) of the Adoption Agreement and if so provided by the Employer in Subsection 1.08(a)(1) of the Adoption Agreement, each Active Participant may elect to make non-deductible Employee Contributions to the Plan in accordance with the rules and procedures established by the Employer and in an amount not less than one percent of such Participant's Compensation for the Plan Year.

5.05. No Deductible Employee Contributions. No deductible Employee Contributions may be made to the Plan. Deductible Employee Contributions made prior to January 1, 1987 shall be maintained in a separate Account. No part of the deductible Employee Contributions Account shall be used to purchase life insurance.

5.06. Rollover Contributions. An Eligible Employee who is or was entitled to receive an eligible rollover distribution, as defined in Code Section 402(c)(4)

and Treasury Regulations issued thereunder, from a qualified plan (or an individual retirement account holding only assets attributable to a distribution from a qualified plan) may elect to contribute all or any portion of such distribution to the Trust directly from such qualified plan or individual retirement account or within 60 days of receipt of such distribution to the Eligible Employee. Rollover Contributions shall only be made in the form of cash, allowable Fund Shares, or, if and to the extent permitted by the Employer with the consent of the Trustee, promissory notes evidencing a plan loan to the Eligible Employee; provided, however, that Rollover Contributions shall only be permitted in the form of promissory notes if the Plan otherwise provides for loans.

An Eligible Employee who has not yet become an Active Participant in the Plan in accordance with the provisions of Article 4 may make a Rollover Contribution to the Plan. Such Eligible Employee shall be treated as a Participant under the Plan for all purposes of the Plan, except eligibility to have Deferral Contributions made on his behalf and to receive an allocation of Matching Employer or Nonelective Employer Contributions.

The Administrator shall develop such procedures and require such information from Eligible Employees as it deems necessary to ensure that amounts contributed under this Section 5.06 meet the requirements for tax-deferred rollovers established by this Section 5.06 and by Code Section 402(c). No Rollover Contributions may be made to the Plan until approved by the Administrator.

If a Rollover Contribution made under this Section 5.06 is later determined by the Administrator not to have met the requirements of this Section 5.06 or of the Code or Treasury regulations, the Trustee shall, within a reasonable time after such determination is made, and on instructions from the Administrator, distribute to the Employee the amounts then held in the Trust attributable to such Rollover Contribution.

A Participant's Rollover Contributions Account shall be subject to the terms of the Plan, including Article 14, except as otherwise provided in this Section 5.06.

Notwithstanding any other provision of this Section 5.06, the Employer may direct the Trustee not to accept Rollover Contributions.

5.07. Qualified Nonelective Employer Contributions. The Employer may, in its discretion, make a Qualified Nonelective Employer Contribution for the Plan Year in any amount necessary to satisfy or help to satisfy the "ADP" test, described in Section 6.03, and/or the "ACP" test, described in Section 6.06. Qualified Nonelective Employer Contributions shall be made and allocated based on Participants' "testing compensation", as defined in Subsection 6.01(t),

rather than Compensation, as defined in Subsection 2.01(j). Any Qualified Nonelective Employer Contribution shall be allocated among the Accounts of Non-Highly Compensated Employees who are Active Participants at any time during the Plan Year as follows:

(a) Unless the Employer elects the allocation formula in Subsection 1.09(a)(1) of the Adoption Agreement, the Qualified Nonelective Employer Contribution shall be allocated at the election of the Employer either

(1) in the ratio that each eligible Active Participant's "testing compensation", as defined in Subsection 6.01(t), for the Plan Year bears

16

to the total "testing compensation" paid to all eligible Active Participants for the Plan Year; or

(2) as a uniform flat dollar amount for each eligible Active Participant for the Plan Year.

(b) If the Employer elects the allocation formula in Subsection 1.09(a)(1) of the Adoption Agreement, the Qualified Nonelective Employer Contribution shall be allocated as follows:

(1) The eligible Active Participant with the least "testing compensation", as defined in Subsection 6.01(t), for the Plan Year shall receive an allocation equal to the lowest of:

(A) the maximum amount that may be contributed on the eligible Active Participant's behalf under Code Section 415, taking into account all other contributions made by or on behalf of the eligible Active Participant to plans maintained by the Employer or a Related Employer that are includable as "annual additions", as defined in Subsection 6.01(b); or

(B) the full amount of the Qualified Nonelective Employer Contribution.

(2) The eligible Active Participant with the next lowest "testing compensation", as defined in Subsection 6.01(t), for the Plan Year shall receive an allocation equal to the lowest of:

(A) the maximum amount that may be contributed on the eligible Active Participant's behalf under Code Section 415, taking into account all other contributions made by or on behalf of the eligible Active Participant to plans maintained by the Employer or a Related Employer that are includable as "annual additions", as defined in Subsection 6.01(b); or

(B) the balance of any Qualified Nonelective Employer Contribution remaining after allocation is made as provided in Subsection 5.07(b)(1) above.

(3) The allocation in Subsection 5.07(b)(2) shall be applied individually to each remaining eligible Active Participant, in ascending order of "testing compensation", until the Qualified Nonelective Employer Contribution is fully allocated. Once the Qualified Nonelective Employer Contribution is fully allocated, no further allocation shall be made to the remaining eligible Active Participants.

Active Participants shall not be required to satisfy any Hours of Service or employment requirement for the Plan Year in order to receive an allocation of Qualified Nonelective Employer Contributions.

Qualified Nonelective Employer Contributions shall be distributable only in accordance with the distribution provisions that are applicable to Deferral Contributions; provided, however, that a Participant shall not be permitted to take a hardship withdrawal of amounts credited to his Qualified Nonelective Employer Contributions Account after the later of December 31, 1988 or the last day of the Plan Year ending before July 1, 1989.

17

5.08. Matching Employer Contributions. If so provided by the Employer in Section 1.10 of the Adoption Agreement, the Employer shall make a Matching Employer Contribution on behalf of each eligible Active Participant, as determined in accordance with Subsection 1.10(d) and Section 1.12 of the Adoption Agreement, who had Deferral Contributions made on his behalf during the Contribution Period. The amount of the Matching Employer Contribution shall be determined in accordance with Subsection 1.10(a) and/or (b) and/or the Safe Harbor Matching Employer Contribution Addendum to the Adoption Agreement, as applicable.

5.09. Qualified Matching Employer Contributions. If so provided by the Employer in Subsection 1.10(e) of the Adoption Agreement, prior to making its Matching Employer Contribution (other than any safe harbor Matching Employer Contribution) to the Plan, the Employer may designate all or a portion of such Matching Employer Contribution as a Qualified Matching Employer Contribution. The Employer shall notify the Trustee of such designation at the time it makes its Matching Employer Contribution. Qualified Matching Employer Contributions shall be distributable only in accordance with the distribution provisions that are applicable to Deferral Contributions; provided, however, that a Participant shall not be permitted to take a hardship withdrawal of amounts credited to his Qualified Matching Employer Contributions Account after the later of December 31, 1988 or the last day of the Plan Year ending before July 1, 1989.

If the amount of an Employer's Qualified Matching Employer Contribution is determined based on a Participant's Compensation, and the Qualified Matching Employer Contribution is necessary to satisfy the "ADP" test described in Section 6.03, the compensation used in determining the amount of the Qualified Matching Employer Contribution shall be "testing compensation", as defined in Subsection 6.01(t). If the Qualified Matching Employer Contribution is not necessary to satisfy the "ADP" test described in Section 6.03, the compensation used to determine the amount of the Qualified Matching Employer Contribution shall be Compensation as defined in Subsection 2.01(j), modified as provided in Section 5.02.

5.10. Nonelective Employer Contributions. If so provided by the Employer in Section 1.11 of the Adoption Agreement, the Employer shall make Nonelective Employer Contributions to the Trust in accordance with Subsection 1.11(a) and/or (b) of the Adoption Agreement to be allocated as follows:

(a) If the Plan is a money purchase pension plan or the Employer has elected a fixed contribution formula, Nonelective Employer Contributions shall be allocated among eligible Active Participants, as determined in accordance with Subsection 1.11(c) and Section 1.12 of the Adoption Agreement, in the manner specified in Subsection 1.11(a) or the Safe Harbor Nonelective Employer Contribution Addendum to the Adoption Agreement, as applicable.

(b) If the Employer has elected a discretionary contribution amount, Nonelective Employer Contributions shall be allocated among eligible Active Participants, as determined in accordance with Subsection 1.11(c) and Section 1.12 of the Adoption Agreement, as follows:

(1) If the non-integrated formula is elected in Subsection 1.11(b)(1) of the Adoption Agreement, Nonelective Employer Contributions shall be allocated to eligible Active Participants in the ratio that each eligible Active Participant's Compensation bears to the total Compensation paid to all eligible Active Participants for the Plan Year; provided, however, that if the Plan is or is deemed to be a "top-heavy plan", as defined in

18

Subsection 15.01(f), for any Plan Year, these allocation provisions shall be modified as provided in Section 15.04; or

(2) If the integrated formula is elected in Subsection 1.11(b)(2) of the Adoption Agreement, Nonelective Employer Contributions shall be allocated in the following steps:

(A) First, to each eligible Active Participant in the same ratio that the sum of the eligible Active Participant's Compensation and "excess Compensation" for the Plan Year bears to the sum of the Compensation and "excess Compensation" of all eligible Active Participants for the Plan Year. This allocation as a percentage of the sum of each eligible Active Participant's Compensation and "excess Compensation" shall not exceed the "permitted disparity limit", as defined in Section 1.11 of the Adoption Agreement.

Notwithstanding the foregoing, if in any Plan Year an eligible Active Participant has reached the "cumulative permitted disparity limit", such eligible Active Participant shall receive an allocation under this Subsection 5.10(b)(2)(A) based on two times his Compensation for the Plan Year, rather than the sum of his Compensation and "excess Compensation" for the Plan Year. If an Active Participant did not benefit under a qualified defined benefit plan or target benefit plan for any Plan Year beginning on or after January 1, 1994, the Active Participant shall have no "cumulative disparity limit".

(B) Second, if any Nonelective Employer Contributions remain after the allocation in Subsection 5.10(b)(2)(A), the remaining Nonelective Employer Contributions shall be allocated to each eligible Active Participant in the same ratio that the eligible Active Participant's Compensation for the Plan Year bears to the total Compensation of all eligible Active Participants for the Plan Year.

Notwithstanding the provisions of Subsections 5.10(b)(2)(A) and (B) above, if in any Plan Year an eligible Active Participant benefits under another qualified plan or simplified employee pension, as defined in Code Section 408(k), that provides for or imputes permitted disparity, the Nonelective Employer Contributions for the Plan Year allocated to such eligible Active Participant shall be in the ratio that his Compensation for the Plan Year bears to the total Compensation paid to all eligible Active Participants.

If the Plan is or is deemed to be a "top-heavy plan", as defined in Subsection 15.01(f), for any Plan Year, the allocation steps in Subsections 5.10(b)(2)(A) and (B) shall be modified as provided in Section 15.04.

For purposes of this Subsection 5.10(b)(2), the following definitions shall apply:

(C) "**Cumulative permitted disparity limit**" means 35 multiplied by the sum of an Active Participant's annual permitted disparity fractions, as defined in Sections 1.401(l)-5(b)(3) through (b)(7) of the Treasury Regulations, attributable to the Active Participant's total years of service under the Plan and any other qualified plan

19

or simplified employee pension, as defined in Code Section 408(k), maintained by the Employer or a Related Employer. For each Plan Year commencing prior to January 1, 1989, the annual permitted disparity fraction shall be deemed to be one, unless the Participant never accrued a benefit under any qualified plan or simplified employee pension maintained by the Employer or a Related Employer during any such Plan Year. In determining the annual permitted disparity fraction for any Plan Year, the Employer may elect to assume that the full disparity limit has been used for such Plan Year.

(D) "**Excess Compensation**" means Compensation in excess of the "integration level" specified by the Employer in Subsection 1.11(b)(2) of the Adoption Agreement.

5.11. Vested Interest in Contributions. A Participant's vested interest in the following sub-accounts shall be 100 percent:

(a) his Deferral Contributions Account;

(b) his Qualified Nonelective Contributions Account;

(c) his Qualified Matching Employer Contributions Account;

(d) his Nonelective Employer Contributions Account attributable to Nonelective Employer Contributions made in accordance with the Safe Harbor Nonelective Employer Contribution Addendum to the Adoption Agreement that are intended to satisfy the safe harbor contribution requirement for deemed satisfaction of the "ADP" test described in Section 6.03;

(e) his Matching Employer Contributions Account attributable to Matching Employer Contributions made in accordance with the Safe Harbor Matching Employer Contribution Addendum to the Adoption Agreement that are intended to satisfy the safe harbor contribution requirement for deemed

satisfaction of the “ADP” test described in Section 6.03;

- (f) his Rollover Contributions Account;
- (g) his Employee Contributions Account; and
- (h) his deductible Employee Contributions Account.

A Participant’s vested interest in his Nonelective Employer Contributions Account attributable to Nonelective Employer Contributions other than those described in Subsection 5.11(d) above, shall be determined in accordance with the vesting schedule elected by the Employer in Subsection 1.15(b)(1) of the Adoption Agreement. A Participant’s vested interest in his Matching Employer Contributions Account attributable to Matching Employer Contributions other than those described in Subsection 5.11(e) above, shall be determined in accordance with the vesting schedule elected by the Employer in Subsection 1.15(b)(2) of the Adoption Agreement.

5.12. Time for Making Contributions. The Employer shall pay its contribution for each Plan Year not later than the time prescribed by law for filing the Employer’s Federal income tax return for the fiscal (or taxable) year with or within which such Plan Year ends (including extensions thereof).

20

The Employer shall remit any safe harbor Matching Employer Contributions made during a Plan Year quarter to the Trustee no later than the last day of the immediately following Plan Year quarter.

The Employer should remit Employee Contributions and Deferral Contributions to the Trustee as of the earliest date on which such contributions can reasonably be segregated from the Employer’s general assets, but not later than the 15th business day of the calendar month following the month in which such amount otherwise would have been paid to the Participant, or within such other time frame as may be determined by applicable regulation or legislation.

The Trustee shall have no authority to inquire into the correctness of the amounts contributed and paid over to the Trustee, to determine whether any contribution is payable under this Article 5, or to enforce, by suit or otherwise, the Employer’s obligation, if any, to make a contribution to the Trustee.

5.13. Return of Employer Contributions. The Trustee shall, upon request by the Employer, return to the Employer the amount (if any) determined under Section 20.24. Such amount shall be reduced by amounts attributable thereto which have been credited to the Accounts of Participants who have since received distributions from the Trust, except to the extent such amounts continue to be credited to such Participants’ Accounts at the time the amount is returned to the Employer. Such amount shall also be reduced by the losses of the Trust attributable thereto, if and to the extent such losses exceed the gains and income attributable thereto, but shall not be increased by the gains and income of the Trust attributable thereto, if and to the extent such gains and income exceed the losses attributable thereto. To the extent such gains exceed losses, the gains shall be forfeited and applied as provided in Section 11.09. In no event shall the return of a contribution hereunder cause the balance of the individual Account of any Participant to be reduced to less than the balance which would have been credited to the Account had the mistaken amount not been contributed.

Article 6. Limitations on Contributions.

6.01. Special Definitions. For purposes of this Article, the following definitions shall apply:

(a) “**Aggregate limit**” means the greater of (1) or (2) where (1) is the sum of (A) 125 percent of the greater of the average “deferral ratio” of the Active Participants who are Non-Highly Compensated Employees for the “testing year” or the average “contribution percentage” of Active Participants who are Non-Highly Compensated Employees for the “testing year” beginning with or within the “testing year” of the cash or deferred arrangement and (B) the lesser of 200 percent or two plus the lesser of such average “deferral ratio” or average “contribution percentage” and where (2) is the sum of (A) 125 percent of the lesser of the average “deferral ratio” of the Active Participants who are Non-Highly Compensated Employees for the “testing year” or the average “contribution percentage” of the Active Participants who are Non-Highly Compensated Employees for the “testing year” beginning with or within the “testing year” of the cash or deferred arrangement and (B) the lesser of 200 percent or two plus the greater of such average “deferral ratio” or average “contribution percentage”.

21

(b) “**Annual additions**” mean the sum of the following amounts allocated to an Active Participant for a Limitation Year:

- (1) all employer contributions allocated to an Active Participant’s account under qualified defined contribution plans maintained by the “415 employer”, including amounts applied to reduce employer contributions as provided under Section 11.09;
- (2) all employee contributions allocated to an Active Participant’s account under a qualified defined contribution plan or a qualified defined benefit plan maintained by the “415 employer” if separate accounts are maintained with respect to such Active Participant under the defined benefit plan;
- (3) all forfeitures allocated to an Active Participant’s account under a qualified defined contribution plan maintained by the “415 employer”;
- (4) all amounts allocated, after March 31, 1984, to an “individual medical benefit account” which is part of a pension or annuity plan maintained by the “415 employer”;
- (5) all amounts derived from contributions paid or accrued after December 31, 1985, in taxable years ending after such date, which are attributable to post-retirement medical benefits allocated to the separate account of a key employee, as defined in Code Section 419A(d)(3), under a “welfare benefit fund” maintained by the “415 employer”; and
- (6) all allocations to an Active Participant under a “simplified employee pension”.

(c) “**Contribution percentage**” means the ratio (expressed as a percentage) of (1) the “contribution percentage amounts” allocated to an “eligible participant’s” accounts for the Plan Year to (2) the “eligible participant’s” “testing compensation” for the Plan Year.

(d) “**Contribution percentage amounts**” mean:

- (1) any Employee Contributions made by an “eligible participant” to the Plan;
- (2) any Matching Employer Contributions, but excluding (A) Qualified Matching Employer Contributions that are taken into account in satisfying the “ADP” test described in Section 6.03 (except that such exclusion shall not apply for any Plan Year in which the “ADP” test described in Section 6.03 is deemed satisfied pursuant to Section 6.10) and (B) Matching Employer Contributions that are forfeited either to correct “excess aggregate contributions” or because the contributions to which they relate are “excess deferrals”, “excess contributions”, or “excess aggregate contributions”;
- (3) at the election of the Employer, Qualified Nonelective Employer Contributions, excluding Qualified Nonelective Employer Contributions that are taken into account in satisfying the “ADP” test described in Section 6.03; and

22

- (4) at the election of the Employer, Deferral Contributions, excluding Deferral Contributions that are taken into account in satisfying the “ADP” test described in Section 6.03.

Notwithstanding the foregoing, for any Plan Year in which the “ADP” test described in Section 6.03 is deemed satisfied pursuant to Section 6.10, “contribution percentage amounts” shall not include the following:

- (5) any Deferral Contributions; and
- (6) if the requirements described in Section 6.11 for deemed satisfaction of the “ACP” test with respect to Matching Employer Contributions are met, any Matching Employer Contributions; or if the requirements described in Section 6.11 for deemed satisfaction of the “ACP” test with respect to Matching Employer Contributions are not met, any Matching Employer Contributions made on behalf of an “eligible participant” for the Plan Year that do not exceed four percent of the “eligible participant’s” Compensation for the Plan Year.

To be included in determining an “eligible participant’s” “contribution percentage” for a Plan Year, Employee Contributions must be made to the Plan before the end of such Plan Year and other “contribution percentage amounts” must be allocated to the “eligible participant’s” Account as of a date within such Plan Year and made before the last day of the 12-month period immediately following the Plan Year to which the “contribution percentage amounts” relate. If an Employer has elected the prior year testing method described in Subsection 1.06(a)(2) of the Adoption Agreement, “contribution percentage amounts” that are taken into account for purposes of determining the “contribution percentages” of Non-Highly Compensated Employees for the prior year relate to such prior year. Therefore, such “contribution percentage amounts” must be made before the last day of the Plan Year being tested.

Effective for Plan Years beginning on or after January 1, 1999, if an Employer elects to change from the current year testing method described in Subsection 1.06(a)(1) of the Adoption Agreement to the prior year testing method described in Subsection 1.06(a)(2) of the Adoption Agreement, the following shall not be considered “contribution percentage amounts” for purposes of determining the “contribution percentages” of Non-Highly Compensated Employees for the prior year immediately preceding the Plan Year in which the change is effective:

- (7) Qualified Matching Employer Contributions that were taken into account in satisfying the “ADP” test described in Section 6.03 for such prior year;
- (8) Qualified Nonelective Employer Contributions that were taken into account in satisfying the “ADP” test described in Section 6.03 or the “ACP” test described in Section 6.06 for such prior year; and
- (9) all Deferral Contributions.

(e) “**Deferral ratio**” means the ratio (expressed as a percentage) of (1) the amount of “includable contributions” made on behalf of an Active Participant for the Plan Year to (2) the Active Participant’s “testing compensation” for such Plan Year. An Active Participant who does not receive “includable contributions” for a Plan Year shall have a “deferral ratio” of zero.

23

(f) “**Defined benefit fraction**” means a fraction, the numerator of which is the sum of the Active Participant’s annual benefits (adjusted to an actuarially equivalent straight life annuity if such benefit is expressed in a form other than a straight life annuity or qualified joint and survivor annuity) under all the defined benefit plans (whether or not terminated) maintained by the “415 employer”, each such annual benefit computed on the assumptions that the Active Participant shall remain in employment until the normal retirement age under each such plan (or the Active Participant’s current age, if later) and that all other factors used to determine benefits under such plan shall remain constant for all future Limitation Years, and the denominator of which is the lesser of 125 percent of the dollar limitation determined for the Limitation Year under Code Sections 415(b)(1)(A) and 415(d) or 140 percent of the Active Participant’s highest average Compensation for three consecutive calendar years of service during which the Active Participant was active in each such plan, including any adjustments under Code Section 415(b). However, if the Active Participant was a participant as of the first day of the first Limitation Year beginning after December 31, 1986, in one or more defined benefit plans maintained by the “415 employer” which were in existence on May 6, 1986 then the denominator of the “defined benefit fraction” shall not be less than 125 percent of the Active Participant’s total accrued benefit as of the close of the last Limitation Year beginning before January 1, 1987, disregarding any changes in the terms and conditions of such plans made after May 5, 1986, under all such defined benefit plans that met, individually and in the aggregate, the requirements of Code Section 415 for all Limitation Years beginning before January 1, 1987.

(g) “**Defined contribution fraction**” means a fraction, the numerator of which is the sum of all “annual additions” credited to an Active Participant for the current Limitation Year and all prior Limitation Years and the denominator of which is the sum of the “maximum permissible amounts” for the current Limitation Year and all prior Limitation Years during which the Participant was an Employee (regardless of whether the “415 employer” maintained a defined contribution plan in any such Limitation Year).

If the Active Participant was a participant as of the first day of the first Limitation Year beginning after December 31, 1986, in one or more defined contribution plans maintained by the “415 employer” which were in existence on May 6, 1986, then the numerator of the “defined contribution fraction” shall be adjusted if the sum of this fraction and the “defined benefit fraction” would otherwise exceed 1.0 under the terms of the Plan. Under the adjustment an amount equal to the product of (1) the excess of the sum of the fractions over 1.0 and (2) the denominator of this fraction shall be permanently subtracted from the numerator of this fraction. The adjustment is calculated using the fractions as they would be computed as of the end of the last Limitation Year beginning before January 1, 1987, and disregarding any changes in the terms and conditions of the plans made after May 6, 1986, but using the Section 415 limitation applicable to the first Limitation Year beginning on or after January 1, 1987.

For purposes of determining the “defined contribution fraction”, the “annual additions” for Limitation Years beginning before January 1, 1987 shall not be recomputed to treat all employee contributions as “annual additions”.

24

(h) “**Determination year**” means (1) for purposes of determining income or loss with respect to “excess deferrals”, the calendar year in which the “excess deferrals” were made and (2) for purposes of determining income or loss with respect to “excess contributions”, and “excess aggregate contributions”, the Plan Year in which such “excess contributions” or “excess aggregate contributions” were made.

(i) “**Elective deferrals**” mean all employer contributions, other than Deferral Contributions, made on behalf of a Participant pursuant to an election to defer under any qualified CODA as described in Code Section 401(k), any simplified employee pension cash or deferred arrangement as described in Code Section 402(h)(1)(B), any eligible deferred compensation plan under Code Section 457, any plan as described under Code Section 501(c)(18), and any employer contributions made on behalf of a Participant pursuant to a salary reduction agreement for the purchase of an annuity contract under Code Section 403(b). “Elective deferrals” shall not include any deferrals properly distributed as excess “annual additions”.

(j) “**Eligible participant**” means any Active Participant who is eligible to make Employee Contributions, or Deferral Contributions (if the Employer takes such contributions into account in calculating “contribution percentages”), or to receive a Matching Employer Contribution. Notwithstanding the foregoing, the term “eligible participant” shall not include any Active Participant who is included in a unit of Employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers.

(k) “**Excess aggregate contributions**” with respect to any Plan Year mean the excess of

(1) The aggregate “contribution percentage amounts” actually taken into account in computing the average “contribution percentages” of “eligible participants” who are Highly Compensated Employees for such Plan Year, over

(2) The maximum amount of “contribution percentage amounts” permitted to be made on behalf of Highly Compensated Employees under Section 6.06 (determined by reducing “contribution percentage amounts” made for the Plan Year on behalf of “eligible participants” who are Highly Compensated Employees in order of their “contribution percentages” beginning with the highest of such “contribution percentages”).

“Excess aggregate contributions” shall be determined after first determining “excess deferrals” and then determining “excess contributions”.

(l) “**Excess contributions**” with respect to any Plan Year mean the excess of

(1) The aggregate amount of “includable contributions” actually taken into account in computing the average “deferral percentage” of Active Participants who are Highly Compensated Employees for such Plan Year, over

(2) The maximum amount of “includable contributions” permitted to be made on behalf of Highly Compensated Employees under Section 6.03 (determined by reducing “includable contributions” made for the Plan Year on behalf of Active Participants who are Highly Compensated Employees in

25

order of their “deferral ratios”, beginning with the highest of such “deferral ratios”).

(m) “**Excess deferrals**” mean those Deferral Contributions and/or “elective deferrals” that are includable in a Participant’s gross income under Code Section 402(g) to the extent such Participant’s Deferral Contributions and/or “elective deferrals” for a calendar year exceed the dollar limitation under such Code Section for such calendar year.

(n) “**Excess 415 amount**” means the excess of an Active Participant’s “annual additions” for the Limitation Year over the “maximum permissible amount”.

(o) “**415 employer**” means the Employer and any other employers which constitute a controlled group of corporations (as defined in Code Section 414(b) as modified by Code Section 415(h)) or which constitute trades or businesses (whether or not incorporated) which are under common control (as defined in Code Section 414(c) as modified by Code Section 415(h)) or which constitute an affiliated service group (as defined in Code Section 414(m)) and any other entity required to be aggregated with the Employer pursuant to regulations issued under Code Section 414(o).

(p) “**Includable contributions**” mean:

(1) any Deferral Contributions made on behalf of an Active Participant, including “excess deferrals” of Highly Compensated Employees, but excluding (a) “excess deferrals” of Non-Highly Compensated Employees that arise solely from Deferral Contributions made under the Plan or plans maintained by the Employer or a Related Employer and (b) Deferral Contributions that are taken into account in satisfying the “ACP” test described in Section 6.06;

(2) at the election of the Employer, Qualified Nonelective Employer Contributions, excluding Qualified Nonelective Employer Contributions that are taken into account in satisfying the “ACP” test described in Section 6.06; and

(3) at the election of the Employer, Qualified Matching Employer Contributions; provided, however, that the Employer may not elect to treat Qualified Matching Employer Contributions as “includable contributions” for any Plan Year in which the “ADP” test described in Section 6.03 is deemed satisfied pursuant to Section 6.10.

To be included in determining an Active Participant’s “deferral ratio” for a Plan Year, “includable contributions” must be allocated to the Participant’s Account as of a date within such Plan Year and made before the last day of the 12-month period immediately following the Plan Year to which the “includable contributions” relate. If an Employer has elected the prior year testing method described in Subsection 1.06(a)(2) of the Adoption Agreement, “includable contributions” that are taken into account for purposes of determining the “deferral ratios” of Non-Highly Compensated Employees for the prior year relate to such prior year. Therefore, such “includable contributions” must be made before the last day of the Plan Year being tested.

Effective for Plan Years beginning on or after January 1, 1999, if an Employer elects to change from the current year testing method described in Subsection 1.06(a)(1) of the Adoption Agreement to the prior year testing

method described in Subsection 1.06(a)(2) of the Adoption Agreement, the following shall not be considered “includable contributions” for purposes of determining the “deferral ratios” of Non-Highly Compensated Employees for the prior year immediately preceding the Plan Year in which the change is effective:

(4) Deferral Contributions that were taken into account in satisfying the “ACP” test described in Section 6.06 for such prior year;

(5) Qualified Nonelective Employer Contributions that were taken into account in satisfying the “ADP” test described in Section 6.03 or the “ACP” test described in Section 6.06 for such prior year; and

(6) all Qualified Matching Employer Contributions.

(q) “**Individual medical benefit account**” means an individual medical benefit account as defined in Code Section 415(l)(2).

(r) “**Maximum permissible amount**” means for a Limitation Year with respect to any Active Participant the lesser of (1) \$30,000 (adjusted as provided in Code Section 415(d)) or (2) 25 percent of the Active Participant’s Compensation for the Limitation Year. If a short Limitation Year is created because of an amendment changing the Limitation Year to a different 12-consecutive-month period, the dollar limitation specified in clause (1) above shall be adjusted by multiplying it by a fraction the numerator of which is the number of months in the short Limitation Year and the denominator of which is 12.

The Compensation limitation specified in clause (2) above shall not apply to any contribution for medical benefits within the meaning of Code Section 401(h) or 419A(f)(2) after separation from service which is otherwise treated as an “annual addition” under Code Section 419A(d)(2) or 415(l)(1).

(s) “**Simplified employee pension**” means a simplified employee pension as defined in Code Section 408(k).

(t) “**Testing compensation**” means compensation as defined in Code Section 414(s). “Testing compensation” shall be based on the amount actually paid to a Participant during the “testing year” or, at the option of the Employer, during that portion of the “testing year” during which the Participant is an Active Participant; provided, however, that if the Employer elected different Eligibility Service requirements for purposes of eligibility to make Deferral Contributions and to receive Matching Employer Contributions, then “testing compensation” must be based on the amount paid to a Participant during the full “testing year”.

The annual “testing compensation” of each Active Participant taken into account in applying the “ADP” test described in Section 6.03 and the “ACP” test described in Section 6.06 for any “testing year” shall not exceed the annual compensation limit under Code Section 401(a)(17) as in effect on the first day of the “testing year”. This limit shall be adjusted by the Secretary to reflect increases in the cost of living, as provided in Code Section 401(a)(17)(B); provided, however, that the dollar increase in effect on January 1 of any calendar year is effective for “testing years” beginning in such calendar year. If a Plan determines “testing compensation” over a period that contains fewer than 12 calendar months (a “short determination

period”), then the Compensation limit for such “short determination period” is equal to the Compensation limit for the calendar year in which the “short determination period” begins multiplied by the ratio obtained by dividing the number of full months in the “short determination period” by 12; provided, however, that such proration shall not apply if there is a “short determination period” because (1) the Employer elected in accordance with any rules and regulations issued by the Secretary of the Treasury or his delegate to apply the “ADP” test described in Section 6.03 and/or the “ACP” test described in Section 6.06 based only on Compensation paid during the portion of the “testing year” during which an individual was an Active Participant or (2) an Employee is covered under the Plan for fewer than 12 calendar months.

(u) “**Testing year**” means

(1) if the Employer has elected the current year testing method in Subsection 1.06(a)(1) of the Adoption Agreement, the Plan Year being tested.

(2) if the Employer has elected the prior year testing method in Subsection 1.06(a)(2) of the Adoption Agreement, the Plan Year immediately preceding the Plan Year being tested.

(v) “**Welfare benefit fund**” means a welfare benefit fund as defined in Code Section 419(e).

6.02. Code Section 402(g) Limit on Deferral Contributions. In no event shall the amount of Deferral Contributions made under the Plan for a calendar year, when aggregated with the “elective deferrals” made under any other plan maintained by the Employer or a Related Employer, exceed the dollar limitation contained in Code Section 402(g) in effect at the beginning of such calendar year.

A Participant may assign to the Plan any “excess deferrals” made during a calendar year by notifying the Administrator on or before March 15 following the calendar year in which the “excess deferrals” were made of the amount of the “excess deferrals” to be assigned to the Plan. A Participant is deemed to notify the Administrator of any “excess deferrals” that arise by taking into account only those Deferral Contributions made to the Plan and those “elective deferrals” made to any other plan maintained by the Employer or a Related Employer. Notwithstanding any other provision of the Plan, “excess deferrals”, plus any income and minus any loss allocable thereto, as determined under Section 6.09, shall be distributed no later than April 15 to any Participant to whose Account “excess deferrals” were so assigned for the preceding calendar year and who claims “excess deferrals” for such calendar year.

Any Matching Employer Contributions attributable to “excess deferrals”, plus any income and minus any loss allocable thereto, as determined under Section 6.09, shall be forfeited and applied as provided in Section 11.09.

“Excess deferrals” shall be treated as “annual additions” under the Plan, unless such amounts are distributed no later than the first April 15 following the close of the calendar year in which the “excess deferrals” were made.

6.03. Additional Limit on Deferral Contributions (“ADP” Test). Notwithstanding any other provision of the Plan to the contrary, the Deferral Contributions made with respect to a Plan Year on behalf of Active Participants who are Highly

28

Compensated Employees for such Plan Year may not result in an average “deferral ratio” for such Active Participants that exceeds the greater of:

(a) the average “deferral ratio” for the “testing year” of Active Participants who are Non-Highly Compensated Employees for the “testing year” multiplied by 1.25; or

(b) the average “deferral ratio” for the “testing year” of Active Participants who are Non-Highly Compensated Employees for the “testing year” multiplied by two, provided that the average “deferral ratio” for Active Participants who are Highly Compensated Employees for the Plan Year being tested does not exceed the average “deferral ratio” for Participants who are Non-Highly Compensated Employees for the “testing year” by more than two percentage points.

For the first Plan Year in which the Plan provides a cash or deferred arrangement, the average “deferral ratio” for Active Participants who are Non-Highly Compensated Employees used in determining the limits applicable under Subsections 6.03(a) and (b) shall be either three percent or the actual average “deferral ratio” for such Active Participants for such first Plan Year, as elected by the Employer in Section 1.06(b) of the Adoption Agreement.

The deferral ratios of Active Participants who are included in a unit of Employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement shall be disaggregated from the “deferral ratios” of other Active Participants and the provisions of this Section 6.03 shall be applied separately with respect to each group.

The “deferral ratio” for any Active Participant who is a Highly Compensated Employee for the Plan Year being tested and who is eligible to have “includable contributions” allocated to his accounts under two or more cash or deferred arrangements described in Code Section 401(k) that are maintained by the Employer or a Related Employer, shall be determined as if such “includable contributions” were made under a single arrangement. If a Highly Compensated Employee participates in two or more cash or deferred arrangements that have different plan years, all cash or deferred arrangements ending with or within the same calendar year shall be treated as a single arrangement. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under Code Section 401(k).

If this Plan satisfies the requirements of Code Section 401(k), 401(a)(4), or 410(b) only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such Code Sections only if aggregated with this Plan, then this Section 6.03 shall be applied by determining the “deferral ratios” of Employees as if all such plans were a single plan. Plans may be aggregated in order to satisfy Code Section 401(k) only if they have the same plan year.

The Employer shall maintain records sufficient to demonstrate satisfaction of the “ADP” test and the amount of Qualified Nonelective and/or Qualified Matching Employer Contributions used in such test.

6.04. Allocation and Distribution of “Excess Contributions”. Notwithstanding any other provision of this Plan, the “excess contributions” allocable to the Account of a Participant, plus any income and minus any loss allocable thereto, as determined under Section 6.09, shall be distributed to the Participant no later than the last day of the Plan Year immediately following the Plan Year in which

29

the “excess contributions” were made. If such excess amounts are distributed more than 2 1/2 months after the last day of the Plan Year in which the “excess contributions” were made, a ten percent excise tax shall be imposed on the Employer maintaining the Plan with respect to such amounts.

The “excess contributions” allocable to a Participant’s Account shall be determined by reducing the “includable contributions” made for the Plan Year on behalf of Active Participants who are Highly Compensated Employees in order of the dollar amount of such “includable contributions”, beginning with the

highest such dollar amount.

“Excess contributions” shall be treated as “annual additions”.

Any Matching Employer Contributions attributable to “excess contributions”, plus any income and minus any loss allocable thereto, as determined under Section 6.09, shall be forfeited and applied as provided in Section 11.09.

6.05. Reductions in Deferral Contributions to Meet Code Requirements. If the Administrator anticipates that the Plan will not satisfy the “ADP” and/or “ACP” test for the year, the Administrator may objectively reduce the rate of Deferral Contributions of Participants who are Highly Compensated Employees to an amount determined by the Administrator to be necessary to satisfy the “ADP” and/or “ACP” test.

6.06. Limit on Matching Employer Contributions and Employee Contributions (“ACP” Test). The provisions of this Section 6.06 shall not apply to Active Participants who are included in a unit of Employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers.

Notwithstanding any other provision of the Plan to the contrary, Matching Employer Contributions and Employee Contributions made with respect to a Plan Year by or on behalf of “eligible participants” who are Highly Compensated Employees for such Plan Year may not result in an average “contribution percentage” for such “eligible participants” that exceeds the greater of:

(a) the average “contribution percentage” for the “testing year” of “eligible participants” who are Non-Highly Compensated Employees for the “testing year” multiplied by 1.25; or

(b) the average “contribution percentage” for the “testing year” of “eligible participants” who are Non-Highly Compensated Employees for the “testing year” multiplied by two, provided that the average “contribution percentage” for the Plan Year being tested of “eligible participants” who are Highly Compensated Employees does not exceed the average “contribution percentage” for the “testing year” of “eligible participants” who are Non-Highly Compensated Employees for the “testing year” by more than two percentage points.

For the first Plan Year in which the Plan provides for “contribution percentage amounts” to be made, the “ACP” for “eligible participants” who are Non-Highly Compensated Employees used in determining the limits applicable under paragraphs (a) and (b) of this Section 6.06 shall be either three percent or the actual “ACP” of such eligible participants for such first Plan Year, as elected by the Employer in Section 1.06(b).

30

The “contribution percentage” for any “eligible participant” who is a Highly Compensated Employee for the Plan Year and who is eligible to have “contribution percentage amounts” allocated to his accounts under two or more plans described in Code Section 401(a) that are maintained by the Employer or a Related Employer, shall be determined as if such “contribution percentage amounts” were contributed under a single plan. If a Highly Compensated Employee participates in two or more such plans that have different plan years, all plans ending with or within the same calendar year shall be treated as a single plan. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under Treasury Regulations issued under Code Section 401(m).

If this Plan satisfies the requirements of Code Section 401(m), 401(a)(4) or 410(b) only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such Code Sections only if aggregated with this Plan, then this Section 6.06 shall be applied by determining the “contribution percentages” of Employees as if all such plans were a single plan. Plans may be aggregated in order to satisfy Code Section 401(m) only if they have the same plan year.

The Employer shall maintain records sufficient to demonstrate satisfaction of the “ACP” test and the amount of Deferral Contributions, Qualified Nonelective Employer Contributions, and/or Qualified Matching Employer Contributions used in such test.

6.07. Allocation, Distribution, and Forfeiture of “Excess Aggregate Contributions”. Notwithstanding any other provision of the Plan, the “excess aggregate contributions” allocable to the Account of a Participant, plus any income and minus any loss allocable thereto, as determined under Section 6.09, shall be forfeited, if forfeitable, or if not forfeitable, distributed to the Participant no later than the last day of the Plan Year immediately following the Plan Year in which the “excess aggregate contributions” were made. If such excess amounts are distributed more than 2 1/2 months after the last day of the Plan Year in which such “excess aggregate contributions” were made, a ten percent excise tax shall be imposed on the Employer maintaining the Plan with respect to such amounts.

The “excess aggregate contributions” allocable to a Participant’s Account shall be determined by reducing the “contribution percentage amounts” made for the Plan Year on behalf of “eligible participants” who are Highly Compensated Employees in order of the dollar amount of such “contribution percentage amounts”, beginning with the highest such dollar amount.

“Excess aggregate contributions” shall be treated as “annual additions”.

“Excess aggregate contributions” shall be forfeited or distributed from a Participant’s Employee Contributions Account, Matching Employer Contributions Account and if applicable, the Participant’s Deferral Contributions Account and/or Qualified Nonelective Employer Contributions Account in the order prescribed by the Employer, who shall direct the Trustee, and which order shall be uniform with respect to all Participants and non-discriminatory.

Forfeitures of “excess aggregate contributions” shall be applied as provided in Section 11.09.

6.08. Aggregate Limit on “Contribution Percentage Amounts” and “Includable Contributions”. The sum of the average “deferral ratio” and the average

31

“contribution percentage” of those Active Participants who are Highly Compensated Employees during the Plan Year shall not exceed the “aggregate limit”. The average “deferral ratio” and average “contribution percentage” of such Active Participants shall be determined after any corrections required to meet the “ADP” test, described in Section 6.03, and the “ACP” test, described in Section 6.06, have been made. Notwithstanding the foregoing, the “aggregate limit” shall not be exceeded if either the average “deferral ratio” or the average “contribution percentage” of such Active Participants for the Plan Year does not exceed 1.25 multiplied by the average “deferral ratio” or the average “contribution percentage”, as applicable, for the “testing year” of the Active Participants who are Non-Highly Compensated Employees for the “testing year”.

If the “aggregate limit” would be exceeded for any Plan Year, then the limit shall be met by reducing the “contribution percentage amounts” contributed for the Plan Year on behalf of the Active Participants who are Highly Compensated Employees for such Plan Year (in order of their “contribution percentages”, beginning with the highest such “contribution percentage”). “Contribution percentage amounts” that are reduced as provided herein shall be treated as “excess aggregate contributions”. If for any Plan Year in which the “ADP” test described in Section 6.03 is deemed satisfied pursuant to Section 6.10, the average “deferral ratio” of those Active Participants who are Highly Compensated Employees during the Plan Year does not meet the “aggregate limit” after reducing the “contribution percentage amounts” contributed on behalf of such Active Participants to zero, no further reduction shall be required under this Section 6.08.

6.09. Income or Loss on Distributable Contributions. The income or loss allocable to “excess deferrals”, “excess contributions”, and “excess aggregate contributions” shall be determined under one of the following methods:

- (a) the income or loss for the “determination year” allocable to the Participant’s Account to which such contributions were made multiplied by a fraction, the numerator of which is the amount of the distributable contributions and the denominator of which is the balance of the Participant’s Account to which such contributions were made, determined without regard to any income or loss occurring during the “determination year”; or
- (b) the income or loss for the “determination year” determined under any other reasonable method, provided that such method is used consistently for all Participants in determining the income or loss allocable to distributable contributions hereunder for the Plan Year, and is used by the Plan in allocating income or loss to Participants’ Accounts.

Income or loss allocable to the period between the end of the “determination year” and the date of distribution shall be disregarded in determining income or loss.

6.10. Deemed Satisfaction of “ADP” Test. Notwithstanding any other provision of this Article 6 to the contrary, for any Plan Year beginning on or after January 1, 1999, if the Employer has elected one of the safe harbor contributions in Subsection 1.10(a)(3) or 1.11(a)(3) of the Adoption Agreement and complies with the notice requirements described herein for such Plan Year, the Plan shall be deemed to have satisfied the “ADP” test described in Section 6.03. The Employer shall provide a notice to each Active Participant during the Plan Year describing the following:

32

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- (a) the formula used for determining the amount of the safe harbor contribution to be made on behalf of Active Participants for the Plan Year or a statement that the Plan may be amended during the Plan Year to provide for a safe harbor Nonelective Employer Contribution for the Plan Year equal to at least three percent of each Active Participant’s Compensation for the Plan Year;
 - (b) any other employer contributions provided under the Plan and any requirements that Active Participants must satisfy to be entitled to receive such employer contributions;
 - (c) the type and amount of Compensation that may be deferred under the Plan as Deferral Contributions;
 - (d) the procedures for making a cash or deferred election under the Plan and the periods during which such elections may be made or changed; and
 - (e) the withdrawal and vesting provisions applicable to contributions under the Plan.

The descriptions required in (b) through (e) may be provided by cross references to the relevant sections of an up to date summary plan description. Such notice shall be written in a manner calculated to be understood by the average Active Participant. The Employer shall provide the notice to each Active Participant within one of the following periods, whichever is applicable:

- (f) if the employee is an Active Participant 90 days before the beginning of the Plan Year, within the period beginning 90 days and ending 30 days before the first day of the Plan Year; or
- (g) if the employee becomes an Active Participant after the date described in paragraph (f) above, within the period beginning 90 days before and ending on the date he becomes an Active Participant;

provided, however, that such notice shall not be required to be provided to an Active Participant earlier than is required under any guidance published by the Internal Revenue Service.

If an Employer that provides notice that the Plan may be amended to provide a safe harbor Nonelective Employer Contribution for the Plan Year does amend the Plan to provide such contribution, the Employer shall provide a supplemental notice to all Active Participants stating that a safe harbor Nonelective Employer Contribution in the specified amount shall be made for the Plan Year. Such supplemental notice shall be provided to Active Participants at least 30 days before the last day of the Plan Year.

6.11. Deemed Satisfaction of “ACP” Test With Respect to Matching Employer Contributions. A Plan that satisfies the requirements of Section 6.10 shall also be deemed to have satisfied the “ACP” test described in Section 6.06 with respect to Matching Employer Contributions, if Matching Employer Contributions to the Plan for the Plan Year meet all of the following requirements: (a) the percentage of Deferral Contributions matched does not increase as the percentage of Compensation contributed increases; (b) Highly Compensated Employees are not provided a greater percentage match than Non-Highly Compensated Employees; (c) Deferral Contributions matched do not exceed six percent of a Participant’s Compensation; and (d) if the Employer elected in Subsection 1.10(a)(2) or 1.10(b)

of the Adoption Agreement to provide discretionary Matching Employer Contributions, the Employer also elected in Subsection 1.10(a)(2)(A) or 1.10(b)(1) of the Adoption Agreement, as applicable, to limit the dollar amount of such discretionary Matching Employer Contributions allocated to a Participant for the Plan Year to no more than four percent of such Participant's Compensation for the Plan Year.

If such Plan provides for Employee Contributions, the "ACP" test described in Section 6.06 must be applied with respect to such Employee Contributions. For purposes of applying the "ACP" test with respect to Employee Contributions, Matching Employer Contributions and Nonelective Employer Contributions that satisfy the vesting and distribution requirements applicable to safe harbor contributions, but which are not required to comply with the safe harbor contribution requirements may be taken into account.

6.12. Code Section 415 Limitations. Notwithstanding any other provisions of the Plan, the following limitations shall apply:

(a) Employer Maintains Single Plan: If the "415 employer" does not maintain any other qualified defined contribution plan or any "welfare benefit fund", "individual medical benefit account", or "simplified employee pension" in addition to the Plan, the provisions of this Subsection 6.12(a) shall apply.

(1) If a Participant does not participate in, and has never participated in any other qualified defined contribution plan, "welfare benefit fund", "individual medical benefit account", or "simplified employee pension" maintained by the "415 employer", which provides an "annual addition", the amount of "annual additions" to the Participant's Account for a Limitation Year shall not exceed the lesser of the "maximum permissible amount" or any other limitation contained in the Plan. If a contribution that would otherwise be contributed or allocated to the Participant's Account would cause the "annual additions" for the Limitation Year to exceed the "maximum permissible amount", the amount contributed or allocated shall be reduced so that the "annual additions" for the Limitation Year shall equal the "maximum permissible amount".

(2) Prior to the determination of a Participant's actual Compensation for a Limitation Year, the "maximum permissible amount" may be determined on the basis of a reasonable estimation of the Participant's Compensation for such Limitation Year, uniformly determined for all Participants similarly situated. Any Employer contributions based on estimated annual Compensation shall be reduced by any "excess 415 amounts" carried over from prior Limitation Years.

(3) As soon as is administratively feasible after the end of the Limitation Year, the "maximum permissible amount" for such Limitation Year shall be determined on the basis of the Participant's actual Compensation for such Limitation Year.

(4) If there is an "excess 415 amount" with respect to a Participant for a Limitation Year as a result of the estimation of the Participant's Compensation for the Limitation Year, the allocation of forfeitures to the Participant's Account, or a reasonable error in determining the amount of Deferral Contributions that may be made on behalf of the Participant under the limits of this Section 6.12, such "excess 415 amount" shall be disposed of as follows:

34

(A) Any Employee Contributions shall be reduced to the extent necessary to reduce the "excess 415 amount".

(B) If after application of Subsection 6.12(a)(4)(A) an "excess 415 amount" still exists, any Deferral Contributions that have not been matched shall be reduced to the extent necessary to reduce the "excess 415 amount".

(C) If after application of Subsection 6.12(a)(4)(B) an "excess 415 amount" still exists, any Deferral Contributions that have been matched and the Matching Employer Contributions attributable thereto shall be reduced to the extent necessary to reduce the "excess 415 amount".

(D) If after the application of Subsection 6.12(a)(4)(C) an "excess 415 amount" still exists, any Nonelective Employer Contributions shall be reduced to the extent necessary to reduce the "excess 415 amount".

(E) If after the application of Subsection 6.12(a)(4)(D) an "excess 415 amount" still exists, any Qualified Nonelective Employer Contributions shall be reduced to the extent necessary to reduce the "excess 415 amount".

Employee Contributions and Deferral Contributions that are reduced as provided above shall be returned to the Participant. Any income allocable to returned Employee Contributions or Deferral Contributions shall also be returned or shall be treated as additional "annual additions" for the Limitation Year in which the excess contributions to which they are allocable were made.

If Matching Employer, Nonelective Employer, or Qualified Nonelective Employer Contributions to a Participant's Account are reduced as an "excess 415 amount", as provided above, and the individual is still an Active Participant at the end of the Limitation Year, then such "excess 415 amount" shall be reapplied to reduce future Employer contributions under the Plan for the next Limitation Year (and for each succeeding Limitation Year, as necessary) for such Participant, so that in each such Limitation Year the sum of the actual Employer contributions made on behalf of such Participant plus the reapplied amount shall equal the amount of Employer contributions which would otherwise be made to such Participant's Account. If the individual is not an Active Participant at the end of a Limitation Year, then such "excess 415 amount" shall be held unallocated in a suspense account. The suspense account shall be applied to reduce future Employer contributions for all remaining Active Participants in the next Limitation Year and each succeeding Limitation Year if necessary.

If a suspense account is in existence at any time during the Limitation Year pursuant to this Subsection 6.12(a)(4), it shall participate in the allocation of the Trust Fund's investment gains and losses. All amounts in the suspense account must be allocated to the Accounts of Active Participants before any Employer contribution may be made for the Limitation Year.

Except as otherwise specifically provided in this Subsection 6.12, "excess 415 amounts" may not be distributed to Participants.

(b) **Employer Maintains Multiple Defined Contribution Type Plans:** Unless the Employer specifies another method for limiting “annual additions” in the 415 Correction Addendum to the Adoption Agreement, if the “415 employer” maintains any other qualified defined contribution plan or any “welfare benefit fund”, “individual medical benefit account”, or “simplified employee pension” in addition to the Plan, the provisions of this Subsection 6.12(b) shall apply.

(1) If a Participant is covered under any other qualified defined contribution plan or any “welfare benefit fund”, “individual medical benefit account”, or “simplified employee pension” maintained by the “415 employer”, that provides an “annual addition”, the amount of “annual additions” to the Participant’s Account for a Limitation Year shall not exceed the lesser of

(A) the “maximum permissible amount”, reduced by the sum of any “annual additions” to the Participant’s accounts for the same Limitation Year under such other qualified defined contribution plans and “welfare benefit funds”, “individual medical benefit accounts”, and “simplified employee pensions”, or

(B) any other limitation contained in the Plan.

If the “annual additions” with respect to a Participant under other qualified defined contribution plans, “welfare benefit funds”, “individual medical benefit accounts”, and “simplified employee pensions” maintained by the “415 employer” are less than the “maximum permissible amount” and a contribution that would otherwise be contributed or allocated to the Participant’s Account under the Plan would cause the “annual additions” for the Limitation Year to exceed the “maximum permissible amount”, the amount to be contributed or allocated shall be reduced so that the “annual additions” for the Limitation Year shall equal the “maximum permissible amount”. If the “annual additions” with respect to the Participant under such other qualified defined contribution plans, “welfare benefit funds”, “individual medical benefit accounts”, and “simplified employee pensions” in the aggregate are equal to or greater than the “maximum permissible amount”, no amount shall be contributed or allocated to the Participant’s Account under the Plan for the Limitation Year.

(2) Prior to the determination of a Participant’s actual Compensation for the Limitation Year, the amounts referred to in Subsection 6.12(b)(1)(A) above may be determined on the basis of a reasonable estimation of the Participant’s Compensation for such Limitation Year, uniformly determined for all Participants similarly situated. Any Employer contribution based on estimated annual Compensation shall be reduced by any “excess 415 amounts” carried over from prior Limitation Years.

(3) As soon as is administratively feasible after the end of the Limitation Year, the amounts referred to in Subsection 6.12(b)(1)(A) shall be determined on the basis of the Participant’s actual Compensation for such Limitation Year.

(4) Notwithstanding the provisions of any other plan maintained by a “415 employer”, if there is an “excess 415 amount” with respect to a

Participant for a Limitation Year as a result of estimation of the Participant’s Compensation for the Limitation Year, the allocation of forfeitures to the Participant’s account under any qualified defined contribution plan maintained by the “415 employer”, or a reasonable error in determining the amount of Deferral Contributions that may be made on behalf of the Participant to the Plan or any other qualified defined contribution plan maintained by the “415 employer” under the limits of this Subsection 6.12(b), such “excess 415 amount” shall be deemed to consist first of the “annual additions” allocated to this Plan and shall be reduced as provided in Subsection 6.12(a)(4); provided, however, that if the “415 employer” maintains both a profit sharing plan and a money purchase pension plan under this Basic Plan Document, “annual additions” to the money purchase pension plan shall be reduced only after all “annual additions” to the profit sharing plan have been reduced.

(c) **Employer Maintains or Maintained Defined Benefit Plan:** For Limitation Years beginning prior to January 1, 2000, if the “415 employer” maintains, or at any time maintained, a qualified defined benefit plan, the sum of any Participant’s “defined benefit plan fraction and “defined contribution plan fraction” shall not exceed the combined plan limitation of 1.00 in any such Limitation Year. The combined plan limitation shall be met by reducing “annual additions” under the Plan, unless otherwise provided in the qualified defined benefit plan.

(d) **Adjustment to Compensation:** Compensation for purposes of this Section 6.12 shall include amounts that are not includable in the gross income of the Participant under a salary reduction agreement by reason of the application of Code Section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b).

Article 7. Participants’ Accounts.

7.01. Individual Accounts. The Administrator shall establish and maintain an Account for each Participant that shall reflect Employer and Employee contributions made on behalf of the Participant and earnings, expenses, gains and losses attributable thereto, and investments made with amounts in the Participant’s Account. The Administrator shall establish and maintain such other accounts and records as it decides in its discretion to be reasonably required or appropriate in order to discharge its duties under the Plan. The Administrator shall notify the Trustee of all Accounts established and maintained under the Plan.

7.02. Valuation of Accounts. Participant Accounts shall be valued at their fair market value at least annually as of a date specified by the Administrator in accordance with a method consistently followed and uniformly applied, and on such date earnings, expenses, gains and losses on investments made with amounts in each Participant’s Account shall be allocated to such Account. Participants shall be furnished statements of their Account values at least once each Plan Year.

Article 8. Investment of Contributions.

8.01. Manner of Investment. All contributions made to the Accounts of Participants shall be held for investment by the Trustee. Except as otherwise specifically provided in Section 20.10, the Accounts of Participants shall be

invested and reinvested only in Permissible Investments selected by the Employer and designated in the Service Agreement.

8.02. Investment Decisions. Investments shall be directed by the Employer or by each Participant or both, in accordance with the Employer's election in Subsection 1.23 of the Adoption Agreement. Pursuant to Section 20.04, the Trustee shall have no discretion or authority with respect to the investment of the Trust Fund; however, an affiliate of the Trustee may exercise investment management authority in accordance with Subsection (e) below.

(a) With respect to those Participant Accounts for which Employer investment direction is elected, the Employer (in its capacity as a named fiduciary under ERISA) has the right to direct the Trustee in writing with respect to the investment and reinvestment of assets comprising the Trust Fund in the Permissible Investments designated in the Service Agreement.

(b) With respect to those Participant Accounts for which Participant investment direction is elected, each Participant shall direct the investment of his Account among the Permissible Investments designated in the Service Agreement. The Participant shall file initial investment instructions with the Administrator, on such form as the Administrator may provide, selecting the Permissible Investments in which amounts credited to his Account shall be invested.

(1) Except as provided in this Section 8.02, only authorized Plan contacts and the Participant shall have access to a Participant's Account. While any balance remains in the Account of a Participant after his death, the Beneficiary of the Participant shall make decisions as to the investment of the Account as though the Beneficiary were the Participant. To the extent required by a qualified domestic relations order as defined in Code Section 414(p), an alternate payee shall make investment decisions with respect to any segregated account established in the name of the alternate payee as provided in Section 18.04.

(2) If the Trustee receives any contribution under the Plan as to which investment instructions have not been provided, the Trustee shall promptly notify the Administrator and the Administrator shall take steps to elicit instructions from the Participant. The Trustee shall credit any such contribution to the Participant's Account and such amount shall be invested in the Permissible Investment selected by the Employer for such purposes or, absent Employer selection, in the most conservative Permissible Investment designated in the Service Agreement, until investment instructions have been received by the Trustee.

If the Employer elects to allow Participants to direct the investment of their Account in Subsection 1.23(b) or (c) of the Adoption Agreement, the Plan is intended to constitute a plan described in ERISA Section 404(c) and regulations issued thereunder. The fiduciaries of the Plan shall be relieved of liability for any losses that are the direct and necessary result of investment instructions given by the Participant, his Beneficiary, or an alternate payee under a qualified domestic relations order. The Employer shall not be relieved of fiduciary responsibility for the selection and monitoring of the Permissible Investments under the Plan.

(c) All dividends, interest, gains and distributions of any nature received in respect of Fund Shares shall be reinvested in additional shares of that Permissible Investment.

(d) Expenses attributable to the acquisition of investments shall be charged to the Account of the Participant for which such investment is made.

(e) The Employer may appoint an investment manager (which may be the Trustee or an affiliate) to determine the allocation of amounts held in Participants' Accounts among various investment options (the "Managed Account" option) for Participants who direct the Trustee to invest any portion of their accounts in the Managed Account option. The investment options utilized under the Managed Account option may be those generally available under the Plan or may be as selected by the investment manager for use under the Managed Account option. Participation in the Managed Account option shall be subject to such conditions and limitations (including account minimums) as may be imposed by the investment manager.

8.03. Participant Directions to Trustee. The method and frequency for change of investments shall be determined under (a) the rules applicable to the Permissible Investments selected by the Employer and designated in the Service Agreement and (b) any additional rules of the Employer limiting the frequency of investment changes, which are included in a separate written administrative procedure adopted by the Employer and accepted by the Trustee. The Trustee shall have no duty to inquire into the investment decisions of a Participant or to advise him regarding the purchase, retention, or sale of assets credited to his Account.

Article 9. Participant Loans.

9.01. Special Definitions. For purposes of this Article, the following special definitions shall apply:

(a) A "**participant**" is any Participant or Beneficiary, including an alternate payee under a qualified domestic relations order, as defined in Code Section 414(p), who is a party-in-interest (as determined under ERISA Section 3(14)) with respect to the Plan.

(b) An "**owner-employee**" is, if the Employer is a sole proprietorship for Federal income tax purposes (regardless of its characterization under state law), the individual who is the sole proprietor or sole member, as applicable; if the Employer is a partnership for Federal income tax purposes (regardless of its characterization under state law), a partner or member, as applicable, who owns more than 10 percent of either the capital interest or the profits interest of the partnership.

(c) A "**shareholder-employee**" is an employee or officer of an electing small business (Subchapter S) corporation who owns (or is considered as owning within the meaning of Code Section 318(a)(1)), on any day during the taxable year of such corporation, more than five percent of the outstanding stock of the corporation.

9.02. Participant Loans. If so provided by the Employer in Section 1.17 of the Adoption Agreement, the Administrator shall allow "participants" to apply for a loan from their Accounts under the Plan, subject to the provisions of this Article 9.

9.03. Separate Loan Procedures. All Plan loans shall be made and administered in accordance with separate loan procedures that are hereby incorporated into the Plan by reference.

9.04. Availability of Loans. Loans shall be made available to all “participants” on a reasonably equivalent basis. Notwithstanding the preceding sentence, no loans shall be made to (a) an Eligible Employee who makes a Rollover Contribution in accordance with Section 5.06, but who has not satisfied the requirements of Section 4.01 to become an Active Participant or (b) a “shareholder-employee” or “owner-employee”.

Loans shall not be made available to “participants” who are Highly Compensated Employees in an amount greater than the amount made available to other “participants”.

9.05. Limitation on Loan Amount. No loan to any “participant” shall be made to the extent that such loan when added to the outstanding balance of all other loans to the “participant” would exceed the lesser of (a) \$50,000 reduced by the excess (if any) of the highest outstanding balance of plan loans during the one-year period ending on the day before the loan is made over the outstanding balance of plan loans on the date the loan is made, or (b) one-half the present value of the “participant’s” vested interest in his Account. For purposes of the above limitation, plan loans include all loans from all plans maintained by the Employer and any Related Employer.

9.06. Interest Rate. All loans shall bear a reasonable rate of interest as determined by the Administrator based on the prevailing interest rates charged by persons in the business of lending money for loans which would be made under similar circumstances. The determination of a reasonable rate of interest must be based on appropriate regional factors unless the Plan is administered on a national basis in which case the Administrator may establish a uniform reasonable rate of interest applicable to all regions.

9.07. Level Amortization. All loans shall by their terms require that repayment (principal and interest) be amortized in level payments, not less than quarterly, over a period not extending beyond five years from the date of the loan unless such loan is for the purchase of a “participant’s” primary residence. Notwithstanding the foregoing, the amortization requirement may be waived for a period not exceeding one year during which a “participant” is on a leave of absence from employment with the Employer and any Related Employer either without pay or at a rate of pay which, after withholding for employment and income taxes, is less than the amount of the installment payments required under the terms of the loan. Installment payments must resume after such leave of absence ends or, if earlier, after the first year of such leave of absence, in an amount that is not less than the amount of the installment payments required under the terms of the original loan. No waiver of the amortization requirements shall extend the period of the loan beyond five years from the date of the loan, unless the loan is for purchase of the “participant’s” primary residence.

9.08. Security. Loans must be secured by the “participant’s” vested interest in his Account not to exceed 50 percent of such vested interest. If the provisions of Section 14.04 apply to a Participant, a Participant must obtain the consent of his or her spouse, if any, to use his vested interest in his Account as security for the loan. Spousal consent shall be obtained no earlier than the beginning of the 90-day period that ends on the date on which the loan is to be so secured. The consent must be in writing, must acknowledge the effect of the loan, and must

be witnessed by a Plan representative or notary public. Such consent shall thereafter be binding with respect to the consenting spouse or any subsequent spouse with respect to that loan.

9.09. Transfer and Distribution of Loan Amounts from Permissible Investments. The Employer shall confirm the order in which the Permissible Investments shall be liquidated in order that the loan amount can be transferred and distributed.

9.10. Default. The Administrator shall treat a loan in default if

- (a) any scheduled repayment remains unpaid at the end of the period specified in the separate loan procedures (unless payment is not made due to a waiver of the amortization schedule for a “participant” who is on a leave of absence, as described in Section 9.07), or
- (b) there is an outstanding principal balance existing on a loan after the last scheduled repayment date.

Upon default, the entire outstanding principal and accrued interest shall be immediately due and payable. If a distributable event (as defined by the Code) has occurred, the Administrator shall direct the Trustee to foreclose on the promissory note and offset the “participant’s” vested interest in his Account by the outstanding balance of the loan. If a distributable event has not occurred, the Administrator shall direct the Trustee to foreclose on the promissory note and offset the “participant’s” vested interest in his Account as soon as a distributable event occurs. The Trustee shall have no obligation to foreclose on the promissory note and offset the outstanding balance of the loan except as directed by the Administrator.

9.11. Effect of Termination Where Participant has Outstanding Loan Balance. If a Participant has an outstanding loan balance at the time his employment terminates, the entire outstanding principal and accrued interest shall be immediately due and payable. Any outstanding loan amounts that are immediately due and payable hereunder shall be treated in accordance with the provisions of Sections 9.10 and 9.12 as if the Participant had defaulted on the outstanding loan.

9.12. Deemed Distributions Under Code Section 72(p). Notwithstanding the provisions of Section 9.10, if a “participant’s” loan is in default, the “participant” shall be treated as having received a taxable “deemed distribution” for purposes of Code Section 72(p), whether or not a distributable event has occurred. The amount of a loan that is a deemed distribution ceases to be an outstanding loan for purposes of Code Section 72, except as otherwise specifically provided herein, and a Participant shall not be treated as having received a taxable distribution when the Participant’s Account is offset by the outstanding balance of the loan amount as provided in Section 9.10. In addition, interest that accrues on a loan after it is deemed distributed shall not be treated as an additional loan to the Participant and shall not be included in the income of the Participant as a deemed distribution. Notwithstanding the foregoing, unless a Participant repays a loan that has been deemed distributed, with interest thereon, the amount of such loan, with interest, shall be considered an outstanding loan under Code Section 72(p) for purposes of determining the applicable limitation on subsequent loans under Section 9.05.

treated as Employee Contributions to the Plan for purposes of increasing the Participant's tax basis in his Account, but shall not be treated as Employee Contributions for any other purpose under the Plan, including application of the "ACP" test described in Section 6.06 and application of the Code Section 415 limitations described in Section 6.12.

The provisions of this Section 9.12 regarding treatment of loans that are deemed distributed shall be effective as of

- (a) the Effective Date, if the Plan is a new plan or is an amendment and restatement of a plan that administered loans in accordance with the provisions of Q & A 19 and 20 of Section 1.72(p)-1 of the Proposed Treasury Regulations immediately prior to the Effective Date or
- (b) as of the January 1 coinciding with or immediately following the Effective Date, in any other case.

Any loan that was deemed distributed prior to the date the provisions of this Section 9.12 are effective shall be administered in accordance with the provisions of this Section 9.12 to the extent such administration is consistent with the transition rules in Q & A 21(c)(2) of Section 1.72(p)-1 of the Proposed Treasury Regulations.

9.13. Determination of Account Value Upon Distribution Where Plan Loan is Outstanding. Notwithstanding any other provision of the Plan, the portion of a "participant's" vested interest in his Account that is held by the Plan as security for a loan outstanding to the "participant" in accordance with the provisions of this Article shall reduce the amount of the Account payable at the time of death or distribution, but only if the reduction is used as repayment of the loan. If less than 100 percent of a "participant's" vested interest in his Account (determined without regard to the preceding sentence) is payable to the "participant's" surviving spouse or other Beneficiary, then the Account shall be adjusted by first reducing the "participant's" vested interest in his Account by the amount of the security used as repayment of the loan, and then determining the benefit payable to the surviving spouse or other Beneficiary.

Article 10. In-Service Withdrawals.

10.01. Availability of In-Service Withdrawals. Except as otherwise permitted under Section 11.02 with respect to Participants who continue in employment past Normal Retirement Age, or as required under Section 12.04 with respect to Participants who continue in employment past their Required Beginning Date, a Participant shall not be permitted to make a withdrawal from his Account under the Plan prior to retirement or termination of employment with the Employer and all Related Employers, if any, except as provided in this Article.

10.02. Withdrawal of Employee Contributions. A Participant may elect to withdraw, in cash, up to 100 percent of the amount then credited to his Employee Contributions Account. Such withdrawals may be made at any time, unless the Employer elects in Subsection 1.18(c)(1)(A) of the Adoption Agreement to limit the frequency of such withdrawals.

10.03. Withdrawal of Rollover Contributions. A Participant may elect to withdraw, in cash, up to 100 percent of the amount then credited to his Rollover Contributions Account. Such withdrawals may be made at any time.

10.04. Age 59 1/2 Withdrawals. If so provided by the Employer in Subsection 1.18(b) or the Protected In-Service Withdrawals Addendum to the Adoption Agreement, a Participant who continues in employment as an Employee and who has attained the age of 59 1/2 is permitted to withdraw upon request all or any portion of the Accounts specified by the Employer in Subsection 1.18(b) or the Protected In-Service Withdrawals Addendum to the Adoption Agreement, as applicable.

10.05. Hardship Withdrawals. If so provided by the Employer in Subsection 1.18(a) of the Adoption Agreement, a Participant who continues in employment as an Employee may apply to the Administrator for a hardship withdrawal of all or any portion of his Deferral Contributions Account (excluding any earnings thereon accrued after the later of December 31, 1988 or the last day of the last Plan Year ending before July 1, 1989) and, if so provided by the Employer in Subsection 1.18(d)(2), such other Accounts as may be specified in Subsection (c) of the Protected In-Service Withdrawals Addendum to the Adoption Agreement. The minimum amount that a Participant may withdraw because of hardship is \$500.

For purposes of this Section 10.05, a withdrawal is made on account of hardship if made on account of an immediate and heavy financial need of the Participant where such Participant lacks other available resources. Determinations with respect to hardship shall be made by the Administrator and shall be conclusive for purposes of the Plan, and shall be based on the following special rules:

- (a) The following are the only financial needs considered immediate and heavy:
 - (1) expenses incurred or necessary for medical care (within the meaning of Code Section 213(d)) of the Participant, the Participant's spouse, children, or dependents;
 - (2) the purchase (excluding mortgage payments) of a principal residence for the Participant;
 - (3) payment of tuition, related educational fees, and room and board for the next 12 months of post-secondary education for the Participant, the Participant's spouse, children or dependents;
 - (4) the need to prevent the eviction of the Participant from, or a foreclosure on the mortgage of, the Participant's principal residence; or
 - (5) any other financial need determined to be immediate and heavy under rules and regulations issued by the Secretary of the Treasury or his delegate.

(b) A distribution shall be considered as necessary to satisfy an immediate and heavy financial need of the Participant only if:

(1) The Participant has obtained all distributions, other than the hardship withdrawal, and all nontaxable (at the time of the loan) loans currently available under all plans maintained by the Employer or any Related Employer;

43

(2) The Participant suspends Deferral Contributions and Employee Contributions to the Plan for the 12-month period following the date of his hardship withdrawal. The suspension must also apply to all elective contributions and employee contributions to all other qualified plans and non-qualified plans maintained by the Employer or any Related Employer, other than any mandatory employee contribution portion of a defined benefit plan, including stock option, stock purchase, and other similar plans, but not including health and welfare benefit plans (other than the cash or deferred arrangement portion of a cafeteria plan);

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

(4) The Participant agrees to limit Deferral Contributions (and “elective deferrals”, as defined in Subsection 6.01(i)) to the Plan and any other qualified plan maintained by the Employer or a Related Employer for the calendar year immediately following the calendar year in which the Participant received the hardship withdrawal to the applicable limit under Code Section 402(g) for such calendar year less the amount of the Participant’s Deferral Contributions (and “elective deferrals”) for the calendar year in which the Participant received the hardship withdrawal.

10.06. Preservation of Prior Plan In-Service Withdrawal Rules. As indicated by the Employer in Subsection 1.18(d) of the Adoption Agreement, to the extent required under Code Section 411(d)(6), in-service withdrawals that were available under a prior plan shall be available under the Plan.

(a) If the Plan is a profit sharing plan, the following provisions shall apply to preserve prior in-service withdrawal provisions.

(1) If the Plan is an amendment and restatement of a prior plan or is a transferee plan of a prior plan that provided for in-service withdrawals from a Participant’s Matching Employer and/or Nonelective Employer Contributions Accounts of amounts that have been held in such Accounts for a specified period of time, a Participant shall be entitled to withdraw at any time prior to his termination of employment, subject to any restrictions applicable under the prior plan that the Employer elects in Subsection 1.18(d)(1)(A)(i) of the Adoption Agreement to continue under the Plan as amended and restated hereunder (other than any mandatory suspension of contributions restriction), any vested amounts held in such Accounts for the period of time specified by the Employer in Subsection 1.18(d)(1)(A) of the Adoption Agreement.

(2) If the Plan is an amendment and restatement of a prior plan or is a transferee plan of a prior plan that provided for in-service withdrawals from a Participant’s Matching Employer and/or Nonelective Employer Contributions Accounts by Participants with at least 60 months of participation, a Participant with at least 60 months of participation shall be entitled to withdraw at any time prior to his termination of employment, subject to any restrictions applicable under the prior plan that the Employer elects in Subsection 1.18(d)(1)(B)(i) of the Adoption Agreement to continue under the Plan as amended and restated hereunder (other than any mandatory suspension of contributions restriction), any vested amounts held in such Accounts.

44

(3) If the Plan is an amendment and restatement of a prior plan or is a transferee plan of a prior plan that provided for in-service withdrawals from a Participant’s Matching Employer and/or Nonelective Employer Contributions Accounts under any other circumstances, a Participant who has met any applicable requirements, as set forth in the Protected In-Service Withdrawals Addendum to the Adoption Agreement, shall be entitled to withdraw at any time prior to his termination of employment any vested amounts held in such Accounts, subject to any restrictions applicable under the prior plan that the Employer elects to continue under the Plan as amended and restated hereunder, as set forth in the Protected In-Service Withdrawal Addendum to the Adoption Agreement.

(b) If the Plan is a money purchase pension plan that is an amendment and restatement of a prior profit sharing plan or is a transferee plan of a prior profit sharing plan that provided for in-service withdrawals from any portion of a Participant’s Account other than his Employee Contributions and/or Rollover Contributions Accounts, a Participant who has met any applicable requirements, as set forth in the Protected in-Service Withdrawals Addendum to the Adoption Agreement, shall be entitled to withdraw at any time prior to his termination of employment his vested interest in amounts attributable to such prior profit sharing accounts, subject to any restrictions applicable under the prior plan that the Employer elects to continue under the Plan as amended and restated hereunder (other than any mandatory suspension of contributions restriction), as set forth in the Protected In-Service Withdrawal Addendum to the Adoption Agreement.

10.07. Restrictions on In-Service Withdrawals. The following restrictions apply to any in-service withdrawal made from a Participant’s Account under this Article:

(a) If the provisions of Section 14.04 apply to a Participant’s Account, the Participant must obtain the consent of his spouse, if any, to obtain an in-service withdrawal.

(b) In-service withdrawals shall be made in a lump sum payment, except that if the provisions of Section 14.04 apply to a Participant’s Account, the Participant may receive the in-service withdrawal in the form of a “qualified joint and survivor annuity”, as defined in Subsection 14.01(a).

(c) Notwithstanding any other provision of the Plan to the contrary other than the provisions of Section 11.02, a Participant shall not be permitted to make an in-service withdrawal from his Account of amounts attributable to contributions made to a money purchase pension plan, except employee and/or rollover contributions that were held in a separate account(s) under such plan.

10.08. Distribution of Withdrawal Amounts. The Employer shall confirm the order in which the Permissible Investments shall be liquidated in order that the withdrawal amount can be distributed.

Article 11. Right to Benefits.

11.01. Normal or Early Retirement. Each Participant who continues in employment as an Employee until his Normal Retirement Age or, if so provided by the Employer in Subsection 1.13(b) of the Adoption Agreement, Early Retirement Age, shall have

45

a vested interest in his Account of 100 percent regardless of any vesting schedule elected in Section 1.15 of the Adoption Agreement. If a Participant retires upon the attainment of Normal or Early Retirement Age, such retirement is referred to as a normal retirement.

11.02. Late Retirement. If a Participant continues in employment as an Employee after his Normal Retirement Age, he shall continue to have a 100 percent vested interest in his Account and shall continue to participate in the Plan until the date he establishes with the Employer for his late retirement. Until he retires, he has a continuing election to receive all or any portion of his Account.

11.03. Disability Retirement. If so provided by the Employer in Subsection 1.13(c) of the Adoption Agreement, a Participant who becomes disabled while employed as an Employee shall have a 100 percent vested interest in his Account regardless of any vesting schedule elected in Section 1.15 of the Adoption Agreement. An Employee is considered disabled if he satisfies any of the requirements for disability retirement selected by the Employer in Section 1.14 of the Adoption Agreement and terminates his employment with the Employer. Such termination of employment is referred to as a disability retirement. Determinations with respect to disability shall be made by the Administrator.

11.04. Death. If a Participant who is employed as an Employee dies, his Account shall become 100 percent vested and his designated Beneficiary shall be entitled to receive the balance of his Account, plus any amounts thereafter credited to his Account. If a Participant whose employment as an Employee has terminated dies, his designated Beneficiary shall be entitled to receive the Participant's vested interest in his Account.

A copy of the death notice or other sufficient documentation must be filed with and approved by the Administrator. If upon the death of the Participant there is, in the opinion of the Administrator, no designated Beneficiary for part or all of the Participant's Account, such amount shall be paid to his surviving spouse or, if none, to his estate (such spouse or estate shall be deemed to be the Beneficiary for purposes of the Plan). If a Beneficiary dies after benefits to such Beneficiary have commenced, but before they have been completed, and, in the opinion of the Administrator, no person has been designated to receive such remaining benefits, then such benefits shall be paid in a lump sum to the deceased Beneficiary's estate.

Subject to the requirements of Section 14.04, a Participant may designate a Beneficiary, or change any prior designation of Beneficiary by giving notice to the Administrator on a form designated by the Administrator. If more than one person is designated as the Beneficiary, their respective interests shall be as indicated on the designation form. In the case of a married Participant, the Participant's spouse shall be deemed to be the designated Beneficiary unless the Participant's spouse has consented to another designation in the manner described in Section 14.06.

11.05. Other Termination of Employment. If a Participant terminates his employment with the Employer and all Related Employers, if any, for any reason other than death or normal, late, or disability retirement, he shall be entitled to a termination benefit equal to the sum of (a) his vested interest in the balance of his Matching Employer and/or Nonelective Employer Contributions Account(s), other than the balance attributable to safe harbor Matching Employer and/or safe harbor Nonelective Employer Contributions elected by the Employer in Subsection 1.10(a)(3) or 1.11(a)(3) of the Adoption Agreement, such vested

46

interest to be determined in accordance with the vesting schedule(s) selected by the Employer in Section 1.15 of the Adoption Agreement, and (b) the balance of his Deferral, Employee, Qualified Nonelective Employer, Qualified Matching Employer, and Rollover Contributions Accounts, and the balance of his Matching Employer or Nonelective Employer Contributions Account that is attributable to safe harbor Matching Employer and/or safe harbor Nonelective Employer Contributions.

11.06. Application for Distribution. Unless a Participant's Account is cashed out as provided in Section 13.02, a Participant (or his Beneficiary, if the Participant has died) who is entitled to a distribution hereunder must make application, in a form acceptable to the Administrator, for a distribution from his Account. No distribution shall be made hereunder without proper application therefore, except as otherwise provided in Section 13.02.

11.07. Application of Vesting Schedule Following Partial Distribution. If a distribution from a Participant's Matching Employer and/or Nonelective Employer Contributions Account has been made to him at a time when he is less than 100 percent vested in such Account balance, the vesting schedule(s) in Section 1.15 of the Adoption Agreement shall thereafter apply only to the balance of his Account attributable to Matching Employer and/or Nonelective Employer Contributions allocated after such distribution. The balance of the Account from which such distribution was made shall be transferred to a separate account immediately following such distribution.

At any relevant time prior to a forfeiture of any portion thereof under Section 11.08, a Participant's vested interest in such separate account shall be equal to $P(AB + (Rx D)) - (Rx D)$, where P is the Participant's vested interest at the relevant time determined under Section 11.05; AB is the account balance of the separate account at the relevant time; D is the amount of the distribution; and R is the ratio of the account balance at the relevant time to the account balance after distribution. Following a forfeiture of any portion of such separate account under Section 11.08 below, any balance in the Participant's separate account shall remain 100 percent vested.

11.08. Forfeitures. If a Participant terminates his employment with the Employer and all Related Employers before he is 100 percent vested in his Matching Employer and/or Nonelective Employer Contributions Accounts, the non-vested portion of his Account (including any amounts credited after his termination of employment) shall be forfeited by him as follows:

(a) If the Inactive Participant elects to receive distribution of his entire vested interest in his Account, the non-vested portion of his Account shall be forfeited upon the complete distribution of such vested interest, subject to the possibility of reinstatement as provided in Section 11.10. For purposes of this Subsection, if the value of an Employee's vested interest in his Account balance is zero, the Employee shall be deemed to have received a distribution of his vested interest immediately following termination of employment.

(b) If the Inactive Participant elects not to receive distribution of his vested interest in his Account following his termination of employment, the non-vested portion of his Account shall be forfeited after the Participant has incurred five consecutive Breaks in Vesting Service.

47

No forfeitures shall occur solely as a result of a Participant's withdrawal of Employee Contributions.

11.09. Application of Forfeitures. Any forfeitures occurring during a Plan Year shall be applied to reduce the contributions of the Employer, unless the Employer has elected in Subsection 1.15(d)(3) of the Adoption Agreement that such remaining forfeitures shall be allocated among the Accounts of Active Participants who are eligible to receive allocations of Nonelective Employer Contributions for the Plan Year in which the forfeiture occurs. Forfeitures that are allocated among the Accounts of eligible Active Participants shall be allocated in the same manner as Nonelective Employer Contributions. If the plan is a money purchase pension plan or the Employer has elected a fixed Nonelective Employer Contribution rate rather than a discretionary rate, forfeitures shall incrementally increase the amount allocated to the Accounts of eligible Active Participants. Notwithstanding any other provision of the Plan to the contrary, forfeitures may first be used to pay administrative expenses under the Plan, as directed by the Employer. To the extent that forfeitures are not used to reduce administrative expenses under the Plan, as directed by the Employer, forfeitures will be applied in accordance with this Section 11.09.

Pending application, forfeitures shall be held in the Permissible Investment selected by the Employer for such purpose or, absent Employer selection, in the most conservative Permissible Investment designated by the Employer in the Service Agreement.

Notwithstanding any other provision of the Plan to the contrary, in no event may forfeitures be used to reduce the Employer's obligation to remit to the Trust (or other appropriate Plan funding vehicle) loan repayments made pursuant to Article 9, Deferral Contributions or Employee Contributions.

11.10. Reinstatement of Forfeitures. If a Participant forfeits any portion of his Account under Subsection 11.08(a) because of distribution of his complete vested interest in his Account, but again becomes an Employee, then the amount so forfeited, without any adjustment for the earnings, expenses, losses, or gains of the assets credited to his Account since the date forfeited, shall be recredited to his Account (or to a separate account as described in Section 11.07, if applicable) if he meets all of the following requirements:

(a) he again becomes an Employee before the date he incurs five-consecutive Breaks in Vesting Service following the date complete distribution of his vested interest was made to him; and

(b) he repays to the Plan the amount previously distributed to him, without interest, within five years of his Reemployment Date. If an Employee is deemed to have received distribution of his complete vested interest as provided in Section 11.08, the Employee shall be deemed to have repaid such distribution on his Reemployment Date.

Upon such an actual or deemed repayment, the provisions of the Plan (including Section 11.07) shall thereafter apply as if no forfeiture had occurred. The amount to be recredited pursuant to this paragraph shall be derived first from the forfeitures, if any, which as of the date of recrediting have yet to be applied as provided in Section 11.09 and, to the extent such forfeitures are insufficient, from a special contribution to be made by the Employer.

48

11.11. Adjustment for Investment Experience. If any distribution under this Article 11 is not made in a single payment, the amount retained by the Trustee after the distribution shall be subject to adjustment until distributed to reflect the income and gain or loss on the investments in which such amount is invested and any expenses properly charged under the Plan and Trust to such amounts.

Article 12. Distributions.

12.01. Restrictions on Distributions. A Participant, or his Beneficiary, may not receive a distribution from his Deferral Contributions, Qualified Nonelective Employer Contributions, Qualified Matching Employer Contributions, safe harbor Matching Employer Contributions or safe harbor Nonelective Employer Contributions Accounts earlier than upon the Participant's separation from service with the Employer and all Related Employers, death, or disability, except as otherwise provided in Article 10, Section 11.02 or Section 12.04. Notwithstanding the foregoing, amounts may also be distributed from such Accounts, in the form of a lump sum only, upon

(a) Termination of the Plan without establishment of another defined contribution plan, other than an employee stock ownership plan (as defined in Code Section 4975(e) or 409) or a simplified employee pension plan as defined in Code Section 408(k).

(b) The disposition by a corporation to an unrelated corporation of substantially all of the assets (within the meaning of Code Section 409(d)(2)) used in a trade or business of such corporation if such corporation continues to maintain the Plan after the disposition, but only with respect to former Employees who continue employment with the corporation acquiring such assets.

(c) The disposition by a corporation to an unrelated entity of such corporation's interest in a subsidiary (within the meaning of Code Section 409(d)(3)) if such corporation continues to maintain this Plan, but only with respect to former Employees who continue employment with such subsidiary.

12.02. Timing of Distribution Following Retirement or Termination of Employment. Except as otherwise elected by the Employer in Subsection 1.20(b) and provided in the Postponed Distribution Addendum to the Adoption Agreement, the balance of a Participant's vested interest in his Account shall be distributable upon his termination of employment with the Employer and all Related Employers, if any, because of death, normal, early, or disability retirement (as permitted under the Plan), or other termination of employment. Notwithstanding the foregoing, a Participant whose vested interest in his Account exceeds \$5,000 as determined under Section 13.02 (or such larger amount as may be specified in Code Section 417(e)(1)) may elect to postpone

distribution of his Account until his Required Beginning Date. A Participant who elects to postpone distribution has a continuing election to receive such distribution prior to the date as of which distribution is required, unless such Participant is reemployed as an Employee.

12.03. Participant Consent to Distribution. If a Participant's vested interest in his Account exceeds \$5,000 as determined under Section 13.02 (or such larger amount as may be specified in Code Section 417(e)(1)), no distribution shall be made to the Participant before he reaches his Normal Retirement Age (or age 62, if later), unless the consent of the Participant has been obtained. Such consent

49

shall be made within the 90-day period ending on the Participant's Annuity Starting Date.

The consent of the Participant's spouse must also be obtained if the Participant's Account is subject to the provisions of Section 14.04, unless the distribution shall be made in the form of a "qualified joint and survivor annuity" as defined in Section 14.01. A spouse's consent to early distribution, if required, must satisfy the requirements of Section 14.06.

Neither the consent of the Participant nor the Participant's spouse shall be required to the extent that a distribution is required to satisfy Code Section 401(a)(9) or Code Section 415. In addition, upon termination of the Plan if it does not offer an annuity option (purchased from a commercial provider) and if the Employer or any Related Employer does not maintain another defined contribution plan (other than an employee stock ownership plan as defined in Code Section 4975(e)(7)) the Participant's Account shall, without the Participant's consent, be distributed to the Participant. However, if any Related Employer maintains another defined contribution plan (other than an employee stock ownership plan as defined in Code Section 4975(e)(7)) then the Participant's Account shall be transferred, without the Participant's consent, to the other plan if the Participant does not consent to an immediate distribution.

12.04. Required Commencement of Distribution to Participants. In no event shall distribution to a Participant commence later than the earlier of the dates described in (a) and (b) below:

- (a) unless the Participant (and his spouse, if appropriate) elects otherwise, the 60th day after the close of the Plan Year in which occurs the latest of (i) the date on which the Participant attains Normal Retirement Age, or age 65, if earlier, (ii) the date on which the Participant's employment with the Employer and all Related Employers ceases, or (iii) the 10th anniversary of the year in which the Participant commenced participation in the Plan; and
- (b) the Participant's Required Beginning Date.

Notwithstanding the provisions of Subsection 12.04(a) above, the failure of a Participant (and the Participant's spouse, if applicable) to consent to a distribution as required under Section 12.03, shall be deemed to be an election to defer commencement of payment as provided in Subsection 12.04(a) above.

12.05. Required Commencement of Distribution to Beneficiaries. If a Participant dies before his Annuity Starting Date, the Participant's Beneficiary shall receive distribution of the Participant's vested interest in his Account in the form provided under Article 13 or 14, as applicable, beginning as soon as reasonably practicable following the date the Beneficiary's application for distribution is filed with the Administrator. Unless distribution is to be made over the life or over a period certain not greater than the life expectancy of the Beneficiary, distribution of the Participant's entire vested interest shall be made to the Beneficiary no later than the end of the fifth calendar year beginning after the Participant's death. If distribution is to be made over the life or over a period certain no greater than the life expectancy of the Beneficiary, distribution shall commence no later than:

- (a) If the Beneficiary is not the Participant's spouse, the end of the first calendar year beginning after the Participant's death; or

50

- (b) If the Beneficiary is the Participant's spouse, the later of (i) the end of the first calendar year beginning after the Participant's death or (ii) the end of the calendar year in which the Participant would have attained age 70 1/2 .

If distribution is to be made to a Participant's spouse, it shall be made available within a reasonable period of time after the Participant's death that is no less favorable than the period of time applicable to other distributions. In the event such spouse dies prior to the date distribution commences, he shall be treated for purposes of this Section 12.05 (other than Subsection 12.05(b) above) as if he were the Participant. Any amount paid to a child of the Participant shall be treated as if it had been paid to the surviving spouse if the amount becomes payable to the surviving spouse when the child reaches the age of majority.

If the Participant has not designated a Beneficiary, or the Participant or Beneficiary has not effectively selected a method of distribution, distribution of the Participant's benefit shall be completed by the close of the calendar year in which the fifth anniversary of the death of the Participant occurs.

If a Participant dies on or after his Annuity Starting Date, but before his entire vested interest in his Account is distributed, his Beneficiary shall receive distribution of the remainder of the Participant's vested interest in his Account beginning as soon as reasonably practicable following the Participant's date of death in a form that provides for distribution at least as rapidly as under the form in which the Participant was receiving distribution.

12.06. Whereabouts of Participants and Beneficiaries. The Administrator shall at all times be responsible for determining the whereabouts of each Participant or Beneficiary who may be entitled to benefits under the Plan and shall at all times be responsible for instructing the Trustee in writing as to the current address of each such Participant or Beneficiary. The Trustee shall be entitled to rely on the latest written statement received from the Administrator as to such addresses. The Trustee shall be under no duty to make any distributions under the Plan unless and until it has received written instructions from the Administrator satisfactory to the Trustee containing the name and address of the distributee, the time when the distribution is to occur, and the form which the distribution shall take.

Notwithstanding the foregoing, if the Trustee attempts to make a distribution in accordance with the Administrator's instructions but is unable to make such distribution because the whereabouts of the distributee is unknown, the Trustee shall notify the Administrator of such situation and thereafter the Trustee shall be under no duty to make any further distributions to such distributee until it receives further written instructions from the Administrator.

If the Administrator is unable after diligent attempts to locate a Participant or Beneficiary who is entitled to a benefit under the Plan, the benefit otherwise payable to such Participant or Beneficiary shall be forfeited and applied as provided in Section 11.09. If a benefit is forfeited because the Administrator determines that the Participant or Beneficiary cannot be found, such benefit shall be reinstated by the Employer if a claim is filed by the Participant or Beneficiary with the Administrator and the Administrator confirms the claim to the Employer. Notwithstanding the above, forfeiture of a Participant's or Beneficiary's benefit may occur only if a distribution could be made to the Participant or Beneficiary without obtaining the Participant's or Beneficiary's

consent in accordance with the requirements of Section 1.411(a)-11 of the Treasury Regulations.

Article 13. Form of Distribution.

13.01. Normal Form of Distribution Under Profit Sharing Plan. Unless the Plan is a money purchase pension plan subject to the requirements of Article 14, or a Participant's Account is otherwise subject to the requirements of Section 14.03 or 14.04, distributions to a Participant or to the Beneficiary of the Participant shall be made in a lump sum in cash or, if elected by the Participant (or the Participant's Beneficiary, if applicable) and provided by the Employer in Section 1.19 of the Adoption Agreement, under a systematic withdrawal plan (installments). A Participant (or the Participant's Beneficiary, if applicable) who is receiving distribution under a systematic withdrawal plan may elect to accelerate installment payments or to receive a lump sum distribution of the remainder of his Account balance. Distribution may also be made hereunder in any non-annuity form that is a protected benefit and is provided by the Employer in Section 1.19(d) of the Adoption Agreement.

Notwithstanding anything herein to the contrary, if a distribution to a Participant commences on the Participant's Required Beginning Date as determined under Subsection 2.01(ss), the Participant may elect to receive distributions under a systematic withdrawal plan that provides the minimum distributions required under Code Section 401(a)(9).

Distributions shall be made in cash, except that distributions may be made in Fund Shares of marketable securities (as defined in Code Section 731(c)(2)), other than Fund Shares of Employer Stock, at the election of the Participant, pursuant to the qualifying rollover of such distribution to a Fidelity Investments® individual retirement account. A distribution may be made in the form of Fund Shares of Employer Stock or an in-kind distribution of Plan investments that are not marketable securities only if and to the extent provided in Section 1.19(d) of the Adoption Agreement; provided, however, that notwithstanding any other provision of the Plan to the contrary, the right of a Participant to receive a distribution in the form of Fund Shares of Employer Stock or an in-kind distribution of Plan investments that are not marketable securities applies only to that portion of the Participant's Account invested in such form at the time of distribution.

13.02. Cash Out Of Small Accounts. Notwithstanding any other provision of the Plan to the contrary, if a Participant's vested interest in his Account is \$5,000 (or such larger amount as may be specified in Code Section 417(e)(1)) or less, the Participant's vested interest in his Account shall be distributed in a lump sum as soon as practicable following the Participant's termination of employment because of retirement, disability, death or other termination of employment. For purposes of this Section, until final Treasury Regulations are issued to the contrary, if either (a) a Participant has commenced distribution of his Account under a systematic withdrawal plan or (b) his Account is subject to the provisions of Section 14.04 and the Participant's Annuity Starting Date has occurred with respect to amounts currently held in his Account, the Participant's vested interest in his Account shall be deemed to exceed \$5,000 (or such larger amount as may be specified in Code Section 417(e)(1)) if the Participant's vested interest in such amounts exceeded such dollar amount on the Participant's Annuity Starting Date.

Notwithstanding the provisions of this Section 13.02, the Employer may determine not to cash out Participant Accounts in accordance with the foregoing provisions, provided that such determination is uniform with respect to all Participants and non-discriminatory.

13.03. Minimum Distributions. This Section applies to distributions under a systematic withdrawal plan that are made on or after a Participant's Required Beginning Date or his date of death, if earlier. This Section shall be interpreted and applied in accordance with the regulations under Code Section 401(a)(9), including the minimum distribution incidental benefit requirement of Section 1.401(a)(9)-2 of the Proposed Treasury Regulations, or any successor regulations of similar import.

Distribution must be made in substantially equal annual, or more frequent, installments, in cash, over a period certain which does not extend beyond the life expectancy or joint life expectancies of the Participant and his Beneficiary or, if the Participant dies prior to the commencement of distributions from his Account, the life expectancy of the Participant's Beneficiary. The amount to be distributed for each calendar year for which a minimum distribution is required shall be at least an amount equal to the quotient obtained by dividing the Participant's interest in his Account by the life expectancy of the Participant or Beneficiary or the joint life and last survivor expectancy of the Participant and his Beneficiary, whichever is applicable. The amount to be distributed for each calendar year shall not be less than an amount equal to the quotient obtained by dividing the Participant's interest in his Account by the lesser of (a) the applicable life expectancy, or (b) if a Participant's Beneficiary is not his spouse, the applicable divisor determined under Section 1.401(a)(9)-2, Q&A 4 of the Proposed Treasury Regulations, or any successor regulations of similar import. Distributions after the death of the Participant shall be made using the applicable life expectancy under (a) above, without regard to Section 1.401(a)(9)-2 of such regulations. For purposes of this Section 13.03, life expectancy and joint life and last survivor expectancy shall be computed by use of the expected return multiples in Table V and VI of Section 1.72-9 of the Treasury Regulations.

For purposes of this Section 13.03, the life expectancy of a Participant or a Beneficiary who is the Participant's surviving spouse shall be recalculated annually unless the Participant or the Participant's spouse irrevocably elects otherwise prior to the time distributions are required to begin. If not recalculated in accordance with the foregoing, life expectancy shall be calculated using the attained age of the Participant or Beneficiary, whichever is applicable, as of such individual's birth date in the first year for which a minimum distribution is required reduced by one for each elapsed calendar year since the date life expectancy was first calculated.

If the Participant dies after distribution of his benefits has begun, distributions to the Participant's Beneficiary shall be made at least as rapidly as under the method of distribution being used as of the date of the Participant's death.

A Participant's interest in his Account for purposes of this Section 13.03 shall be determined as of the last valuation date in the calendar year immediately preceding the calendar year for which a minimum distribution is required, increased by the amount of any contributions allocated to, and decreased by any distributions from, such Account after the valuation date. Any distribution for the first year for which a minimum distribution is required made

after the close of such year shall be treated as if made prior to the close of such year.

The Administrator shall notify the Trustee in writing whenever a distribution is necessary in order to comply with the minimum distribution rules set forth in this Section 13.03.

13.04. Direct Rollovers. Notwithstanding any other provision of the Plan to the contrary, a "distributee" may elect, at the time and in the manner prescribed by the Administrator, to have any portion or all of an "eligible rollover distribution" paid directly to an "eligible retirement plan" specified by the "distributee" in a direct rollover; provided, however, that this provision shall not apply if the total "eligible rollover distribution" that the "distributee" is reasonably expected to receive for the calendar year is less than \$200 and that a "distributee" may not elect a direct rollover with respect to a portion of an "eligible rollover distribution" if such portion totals less than \$500. For purposes of this Section 13.04, the following definitions shall apply:

(a) "Distributee" means a Participant, the Participant's surviving spouse, and the Participant's spouse or former spouse who is the alternate payee under a qualified domestic relations order, who is entitled to receive a distribution from the Participant's vested interest in his Account.

(b) "Eligible retirement plan" means an individual retirement account described in Code Section 408(a), an individual retirement annuity described in Code Section 408(b), an annuity plan described in Code Section 403(a), or a qualified trust described in Code Section 401(a), that accepts "eligible rollover distributions". However, in the case of an "eligible rollover distribution" to a surviving spouse, an "eligible retirement plan" means an individual retirement account or individual retirement annuity.

(c) "Eligible rollover distribution" means any distribution of all or any portion of the balance to the credit of the "distributee", except that an "eligible rollover distribution" does not include the following:

(1) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the "distributee" or the joint lives (or joint life expectancies) of the "distributee" and the "distributee's" designated beneficiary, or for a specified period of ten years or more;

(2) any distribution to the extent such distribution is required under Code Section 401(a)(9);

(3) the portion of any distribution that is not includable in gross income (determined without regard to the exclusion for net unrealized appreciation with respect to employer securities);

(4) any hardship withdrawal of Deferral Contributions made in accordance with the provisions of Section 10.05 or the Protected In-Service Withdrawals Addendum to the Adoption Agreement.

13.05. Notice Regarding Timing and Form of Distribution. Within the period beginning 90 days before a Participant's Annuity Starting Date and ending 30 days before such date, the Administrator shall provide such Participant with written notice containing a general description of the material features and an explanation of the relative values of the forms of benefit available under the

Plan and informing the Participant of his right to defer receipt of the distribution until his Required Beginning Date and his right to make a direct rollover.

Distribution may commence fewer than 30 days after such notice is given, provided that:

(a) the Administrator clearly informs the Participant that the Participant has a right to a period of at least 30 days after receiving the notice to consider the decision of whether or not to elect a distribution (and, if applicable, a particular distribution option);

(b) the Participant, after receiving the notice, affirmatively elects a distribution, with his spouse's written consent, if necessary;

(c) if the Participant's Account is subject to the requirements of Section 14.04, the following additional requirements apply:

(1) the Participant is permitted to revoke his affirmative distribution election at any time prior to the later of (A) his Annuity Starting Date or (B) the expiration of the seven-day period beginning the day after such notice is provided to him; and

(2) distribution does not begin to such Participant until such revocation period ends.

13.06. Determination of Method of Distribution. Subject to Section 13.02, the Participant shall determine the method of distribution of benefits to himself and may determine the method of distribution to his Beneficiary. Such determination shall be made prior to the time benefits become payable under the Plan. If the Participant does not determine the method of distribution to his Beneficiary or if the Participant permits his Beneficiary to override his determination, the Beneficiary, in the event of the Participant's death, shall determine the method of distribution of benefits to himself as if he were the Participant. A determination by the Beneficiary must be made no later than the close of the calendar year in which distribution would be required to begin under Section 12.05 or, if earlier, the close of the calendar year in which the fifth anniversary of the death of the Participant occurs.

13.07. Notice to Trustee. The Administrator shall notify the Trustee in any medium acceptable to the Trustee, which may be specified in the Service Agreement, whenever any Participant or Beneficiary is entitled to receive benefits under the Plan. The Administrator's notice shall indicate the form of

payment of benefits that such Participant or Beneficiary shall receive, (in the case of distributions to a Participant) the name of any designated Beneficiary or Beneficiaries, and such other information as the Trustee shall require.

Article 14. Superseding Annuity Distribution Provisions.

14.01. Special Definitions. For purposes of this Article, the following special definitions shall apply:

(a) “**Qualified joint and survivor annuity**” means (1) if the Participant is not married on his Annuity Starting Date, an immediate annuity payable for the life of the Participant or (2) if the Participant is married on his

55

Annuity Starting Date, an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant’s spouse (to whom the Participant was married on the Annuity Starting Date) which is equal to at least 50 percent of the amount of the annuity which is payable during the joint lives of the Participant and such spouse, provided that the survivor annuity shall not be payable to a Participant’s spouse if such spouse is not the same spouse to whom the Participant was married on his Annuity Starting Date.

(b) “**Qualified preretirement survivor annuity**” means an annuity purchased with at least 50 percent of a Participant’s vested interest in his Account that is payable for the life of a Participant’s surviving spouse. The Employer shall specify that portion of a Participant’s vested interest in his Account that is to be used to purchase the “qualified preretirement survivor annuity” in Section 1.19 of the Adoption Agreement.

14.02. Applicability. The provisions of this Article shall apply to a Participant’s Account if:

(a) the Plan is a money purchase pension plan;

(b) the Plan is an amendment and restatement of a plan that provided an annuity form of payment and such form of payment has not been eliminated pursuant to Subsection 1.19(e) and the Forms of Payment Addendum to the Adoption Agreement;

(c) the Participant’s Account contains assets attributable to amounts directly or indirectly transferred from a plan that provided an annuity form of payment and such form of payment has not been eliminated pursuant to Subsection 1.19(e) and the Forms of Payment Addendum to the Adoption Agreement.

14.03. Annuity Form of Payment. To the extent provided in Section 1.19 of the Adoption Agreement, a Participant may elect distributions made in whole or in part in the form of an annuity contract. Any annuity contract distributed under the Plan shall be subject to the provisions of this Section 14.03 and, to the extent provided therein, Sections 14.04 through 14.09.

(a) At the direction of the Administrator, the Trustee shall purchase the annuity contract on behalf of a Participant or Beneficiary from an insurance company. Such annuity contract shall be nontransferable.

(b) The terms of the annuity contract shall comply with the requirements of the Plan and distributions under such contract shall be made in accordance with Code Section 401(a)(9) and the regulations thereunder.

(c) The annuity contract may provide for payment over the life of the Participant and, upon the death of the Participant, may provide a survivor annuity continuing for the life of the Participant’s designated Beneficiary. Such an annuity may provide for an annuity certain feature for a period not exceeding the life expectancy of the Participant or, if the annuity is payable to the Participant and a designated Beneficiary, the joint life and last survivor expectancy of the Participant and such Beneficiary. If the Participant dies prior to his Annuity Starting Date, the annuity contract distributed to the Participant’s Beneficiary may provide for payment over the life of the Beneficiary, and may provide for an annuity certain feature for a

56

period not exceeding the life expectancy of the Beneficiary. The types of annuity contracts provided under the Plan shall be limited to the types of annuities described in Section 1.19 and the Forms of Payment Addendum to the Adoption Agreement.

(d) The annuity contract must provide for nonincreasing payments.

14.04. “Qualified Joint and Survivor Annuity” and “Qualified Preretirement Survivor Annuity” Requirements. The requirements of this Section 14.04 apply to a Participant’s Account if:

(a) the Plan is a money purchase pension plan;

(b) the Plan is a profit sharing plan and the Employer has selected distribution in the form of a life annuity as the normal form of distribution with respect to such Participant’s Account in Subsection 1.19(c)(2)(B) of the Adoption Agreement; or

(c) the Plan is a profit sharing plan and the Employer has specified distribution in the form of a life annuity as the normal form of distribution in Subsection (c)(2)(B) of the Forms of Payment Addendum to the Adoption Agreement and the Participant’s Annuity Starting Date occurs prior to the date specified in Subsection (c)(4) of the Forms of Payment Addendum to the Adoption Agreement;

(d) the Participant is permitted to elect and has elected distribution in the form of an annuity contract payable over the life of the Participant.

If a Participant’s Account is subject to the requirements of this Section 14.04, distribution shall be made to the Participant in the form of a “qualified joint and survivor annuity” (with a survivor annuity in the percentage amount specified by the Employer in Subsection 1.19 of the Adoption Agreement), unless the Participant waives the “qualified joint and survivor annuity” as provided in Section 14.05. If the Participant dies prior to his Annuity Starting Date,

distribution shall be made to the Participant's surviving spouse, if any, in the form of a "qualified preretirement survivor annuity", unless the Participant waives the "qualified preretirement survivor annuity" as provided in Section 14.05, or the Participant's surviving spouse elects in writing to receive distribution in one of the other forms of payment provided under the Plan. If the Employer has specified in Section 1.19 of the Adoption Agreement that less than 100 percent of a Participant's Account shall be used to purchase the "qualified preretirement survivor annuity", distribution of the balance of the Participant's vested interest in his Account that is not used to purchase the "qualified preretirement survivor annuity" shall be distributed to the Participant's designated Beneficiary in accordance with the provisions of Sections 11.04 and 12.05.

14.05. Waiver of the "Qualified Joint and Survivor Annuity" and/or "Qualified Preretirement Survivor Annuity" Rights. A Participant may waive the "qualified joint and survivor annuity" described in Section 14.04 and elect another form of distribution permitted under the Plan at any time during the 90-day period ending on his Annuity Starting Date; provided, however, that if the Participant is married, his spouse must consent in writing to such election as provided in Section 14.06. Spousal consent is not required if the Participant elects distribution in the form of a different "qualified joint and survivor annuity".

57

A Participant may waive the "qualified preretirement survivor annuity" and designate a non-spouse Beneficiary at any time during the "applicable election period"; provided, however, that the Participant's spouse must consent in writing to such election as provided in Section 14.06. The "applicable election period" begins on the later of (1) the date the Participant's Account becomes subject to the requirements of Section 14.04 or (2) the first day of the Plan Year in which the Participant attains age 35 or, if he terminates employment prior to such date, the date he terminates employment with the Employer and all Related Employers. The "applicable election period" ends on the earlier of the Participant's Annuity Starting Date or the date of the Participant's death. A Participant whose employment has not terminated may elect to waive the "qualified preretirement survivor annuity" prior to the Plan Year in which he attains age 35, provided that any such waiver shall cease to be effective as of the first day of the Plan Year in which the Participant attains age 35.

If the Employer has specified in Section 1.19 of the Adoption Agreement that less than 100 percent of a Participant's Account shall be used to purchase the "qualified preretirement survivor annuity", the Participant may designate a non-spouse Beneficiary for the balance of the Participant's vested interest in his Account that is not used to purchase the "qualified preretirement survivor annuity". Such designation shall not be subject to the spousal consent requirements of Section 14.06.

14.06. Spouse's Consent to Waiver. A spouse's written consent to a Participant's waiver of the "qualified joint and survivor annuity" or "qualified preretirement survivor annuity" forms of distribution must acknowledge the effect of the Participant's election and must be witnessed by a Plan representative or a notary public. In addition, the spouse's written consent must either (a) specify the form of distribution elected instead of the "qualified joint and survivor annuity", if applicable, and that such form may not be changed (except to a "qualified joint and survivor annuity") without written spousal consent and specify any non-spouse Beneficiary designated by the Participant, if applicable, and that such designation may not be changed without written spousal consent or (b) acknowledge that the spouse has the right to limit consent as provided in clause (a) above, but permit the Participant to change the form of distribution elected or the designated Beneficiary without the spouse's further consent.

A Participant's spouse shall be deemed to have given written consent to a Participant's waiver if the Participant establishes to the satisfaction of a Plan representative that spousal consent cannot be obtained because the spouse cannot be located or because of other circumstances set forth in Code Section 401(a)(11) and Treasury Regulations issued thereunder.

Any written consent given or deemed to have been given by a Participant's spouse hereunder shall be irrevocable and shall be effective only with respect to such spouse and not with respect to any subsequent spouse.

A spouse's consent to a Participant's waiver shall be valid only if the applicable notice described in Section 14.07 or 14.08 has been provided to the Participant.

14.07. Notice Regarding "Qualified Joint and Survivor Annuity". The notice provided to a Participant under Section 14.05 shall include a written explanation of (a) the terms and conditions of the "qualified joint and survivor annuity" provided herein, (b) the Participant's right to make, and the effect of, an election to waive the "qualified joint and survivor annuity", (c) the rights of the Participant's spouse under Section 14.06, and (d) the Participant's right to

58

revoke an election to waive the "qualified joint and survivor annuity" prior to his Annuity Starting Date.

14.08. Notice Regarding "Qualified Preretirement Survivor Annuity". If a Participant's Account is subject to the requirements of Section 14.04, the Administrator shall provide the Participant with a written explanation of the "qualified preretirement survivor annuity" comparable to the written explanation provided with respect to the "qualified joint and survivor annuity", as described in Section 14.07. Such explanation shall be furnished within whichever of the following periods ends last:

- (a) the period beginning with the first day of the Plan Year in which the Participant reaches age 32 and ending with the end of the Plan Year preceding the Plan Year in which he reaches age 35;
- (b) a reasonable period ending after the Employee becomes an Active Participant;
- (c) a reasonable period ending after Section 14.04 first becomes applicable to the Participant's Account; or
- (d) in the case of a Participant who separates from service before age 35, a reasonable period ending after such separation from service.

For purposes of the preceding sentence, the two-year period beginning one year prior to the date of the event described in Subsection 14.08(b), (c) or (d) above, whichever is applicable, and ending one year after such date shall be considered reasonable, provided, that in the case of a Participant who separates from service under Subsection 14.08(d) above and subsequently recommences employment with the Employer, the applicable period for such Participant shall be redetermined in accordance with this Section 14.08.

14.09. Former Spouse. For purposes of this Article, a former spouse of a Participant shall be treated as the spouse or surviving spouse of the Participant, and a current spouse shall not be so treated, to the extent required under a qualified domestic relations order, as defined in Code Section 414(p).

Article 15. Top-Heavy Provisions.

15.01. Definitions. For purposes of this Article, the following special definitions shall apply:

- (a) **“Determination date”** means, for any Plan Year subsequent to the first Plan Year, the last day of the preceding Plan Year. For the first Plan Year of the Plan, “determination date” means the last day of that Plan Year.
- (b) **“Determination period”** means the Plan Year containing the “determination date” and the four preceding Plan Years.
- (c) **“Key employee”** means any Employee or former Employee (and the Beneficiary of any such Employee) who at any time during the “determination period” was (1) an officer of the Employer or a Related Employer whose annual Compensation exceeds 50 percent of the dollar limitation under Code Section 415(b)(1)(A), (2) one of the ten Employees whose annual Compensation from the Employer or a Related Employer exceeds the dollar limitation under Code

59

Section 415(c)(1)(A) and who owns (or is considered as owning under Code Section 318) one of the largest interests in the Employer and all Related Employers, (3) a five percent owner of the Employer and all Related Employers, or (4) a one percent owner of the Employer and all Related Employers whose annual Compensation exceeds \$150,000. The determination of who is a “key employee” shall be made in accordance with Code Section 416(i)(1) and regulations issued thereunder.

(d) **“Permissive aggregation group”** means the “required aggregation group” plus any other qualified plans of the Employer or a Related Employer which, when considered as a group with the “required aggregation group”, would continue to satisfy the requirements of Code Sections 401(a)(4) and 410.

(e) **“Required aggregation group”** means:

- (1) Each qualified plan of the Employer or Related Employer in which at least one “key employee” participates, or has participated at any time during the “determination period” (regardless of whether the plan has terminated), and
- (2) any other qualified plan of the Employer or Related Employer which enables a plan described in Subsection 15.01(e)(1) above to meet the requirements of Code Section 401(a)(4) or 410.

(f) **“Top-heavy plan”** means a plan in which any of the following conditions exists:

- (1) the “top-heavy ratio” for the plan exceeds 60 percent and the Plan is not part of any “required aggregation group” or “permissive aggregation group”;
- (2) the plan is a part of a “required aggregation group” but not part of a “permissive aggregation group” and the “top-heavy ratio” for the “required aggregation group” exceeds 60 percent; or
- (3) the plan is a part of a “required aggregation group” and a “permissive aggregation group” and the “top-heavy ratio” for both groups exceeds 60 percent.

(g) **“Top-heavy ratio”** means:

(1) With respect to the Plan, or with respect to any “required aggregation group” or “permissive aggregation group” that consists solely of defined contribution plans (including any simplified employee pension, as defined in Code Section 408(k)), a fraction, the numerator of which is the sum of the account balances of all “key employees” under the plans as of the “determination date” (including any part of any account balance distributed during the five-year period ending on the “determination date”), and the denominator of which is the sum of all account balances (including any part of any account balance distributed during the five-year period ending on the “determination date”) of all participants under the plans as of the “determination date”. Both the numerator and denominator of the “top-heavy ratio” shall be increased, to the extent required by Code Section 416, to reflect any contribution which is due but unpaid as of the “determination date”.

60

(2) With respect to any “required aggregation group” or “permissive aggregation group” that includes one or more defined benefit plans which, during the five-year period ending on the “determination date”, has covered or could cover an Active Participant in the Plan, a fraction, the numerator of which is the sum of the account balances under the defined contribution plans for all “key employees” and the present value of accrued benefits under the defined benefit plans for all “key employees”, and the denominator of which is the sum of the account balances under the defined contribution plans for all participants and the present value of accrued benefits under the defined benefit plans for all participants. Both the numerator and denominator of the “top-heavy ratio” shall be increased for any distribution of an account balance or an accrued benefit made during the five-year period ending on the “determination date” and any contribution due but unpaid as of the “determination date”.

For purposes of Subsections 15.01(g)(1) and (2) above, the value of accounts and the present value of accrued benefits shall be determined as of the most recent “determination date”, except as provided in Code Section 416 and the regulations issued thereunder for the first and second plan years of a defined benefit plan. When aggregating plans, the value of accounts and accrued benefits shall be calculated with reference to the “determination dates” that fall within the same calendar year. The present value of accrued benefits shall be determined using the interest rate and mortality table specified in Subsection 1.21(b) of the Adoption Agreement.

The accounts and accrued benefits of a Participant who is not a “key employee” but who was a “key employee” in a prior year, or who has not performed services for the Employer or any Related Employer at any time during the five-year period ending on the “determination date”, shall be disregarded. The calculation of the “top-heavy ratio”, and the extent to which distributions, rollovers, and transfers are taken into account, shall be made in accordance with Code Section 416 and the regulations issued thereunder. Deductible employee contributions shall not be taken into account for purposes of computing the “top-heavy ratio”.

For purposes of determining if the Plan, or any other plan included in a “required aggregation group” of which the Plan is a part, is a “top-heavy plan”, the accrued benefit in a defined benefit plan of an Employee other than a “key employee” shall be determined under the method, if any, that uniformly applies for accrual purposes under all plans maintained by the Employer or a Related Employer, or, if there is no such method, as if such benefit accrued not more rapidly than the slowest accrual rate permitted under the fractional accrual rate of Code Section 411(b)(1)(C).

15.02. Application. If the Plan is or becomes a “top-heavy plan” in any Plan Year or is automatically deemed to be a “top-heavy plan” in accordance with the Employer’s selection in Subsection 1.21(a)(1) of the Adoption Agreement, the provisions of this Article shall apply and shall supersede any conflicting provision in the Plan.

15.03. Minimum Contribution. Except as otherwise specifically provided in this Section 15.03, the Nonelective Employer Contributions made for the Plan Year on behalf of any Active Participant who is not a “key employee” shall not be less than the lesser of three percent (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement) of such Participant’s Compensation for the Plan Year or, in the case where neither the Employer nor any Related Employer maintains a defined benefit plan which uses the Plan to satisfy

61

Code Section 401(a)(4) or 410, the largest percentage of Employer contributions made on behalf of any “key employee” for the Plan Year, expressed as a percentage of the “key employee’s” Compensation for the Plan Year, unless the Employer has provided in Subsection 1.21(c) of the Adoption Agreement that the minimum contribution requirement shall be met under the other plan or plans of the Employer.

The minimum contribution required under this Section 15.03 shall be made to the Account of an Active Participant even though, under other Plan provisions, the Active Participant would not otherwise be entitled to receive a contribution, or would have received a lesser contribution for the Plan Year, because (a) the Active Participant failed to complete the Hours of Service requirement selected by the Employer in Subsection 1.10(d) or 1.11(c) of the Adoption Agreement, or (b) the Participant’s Compensation was less than a stated amount; provided, however, that no minimum contribution shall be made for a Plan Year to the Account of an Active Participant who is not employed by the Employer or a Related Employer on the last day of the Plan Year.

The minimum contribution for the Plan Year made on behalf of each Active Participant who is not a “key employee” and who is a participant in a defined benefit plan maintained by the Employer or a Related Employer shall not be less than five percent of such Participant’s Compensation for the Plan Year, unless the Employer has provided in Subsection 1.21(c) of the Adoption Agreement that the minimum contribution requirement shall be met under the other plan or plans of the Employer.

That portion of a Participant’s Account that is attributable to minimum contributions required under this Section 15.03, to the extent required to be nonforfeitable under Code Section 416(b), may not be forfeited under Code Section 411(a)(3)(B).

Notwithstanding any other provision of the Plan to the contrary, for purposes of this Article, Compensation shall include amounts that are not includable in the gross income of the Participant under a salary reduction agreement by reason of the application of Code Section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b). Compensation shall generally be based on the amount actually paid to the Eligible Employee during the Plan Year or during that portion of the Plan Year during which the Eligible Employee is an Active Participant, as elected by the Employer in Subsection 1.05(c) of the Adoption Agreement.

15.04. Modification of Allocation Provisions to Meet Minimum Contribution Requirements. If the Employer elected a discretionary Nonelective Employer Contribution in Subsection 1.11(b) of the Adoption Agreement, the provisions for allocating Nonelective Employer Contributions described in Subsection 5.10(b) shall be modified as provided herein to meet the minimum contribution requirements of Section 15.03.

(a) If the Employer selected the non-integrated formula in Subsection 1.11(b)(1) of the Adoption Agreement, Nonelective Employer Contributions shall be allocated as follows:

(1) Nonelective Employer Contributions shall be allocated to each eligible Active Participant, as determined under this Section 15.04, who is not a “key employee” in the same ratio that the eligible Active Participant’s Compensation for the Plan Year bears to the total Compensation of all such eligible Active Participants for the Plan Year; provided, however that such ratio shall not exceed three percent of a

62

Participant’s Compensation for the Plan Year (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement).

(2) If any Nonelective Employer Contributions remain after the allocation in Subsection 15.04(a)(1) above, the remaining Nonelective Employer Contributions shall be allocated to each eligible Active Participant, as determined under this Section 15.04, who is a “key employee” in the same ratio that the eligible Active Participant’s Compensation for the Plan Year bears to the total Compensation of all such eligible Active Participants for the Plan Year; provided, however that such ratio shall not exceed three percent of a Participant’s Compensation for the Plan Year (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement).

(3) If any Nonelective Employer Contributions remain after the allocation in Subsection 15.04(a)(2) above, the remaining Nonelective Employer Contributions shall be allocated to each eligible Active Participant, as determined under this Section 15.04, in the same ratio that the eligible Active Participant’s Compensation for the Plan Year bears to the total Compensation of all such eligible Active Participants for the Plan Year.

(b) If the Employer selected the integrated formula in Subsection 1.11(b)(2) of the Adoption Agreement, the “permitted disparity limit”, as defined in Subsection 1.11(b)(2) of the Adoption Agreement, shall be reduced by the percentage allocated under Subsection 15.04(b)(1) or (2) below, and the allocation steps in Subsection 5.10(b)(2) shall be preceded by the following steps:

(1) Nonelective Employer Contributions shall be allocated to each eligible Active Participant, as determined under this Section 15.04, who is not a “key employee” in the same ratio that the eligible Active Participant’s Compensation for the Plan Year bears to the total Compensation of all such eligible Active Participants for the Plan Year; provided, however that such ratio shall not exceed three percent of a Participant’s Compensation for the Plan Year (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement).

(2) If any Nonelective Employer Contributions remain after the allocation in Subsection 15.04(b)(1) above, the remaining Nonelective Employer Contributions shall be allocated to each eligible Active Participant, as determined under this Section 15.04, who is a “key employee” in the same ratio that the eligible Active Participant’s Compensation for the Plan Year bears to the total Compensation of all such eligible Active Participants for the Plan Year; provided, however that such ratio shall not exceed three percent of a Participant’s Compensation for the Plan Year (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement).

(3) If any Nonelective Employer Contributions remain after the allocation in Subsection 15.04(b)(2) above, the remaining Nonelective Employer Contributions shall be allocated to each eligible Active Participant in the same ratio that the eligible Active Participant’s Excess Compensation for the Plan Year bears to the total Excess Compensation of all eligible Participants for the Plan Year; provided,

63

however, that such ratio shall not exceed three percent (or such other percentage selected by the Employer in Subsection 1.21(c) of the Adoption Agreement).

15.05. Adjustment to the Limitation on Contributions and Benefits. For Limitation Years beginning prior to January 1, 2000, if the Plan is a “top-heavy plan”, the number 100 shall be substituted for the number 125 in determining the “defined benefit fraction”, as defined in Subsection 6.01(f) and the “defined contribution fraction”, as defined in Subsection 6.01(g). However, this substitution shall not take effect with respect to the Plan in any Plan Year in which the following requirements are satisfied:

(a) The Employer contributions for such Plan Year made on behalf of each eligible Active Participant, as determined under Section 15.03, who is not a “key employee” and who is a participant in a defined benefit plan maintained by the Employer or a Related Employer is not less than 7 1/2 percent of such eligible Active Participant’s Compensation.

(b) The “top-heavy ratio” for the Plan (or the “required aggregation group” or “permissible aggregation group”, as applicable) does not exceed 90 percent.

The substitutions of the number 100 for 125 shall not take effect in any Limitation Year with respect to any Participant for whom no benefits are accrued or contributions made for the Limitation Year.

15.06. Accelerated Vesting. For any Plan Year in which the Plan is or is deemed to be a “top-heavy plan” and all Plan Years thereafter, the top-heavy vesting schedule selected by the Employer in Subsection 1.21(d) of the Adoption Agreement shall automatically apply to the Plan. The top-heavy vesting schedule applies to all benefits within the meaning of Code Section 411(a)(7) except those already subject to a vesting schedule which vests at least as rapidly in all cases as the schedule elected in Subsection 1.21(d) of the Adoption Agreement, including benefits accrued before the Plan becomes a “top-heavy plan”. Notwithstanding the foregoing provisions of this Section 15.06, the top-heavy vesting schedule does not apply to the Account of any Participant who does not have an Hour of Service after the Plan initially becomes or is deemed to have become a “top-heavy plan” and such Employee’s Account attributable to Employer Contributions shall be determined without regard to this Section 15.06.

15.07. Exclusion of Collectively-Bargained Employees. Notwithstanding any other provision of this Article 15, Employees who are included in a unit covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers shall not be included in determining whether or not the Plan is a “top-heavy plan”. In addition, such Employees shall not be entitled to a minimum contribution under Section 15.03 or accelerated vesting under Section 15.06, unless otherwise provided in the collective bargaining agreement.

Article 16. Amendment and Termination.

16.01. Amendments by the Employer that do Not Affect Prototype Status. The Employer reserves the authority through a board of directors’ resolution or similar action, subject to the provisions of Article 1 and Section 16.04, to

64

amend the Plan as provided herein, and such amendment shall not affect the status of the Plan as a prototype plan.

(a) The Employer may amend the Adoption Agreement to make a change or changes in the provisions previously elected by it. Such amendment may be made either by (1) completing an amended Adoption Agreement on which the Employer has indicated the change or changes, or (2) adopting an amendment, executed by the Employer only, in the form provided by the Prototype Sponsor, that provides replacement pages to be inserted into the Adoption Agreement, which pages include the change or changes. Any such amendment must be filed with the Trustee.

(b) The Employer may make a separate amendment to the Plan as necessary to satisfy Code Section 415 or 416 because of the required aggregation of multiple plans by completely overriding the Basic Plan Document provisions.

(c) The Employer may adopt certain model amendments published by the Internal Revenue Service which specifically provide that their adoption shall not cause the Plan to be treated as an individually designed plan.

16.02. Amendments by the Employer that Affect Prototype Status. The Employer reserves the authority through a board of directors' resolution or similar action, subject to the provisions of Section 16.04, to amend the Plan in a manner other than that provided in Section 16.01. However, upon making such amendment, including, if the Plan is a money purchase pension plan, a waiver of the minimum funding requirement under Code Section 412(d), the Employer may no longer participate in this prototype plan arrangement and shall be deemed to have an individually designed plan. Following such amendment, the Trustee may transfer the assets of the Trust to the trust forming part of such newly adopted plan upon receipt of sufficient evidence (such as a determination letter or opinion letter from the Internal Revenue Service or an opinion of counsel satisfactory to the Trustee) that such trust shall be a qualified trust under the Code.

16.03. Amendment by the Mass Submitter Sponsor and the Prototype Sponsor. The Mass Submitter Sponsor may in its discretion amend the mass submitter prototype plan at any time, subject to the provisions of Article 1 and Section 16.04, and provided that the Mass Submitter Sponsor mails a copy of such amendment to each Prototype Sponsor that maintains the prototype plan or a minor modifier of the prototype plan. Each Prototype Sponsor shall provide a copy of such amendment to each Employer adopting its prototype plan at the Employer's last known address as shown on the books maintained by the Prototype Sponsor or its affiliates.

The Prototype Sponsor may, in its discretion, amend the Plan or the Adoption Agreement, subject to the provisions of Article 1 and Section 16.04, and provided that such amendment does not change the Plan's status as a word for word adoption of the mass submitter prototype plan or a minor modifier of the mass submitter prototype plan, unless such Prototype Sponsor elects no longer to be a sponsoring organization with respect to the mass submitter prototype plan. The Prototype Sponsor shall provide a copy of such amendment to each Employer adopting its prototype plan at the Employer's last known address as shown on the books maintained by the Prototype Sponsor or its affiliates.

16.04. Amendments Affecting Vested and/or Accrued Benefits. Except as permitted by Section 16.05, Section 1.19(e) and the Forms of Payment Addendum to the Adoption Agreement, and/or Code Section 411(d)(6) and regulations issued thereunder, no amendment to the Plan shall be effective to the extent that it has the effect of decreasing a Participant's Account or eliminating an optional form

65

of benefit with respect to benefits attributable to service before the amendment. Furthermore, if the vesting schedule of the Plan is amended, the nonforfeitable interest of a Participant in his Account, determined as of the later of the date the amendment is adopted or the date it becomes effective, shall not be less than the Participant's nonforfeitable interest in his Account determined without regard to such amendment.

If the Plan is a money purchase pension plan, no amendment to the Plan that provides for a significant reduction in contributions to the Plan shall be made unless notice has been furnished to Participants and alternate payees under a qualified domestic relations order as provided in ERISA Section 204(h).

If the Plan's vesting schedule is amended because of a change to "top-heavy plan" status, as described in Subsection 15.01(f), the accelerated vesting provisions of Section 15.06 shall continue to apply for all Plan Years thereafter, regardless of whether the Plan is a "top-heavy plan" for such Plan Year.

If the Plan's vesting schedule is amended and an Employee's vested interest, as calculated by using the amended vesting schedule, is less in any year than the Employee's vested interest calculated under the Plan's vesting schedule immediately prior to the amendment, the amended vesting schedule shall apply only to Employees hired on or after the effective date of the change in vesting schedule.

16.05. Retroactive Amendments made by Mass Submitter or Prototype Sponsor. An amendment made by the Mass Submitter Sponsor or Prototype Sponsor in accordance with Section 16.03 may be made effective on a date prior to the first day of the Plan Year in which it is adopted if, in published guidance, the Internal Revenue Service either permits or requires such an amendment to be made to enable the Plan and Trust to satisfy the applicable requirements of the Code and all requirements for the retroactive amendment are satisfied.

16.06. Termination. The Employer has adopted the Plan with the intention and expectation that contributions shall be continued indefinitely. However, said Employer has no obligation or liability whatsoever to maintain the Plan for any length of time and may amend the Plan to discontinue contributions under the Plan or terminate the Plan at any time without any liability hereunder for any such discontinuance or termination. The Employer may terminate the Plan by written notice delivered to the Trustee.

16.07. Distribution upon Termination of the Plan. Upon termination or partial termination of the Plan or complete discontinuance of contributions thereunder, each Participant (including a terminated Participant with respect to amounts not previously forfeited by him) who is affected by such termination or partial termination or discontinuance shall have a vested interest in his Account of 100 percent. Subject to Section 12.01 and Article 14, upon receipt of written instructions from the Administrator, the Trustee shall distribute to each Participant or other person entitled to distribution the balance of the Participant's Account in a single lump sum payment. In the absence of such instructions, the Trustee shall notify the Administrator of such situation and the Trustee shall be under no duty to make any distributions under the Plan until it receives written instructions from the Administrator. Upon the completion of such distributions, the Trust shall terminate, the Trustee shall be relieved from all liability under the Trust, and no Participant or other person shall have any claims thereunder, except as required by applicable law.

66

If distribution is to be made to a Participant or Beneficiary who cannot be located, the Administrator shall give written instructions to the Trustee to (a) escheat the distributable amount to the State or Commonwealth of the distributee's last known address or (b) draw a check in the distributable amount and mail it to the distributee's last known address. In the absence of such instructions, the Trustee shall make distribution to the distributee by drawing a check in the distributable amount and mailing it to the distributee's last known address.

16.08. Merger or Consolidation of Plan; Transfer of Plan Assets. In case of any merger or consolidation of the Plan with, or transfer of assets and liabilities of the Plan to, any other plan, provision must be made so that each Participant would, if the Plan then terminated, receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer if the Plan had then terminated.

Article 17. Amendment and Continuation of Prior Plan; Transfer of Funds to or from Other Qualified Plans.

17.01. Amendment and Continuation of Prior Plan. In the event the Employer has previously established a plan (the “prior plan”) which is a defined contribution plan under the Code and which on the date of adoption of the Plan meets the applicable requirements of Code Section 401(a), the Employer may, in accordance with the provisions of the prior plan, amend and restate the prior plan in the form of the Plan and become the Employer hereunder, subject to the following:

- (a) Subject to the provisions of the Plan, each individual who was a Participant in the prior plan immediately prior to the effective date of such amendment and restatement shall become a Participant in the Plan.
- (b) Except as provided in Section 16.04, no election may be made under the vesting provisions of the Adoption Agreement if such election would reduce the benefits of a Participant under the Plan to less than the benefits to which he would have been entitled if he voluntarily separated from the service of the Employer immediately prior to such amendment and restatement.
- (c) No amendment to the Plan shall decrease a Participant’s accrued benefit or eliminate an optional form of benefit, except as permitted under Section 1.19(e) and the Forms of Payment Addendum to the Adoption Agreement.
- (d) The amounts standing to the credit of a Participant’s account immediately prior to such amendment and restatement which represent the amounts properly attributable to (1) contributions by the Participant and (2) contributions by the Employer and forfeitures shall constitute the opening balance of his Account or Accounts under the Plan.
- (e) Amounts being paid to an Inactive Participant or to a Beneficiary in accordance with the provisions of the prior plan shall continue to be paid in accordance with such provisions.
- (f) Any election and waiver of the “qualified preretirement survivor annuity”, as defined in Section 14.01, in effect after August 23, 1984, under the prior plan immediately before such amendment and restatement shall be

67

deemed a valid election and waiver of Beneficiary under Section 14.04 if such designation satisfies the requirements of Sections 14.05 and 14.06, unless and until the Participant revokes such election and waiver under the Plan.

(g) Unless the Employer and the Trustee agree otherwise, all assets of the predecessor trust shall be deemed to be assets of the Trust as of the effective date of such amendment. Such assets shall be invested by the Trustee as soon as reasonably practicable pursuant to Article 8. The Employer agrees to assist the Trustee in any way requested by the Trustee in order to facilitate the transfer of assets from the predecessor trust to the Trust Fund.

17.02. Transfer of Funds from an Existing Plan. The Employer may from time to time direct the Trustee, in accordance with such rules as the Trustee may establish, to accept cash, allowable Fund Shares or participant loan promissory notes transferred for the benefit of Participants from a trust forming part of another qualified plan under the Code, provided such plan is a defined contribution plan. Such transferred assets shall become assets of the Trust as of the date they are received by the Trustee. Such transferred assets shall be credited to Participants’ Accounts in accordance with their respective interests immediately upon receipt by the Trustee. A Participant’s interest under the Plan in transferred assets which were fully vested and nonforfeitable under the transferring plan or which were transferred to the Plan in a manner intended to satisfy the requirements of subsection (b) of this Section 17.02 shall be fully vested and nonforfeitable at all times. A Participant’s interest under the Plan in transferred assets which were transferred to the Plan in a manner intended to satisfy the requirements of subsection (a) of this Section 17.02 shall be determined in accordance with the terms of the Plan unless the transferor plan’s vesting schedule is more favorable. Such transferred assets shall be invested by the Trustee in accordance with the provisions of Subsection 17.01(g) as if such assets were transferred from a prior plan. Except as otherwise provided below, no transfer of assets in accordance with this Section 17.02 may cause a loss of an accrued or optional form of benefit protected by Code Section 411(d)(6).

Effective for transfers made on or after January 1, 2002, the terms of the Plan as in effect at the time of the transfer shall apply to the amounts transferred regardless of whether such application would have the effect of eliminating or reducing an optional form of benefit protected by Code Section 411(d)(6) which was previously available with respect to any amount transferred to the Plan pursuant to this Section 17.02, provided that such transfer satisfies the requirements set forth in either (a) or (b):

- (a)(1) The transfer is conditioned upon a voluntary, fully informed election by the Participant to transfer his entire account balance to the Plan. As an alternative to the transfer, the Participant is offered the opportunity to retain the form of benefit previously available to him (or, if the transferor plan is terminated, to receive any optional form of benefit for which the participant is eligible under the transferor plan as required by Code Section 411(d)(6));
- (2) If the defined contribution plan from which the transfer is made is a money purchase pension plan, the Plan is a money purchase plan or, if the defined contribution plan from which the transfer is made includes a qualified cash or deferred arrangement, the Plan includes a cash or deferred arrangement; and

68

(3) The transfer is made either in connection with an asset or stock acquisition, merger or other similar transaction involving a change in employer of the employees of a trade or business (i.e., an acquisition or disposition within the meaning of Section 1.410(b)-2(f)) or in connection with the participant’s change in employment status such that the participant is not entitled to additional allocations under the transferor plan.

(b)(1) The transfer satisfies the requirements of subsection (a)(1) of this Section 17.02;

(2) The transfer occurs at a time when the Participant is eligible, under the terms of the transferor plan, to receive an immediate distribution of his account;

(3) If the transfer occurs on or after January 1, 2002, the transfer occurs at a time when the participant is not eligible to receive an immediate distribution of his entire nonforfeitable account balance in a single sum distribution that would consist entirely of an eligible rollover distribution within the meaning of Code Section 401(a)(31)(C); and

(4) The amount transferred, together with the amount of any contemporaneous Code Section 401(a)(31) direct rollover to the Plan, equals the entire nonforfeitable account of the participant whose account is being transferred.

It is the Employer's obligation to ensure that all assets of the Plan, other than those maintained in a separate trust or fund pursuant to the provisions of Section 20.10, are transferred to the Trustee. The Trustee shall have no liability for and no duty to inquire into the administration of such transferred assets for periods prior to the transfer.

17.03. Acceptance of Assets by Trustee. The Trustee shall not accept assets which are not either in a medium proper for investment under the Plan, as set forth in the Plan and the Service Agreement, or in cash. Such assets shall be accompanied by instructions in writing (or such other medium as may be acceptable to the Trustee) showing separately the respective contributions by the prior employer and by the Participant, and identifying the assets attributable to such contributions. The Trustee shall establish such accounts as may be necessary or appropriate to reflect such contributions under the Plan. The Trustee shall hold such assets for investment in accordance with the provisions of Article 8, and shall in accordance with the written instructions of the Employer make appropriate credits to the Accounts of the Participants for whose benefit assets have been transferred.

17.04. Transfer of Assets from Trust. Effective on or after January 1, 2002, the Employer may direct the Trustee to transfer all or a specified portion of the Trust assets to any other plan or plans maintained by the Employer or the employer or employers of an Inactive Participant or Participants, provided that the Trustee has received evidence satisfactory to it that such other plan meets all applicable requirements of the Code, subject to the following:

(a) The assets so transferred shall be accompanied by instructions in writing (or such other medium as may be acceptable to the Trustee) from the Employer

69

naming the persons for whose benefit such assets have been transferred, showing separately the respective contributions by the Employer and by each Inactive Participant, if any, and identifying the assets attributable to the various contributions. The Trustee shall not transfer assets hereunder until all applicable filing requirements are met. The Trustee shall have no further liabilities with respect to assets so transferred.

(b) A transfer of assets made pursuant to this Section 17.04 may result in the elimination or reduction of an optional form of benefit protected by Code Section 411(d)(6), provided that the transfer satisfies the requirements set forth in either (1) or (2):

(1)(i) The transfer is conditioned upon a voluntary, fully informed election by the Participant to transfer his entire Account to the other defined contribution plan. As an alternative to the transfer, the Participant is offered the opportunity to retain the form of benefit previously available to him (or, if the Plan is terminated, to receive any optional form of benefit for which the Participant is eligible under the Plan as required by Code Section 411(d)(6));

(ii) If the Plan is a money purchase pension plan, the defined contribution plan to which the transfer is made must be a money purchase pension plan and if the Plan includes a qualified cash or deferred arrangement under Code Section 401(k), the defined contribution plan to which the transfer is made must include a qualified cash or deferred arrangement; and

(iii) The transfer is made either in connection with an asset or stock acquisition, merger or other similar transaction involving a change in employer of the employees of a trade or business (i.e., an acquisition or disposition within the meaning of Section 1.410(b)-2(f)) or in connection with the Participant's change in employment status such that the Participant becomes an Inactive Participant.

(2)(i) The transfer satisfies the requirements of subsection (1)(i) of this Section 17.04;

(ii) The transfer occurs at a time when the Participant is eligible, under the terms of the Plan, to receive an immediate distribution of his benefit;

(iii) If the transfer occurs on or after January 1, 2002, the transfer occurs at a time when the Participant is not eligible to receive an immediate distribution of his entire nonforfeitable Account in a single sum distribution that would consist entirely of an eligible rollover distribution within the meaning of Code Section 401(a)(31)(C);

(iv) The Participant is fully vested in the transferred amount in the transferee plan; and

(v) The amount transferred, together with the amount of any contemporaneous Code Section 401(a)(31) direct rollover to the transferee plan, equals the entire nonforfeitable Account of the Participant whose Account is being transferred.

70

Article 18. Miscellaneous.

18.01. Communication to Participants. The Plan shall be communicated to all Eligible Employees by the Employer promptly after the Plan is adopted.

18.02. Limitation of Rights. Neither the establishment of the Plan and the Trust, nor any amendment thereof, nor the creation of any fund or account, nor the payment of any benefits, shall be construed as giving to any Participant or other person any legal or equitable right against the Employer, Administrator or Trustee, except as provided herein; and in no event shall the terms of employment or service of any Participant be modified or in any way affected hereby. It is a condition of the Plan, and each Participant expressly agrees by his participation herein, that each Participant shall look solely to the assets held in the Trust for the payment of any benefit to which he is entitled under the Plan.

18.03. Nonalienability of Benefits. Except as provided in Code Sections 401(a)(13)(C) and (D) (relating to offsets ordered or required under a criminal conviction involving the Plan, a civil judgment in connection with a violation or alleged violation of fiduciary responsibilities under ERISA, or a settlement agreement between the Participant and the Department of Labor in connection with a violation or alleged violation of fiduciary responsibilities under ERISA), Section 1.401(a)-13(b)(2) of the Treasury Regulations (relating to Federal tax levies), or as otherwise required by law, the benefits provided hereunder shall not be subject to alienation, assignment, garnishment, attachment, execution or levy of any kind, either voluntarily or involuntarily, and any attempt to cause such benefits to be so subjected shall not be recognized. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined by the Administrator to be a qualified domestic relations order, as defined in Code Section 414(p), or any domestic relations order entered before January 1, 1985.

18.04. Qualified Domestic Relations Orders Procedures. The Administrator must establish reasonable procedures to determine the qualified status of a domestic relations order. Upon receiving a domestic relations order, the Administrator shall promptly notify the Participant and any alternate payee named in the order, in writing, of the receipt of the order and the Plan's procedures for determining the qualified status of the order. Within a reasonable period of time after receiving the domestic relations order, the Administrator must determine the qualified status of the order and must notify the Participant and each alternate payee, in writing, of its determination. The Administrator shall provide such notice by mailing to the individual's address specified in the domestic relations order, or in a manner consistent with the Department of Labor regulations.

If any portion of the Participant's Account is payable during the period the Administrator is making its determination of the qualified status of the domestic relations order, the Administrator must make a separate accounting of the amounts payable. If the Administrator determines the order is a qualified domestic relations order within 18 months of the date amounts first are payable following receipt of the order, the Administrator shall direct the Trustee to distribute the payable amounts in accordance with the order. If the Administrator does not make his determination of the qualified status of the order within the 18-month determination period, the Administrator shall direct the Trustee to distribute the payable amounts in the manner the Plan would distribute if the order did not

71

exist and shall apply the order prospectively if the Administrator later determines the order is a qualified domestic relations order.

The Trustee shall set up segregated accounts for each alternate payee when properly notified by the Administrator.

A domestic relations order shall not fail to be deemed a qualified domestic relations order merely because it requires the distribution or segregation of all or part of a Participant's Account with respect to an alternate payee prior to the Participant's earliest retirement age (as defined in Code Section 414(p)) under the Plan. A distribution to an alternate payee prior to the Participant's attainment of the earliest retirement age is available only if (a) the order specifies distribution at that time and (b) if the present value of the alternate payee's benefits under the Plan exceeds \$5,000 as determined under Section 13.02 (or such larger amount as may be specified in Code Section 417(e)(1)), and the order requires, and the alternate payee consents to, a distribution occurring prior to the Participant's attainment of earliest retirement age.

18.05. Additional Rules for Paired Plans. If the Employer has adopted both a money purchase pension plan and a profit sharing plan under this Basic Plan Document which are to be considered paired plans, the elections in Section 1.04 of the Adoption Agreement must be identical with respect to both plans. When the paired plans are "top-heavy plans", as defined in Subsection 15.01(f), or are deemed to be "top-heavy plans", the money purchase pension plan shall provide the minimum contribution required under Section 15.03, unless contributions under the money purchase pension plan are frozen.

18.06. Application of Plan Provisions in Multiple Employer Plans. Notwithstanding any other provision of the Plan to the contrary, if one of the Employers designated in Subsection 1.02(b) of the Adoption Agreement is not a Related Employer, the Prototype Sponsor reserves the right to take any or all of the following actions:

- (a) treat the Plan as a multiple employer plan;
- (b) permit the Employer to amend the Plan to exclude the un-Related Employer from participation in the Plan; or
- (c) treat the Employer as having amended the Plan in the manner described in Section 16.02 such that the Employer may no longer participate in this prototype plan arrangement.

For the period, if any, that the Prototype Sponsor elects to treat the Plan as a multiple employer plan, each un-Related Employer shall be treated as a separate Employer for purposes of contributions, application of the "ADP" and "ACP" tests described in Sections 6.03 and 6.06, application of the Code Section 415 limitations described in Section 6.12, top-heavy determinations and application of the top-heavy requirements under Article 15, and application of such other Plan provisions as the Employers determine to be appropriate. For any such period, the Prototype Sponsor shall continue to treat the Employer as participating in this prototype plan arrangement for purposes of Plan administration, notices or other communications in connection with the Plan, and other Plan-related services; provided, however, that if the Employer applies to the Internal Revenue Service for a determination letter, the multiple employer plan shall be filed on the form appropriate for multiple employer plans. The Administrator shall be responsible for administering the Plan as a multiple employer plan.

72

18.07. Veterans Reemployment Rights. Notwithstanding any other provision of the Plan to the contrary, contributions, benefits, and service credit with respect to qualified military service shall be provided in accordance with Code Section 414(u). The Administrator shall notify the Trustee of any Participant with respect to whom additional contributions are made because of qualified military service.

18.08. Facility of Payment. In the event the Administrator determines, on the basis of medical reports or other evidence satisfactory to the Administrator, that the recipient of any benefit payments under the Plan is incapable of handling his affairs by reason of minority, illness, infirmity or other incapacity, the Administrator may direct the Trustee to disburse such payments to a person or institution designated by a court which has jurisdiction over such recipient or a person or institution otherwise having the legal authority under state law for the care and control of such recipient. The receipt by such person or institution of

any such payments shall be complete acquittance therefore, and any such payment to the extent thereof, shall discharge the liability of the Trust for the payment of benefits hereunder to such recipient.

18.09. Information between Employer and Trustee. The Employer agrees to furnish the Trustee, and the Trustee agrees to furnish the Employer, with such information relating to the Plan and Trust as may be required by the other in order to carry out their respective duties hereunder, including without limitation information required under the Code and any regulations issued or forms adopted by the Treasury Department thereunder or under the provisions of ERISA and any regulations issued or forms adopted by the Department of Labor thereunder.

18.10. Effect of Failure to Qualify Under Code. Notwithstanding any other provision contained herein, if the Employer fails to obtain or retain approval of the Plan by the Internal Revenue Service as a qualified Plan under the Code, the Employer may no longer participate in this prototype Plan arrangement and shall be deemed to have an individually designed plan.

18.11. Directions, Notices and Disclosure. Any notice or other communication in connection with this Plan shall be deemed delivered in writing if addressed as provided below and if either actually delivered at said address or, in the case of a letter, three business days shall have elapsed after the same shall have been deposited in the United States mails, first-class postage prepaid and registered or certified:

(a) If to the Employer or Administrator, to it at the address set forth in the Adoption Agreement, and, if to the Employer, to the attention of the contact specified in Subsection 1.02(a) of the Adoption Agreement;

(b) If to the Trustee, to it at the address set forth in Subsection 1.03(a) the Adoption Agreement;

or, in each case at such other address as the addressee shall have specified by written notice delivered in accordance with the foregoing to the addressor's then effective notice address.

Any direction, notice or other communication provided to the Employer, the Administrator or the Trustee by another party which is stipulated to be in written form under the provisions of this Plan may also be provided in any medium

73

which is permitted under applicable law or regulation. Any written communication or disclosure to Participants required under the provisions of this Plan may be provided in any other medium (electronic, telephone or otherwise) that is permitted under applicable law or regulation.

18.12. Governing Law. The Plan and the accompanying Adoption Agreement shall be construed, administered and enforced according to ERISA, and to the extent not preempted thereby, the laws of the Commonwealth of Massachusetts.

Nothing contained in Sections 8.02, 19.01 or 19.05 or this Section 18.13 shall be construed in a manner which subjects a governmental plan (as defined in Code Section 414(d)) or a non-electing church plan (as described in Code Section 410(d)) to the fiduciary provisions of Title I of ERISA.

Article 19. Plan Administration.

19.01. Powers and Responsibilities of the Administrator. The Administrator has the full power and the full responsibility to administer the Plan in all of its details, subject, however, to the requirements of ERISA. In addition to the powers and authorities expressly conferred upon it in the Plan, the Administrator shall have all such powers and authorities as may be necessary to carry out the provisions of the Plan, including the discretionary power and authority to interpret and construe the provisions of the Plan, such interpretation to be final and conclusive on all persons claiming benefits under the Plan; to make benefit determinations; to utilize the correction programs or systems established by the Internal Revenue Service (such as the Employee Plans Compliance and Resolution System) or the Department of Labor; and to resolve any disputes arising under the Plan. The Administrator may, by written instrument, allocate and delegate its fiduciary responsibilities in accordance with ERISA Section 405, including allocation of such responsibilities to an administrative committee formed to administer the Plan.

19.02. Nondiscriminatory Exercise of Authority. Whenever, in the administration of the Plan, any discretionary action by the Administrator is required, the Administrator shall exercise its authority in a nondiscriminatory manner so that all persons similarly situated shall receive substantially the same treatment.

19.03. Claims and Review Procedures. Except to the extent that the provisions of any collective-bargaining agreement provide another method of resolving claims for benefits under the Plan, the provisions of this Section 19.03 shall control with respect to the resolution of such claims; provided, however, that the Employer may institute alternative claims procedures that are more restrictive on the Employer and more generous with respect to persons claiming a benefit under the Plan.

(a) **Claims Procedure.** Whenever a request for benefits under the Plan is wholly or partially denied, the Administrator shall notify the person claiming such benefits of its decision in writing. Such notification shall contain (1) specific reasons for the denial of the claim, (2) specific reference to pertinent Plan provisions, (3) a description of any additional material or information necessary for such person to perfect such claim and an explanation of why such material or information is necessary, and (4) information as to the steps to be taken if the person wishes to submit a request for review. Such notification shall be given within 90 days after the claim is received by the Administrator (or within 180 days, if special circumstances require an extension of time for processing the claim, and if

74

written notice of such extension and circumstances is given to such person within the initial 90-day period). If such notification is not given within such period, the claim shall be considered denied as of the last day of such period and such person may request a review of his claim.

(b) **Review Procedure.** Within 60 days after the date on which a person receives a written notice of a denied claim (or, if applicable, within 60 days after the date on which such denial is considered to have occurred), such person (or his duly authorized representative) may (1) file a written request with the

Administrator for a review of his denied claim and of pertinent documents and (2) submit written issues and comments to the Administrator. The Administrator shall notify such person of its decision in writing. Such notification shall be written in a manner calculated to be understood by such person and shall contain specific reasons for the decision as well as specific references to pertinent Plan provisions. The decision on review shall be made within 60 days after the request for review is received by the Administrator (or within 120 days, if special circumstances require an extension of time for processing the request, such as an election by the Administrator to hold a hearing, and if written notice of such extension and circumstances is given to such person within the initial 60-day period). If the decision on review is not made within such period, the claim shall be considered denied.

19.04. Named Fiduciary. The Administrator is a “named fiduciary” for purposes of ERISA Section 402(a)(1) and has the powers and responsibilities with respect to the management and operation of the Plan described herein.

19.05. Costs of Administration. Unless some or all are paid by the Employer, all reasonable costs and expenses (including legal, accounting, and employee communication fees) incurred by the Administrator and the Trustee in administering the Plan and Trust may be paid from the forfeitures (if any) resulting under Section 11.08, or from the remaining Trust Fund. All such costs and expenses paid from the Trust Fund shall, unless allocable to the Accounts of particular Participants, be charged against the Accounts of all Participants on a pro rata basis or in such other reasonable manner as may be directed by the Employer and accepted by the Trustee.

Article 20. Trust Agreement.

20.01. Acceptance of Trust Responsibilities. By executing the Adoption Agreement, the Employer establishes a trust to hold the assets of the Plan that are invested in Permissible Investments. By executing the Adoption Agreement, the Trustee agrees to accept the rights, duties and responsibilities set forth in this Article. If the Plan is an amendment and restatement of a prior plan, the Trustee shall have no liability for and no duty to inquire into the administration of the assets of the Plan for periods prior to the date such assets are transferred to the Trust.

20.02. Establishment of Trust Fund. A trust is hereby established under the Plan. The Trustee shall open and maintain a trust account for the Plan and, as part thereof, Accounts for such individuals as the Employer shall from time to time notify the Trustee are Participants in the Plan. The Trustee shall accept and hold in the Trust Fund such contributions on behalf of Participants as it may receive from time to time from the Employer. The Trust Fund shall be fully

75

invested and reinvested in accordance with the applicable provisions of the Plan in Fund Shares or as otherwise provided in Section 20.10.

The Trust is intended to qualify as a domestic trust in accordance with Code Section 7701(a)(30)(E) and any regulations issued thereunder. Accordingly, only United States persons (as defined in Code Section 7701(a)(30)) may have the authority to control all substantial decisions regarding the Trust (including decisions to appoint, retain or replace the Trustee), unless the Plan filed a domestic trust election pursuant to Treasury Regulation Section 301.7701-7(f) or any subsequent guidance issued by the Internal Revenue Service, or except as otherwise provided in applicable regulation or legislation.

20.03. Exclusive Benefit. The Trustee shall hold the assets of the Trust Fund for the exclusive purpose of providing benefits to Participants and Beneficiaries and defraying the reasonable expenses of administering the Plan. No assets of the Plan shall revert to the Employer except as specifically permitted by the terms of the Plan.

20.04. Powers of Trustee. The Trustee shall have no discretion or authority with respect to the investment of the Trust Fund but shall act solely as a directed trustee of the funds contributed to it. In addition to and not in limitation of such powers as the Trustee has by law or under any other provisions of the Plan, the Trustee shall have the following powers, each of which the Trustee exercises solely as directed Trustee in accordance with the written direction of the Employer except to the extent a Plan asset is subject to Participant direction of investment and provided that no such power shall be exercised in any manner inconsistent with the provisions of ERISA:

- (a) to deal with all or any part of the Trust Fund and to invest all or a part of the Trust Fund in Permissible Investments, without regard to the law of any state regarding proper investment;
- (b) to transfer to and invest all or any part of the Trust in any collective investment trust which is then maintained by a bank or trust company (or any affiliate) and which is tax-exempt pursuant to Code Section 501(a) and Rev. Rul. 81-100; provided that such collective investment trust is a Permissible Investment; and provided, further, that the instrument establishing such collective investment trust, as amended from time to time, shall govern any investment therein, and is hereby made a part of the Plan and this Trust Agreement to the extent of such investment therein;
- (c) to retain uninvested such cash as it may deem necessary or advisable, without liability for interest thereon, for the administration of the Trust;
- (d) to sell, lease, convert, redeem, exchange, or otherwise dispose of all or any part of the assets constituting the Trust Fund;
- (e) to borrow funds from a bank or other financial institution not affiliated with the Trustee in order to provide sufficient liquidity to process Plan transactions in a timely fashion, provided that the cost of borrowing shall be allocated in a reasonable fashion to the Permissible Investment(s) in need of liquidity;
- (f) to enforce by suit or otherwise, or to waive, its rights on behalf of the Trust, and to defend claims asserted against it or the Trust, provided that the Trustee is indemnified to its satisfaction against liability and expenses;

76

(g) to employ such agents and counsel as may be reasonably necessary in collecting, managing, administering, investing, distributing and protecting the Trust Fund or the assets thereof and to pay them reasonable compensation;

(h) to compromise, adjust and settle any and all claims against or in favor of it or the Trust;

(i) to oppose, or participate in and consent to the reorganization, merger, consolidation, or readjustment of the finances of any enterprise, to pay assessments and expenses in connection therewith, and to deposit securities under deposit agreements;

(j) to apply for or purchase annuity contracts in accordance with Article 14;

(k) to hold securities unregistered, or to register them in its own name or in the name of nominees;

(l) to appoint custodians to hold investments within the jurisdiction of the district courts of the United States and to deposit securities with stock clearing corporations or depositories or similar organizations;

(m) to make, execute, acknowledge and deliver any and all instruments that it deems necessary or appropriate to carry out the powers herein granted;

(n) generally to exercise any of the powers of an owner with respect to all or any part of the Trust Fund; and

(o) to take all such actions as may be necessary under the Trust Agreement, to the extent consistent with applicable law.

The Employer specifically acknowledges and authorizes that affiliates of the Trustee may act as its agent in the performance of ministerial, nonfiduciary duties under the Trust. The expenses and compensation of such agent shall be paid by the Trustee.

The Trustee shall provide the Employer with reasonable notice of any claim filed against the Plan or Trust or with regard to any related matter, or of any claim filed by the Trustee on behalf of the Plan or Trust or with regard to any related matter.

20.05. Accounts. The Trustee shall keep full accounts of all receipts and disbursements and other transactions hereunder. Within 120 days after the close of each Plan Year, within 90 days after termination of the Trust, and at such other times as may be appropriate, the Trustee shall determine the then net fair market value of the Trust Fund as of the close of the Plan Year, as of the termination of the Trust, or as of such other time, whichever is applicable, and shall render to the Employer and Administrator an account of its administration of the Trust during the period since the last such accounting, including all allocations made by it during such period.

20.06. Approval of Accounts. To the extent permitted by law, the written approval of any account by the Employer or Administrator shall be final and binding, as to all matters and transactions stated or shown therein, upon the Employer, Administrator, Participants and all persons who then are or thereafter become interested in the Trust. The failure of the Employer or Administrator to

77

notify the Trustee within six months after the receipt of any account of its objection to the account shall, to the extent permitted by law, be the equivalent of written approval. If the Employer or Administrator files any objections within such six month period with respect to any matters or transactions stated or shown in the account, and the Employer or Administrator and the Trustee cannot amicably settle the question raised by such objections, the Trustee shall have the right to have such questions settled by judicial proceedings. Nothing herein contained shall be construed so as to deprive the Trustee of the right to have judicial settlement of its accounts. In any proceeding for a judicial settlement of any account or for instructions, the only necessary parties shall be the Trustee, the Employer and the Administrator.

20.07. Distribution from Trust Fund. The Trustee shall make such distributions from the Trust Fund as the Employer or Administrator may direct (in writing or such other medium as may be acceptable to the Trustee), consistent with the terms of the Plan and either for the exclusive benefit of Participants or their Beneficiaries, or for the payment of expenses of administering the Plan.

20.08. Transfer of Amounts from Qualified Plan. If amounts are to be transferred to the Plan from another qualified plan or trust under Code Section 401(a), such transfer shall be made in accordance with the provisions of the Plan and with such rules as may be established by the Trustee. The Trustee shall only accept assets which are in a medium proper for investment under this Trust Agreement or in cash, and that are accompanied in a timely manner, as agreed to by the Administrator and the Trustee, by instructions in writing (or such other medium as may be acceptable to the Trustee) showing separately the respective contributions by the prior employer and the transferring Employee, the records relating to such contributions, and identifying the assets attributable to such contributions. The Trustee shall hold such assets for investment in accordance with the provisions of this Trust Agreement.

20.09. Transfer of Assets from Trust. Subject to the provisions of the Plan, the Employer may direct the Trustee to transfer all or a specified portion of the Trust assets to any other plan or plans maintained by the Employer or the employer or employers of an Inactive Participant or Participants, provided that the Trustee has received evidence satisfactory to it that such other plan meets all applicable requirements of the Code. The assets so transferred shall be accompanied by written instructions from the Employer naming the persons for whose benefit such assets have been transferred, showing separately the respective contributions by the Employer and by each Participant, if any, and identifying the assets attributable to the various contributions. The Trustee shall have no further liabilities with respect to assets so transferred.

20.10. Separate Trust or Fund for Existing Plan Assets. With the consent of the Trustee, the Employer may maintain a trust or fund (including a group annuity contract) under this prototype plan document separate from the Trust Fund for Plan assets purchased prior to the adoption of this prototype plan document which are not Permissible Investments listed in the Service Agreement. The Trustee shall have no authority and no responsibility for the Plan assets held in such separate trust or fund. The Employer shall be responsible for assuring that such separate trust or fund is maintained pursuant to a separate trust agreement signed by the Employer and the trustee. The duties and responsibilities of the trustee of a separate trust shall be provided by the separate trust agreement, between the Employer and the trustee.

78

Notwithstanding the preceding paragraph, the Trustee or an affiliate of the Trustee may agree in writing to provide ministerial recordkeeping services for guaranteed investment contracts held in the separate trust or fund. The guaranteed investment contract(s) shall be valued as directed by the Employer or the trustee of the separate trust.

The trustee of the separate trust (hereafter referred to as "trustee") shall be the owner of any insurance contract purchased prior to the adoption of this prototype plan document. The insurance contract(s) must provide that proceeds shall be payable to the trustee; provided, however, that the trustee shall be required to pay over all proceeds of the contract(s) to the Participant's designated Beneficiary in accordance with the distribution provisions of this Plan. A Participant's spouse shall be the designated Beneficiary of the proceeds in all circumstances unless a qualified election has been made in accordance with Article 14. Under no circumstances shall the trust retain any part of the proceeds. In the event of any conflict between the terms of the Plan and the terms of any insurance contract purchased hereunder, the Plan provisions shall control.

Any life insurance contracts held in the Trust Fund or in the separate trust are subject to the following limits:

- (a) Ordinary life - For purposes of these incidental insurance provisions, ordinary life insurance contracts are contracts with both nondecreasing death benefits and nonincreasing premiums. If such contracts are held, less than 1/2 of the aggregate employer contributions allocated to any Participant shall be used to pay the premiums attributable to them.
- (b) Term and universal life - No more than 1/4 of the aggregate employer contributions allocated to any participant shall be used to pay the premiums on term life insurance contracts, universal life insurance contracts, and all other life insurance contracts which are not ordinary life.
- (c) Combination - The sum of 1/2 of the ordinary life insurance premiums and all other life insurance premiums shall not exceed 1/4 of the aggregate employer contributions allocated to any Participant.

20.11. Self-Directed Brokerage Option. If one of the Permissible Investments under the Plan is the self-directed brokerage option, the Employer hereby directs the Trustee to use Fidelity Brokerage Services LLC, Member NYSE, SIPC or any of the Trustee's affiliates or subsidiaries (collectively, "FBS"), an affiliate of the Trustee, to purchase or sell individual securities for Participant Accounts in accordance with investment directions provided by such Participants. The provision of brokerage services by FBS shall be subject to the following:

- (a) The Trustee shall provide the Employer with an annual report which summarizes brokerage transactions and transaction-related charges incurred by the Plan.
- (b) Any successor organization of FBS, through reorganization, consolidation, merger, or otherwise, shall, upon consummation of such transaction, become the successor broker in accordance with the terms of this direction provision.

79

(c) The Trustee and FBS shall continue to rely on this direction provision until notified to the contrary. The Employer reserves the right to terminate this direction upon sixty (60) days written notice to FBS (or its successor) and the Trustee, and such termination shall also have the effect of terminating the self-directed brokerage option for the Plan.

(d) The Trustee shall provide the Employer with a list of the types of securities that may not be purchased or held under this self-directed brokerage option. The Trustee shall provide the Employer with administrative procedures and fees governing investment in and withdrawals or exchanges from the self-directed brokerage option. The Trustee shall have no liability in the event a Participant purchases a restricted security.

(e) Participants may authorize the use of an agent to have limited trading authority over assets in their Accounts invested under the self-directed brokerage option provided that the Participant completes and files with FBS a limited trading authorization and indemnification form in the form prescribed by FBS.

(f) FBS shall provide all proxies and other shareholder materials to each Participant with such securities allocated to his or her Account under the self-directed brokerage option. The Participant shall have the authority to direct the exercise of all shareholder rights attributable to the securities allocated to his or her Account and it is intended that all such Participant directions shall be subject to ERISA Section 404(c). The Trustee shall not exercise any such shareholder rights in the absence of a direction from the Participant.

(g) Self-directed brokerage accounts held under the Plan are subject to fees as more fully described in the related self-directed brokerage documents provided to the Employer. If there are insufficient funds to cover the self-directed brokerage account trades and expenses, a liquidation may be made to cover the debit balance and, in doing so, the Trustee shall not be deemed to have exercised any discretion.

20.12. Employer Stock Investment Option. If one of the Permissible Investments is equity securities issued by the Employer or a Related Employer ("Employer Stock"), such Employer Stock must be publicly traded and "qualifying employer securities" within the meaning of Section 407(d)(5) of ERISA. Plan investments in Employer Stock shall be made via the Employer Stock Investment Fund (the "Stock Fund") which shall consist of either (i) the shares of Employer Stock held for each Participant who participates in the Stock Fund (a "Share Accounting Stock Fund"), or (ii) a combination of shares of Employer Stock and short-term liquid investments, consisting of mutual fund shares or commingled money market pool units as agreed to by the Employer and the Trustee, which are necessary to satisfy the Stock Fund's cash needs for transfers and payments (a "Unitized Stock Fund"). Dividends received by the Stock Fund are reinvested in additional shares of Employer Stock or, in the case of a Unitized Stock Fund, in short-term liquid investments. The determination of whether each Participant's interest in the Stock Fund is administered on a share-accounting or a unitized basis shall be determined by the Employer's election in the Service Agreement.

In the case of a Unitized Stock Fund, such units shall represent a proportionate interest in all assets of the Unitized Stock Fund, which includes shares of Employer Stock, short-term investments, and at times, receivables for dividends and/or Employer Stock sold and payables for Employer Stock purchased. A net asset value per unit shall be determined daily for each cash unit outstanding of the

80

Unitized Stock Fund. The return earned by the Unitized Stock Fund shall represent a combination of the dividends paid on the shares of Employer Stock held by the Unitized Stock Fund, gains or losses realized on sales of Employer Stock, appreciation or depreciation in the market price of those shares owned, and interest on the short-term investments held by the Unitized Stock Fund. A target range for the short-term liquid investments shall be maintained for the

Unitized Stock Fund. The Named Fiduciary shall, after consultation with the Trustee, establish and communicate to the Trustee in writing such target range and a drift allowance for such short-term liquid investments. Such target range and drift allowance may be changed by the Named Fiduciary, after consultation with the Trustee, provided any such change is communicated to the Trustee in writing. The Trustee is responsible for ensuring that the actual short-term liquid investments held in the Unitized Stock Fund fall within the agreed upon target range over time, subject to the Trustee's ability to execute open-market trades in Employer Stock or to otherwise trade with the Employer.

Investments in Employer Stock shall be subject to the following limitations:

(a) Acquisition Limit. Pursuant to the Plan, the Trust may be invested in Employer Stock to the extent necessary to comply with investment directions under Section 8.02 of the Plan. Notwithstanding the foregoing, effective for Deferral Contributions made for Plan Years beginning on or after January 1, 1999, the portion of a Participant's Deferral Contributions that the Employer may require to be invested in Employer Stock for a Plan Year cannot exceed one percent of such Participant's Compensation for the Plan Year.

(b) Fiduciary Duty of Named Fiduciary. The Administrator or any person designated by the Administrator as a named fiduciary under Section 19.01 (the "named fiduciary") shall continuously monitor the suitability under the fiduciary duty rules of ERISA Section 404(a)(1) (as modified by ERISA Section 404(a)(2)) of acquiring and holding Employer Stock. The Trustee shall not be liable for any loss, or by reason of any breach, which arises from the directions of the named fiduciary with respect to the acquisition and holding of Employer Stock, unless it is clear on their face that the actions to be taken under those directions would be prohibited by the foregoing fiduciary duty rules or would be contrary to the terms of the Plan or this Trust Agreement.

(c) Execution of Purchases and Sales. Purchases and sales of Employer Stock shall be made on the open market on the date on which the Trustee receives in good order all information and documentation necessary to accurately effect such purchases and sales or (i) if later, in the case of purchases, the date on which the Trustee has received a transfer of the funds necessary to make such purchases, (ii) as otherwise provided in the Service Agreement, or (iii) as provided in Subsection (d) below. Such general rules shall not apply in the following circumstances:

- (1) If the Trustee is unable to determine the number of shares required to be purchased or sold on such day;
- (2) If the Trustee is unable to purchase or sell the total number of shares required to be purchased or sold on such day as a result of market conditions; or
- (3) If the Trustee is prohibited by the Securities and Exchange Commission, the New York Stock Exchange, or any other regulatory body

81

from purchasing or selling any or all of the shares required to be purchased or sold on such day.

In the event of the occurrence of the circumstances described in (1), (2), or (3) above, the Trustee shall purchase or sell such shares as soon as possible thereafter and, in the case of a Share Accounting Stock Fund, shall determine the price of such purchases or sales to be the average purchase or sales price of all such shares purchased or sold, respectively.

(d) Purchases and Sales from or to Employer. If directed by the Employer in writing prior to the trading date, the Trustee may purchase or sell Employer Stock from or to the Employer if the purchase or sale is for adequate consideration (within the meaning of ERISA Section 3(18)) and no commission is charged. If Employer contributions or contributions made by the Employer on behalf of the Participants under the Plan are to be invested in Employer Stock, the Employer may transfer Employer Stock in lieu of cash to the Trust. In such case, the shares of Employer Stock to be transferred to the Trust will be valued at a price that constitutes adequate consideration (within the meaning of ERISA Section 3(18)).

(e) Use of Broker to Purchase Employer Stock. The Employer hereby directs the Trustee to use Fidelity Capital Markets, Inc., an affiliate of the Trustee, or any other affiliate or subsidiary of the Trustee (collectively, "Capital Markets"), to provide brokerage services in connection with all market purchases and sales of Employer Stock for the Stock Fund, except in circumstances where the Trustee has determined, in accordance with its standard trading guidelines or pursuant to Employer direction, to seek expedited settlement of trades. The Trustee shall provide the Employer with the commission schedule for such transactions, a copy of Capital Markets' brokerage placement practices, and an annual report which summarizes all securities transaction-related charges incurred by the Plan. The following shall apply as well:

- (1) Any successor organization of Capital Markets through reorganization, consolidation, merger, or similar transactions, shall, upon consummation of such transaction, become the successor broker in accordance with the terms of this provision.
- (2) The Trustee shall continue to rely on this Employer direction until notified to the contrary. The Employer reserves the right to terminate this authorization upon sixty (60) days written notice to Capital Markets (or its successor) and the Trustee and the Employer and the Trustee shall decide on a mutually-agreeable alternative procedure for handling brokerage transactions on behalf of the Stock Fund.

(f) Securities Law Reports. The named fiduciary shall be responsible for filing all reports required under Federal or state securities laws with respect to the Trust's ownership of Employer Stock; including, without limitation, any reports required under Section 13 or 16 of the Securities Exchange Act of 1934 and shall immediately notify the Trustee in writing of any requirement to stop purchases or sales of Employer Stock pending the filing of any report. The Trustee shall provide to the named fiduciary such information on the Trust's ownership of Employer Stock as the named fiduciary may reasonably request in order to comply with Federal or state securities laws.

82

(g) Voting and Tender Offers. Notwithstanding any other provision of the Trust Agreement the provisions of this Subsection shall govern the voting and tendering of Employer Stock. For purposes of this Subsection, each Participant shall be designated as a named fiduciary under ERISA with respect to shares of Employer Stock that reflect that portion, if any, of the Participant's interest in the Stock Fund not acquired at the direction of the Participant in accordance with ERISA Section 404(c).

The Employer, after consultation with the Trustee, shall provide and pay for all printing, mailing, tabulation and other costs associated with the voting and tendering of Employer Stock, except as required by law. The Trustee, after consultation with the Employer, shall prepare the necessary documents associated with the voting and tendering of Employer Stock, unless the Employer directs the Trustee not to do so.

(1) Voting.

(A) When the issuer of the Employer Stock prepares for any annual or special meeting, the Employer shall notify the Trustee thirty (30) days in advance of the intended record date and shall cause a copy of all proxy solicitation materials to be sent to the Trustee. If requested by the Trustee, the Employer shall certify to the Trustee that the aforementioned materials represent the same information that is distributed to shareholders of Employer Stock. Based on these materials the Trustee shall prepare a voting instruction form. At the time of mailing of notice of each annual or special stockholders' meeting of the issuer of the Employer Stock, the Employer shall cause a copy of the notice and all proxy solicitation materials to be sent to each Participant with an interest in Employer Stock held in the Trust, together with the foregoing voting instruction form to be returned to the Trustee or its designee. The form shall show the proportional interest in the number of full and fractional shares of Employer Stock credited to the Participant's Sub-Accounts held in the Stock Fund. The Employer shall provide the Trustee with a copy of any materials provided to the Participants and shall (if the mailing is not handled by the Trustee) notify the Trustee that the materials have been mailed or otherwise sent to Participants.

(B) Each Participant with an interest in the Stock Fund shall have the right to direct the Trustee as to the manner in which the Trustee is to vote (including not to vote) that number of shares of Employer Stock that is credited to his Account, if the Plan uses share accounting, or, if accounting is by units of participation, that reflects such Participant's proportional interest in the Stock Fund (both vested and unvested). Directions from a Participant to the Trustee concerning the voting of Employer Stock shall be communicated in writing, or by such other means mutually acceptable to the Trustee and the Employer. These directions shall be held in confidence by the Trustee and shall not be divulged to the Employer, or any officer or employee thereof, or any other person, except to the extent that the consequences of such directions are reflected in reports regularly communicated to any such persons in the ordinary course of the performance of the Trustee's services hereunder. Upon its receipt of the directions, the Trustee shall vote the shares of Employer Stock that reflect the Participant's interest in the Stock Fund as directed by the Participant. The Trustee shall not vote

83

shares of Employer Stock that reflect a Participant's interest in the Stock Fund for which the Trustee has received no direction from the Participant, except as required by law.

(2) Tender Offers.

(A) Upon commencement of a tender offer for any securities held in the Trust that are Employer Stock, the Employer shall timely notify the Trustee in advance of the intended tender date and shall cause a copy of all materials to be sent to the Trustee. The Employer shall certify to the Trustee that the aforementioned materials represent the same information distributed to shareholders of Employer Stock. Based on these materials, and after consultation with the Employer, the Trustee shall prepare a tender instruction form and shall provide a copy of all tender materials to be sent to each Participant with an interest in the Stock Fund, together with the foregoing tender instruction form, to be returned to the Trustee or its designee. The tender instruction form shall show the number of full and fractional shares of Employer Stock credited to the Participant's Account, if the Plan uses share accounting, or, if accounting is by units of participation, that reflect the Participant's proportional interest in the Stock Fund (both vested and unvested). The Employer shall notify each Participant with an interest in such Employer Stock of the tender offer and utilize its best efforts to timely distribute or cause to be distributed to the Participant the tender materials and the tender instruction form described herein. The Employer shall provide the Trustee with a copy of any materials provided to the Participants and shall (if the mailing is not handled by the Trustee) notify the Trustee that the materials have been mailed or otherwise sent to Participants.

(B) Each Participant with an interest in the Stock Fund shall have the right to direct the Trustee to tender or not to tender some or all of the shares of Employer Stock that are credited to his Account, if the Plan uses share accounting, or, if accounting is by units of participation, that reflect such Participant's proportional interest in the Stock Fund (both vested and unvested). Directions from a Participant to the Trustee concerning the tender of Employer Stock shall be communicated in writing, or by such other means as is agreed upon by the Trustee and the Employer under the preceding paragraph. These directions shall be held in confidence by the Trustee and shall not be divulged to the Employer, or any officer or employee thereof, or any other person, except to the extent that the consequences of such directions are reflected in reports regularly communicated to any such persons in the ordinary course of the performance of the Trustee's services hereunder. The Trustee shall tender or not tender shares of Employer Stock as directed by the Participant. Except as otherwise required by law, the Trustee shall not tender shares of Employer Stock that are credited to a Participant's Account, if the Plan uses share accounting, or, if accounting is by units of participation, that reflect a Participant's proportional interest in the Stock Fund for which the Trustee has received no direction from the Participant.

(C) A Participant who has directed the Trustee to tender some or all of the shares of Employer Stock that reflect the Participant's

84

proportional interest in the Stock Fund may, at any time prior to the tender offer withdrawal date, direct the Trustee to withdraw some or all of such tendered shares, and the Trustee shall withdraw the directed number of shares from the tender offer prior to the tender offer withdrawal deadline. A Participant shall not be limited as to the number of directions to tender or withdraw that the Participant may give to the Trustee.

(D) A direction by a Participant to the Trustee to tender shares of Employer Stock that reflect the Participant's proportional interest in the Stock Fund shall not be considered a written election under the Plan by the Participant to withdraw, or have distributed, any or all of his withdrawable shares. If the Plan uses share accounting, the Trustee shall credit to the Participant's Account the proceeds received by the

Trustee in exchange for the shares of Employer Stock tendered from the Participant's Account. If accounting is by units of participation, the Trustee shall credit to each proportional interest of the Participant from which the tendered shares were taken the proceeds received by the Trustee in exchange for the shares of Employer Stock tendered from that interest. Pending receipt of direction (through the Administrator) from the Participant or the named fiduciary, as provided in the Plan, as to which of the remaining Permissible Investments the proceeds should be invested in, the Trustee shall invest the proceeds in the Permissible Investment specified for such purposes in the Service Agreement or, if no such Permissible Investment has been specified, the most conservative Permissible Investment designated by the Employer in the Service Agreement.

(h) **Shares Credited.** If accounting with respect to the Stock Fund is by units of participation, then for all purposes of this Section 20.12, the number of shares of Employer Stock deemed "reflected" in a Participant's proportional interest shall be determined as of the last preceding valuation date. The trade date is the date the transaction is valued.

(i) **General.** With respect to all rights other than the right to vote, the right to tender, and the right to withdraw shares previously tendered, in the case of Employer Stock credited to a Participant's Account or proportional interest in the Stock Fund, the Trustee shall follow the directions of the Participant and if no such directions are received, the directions of the named fiduciary. The Trustee shall have no duty to solicit directions from Participants.

(j) **Conversion.** All provisions in this Section 20.12 shall also apply to any securities received as a result of a conversion to Employer Stock.

20.13. Voting; Delivery of Information. The Trustee shall deliver, or cause to be executed and delivered, to the Employer or Administrator all notices, prospectuses, financial statements, proxies and proxy soliciting materials received by the Trustee relating to securities held by the Trust or, if applicable, deliver these materials to the appropriate Participant or the Beneficiary of a deceased Participant. The Trustee shall not vote any securities held by the Trust except in accordance with the instructions of the Employer, Participant, or the Beneficiary of the Participant if the Participant is deceased; provided, however, that the Trustee may, in the absence of instructions, vote "present" for the sole purpose of allowing such shares to be counted for establishment of a quorum at a shareholders' meeting. The Trustee

85

shall have no duty to solicit instructions from Participants, Beneficiaries, or the Employer.

20.14. Compensation and Expenses of Trustee. The Trustee's fee for performing its duties hereunder shall be such reasonable amounts as the Trustee may from time to time specify in the Service Agreement or any other written agreement with the Employer. Such fee, any taxes of any kind which may be levied or assessed upon or with respect to the Trust Fund, and any and all expenses, including without limitation legal fees and expenses of administrative and judicial proceedings, reasonably incurred by the Trustee in connection with its duties and responsibilities hereunder shall, unless some or all have been paid by said Employer, be paid either from forfeitures resulting under Section 11.08, or from the remaining Trust Fund and shall, unless allocable to the Accounts of particular Participants, be charged against the respective Accounts of all Participants, in such reasonable manner as the Trustee may determine.

20.15. Reliance by Trustee on Other Persons. The Trustee may rely upon and act upon any writing from any person authorized by the Employer or the Administrator pursuant to the Service Agreement or any other written direction to give instructions concerning the Plan and may conclusively rely upon and be protected in acting upon any written order from the Employer or the Administrator or upon any other notice, request, consent, certificate, or other instructions or paper reasonably believed by it to have been executed by a duly authorized person, so long as it acts in good faith in taking or omitting to take any such action. The Trustee need not inquire as to the basis in fact of any statement in writing received from the Employer or the Administrator.

The Trustee shall be entitled to rely on the latest certificate it has received from the Employer or the Administrator as to any person or persons authorized to act for the Employer or the Administrator hereunder and to sign on behalf of the Employer or the Administrator any directions or instructions, until it receives from the Employer or the Administrator written notice that such authority has been revoked.

Notwithstanding any provision contained herein, the Trustee shall be under no duty to take any action with respect to any Participant's Account (other than as specified herein) unless and until the Employer or the Administrator furnishes the Trustee with written instructions on a form acceptable to the Trustee, and the Trustee agrees thereto in writing. The Trustee shall not be liable for any action taken pursuant to the Employer's or the Administrator's written instructions (nor for the collection of contributions under the Plan, nor the purpose or propriety of any distribution made thereunder).

20.16. Indemnification by Employer. The Employer shall indemnify and save harmless the Trustee, and all affiliates, employees, agents and sub-contractors of the Trustee, from and against any and all liability or expense (including reasonable attorneys' fees) to which the Trustee, or such other individuals or entities, may be subjected by reason of any act or conduct being taken in the performance of any Plan-related duties, including those described in this Trust Agreement and the Service Agreement, unless such liability or expense results from the Trustee's, or such other individuals' or entities', negligence or willful misconduct.

20.17. Consultation by Trustee with Counsel. The Trustee may consult with legal counsel (who may be but need not be counsel for the Employer or the Administrator) concerning any question which may arise with respect to its rights

86

and duties under the Plan and Trust, and the opinion of such counsel shall, to the extent permitted by law, be full and complete protection in respect of any action taken or omitted by the Trustee hereunder in good faith and in accordance with the opinion of such counsel.

20.18. Persons Dealing with the Trustee. No person dealing with the Trustee shall be bound to see to the application of any money or property paid or delivered to the Trustee or to inquire into the validity or propriety of any transactions.

20.19. Resignation or Removal of Trustee. The Trustee may resign at any time by written notice to the Employer, which resignation shall be effective 60 days after delivery to the Employer. The Trustee may be removed by the Employer by written notice to the Trustee, which removal shall be effective 60 days after delivery to the Trustee or such shorter period as may be mutually agreed upon by the Employer and the Trustee.

Except in the case of Plan termination, upon resignation or removal of the Trustee, the Employer shall appoint a successor trustee. Any such successor trustee shall, upon written acceptance of his appointment, become vested with the estate, rights, powers, discretion, duties and obligations of the Trustee hereunder as if he had been originally named as Trustee in this Agreement.

Upon resignation or removal of the Trustee, the Employer shall no longer participate in this prototype plan and shall be deemed to have adopted an individually designed plan. In such event, the Employer shall appoint a successor trustee within said 60-day period and the Trustee shall transfer the assets of the Trust to the successor trustee upon receipt of sufficient evidence (such as a determination letter or opinion letter from the Internal Revenue Service or an opinion of counsel satisfactory to the Trustee) that such trust shall be a qualified trust under the Code.

The appointment of a successor trustee shall be accomplished by delivery to the Trustee of written notice that the Employer has appointed such successor trustee, and written acceptance of such appointment by the successor trustee. The Trustee may, upon transfer and delivery of the Trust Fund to a successor trustee, reserve such reasonable amount as it shall deem necessary to provide for its fees, compensation, costs and expenses, or for the payment of any other liabilities chargeable against the Trust Fund for which it may be liable. The Trustee shall not be liable for the acts or omissions of any successor trustee.

20.20. Fiscal Year of the Trust. The fiscal year of the Trust shall coincide with the Plan Year.

20.21. Discharge of Duties by Fiduciaries. The Trustee and the Employer and any other fiduciary shall discharge their duties under the Plan and this Trust Agreement solely in the interests of Participants and their Beneficiaries in accordance with the requirements of ERISA.

20.22. Amendment. In accordance with provisions of the Plan, and subject to the limitations set forth therein, this Trust Agreement may be amended by an instrument in writing signed by the Employer and the Trustee. No amendment to this Trust Agreement shall divert any part of the Trust Fund to any purpose other than as provided in Section 20.03.

87

20.23. Plan Termination. Upon termination or partial termination of the Plan or complete discontinuance of contributions thereunder, the Trustee shall make distributions to the Participants or other persons entitled to distributions as the Employer or Administrator directs in accordance with the provisions of the Plan. In the absence of such instructions and unless the Plan otherwise provides, the Trustee shall notify the Employer or Administrator of such situation and the Trustee shall be under no duty to make any distributions under the Plan until it receives written instructions from the Employer or Administrator. Upon the completion of such distributions, the Trust shall terminate, the Trustee shall be relieved from all liability under the Trust, and no Participant or other person shall have any claims thereunder, except as required by applicable law.

20.24. Permitted Reversion of Funds to Employer. If it is determined by the Internal Revenue Service that the Plan does not initially qualify under Code Section 401, all assets then held under the Plan shall be returned by the Trustee, as directed by the Administrator, to the Employer, but only if the application for determination is made by the time prescribed by law for filing the Employer's return for the taxable year in which the Plan was adopted or such later date as may be prescribed by regulations. Such distribution shall be made within one year after the date the initial qualification is denied. Upon such distribution the Plan shall be considered to be rescinded and to be of no force or effect.

Contributions under the Plan are conditioned upon their deductibility under Code Section 404. In the event the deduction of a contribution made by the Employer is disallowed under Code Section 404, such contribution (to the extent disallowed) must be returned to the Employer within one year of the disallowance of the deduction.

Any contribution made by the Employer because of a mistake of fact must be returned to the Employer within one year of the contribution.

20.25. Governing Law. This Trust Agreement shall be construed, administered and enforced according to ERISA and, to the extent not preempted thereby, the laws of the Commonwealth of Massachusetts.

Nothing contained in Sections 20.04, 20.13 or 20.21 or this Section 20.25 shall be construed in a manner which subjects a governmental plan (as defined in Code Section 414(d)) or a non-electing church plan (as described in Code Section 410(d)) to the fiduciary provisions of Title I of ERISA.

88

ADDENDUM

IRS Model Amendment for Proposed Regulations Under Section 401(a)(9) of the Internal Revenue Code

Distributions for Calendar Years Beginning on or After 2002. With respect to distributions under the Plan for calendar years beginning on or after January 1, 2002, the Plan will apply the minimum distribution requirements of section 401(a)(9) of the Internal Revenue Code in accordance with the regulations under section 401(a)(9) that were proposed on January 17, 2001, notwithstanding any provision of the Plan to the contrary. This amendment shall continue in effect until the end of the last calendar year beginning before the effective date of final regulations under section 401(a)(9) or such other date as may be specified in guidance published by the Internal Revenue Service.

1

PREAMBLE

Adoption and Effective Date of Amendment. This amendment of the Plan is adopted to reflect certain provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”). This amendment is intended as good faith compliance with the requirements of EGTRRA and is to be construed in accordance with EGTRRA and guidance issued thereunder. Except as otherwise provided below, this amendment shall be effective as of the first day of the first plan year beginning after December 31, 2001.

Supersession of Inconsistent Provisions. This amendment shall supersede the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this amendment.

1. Section 2.01(j), “Compensation,” is hereby amended by adding the following paragraph to the end thereof:

Notwithstanding anything herein to the contrary, the annual Compensation of each Participant taken into account in determining allocations for any Plan Year beginning after December 31, 2001, shall not exceed \$200,000, as adjusted for cost-of-living increases in accordance with Code Section 401(a)(17)(B). Annual Compensation means Compensation during the Plan Year or such other consecutive 12-month period over which Compensation is otherwise determined under the Plan (the determination period). The cost-of-living adjustment in effect for a calendar year applies to annual Compensation for the determination period that begins with or within such calendar year.

2. Section 2.01(l), “Deferral Contribution,” is hereby amended by replacing the period with a semicolon and adding the following to the end thereof:

provided, however, that the term ‘Deferral Contribution’ shall exclude all catch-up contributions as described in Section 5.03(b)(1) for purposes of Matching Employer Contributions as described in Section 1.10 of the Adoption Agreement, unless otherwise elected by the Employer in Section (c) of the EGTRRA Amendments Addendum to the Adoption Agreement.

3. Section 2.01(tt) “Rollover Contribution” is hereby amended as follows:

‘Rollover Contribution’ means any distribution from an eligible retirement plan as defined in Section 5.06 that an Employee elects to contribute to the Plan in accordance with the terms of such Section 5.06.

4. The existing text of Section 5.03 is hereby redesignated as Section 5.03(a), and a new Section 5.03(b) is hereby added to read as follows

(b) **Catch-up Contributions.**

- (1) If elected by the Employer in Section (a) of the EGTRRA Amendments Addendum to the Adoption Agreement, all Participants who are eligible to make Deferral Contributions under the Plan and who are projected to attain age 50 before the close of the calendar year shall be eligible to make catch-up contributions in accordance with, and subject to the limitations of, Code Section 414(v). Such catchup contributions shall not be taken into account for purposes of the provisions of the Plan implementing the required limitations of Code Sections 402(g) and 415. The Plan shall not be treated

1

as failing to satisfy the provisions of the Plan implementing the requirements of Code Section 401(k)(3), 401(k)(11), 401(k)(12), 410(b), or 416, as applicable, by reason of the making of such catch-up contributions.

- (2) Unless otherwise elected by the Employer in Section (b) of the EGTRRA Amendments Addendum to the Adoption Agreement, if the Plan permits catch-up contributions, as described in paragraph (1) above on April 1, 2002, then, notwithstanding anything herein to the contrary, effective April 1, 2002, the limit on Deferral Contributions, as otherwise provided in Section 1.07(a)(1) (the “Plan Limit”) shall be 60% of Compensation for the payroll period in question, provided, however, that this Section 5.03(b)(2) shall be inapplicable if the Plan’s Section 1.01(g)(2)(B) Amendment Effective Date is after April 1, 2002.
- (3) In the event that the Plan Limit is changed during the Plan Year, for purposes of determining catchup contributions for the Plan Year, as described in paragraph (1) above, the Plan Limit shall be determined pursuant to the time-weighted average method described in Proposed Income Tax Regulation Section 1.414(v)-1(b)(2)(i).

5. Section 5.06 is hereby amended to add the following paragraph to the end thereof:

Unless otherwise elected by the Employer in Section (e) of the EGTRRA Amendments Addendum to the Adoption Agreement, the Plan will accept Participant Rollover Contributions and/or direct rollovers of distributions made after December 31, 2001 (including Rollover Contributions received by the Participant as a surviving spouse, or a spouse or former spouse who is an alternate payee under a qualified domestic relations order), from the following types of plans:

- (a) a qualified plan described in Code Section 401(a) or 403(a), including after-tax employee contributions (provided, however, that any such after-tax employee contributions must be contributed in a direct rollover);
- (b) an annuity contract described in Code Section 403(b), excluding after-tax employee contributions;
- (c) an eligible plan under Code Section 457(b) that is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state; and
- (d) Participant Rollover Contributions of the portion of a distribution from an individual retirement account or annuity described in Code Section 408(a) or 408(b) that is eligible to be rolled over and would otherwise be includible in gross income, provided, however, that the Plan will in no event accept a rollover contribution consisting of nondeductible individual retirement account or annuity contributions.

6. The first paragraph of Section 6.02 is hereby amended by replacing the first sentence thereof with the following:

In no event shall the amount of Deferral Contributions made under the Plan for a calendar year, when aggregated with the 'elective deferrals' made under any other plan maintained by the Employer or a Related Employer, exceed the dollar limitation contained in Code Section 402(g) in effect at the beginning of such calendar year, except to the extent permitted under Section 5.03(b)(1) and Code Section 414(v), if applicable.

7. Section 6.08 is hereby amended by adding the following sentence to the end thereof:

Notwithstanding anything herein to the contrary, the multiple use test described in Treasury Regulation Section 1.401(m)-2 and this Section 6.08 shall not apply for Plan Years beginning after December 31, 2001.

8. Section 6.12 is hereby amended by adding a new subsection 6.12(e) thereto as follows:

- (e) Maximum Annual Additions for Limitation Years Beginning After December 31, 2001.
Notwithstanding anything herein to the contrary, this subsection (e) shall be effective for Limitation

2

Years beginning after December 31, 2001. Except to the extent permitted under Section 5.03(b)(1) and Code Section 414(v), if applicable, the 'annual additions' that may be contributed or allocated to a Participant's Account under the Plan for any Limitation Year shall not exceed the lesser of:

- (1) \$40,000, as adjusted for increases in the cost-of-living under Code Section 415(d), or
- (2) 100 percent of the Participant's compensation, within the meaning of Code Section 415(c)(3), for the Limitation Year.

The compensation limit referred to in (2) shall not apply to any contribution for medical benefits after separation from service (within the meaning of Code Section 401(h) or 419A(f)(2)) that is otherwise treated as an 'annual addition'.

9. Section 9.04 is hereby amended by replacing the final period in the first paragraph with a semi-colon and adding the following to the end thereof:

provided, however, that notwithstanding anything herein to the contrary, effective for Plan loans made after December 31, 2001, Plan provisions prohibiting loans to any 'owner-employee' or 'shareholder-employee' shall cease to apply.

10. Section 10.05(b)(2) is hereby amended by replacing the semicolon with a period and adding the following to the end thereof:

Notwithstanding anything herein to the contrary, the rule in this Section 10.05(b)(2) shall be applied to a Participant who receives a distribution after December 31, 2001, on account of hardship, by substituting the phrase 'the 6-month period' for the phrase 'the 12-month period'.

11. Section 10.05(b)(4) is hereby amended by adding the following phrase to the beginning thereof:

Effective for calendar years beginning before January 1, 2002, for a Participant who received a hardship distribution before January 1, 2001,

12. The existing text of Section 11.05 is hereby redesignated as Section 11.05(a), and a new Section 11.05(b) is hereby added to read as follows:

- (b) Vesting of Matching Employer Contributions.** Notwithstanding anything herein to the contrary, the vesting schedule elected by the Employer in Section (d)(1) of the EGTRRA Amendments Addendum to the Adoption Agreement shall apply to all accrued benefits derived from Matching Employer Contributions for Participants who complete an Hour of Service in a Plan Year beginning after December 31, 2001, except as otherwise elected by the Employer in Section (d)(2) or Section (d)(3) of the EGTRRA Amendments Addendum to the Adoption Agreement. With respect to Participants covered by a collective bargaining agreement, the vesting schedule elected in Section (d)(1) of the EGTRRA Amendments Addendum to the Adoption Agreement shall take effect on a later date if so elected in Section (d)(2). If so elected in Section (d)(3) of the EGTRRA Amendments Addendum to the Adoption Agreement, the vesting schedule elected in Section (d)(1) shall apply only to the accrued benefits derived from Matching Employer Contributions made with respect to Plan Years beginning after December 31, 2001 (or such later date as may be provided in Section (d)(2) for Participants covered by a collective bargaining agreement).

13. The existing text of Section 12.01 is hereby redesignated as Section 12.01(a), current subsections (a), (b), and (c) thereof are redesignated as paragraphs (1), (2), and (3), respectively, and the first sentence thereof is replaced with the following:

Subject to the application of Section 12.01(b), a Participant or his Beneficiary may not receive a distribution from his Deferral Contributions, Qualified Nonelective Employer Contributions, Qualified Matching Employer Contributions, safe harbor Matching Employer Contributions or safe harbor Nonelective Employer Contributions Accounts earlier than upon the Participant's separation from service with the Employer and all Related Employers, death, or disability, except as otherwise provided in Article 10 or Section 12.04.

3

14. Section 12.01 is hereby amended by adding a new subsection (b) to the end thereof:

- (b) If elected by the Employer in Section (f) of the EGTRRA Amendments Addendum to the Adoption Agreement, notwithstanding subsection (a) of this Section 12.01, a Participant, or his Beneficiary, may receive a distribution after December 31, 2001 (or such later date

as specified therein), from his Deferral Contributions, Qualified Nonelective Employer Contributions, Qualified Matching Employer Contributions, safe harbor Matching Employer Contributions or safe harbor Nonelective Employer Contributions Accounts on account of the Participant's severance from employment occurring after the dates specified in Section (f) of the EGTRRA Amendments Addendum to the Adoption Agreement.

15. Section 13.04 is hereby amended by adding the following paragraph to the end thereof:

Notwithstanding anything herein to the contrary, the following provisions shall apply to distributions made after December 31, 2001:

- (i) Modification of definition of eligible retirement plan. For purposes of this Section 13.04, an 'eligible retirement plan' shall also mean an annuity contract described in Code Section 403(b) and an eligible deferred compensation plan under Code Section 457(b) that is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. The definition of 'eligible retirement plan' shall also apply in the case of a distribution to a surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Code Section 414(p).
- (ii) Modification of definition of eligible rollover distribution to exclude hardship distributions. For purposes of this Section 13.04, any amount that is distributed on account of hardship shall not be an 'eligible rollover distribution' and the 'distributee' may not elect to have any portion of such a distribution paid directly to an 'eligible retirement plan.'
- (iii) Modification of definition of eligible rollover distribution to include after-tax Employee Contributions. For purposes of this Section 13.04, a portion of a distribution shall not fail to be an "eligible rollover distribution" merely because the portion consists of after-tax Employee Contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Code Section 408(a) or (b), or to a qualified defined contribution plan described in Code Section 401(a) or 403(a) that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

16. Article 15 is hereby amended by adding a new Section 15.08 at the end thereof as follows:

15.08. Modification of Top-Heavy Provisions. Notwithstanding anything herein to the contrary, this Section 15.08 shall apply for purposes of determining whether the Plan is a top-heavy plan under Code Section 416(g) for Plan Years beginning after December 31, 2001, and whether the Plan satisfies the minimum benefits requirements of Code Section 416(c) for such years. This Section modifies the rules in this Article 15 of the Plan for Plan Years beginning after December 31, 2001.

(a) Determination of top-heavy status.

(1) Key employee. Key employee means any Employee or former Employee (including any deceased Employee) who at any time during the Plan Year that includes the determination date was an officer of the Employer having annual compensation greater than \$130,000 (as adjusted under Code Section 416(i)(1) for Plan Years beginning after December 31, 2002), a 5-percent owner of the Employer, or a 1-percent owner of the Employer having annual compensation of more than \$150,000. For this purpose, annual compensation means compensation within the meaning of Code Section 415(c)(3). The determination of who is a key

4

employee will be made in accordance with Code Section 416(i)(1) and the applicable regulations and other guidance of general applicability issued thereunder.

(2) Determination of present values and amounts. This Section 15.08(a)(2) shall apply for purposes of determining the present values of accrued benefits and the amounts of account balances of Employees as of the determination date.

(A) Distributions during year ending on the determination date. The present values of accrued benefits and the amounts of account balances of an Employee as of the determination date shall be increased by the distributions made with respect to the Employee under the Plan and any plan aggregated with the Plan under Code Section 416(g)(2) during the 1-year period ending on the determination date. The preceding sentence shall also apply to distributions under a terminated plan which, had it not been terminated, would have been aggregated with the Plan under Code Section 416(g)(2)(A)(i). In the case of a distribution made for a reason other than separation from service, death, or disability, this provision shall be applied by substituting the phrase "5-year period" for the phrase "1-year period."

(B) Employees not performing services during year ending on the determination date. The accrued benefits and accounts of any individual who has not performed services for the Employer during the 1-year period ending on the determination date shall not be taken into account.

(b) Minimum benefits.

- (1) Matching contributions. Matching Employer Contributions shall be taken into account for purposes of satisfying the minimum contribution requirements of Code Section 416(c)(2) and the Plan. The preceding sentence shall apply with respect to Matching Employer Contributions under the Plan or, if the Plan provides that the minimum contribution requirement shall be met in another plan, such other plan. Matching Employer Contributions that are used to satisfy the minimum contribution requirements shall be treated as matching contributions for purposes of the actual contribution percentage test and other requirements of Code Section 401(m).
- (2) Contributions under other plans. The Employer may provide in the Adoption Agreement that the minimum benefit requirement shall be met in another plan (including another plan that consists solely of a cash or deferred arrangement which meets the

requirements of Code Section 401(k)(12) and matching contributions with respect to which the requirements of Code Section 401(m)(11) are met).

(c) Other Modifications. The top-heavy requirements of Code Section 416 and this Article 15 shall not apply in any year beginning after December 31, 2001, in which the Plan consists solely of a cash or deferred arrangement which meets the requirements of Code Section 401(k)(12) and Matching Employer Contributions with respect to which the requirements of Code Section 401(m)(11) are met.

ADDENDUM

**IRS Model Amendment for Final and Temporary Regulations
Under Internal Revenue Code Section 401(a)(9)**

Section 1. General Rules

- 1.1 Effective Date. The provisions of this addendum will apply for purposes of determining required minimum distributions for calendar years beginning with the 2003 calendar year.
- 1.2 Precedence. The requirements of this addendum will take precedence over any inconsistent provisions of the Plan.
- 1.3 Requirements of Treasury Regulations Incorporated. All distributions required under this addendum will be determined and made in accordance with the Treasury regulations under section 401(a)(9) of the Internal Revenue Code.
- 1.4 TEFRA Section 242(b)(2) Elections. Notwithstanding the other provisions of this addendum, distributions may be made under a designation made before January 1, 1984, in accordance with section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act (TEFRA) and the provisions of the Plan that relate to section 242(b)(2) of TEFRA.

Section 2. Time and Manner of Distribution.

- 2.1 Required Beginning Date. The Participant's entire interest will be distributed, or begin to be distributed, to the Participant no later than the Participant's Required Beginning Date.
- 2.2 Death of Participant Before Distributions Begin. If the Participant dies before distributions begin, the Participant's entire interest will be distributed, or begin to be distributed, no later than as follows:
 - (a) If the Participant's surviving spouse is the Participant's sole designated Beneficiary, then, except as otherwise elected under section 6, distributions to the surviving spouse will begin by December 31 of the calendar year immediately following the calendar year in which the Participant died, or by December 31 of the calendar year in which the Participant would have attained age 70 ½, if later.
 - (b) If the Participant's surviving spouse is not the Participant's sole designated Beneficiary, then, except as otherwise elected under section 6, distributions to the designated Beneficiary will begin by December 31 of the calendar year immediately following the calendar year in which the Participant died.
 - (c) If there is no designated Beneficiary as of September 30 of the year following the year of the Participant's death, the Participant's entire interest will be distributed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.
 - (d) If the Participant's surviving spouse is the Participant's sole designated Beneficiary and the surviving spouse dies after the Participant but before distributions to the surviving spouse begin, this section 2.2, other than section 2.2(a), will apply as if the surviving spouse were the Participant.

For purposes of this section 2.2 and section 4, unless section 2.2(d) applies, distributions are considered to begin on the Participant's Required Beginning Date. If section 2.2(d) applies, distributions are considered to begin on the date distributions are required to begin to the surviving spouse under section 2.2(a). If distributions under an annuity purchased from an insurance company irrevocably commence to the Participant before the Participant's Required Beginning Date (or to the Participant's surviving spouse before the date distributions are required to begin to the surviving spouse under section 2.2(a)), the date distributions are considered to begin is the date distributions actually commence.

- 2.3 Forms of Distribution. Unless the Participant's interest is distributed in the form of an annuity purchased from an insurance company or in a single sum on or before the Required Beginning Date, as of the first distribution calendar year distributions will be made in accordance with sections 3 and 4 of this addendum. If the Participant's interest is distributed in the form of an annuity purchased from an insurance company, distributions thereunder will be made in

accordance with the requirements of section 401(a)(9) of the Code and the Treasury regulations.

Section 3. Required Minimum Distributions During Participant's Lifetime.

- 3.1 Amount of Required Minimum Distribution For Each Distribution Calendar Year. During the Participant's lifetime, the minimum amount that will be distributed for each distribution calendar year is the lesser of:
 - (a) the quotient obtained by dividing the Participant's account balance by the distribution period in the Uniform Lifetime Table set forth in section 1.401(a)(9)-9 of the Treasury regulations, using the Participant's age as of the Participant's birthday in the distribution calendar year; or

(b) if the Participant's sole designated Beneficiary for the distribution calendar year is the Participant's spouse, the quotient obtained by dividing the Participant's account balance by the number in the Joint and Last Survivor Table set forth in section 1.401(a)(9)-9 of the Treasury regulations, using the Participant's and spouse's attained ages as of the Participant's and spouse's birthdays in the distribution calendar year.

3.2 Lifetime Required Minimum Distributions Continue Through Year of Participant's Death. Required minimum distributions will be determined under this section 3 beginning with the first distribution calendar year and up to and including the distribution calendar year that includes the Participant's date of death.

Section 4. Required Minimum Distributions After Participant's Death.

4.1 Death On or After Date Distributions Begin.

(a) Participant Survived by Designated Beneficiary. If the Participant dies on or after the date distributions begin and there is a designated Beneficiary, the minimum amount that will be distributed for each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's account balance by the longer of the remaining life expectancy of the Participant or the remaining life expectancy of the Participant's designated Beneficiary, determined as follows:

(1) The Participant's remaining life expectancy is calculated using the age of the Participant in the year of death, reduced by one for each subsequent year.

(2) If the Participant's surviving spouse is the Participant's sole designated Beneficiary, the remaining life expectancy of the surviving spouse is calculated for each distribution calendar year after the year of the Participant's death using the surviving spouse's age as of the spouse's birthday in that year. For distribution calendar years after the year of the surviving spouse's death, the remaining life expectancy of the surviving spouse is calculated using the age of the surviving spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each subsequent calendar year.

(3) If the Participant's surviving spouse is not the Participant's sole designated Beneficiary, the designated Beneficiary's remaining life expectancy is calculated using the age of the Beneficiary in the year following the year of the Participant's death, reduced by one for each subsequent year.

(b) No Designated Beneficiary. If the Participant dies on or after the date distributions begin and there is no designated Beneficiary as of September 30 of the year after the year of the Participant's death, the minimum amount that will be distributed for each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's account balance by the Participant's remaining life expectancy calculated using the age of the Participant in the year of death, reduced by one for each subsequent year.

4.2 Death Before Date Distributions Begin.

(a) Participant Survived by Designated Beneficiary. Except as otherwise elected under section 6, if the Participant dies before the date distributions begin and there is a designated Beneficiary, the minimum amount that will be distributed for

each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's account balance by the remaining life expectancy of the Participant's designated Beneficiary, determined as provided in section 4.1.

(b) No Designated Beneficiary. If the Participant dies before the date distributions begin and there is no designated Beneficiary as of September 30 of the year following the year of the Participant's death, distribution of the Participant's entire interest will be completed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.

(c) Death of Surviving Spouse Before Distributions to Surviving Spouse Are Required to Begin. If the Participant dies before the date distributions begin, the Participant's surviving spouse is the Participant's sole designated Beneficiary, and the surviving spouse dies before distributions are required to begin to the surviving spouse under section 2.2(a), this section 4.2 will apply as if the surviving spouse were the Participant.

Section 5. Definitions.

5.1 Designated Beneficiary. The individual who is the designated Beneficiary, as such term is defined under section 2.01 of the Plan, and is the designated Beneficiary under section 401(a)(9) of the Internal Revenue Code and section 1.401(a)(9)-1, Q&A-4, of the Treasury regulations.

5.2 Distribution calendar year. A calendar year for which a minimum distribution is required. For distributions beginning before the Participant's death, the first distribution calendar year is the calendar year immediately preceding the calendar year which contains the Participant's Required Beginning Date. For distributions beginning after the Participant's death, the first distribution calendar year is the calendar year in which distributions are required to begin under section 2.2. The required minimum distribution for the Participant's first distribution calendar year will be made on or before the Participant's Required Beginning Date. The required minimum distribution for other distribution calendar years, including the required minimum distribution for the distribution calendar year in which the Participant's Required Beginning Date occurs, will be made on or before December 31 of that distribution calendar year.

5.3 Life expectancy. Life expectancy as computed by use of the Single Life Table in section 1.401(a)(9)-9 of the Treasury regulations.

5.4 Participant's account balance. The account balance as of the last valuation date in the calendar year immediately preceding the distribution calendar year (valuation calendar year) increased by the amount of any contributions made and allocated or forfeitures allocated to the account balance as of dates in the valuation calendar year after the valuation date and decreased by distributions made in the valuation calendar year after the valuation date. The account balance for the valuation calendar year includes any amounts rolled over or transferred to the Plan either in the valuation calendar year or in the distribution calendar year if distributed or transferred in the valuation calendar year.

5.5 Required Beginning Date. The Required Beginning Date, as such term is defined in section 2.01 of the Plan.

Section 6. Elections.

(a) Participants or Beneficiaries May Elect 5-Year Rule. Participants or Beneficiaries may elect on an individual basis whether the 5-year rule or the life expectancy rule in sections 2.2 and 4.2 of this addendum applies to distributions after the death of a Participant who has a designated Beneficiary. The election must be made no later than the earlier of September 30 of the calendar year in which distribution would be required to begin under section 2.2 of this addendum, or by September 30 of the calendar year which contains the fifth anniversary of the Participant's (or, if applicable, the surviving spouse's) death. If neither the Participant nor the Beneficiary makes an election under this section 6, distributions will be made in accordance with sections 2.2 and 4.2 of this addendum.

(b) Designated Beneficiary Receiving Distributions Under 5-Year Rule May Elect Life Expectancy Distributions. A

designated Beneficiary who is receiving payments under the 5-year rule may make a new election to receive payments under the life expectancy rule until December 31, 2003, provided that all amounts that would have been required to be distributed under the life expectancy rule for all distribution calendar years before 2004 are distributed by the earlier of December 31, 2003 or the end of the 5-year period.

The CORPORATEplan for RetirementSM
ADDENDUM
Re: Economic Growth and Tax Relief Reconciliation Act of 2001
("EGTRRA")
Second Amendment for Fidelity Basic Plan Document No. 02

PREAMBLE

Adoption and Effective Date of Amendment. This amendment of the Plan is adopted to reflect certain provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). This amendment is intended as good faith compliance with the requirements of EGTRRA and is to be construed in accordance with EGTRRA and guidance issued thereunder. This amendment shall be effective December 1, 2003.

Supersession of Inconsistent Provisions. This amendment shall supersede the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this amendment.

The following paragraph is hereby added to the end of Section 16.04:

Notwithstanding anything in the Basic Plan Document or Adoption Agreement (including addenda thereto) to the contrary, to the extent permitted by any regulation or other guidance under the Code, forms of payment may be eliminated without the application of a waiting period and without prior notice to Participants effective with respect to Participants whose Annuity Starting Dates occur on or after the date the Plan amendment eliminating such forms of payment is adopted; provided, however, that to the extent any regulation or other guidance under the Code requires prior notice to Participants as a precondition to the elimination of any form of payment or imposes any other requirement on such elimination, no such elimination shall be effective unless the Plan Administrator has complied with such notice or other requirement.

**THE CORPORATEPLAN
FOR RETIREMENTSM**

(PROFIT SHARING/401(K) PLAN)

A FIDELITY PROTOTYPE PLAN

**Non-Standardized Adoption Agreement No. 001
For use With
Fidelity Basic Plan Document No. 02**

Plan Number: 47851
The CORPORATEplan for RetirementSM

Non-Std PS Plan
12/05/2001

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**ADOPTION AGREEMENT
ARTICLE 1
NON-STANDARDIZED PROFIT SHARING/401(K) PLAN**

1.01 PLAN INFORMATION

(a) *Name of Plan:*

This is the Nektar Therapeutics 401(k) Plan (the "Plan")

(b) *Type of Plan:*

- (1) o 401(k) Only
(2) 401(k) and Profit Sharing
(3) o Profit Sharing Only

(c) *Administrator Name (if not the Employer):*

Address:

Telephone Number:

The Administrator is the agent for service of legal process for the Plan.

(d) *Plan Year End* (month/day): 12/31

(e) *Three Digit Plan Number:* 001

(f) *Limitation Year* (check one):

- (1) o Calendar Year
(2) Plan Year
(3) o Other:

(g) *Plan Status* (check appropriate box(es)):

- (1) o New Plan Effective Date:
(2) Amendment Effective Date: 08/01/2003

This is (check one):

EXECUTION PAGE (FIDELITY'S COPY)

This Agreement shall be effective upon execution by both parties. By executing this Agreement, the parties agree to terms and conditions contained in the Agreement and the following attached Appendices:

Service Agreement	Original Effective Date	Revision Date(s)
Articles I and II	11/01/2000	
Appendix A - Investment Schedule and Services	11/01/2000	
Appendix B - Enrollment and Education Services	11/01/2000	08/01/2003
Appendix C - Contribution Processing Services	11/01/2000	
Appendix D - Loan and Withdrawal Services	11/01/2000	
Appendix E - Compliance Services	11/01/2000	
Appendix F - Miscellaneous Additional Services	11/01/2000	

In witness whereof, the parties hereto have caused this Agreement to be executed by their duly authorized officers.

Employer:

/s/ John D. Wilson
(Signature)

John D. Wilson
(Print Name)

Director, Compensation and Benefits
(Title)

July 17, 2003
(Date)

Employer:

(Signature)

(Print Name)

(Title)

(Date)

Note: Only one authorized signature is required to execute this Agreement unless the Employer's corporate policy mandates two authorized signatures.

Fidelity Management Trust Company:

/s/ Linda A. Scherer
(Signature)

Linda A. Scherer
(Print Name) Authorized Signatory

(Title)

07/28/2003
(Date)

APPENDIX B - ENROLLMENT AND EDUCATION SERVICES

Fidelity shall provide Enrollment and Education Services as outlined in this Appendix B. Consultation with a Fidelity Education Consultant is available to identify additional needs in the future.

1. Initial Enrollment & Education Services

- Enrollment kits for eligible employees
- Enrollment posters
- Information inserts
- Interactive worksheets

Initial Enrollment and Education Services paid by: Employer

2. Ongoing Enrollment and Educational Services provided at no additional charge

- Enrollment Kits for newly eligible Participants

- Ongoing Educational Literature
- Retirement Benefits Line
- Stages Magazines
- Stages Program for Retirees, Pre-retirees and Job Changers
- NetBenefits Internet Service
- Unless the Employer specifically directs Fidelity otherwise in writing, Plan Participants will be provided educational and informational materials about integrated Fidelity investment opportunities through the Fidelity Employee Investment Services program.
- Participant Statements:
 - Fidelity will mail Participant statements directly to Participants' homes except for individual Participants who have indicated through Automated Channels (Fidelity Automated Retirement Benefits Line, NetBenefitsSM World Wide Web Internet service, or any other service subsequently employed by Fidelity to facilitate electronic plan administration) that they desire to receive statements only through Automated channels.

Notwithstanding any of the above, a Participant will always have the ability to request a written statement at least as frequently as legally required.

- Unless the Plan Administrator directs otherwise in writing, Fidelity will process address changes for Plan participants who have separated from service with the Employer, as indicated by the appropriate system status code, as requested by those participants through Fidelity's Automated Channels. The Employer is responsible for updating the status codes, applicable dates, and other appropriate information for participants via PSW, or other agreed upon transmission. Fidelity agrees to send a confirmation statement listing the participants' previous and current addresses to both such addresses for Plan participants changing address through Fidelity's Automated Channels. The Employer agrees that a participant changing address through Fidelity's Automated Channels will not be able to request a withdrawal or distribution from his or her Plan account for a period of 15 calendar days after an address change is processed. The Employer understands that Fidelity will not send the employer any record of each such change made through Fidelity's Automated Channels, but that the Employer may request a report from PSW showing the most recent address of every participant.
- In the event that Fidelity, or any of its affiliates, provides tools or services that estimate the initial

eligible entry date for Employees based on Plan design and assumed achievement of some Plan eligibility variables, Fidelity does not represent, warrant, guarantee or certify that such estimates are accurate. The Employer agrees that Fidelity has no responsibility for any such estimates.

- Fidelity may from time to time produce communication materials and forms that the Employer may use regarding the Plan. The Employer acknowledges that it is solely responsible for any such communication materials and/or forms, or modification thereof, ultimately distributed or otherwise used in connection with the Plan.

3. Enrollment and Educational Services available for additional charge

- Additional Employee Education Meetings
- Additional Enrollment Kits for existing Participants
- Meeting Leader Workshop with customized plan video
- Automated Enrollments
- Ongoing Automated Enrollments and Deferral Changes

Annual fee per Plan:

Fee Paid By: Fee Waived

Annual fee per Participant:

Fee Paid By: Fee Waived

Fidelity shall provide Automated Enrollments in accordance with and subject to the terms and conditions of this Section:

- a. The Employer shall provide Fidelity with the following Participant data in an acceptable format prior to the date Employees become eligible to participate in the Plan: name, address, social security number, date of birth, date of hire, date of participation, date of termination, and employment status code. Failure to provide timely, complete, and accurate data shall delay Participants' ability to make investment elections and pre-tax and after-tax (if applicable) contribution elections.
- b. The Employer shall be responsible for mailing enrollment packets to Participants, including a worksheet for Automated Enrollment.
- c. Participants shall be eligible to communicate their initial investment elections and pre-tax and after-tax (if applicable) contribution elections by the Fidelity Automated Retirement Benefits Line or Net BenefitsSM (or any other service subsequently employed by Fidelity to facilitate electronic plan administration, hereafter NetBenefits) virtually 24 hours a day. Participants shall direct the investment of their future contributions. Investment elections shall not apply to employees making rollover contributions as they must complete a Rollover Contribution Form to indicate their investment elections.
- d. Participants who fail to use the Fidelity Automated Retirement Benefits Line or NetBenefits to establish their investment elections shall have their future contributions invested in the default investment option identified in Article II, Section 5 of this Service Agreement, unless designated otherwise pursuant to Article II, Section 4 of this Service Agreement. Participants shall have the opportunity to change the investment direction of their future contributions, and their pre-tax and after tax (if applicable) contribution

CERTIFICATIONS

I, Ajit S. Gill certify that:

1. I have reviewed this quarterly report on Form 10-Q of Nektar Therapeutics;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant and have:
 - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by this report based on such evaluation;
 - c) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonable likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
 - a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonable likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls over financial reporting.

Date: August 5, 2004

/s/ AJIT S. GILL

Ajit S. Gill
Chief Executive Officer, President
and Director

CERTIFICATIONS

I, Ajay Bansal certify that:

1. I have reviewed this quarterly report on Form 10-Q of Nektar Therapeutics;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant and have:
 - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by this report based on such evaluation;
 - c) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonable likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
 - a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonable likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls over financial reporting.

Date: August 5, 2004

/s/ AJAY BANSAL

Ajay Bansal
Chief Financial Officer and Vice
President, Finance and
Administration

SECTION 1350 CERTIFICATIONS*

Pursuant to the requirement set forth in Rule 13a-14(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. §1350), Ajit S. Gill, Chief Executive Officer, President and Director of Nektar Therapeutics (the "Company"), and Ajay Bansal, Chief Financial Officer and Vice President, Finance and Administration of the Company, each hereby certifies that, to the best of his knowledge:

1. The Company's Quarterly Report on Form 10-Q for the period ended June 30, 2004, to which this Certification is attached as Exhibit 32.1 (the "Periodic Report"), fully complies with the requirements of Section 13(a) or Section 15(d) of the Exchange Act; and
2. The information contained in the Periodic Report fairly presents, in all material respects, the financial condition of the Company at the end of the period covered by the Periodic Report and results of operations of the Company for the period covered by the Periodic Report.

Dated: August 5, 2004

/s/ AJIT S. GILL

Ajit S. Gill
Chief Executive Officer, President and Director

/s/ AJAY BANSAL

Ajay Bansal
Chief Financial Officer and Vice President, Finance and Administration

A signed original of this written statement required by Section 906, or other document authenticating, acknowledging, or otherwise adopting the signature that appears in typed form within the electronic version of this statement required by section 906, has been provided to Nektar Therapeutics and will be retained by Nektar Therapeutics and furnished to the Securities and Exchange Commission ("SEC") or its staff upon request.

* This certification accompanies the Form 10-Q to which it relates, is not deemed filed with the SEC and is not to be incorporated by reference into any filing of the Company under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended (whether made before or after the date of the Form 10-Q), irrespective of any general incorporation language contained in such filing.